IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

BRINCE WILFORD,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	**NO. 15-856-BC**
	)	
GABRIEL COLTEA,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This lawsuit was filed by the Investor Member of a two-person LLC against the Operating Member for breach of the LLC Operating Agreement and breach of fiduciary duty. Among the breaches alleged are that the Defendant/Operating Member has failed to: keep the Plaintiff informed about the LLC; obtain Plaintiff's approval for expenses in excess of $1,000 and increases in Defendant's compensation; forbear taking an LLC investment opportunity; and obtain Plaintiff's consent to dissolution of the LLC. Damages, an accounting and injunctive relief are sought.

The Defendant denies these breaches and has filed a Counterclaim for dissolution of the LLC upon two causes of action:

- Count I—The Court construe the Operating Agreement and enter a declaratory judgment that the Defendant had the unilateral right to dissolve the LLC as per his actions on April 3, 2015; or

- Count II—Judicial dissolution pursuant to 6 Del. Code § 18-802 due to an impasse of the members.

It is Count I on which the case is presently before the Court.

The Defendant has filed a Motion For Judgment On The Pleadings of the Counterclaim for the Court to construe the Operating Agreement as a matter of law and declare under Count I that the Defendant had the unilateral right on April 3, 2015 to dissolve the LLC. The Plaintiff disputes this construction and asserts that the Operating Agreement requires the consent of the Plaintiff/Investor Member to dissolve the LLC.

The basis for the parties' differing constructions is that they disagree on the relationship of the two sections in the Operating Agreement where dissolution is covered.

The Defendant's construction is that the sections are independent of each other and deal with dissolution under separate circumstances. Only one of those circumstances, the Defendant argues, requires consent of the Plaintiff to dissolve the LLC. The other circumstance, the Defendant asserts, does not require the Plaintiff's consent; the Operating Agreement gives the Defendant the unilateral right to dissolve the LLC. It is this circumstance, the Defendant asserts, which took place on April 3, 2015, when the Defendant took action to unilaterally dissolve the LLC.

To the contrary, the Plaintiff asserts there are not two kinds of dissolution under the Operating Agreement. Dissolution of the LLC is dissolution. The reason for separate

sections referring to dissolution is that the sections pertain to separate aspects. One section provides how the right is exercised among the Investor and Operating Members; the other section provides the logistics of dissolution such as timing and protocol.

After analyzing the text of the Operating Agreement, applying the controlling law, and considering argument of Counsel, the Court concludes the Plaintiff's construction of the Operating Agreement prevails, and the Defendant's motion is denied. The Court's reasoning is as follows.

The sections to be construed are Articles IV and VIII of the Operating Agreement. They provide in pertinent part:

ARTICLE IV

MANAGEMENT

4.1 Management & Decision Making.

(a) Except to the extent otherwise specifically set forth in this Agreement where the written consent of both of the Initial Members is required, the Operating Member is hereby appointed and designated as the "Managing Member" of the Company, and in such capacity, the Managing Member is hereby authorized to act for and on behalf of the Company in every capacity under this Agreement and under applicable law, which acts of the Managing Member shall bind the Company in all instances.

(b) In furtherance of the foregoing Section 4.1(a) but subject to the other terms and conditions of this Agreement, the Operating Member shall have responsibility and authority for the day-to-day management and operation of the business and affairs of the Company, for implementing Major Decisions

and Capital Decision and for managing the Company consistent with the other terms and conditions of this Agreement, including, without limitation, the requirements of the provisions of Section 4.1(a) above.

* * *

4.2 Capital & Major Decision.

(a) Notwithstanding any provision of this Agreement to the contrary, the Operating Member shall not, in the exercise of its day-to-day authority as more particularly described in Section 4.1 above, take or cause the Company to take any of the following actions (each, a "Capital Decision"), without in each instance first obtaining the prior written approval of the Investor Member . . .

(v) Dissolve the Company or seek the protection of any other Federal or State bankruptcy or insolvency law or debtor relief statute . . . .

* * *

ARTICLE VIII

DISSOLUTION

8.1 Dissolution. The Company shall dissolve, and its affairs shall be wound up upon the earlier of the Termination Date or the entry of a decree of judicial dissolution under applicable law. The Members shall have no right to cause the dissolution of the Company except pursuant to termination as provided in Section 8.4.

8.2 Winding Up. Upon the dissolution of the Company, the Operating Member may, in the name of, for, and on behalf of the Company, prosecute and defend suits, whether civil, criminal, or administrative, sell, and close the Company's properties, assets, and businesses, and dispose of and convey and distribute to Members any remaining properties and assets of the Company, all without affecting the liability of Members. Assets of the Company, for federal income tax purposes, during the period of liquidation

shall be allocated in accordance with the provisions of Article VI. Upon winding up of the Company, the assets shall be distributed as follows:

(a) To creditors, including Members who are creditors, to the extent permitted by law, in satisfaction of liabilities of the Company, whether by payment or by making of reasonable provision for payment thereof, other than liabilities for which reasonable provision for payment has been made; and

(b) The balance, if any, to the Members pursuant to Section 6.4(c)(i).

8.3 Nonrecourse to Members. Except as provided by applicable law or as expressly provided in this Agreement, upon dissolution of the Company, each Member shall receive a return of its Capital Contribution solely from the assets of the Company. If the assets of the Company remaining after the payment or discharge of the debts and liabilities of the Company are insufficient to return any Capital Contribution of any Member, such Member shall have no recourse against any other Member.

8.4 Termination. The Company shall terminate (the date of such termination, the "Termination Date") upon the issuance of a written notice to the Members by the Operating Member recommending that the Company be terminated.

