IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROSS HOLDING AND MANAGEMENT COMPANY; ELD PARTNERS, L.P.; GREGORY N. SENKEVITCH; NICHOLAS G. STATHAKIS; and GARY J. SOPKO,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 4113-VCN**
ADVANCE REALTY GROUP, LLC; ADVANCE CAPITAL PARTNERS, LLC; ADVANCE REALTY DEVELOPMENT, LLC; PETER COCOZIELLO; ROTHSCHILD REALTY, INC.; ROTHSCHILD REALTY MANAGERS, LLC; FIVE ARROWS REALTY SECURITIES, III, LLC; D. PIKE ALOIAN; JOHN MCGURK; KURT R. PADAVANO; RONALD L. RAYEVICH; and PATRICIA K. SHERIDAN,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: November 20, 2009
Date Decided: April 28, 2010

Charles J. Brown, III, Esquire of Archer & Greiner, P.C., Wilmington, Delaware and Joseph A. Martin, Esquire of Archer & Greiner, P.C., Haddonfield, New Jersey, Attorneys for Plaintiffs.

Samuel A. Nolen, Esquire and Harry Tashjian, IV, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware and Brian J. McMahon, Esquire, Christine A. Amalfe, Esquire, Christopher Walsh, Esquire, and Joshua R. Elias, Esquire of Gibbons P.C., Newark, New Jersey, Attorneys for Defendants.

NOBLE, Vice Chancellor

I. INTRODUCTION

The Defendants have moved for judgment on the pleadings, seeking dismissal of claims that, they contend, former employee plaintiffs released after their termination. They also invoke the parol evidence rule as a potential bar to certain claims. In addition, before the Court is the motion of a Defendant foreign corporation, alleged to have managed the Delaware limited liability company at the center of the dispute, to dismiss for lack of personal jurisdiction.

II. BACKGROUND

A. *The Scope of the Facts Presented*

In their Amended Complaint, the Plaintiffs have asserted numerous distinct causes of action, including breach of fiduciary duty and breach of contract, as well as claims premised on promissory estoppel, tortious interference, and civil conspiracy. These claims are supported by wide ranging allegations against an assortment of Defendants. The Court will refrain from a comprehensive recitation of the Plaintiffs' allegations and, instead, attempt to limit its development of the factual background to those facts relevant to the pending motions.

In short, the Plaintiffs are equity holders, by way of Class A units, of Defendant Advance Realty Group, LLC ("ARG" or the "Company"), a real estate investment and development company that owns commercial properties along the East Coast, although not in Delaware. The Plaintiffs claim that the management of

ARG has engaged in numerous self-dealing transactions and operated the Company to its benefit and to the detriment of Class A unit holders, and has otherwise breached its fiduciary duties to the Plaintiffs. The allegations principally center around ARG founder Defendant Peter Cocoziello and outside investor Defendant Five Arrows Realty Securities, III, LLC, whose representatives, along with Cocoziello, constituted a majority of ARG's Managing Board (the "Board"). The Plaintiffs allege that they used this control to engage in transactions to benefit Cocoziello personally and to ensure a high return to the outside investor at the expense of unit holders, by, for example, liquidating ARG's real estate holdings.

In their motion for judgment on the pleadings, the Defendants seek dismissal of claims raised by certain of the Plaintiffs who were previously employed by ARG and who, upon their collective termination, signed separation agreements that included text releasing the Defendants from certain causes of action (the scope of these releases being at issue here).

B. *Rothschild's Role in ARG*

In 2001, ARG, a Delaware limited liability company, sought outside investment, which it allegedly received from Defendant Rothschild Realty, Inc. ("Rothschild") through its investment fund known as Five Arrows Realty Securities, III, LLC ("FARS"). Rothschild is a New York corporation that operated as a real estate investment company with approximately $800 million

under management through its allegedly wholly-owned and controlled Five Arrows Realty Securities, which consists of a series of institutional investment funds, including FARS. Rothschild has not directly performed any business in Delaware.