The Defendant's construction is that sections 4.1 and 4.2(a) of Article IV, and section 8.4 of Article VIII pertain to different matters and are independent. As to sections 4.1 and 4.2(a), the Defendant asserts that these sections outline and govern the Defendant's actions in management of the LLC. Separate from that, the Defendant argues, is section 8.4. It provides an independent source of power and authority for the Defendant Operating Member to dissolve Rubicon.

Supporting its construction, the Defendant asserts, is that the prohibition in section 4.2(a)(v), against unilateral dissolution by the Defendant, is joined in that sentence with prohibition of the Defendant unilaterally seeking any "other" bankruptcy, insolvency or debtor relief. This text leads the Defendant to argue that the section 4.2(a)(v) prohibition of unilateral Defendant dissolution of the LLC applies only to tactical dissolutions due to dire financial constraints in the exercise of the Defendant's day-to-day authority as a manager.

Further supporting its construction, the Defendant asserts, is that section 4.2(a)(v)'s prohibition of unilateral dissolution comes within the context of limiting the Defendant's powers regarding day-to-day management. In contrast, section 4.2(b) contains limitations on Defendant's general powers and authority, and it does not prohibit the Defendant from unilateral dissolving the LLC. Thus, the Defendant argues unilateral dissolution by the Defendant is prohibited only when exercised as a day-to-day management tool such as bankruptcy or insolvency.

In their briefing Counsel provided the Court with this applicable law: (1) 6 Del. Code § 18-801 states that dissolution can occur upon "the happening of events specified in the Operating Agreement" and (2) that courts in construing a contract "must give effect to all terms of the instrument, must read the instrument as a whole and, if possible, reconcile all the provisions of the instrument." *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385-86 (De. 2012).

Applying this law, the Court is unable to conclude that the unilateral dissolution prohibited in section 4.2(a)(v) is a different event than that referred to in Article VIII. The Court concludes that the prohibition in section 4.2(a)(v) of unilateral dissolution by the Defendant carries over to Article VIII. There can be no unilateral dissolution by the Defendant. Either the parties must agree to dissolve the LLC, or, in the absence of an agreement, seek judicial dissolution.

In so concluding the Court sees that section 4.2(a)(v), where unilateral dissolution is explicitly prohibited, is contained in a separate section on "Management" from Article VIII on "Dissolution." These separate headings, however, do not have a bearing on construction, for section 9.7 provides that the headings are for "convenience of reference only, and shall not be used to interpret or construe any provision of this Agreement."

Moving, then, away from form and format, the Court's analysis of the substance of section 4.2(a)(v) and Article VIII is that they do "not differentiate between 'types' of dissolutions." *Plaintiff's Response And Opposition To Defendant's Second Motion For Partial Judgment On The Pleadings*, October 26, 2015, ("*Plaintiff's Response*") at 2. The text of section 4.2(a)(v) specifically requires approval of the Investor Member to "Dissolve the Company." Thus, the decision to dissolve, according to section 4.2(a)(v), must be mutual. Proceeding next to Article VIII, the Court finds nothing in its text to separate it from the dissolution referred to in section 4.2(a)(v). The text of section 8.1 prescribes the timing of dissolution. Similarly, sections 8.2 and 8.3 are logistical, containing additional provisions

on how dissolution is accomplished. As well, section 8.4 is logistical. It specifies the means to be used to effect nonjudicial dissolution: issuance of a written notice by the Operating Member "recommending" termination. None of the matters provided in Article VIII, by their plain text, are contrary to, inconsistent with or incompatible with the requirement in section 4.2(a)(v) that dissolution be a mutual decision. Article VIII merely supplies the ways and means to effect and implement the mutual dissolution decision. This construction adheres to Delaware law of giving effect to all terms of the instrument, reading the instrument as a whole and reconciling all of the provisions of the instrument.

In contrast, construction of Article VIII as an independent source of general authority for the Defendant to unilaterally dissolve the corporation separate from the mutual decision to dissolve, required by section 4.2(a)(v), is strained. It depends upon separating Defendant's duties into two categories: day-to-day versus general, and then concluding that day-to-day duties are specified in Article IV whereas general duties are interspersed throughout the Operating Agreement, including in Article VIII. The Court adopts the Plaintiff's analysis that, "Sections 4.2(v), 8.1 and 8.4 apply to *any* dissolution, regardless of the cause. The language of each section refers to 'dissolution' – without qualification – and the procedures for dissolution do not vary based on the members' rationale for dissolving. Further, the Agreement does not contemplate dissolution in the exercise of Mr. Coltea's 'day-to-day authority.' Instead, Section 4.2 of the Agreement expressly defines 'Capital Decisions' – which express fall *outside* Mr. Coltea's day-to-day management authority – to include the

dissolution of Rubicon. By definition, therefore, there is no such thing as a dissolution made 'in the exercise of Mr. Coltea's day-to-day authority.'" *Plaintiff's Response* at 6 (emphasis in original).

Additionally supportive of the Plaintiff's construction, although less weighty, is the word choice "recommending," in section 8.4, as the action to be taken by the Operating Member regarding dissolution. That word is more consistent with mutual dissolution than unilateral authority of the Operating Member to dissolve. Also of note is that the Operating Agreement provides in other sections, as well, that decisions significant to the LLC require mutual consent. *See* sections 2.2, 2.3, 3.6, 4.2, 5.7, 9.3, 9.13.

While the Operating Agreement is not a model of clarity on this issue, its provisions are more consistent with Plaintiff's construction than Defendant's.

It is therefore ORDERED that the Defendant's Motion For Judgment On the Pleadings is denied.

Ellen Hobbs Lyle

ELLEN HOBBS LYLE
BUSINESS COURT JUDGE

cc: Steven Riley
Gregory Reynolds
Eugene Bulso, Jr.
Steven Nieters