FARS invested $60 million in ARG pursuant to a credit agreement under which FARS received a promissory note that was convertible to equity in the Company and which permitted FARS to select two of the four members of the Board. During the relevant period, Defendants John McGurk and D. Pike Aloian, who were managers and principals at both Rothschild and FARS, were FARS's representatives on the Board.[1] The Plaintiffs assert that, through McGurk and Aloian, Rothschild controlled ARG to its benefit and to the detriment of Plaintiffs, and that McGurk and Aloian were acting in the best interests of FARS and Rothschild and not in the best interests of ARG and its unit holders, including the Plaintiffs, in the performance of their duties as members of the Board. Rothschild

[1] Aloian is a resident of Connecticut. He served as a Managing Director of Rothschild and as a principal at FARS while a member of the Board. He is currently the President and Chief Executive Officer of ARG. Compl. ¶ 22. McGurk is a resident of New York and was the founder, President, and Chief Executive Officer of Rothschild. He has also been a principal at FARS while serving on the Board. Compl. ¶ 23. In 2007, Rothschild reorganized its business structure, transferred all of its assets to Defendant Rothschild Realty Managers, LLC ("Realty Managers") and stopped functioning as an operating company. Pursuant to that reorganization, McGurk and Aloian ceased to be Rothschild employees, although they subsequently became employees of Realty Managers, the new manager of the FARS funds, and remain employees of FARS. McGurk and Aloian both asserted that, during their time as members of the Board, ARG has never convened any board meetings in Delaware, and "I have never traveled to Delaware on ARG-related business, although I may have passed through Delaware on my way to another destination to conduct ARG-related business." Aloian Aff. ¶ 2, McGurk Aff. ¶ 6. Plaintiff Senkevitch, who also served on the Board at one time, did not dispute this assertion in his affidavit.

contends that it cannot be subject to personal jurisdiction in Delaware because of the lack of an adequate statutory hook for acquiring such jurisdiction, and because Rothschild does not meet the minimum contacts test for due process purposes.

C. *The Employee Plaintiffs are Terminated and Sign the Separation Agreements*

Plaintiffs Gregory N. Senkevitch, Nicholas G. Stathakis, and Gary J. Sopko (collectively, the "Employee Plaintiffs") were employees of ARG who served in senior management roles. Senkevitch was ARG's Chief Operating Officer and later its Chief Investment Officer.[2] Stathakis was the Company's Senior Vice President and Controller, and Sopko was ARG's Managing Director of Capital Markets and Acquisitions. In these positions, they each received ownership interests in ARG in the form of Class A units and Class B units. Class A units were the general ownership shares in the Company while Class B units were provided to employees pursuant to the Company's 2001 Incentive Compensation Plan (the "Plan").

On August 30, 2007, the Employee Plaintiffs were fired as part of a major restructuring of the Company. Pursuant to the terms of the Plan, ARG agreed to repurchase the Class B units held by the Employee Plaintiffs. In connection with their terminations, each of the Employee Plaintiffs negotiated and signed a Separation and Release Agreement (the "Separation Agreements" or

[2] Senkevitch also served on the Board until his termination, though he was required to cast his vote in tandem with Cocoziello's vote.

"Agreements") that set forth the parties' "agreement concerning the termination of [his] employment relationship" with ARG and provided the terms by which ARG would repurchase the Employee Plaintiffs' Class B units. Despite their apparent entitlement under the terms of the Plan to have their Class B units repurchased at 100% of their fair market value, the Employee Plaintiffs ultimately agreed to sell them for less than this amount.

During the negotiation of the Agreements, the Employee Plaintiffs each contended that ARG also had an obligation to redeem his Class A units, as well.[3] In response, ARG allegedly promised through Defendant and ARG Chief Operating Officer Kurt R. Padavano that ARG would redeem their Class A units later. According to Plaintiffs, Padavano claimed that, because the Class A units were not "employment related," they should not be addressed in the Separation Agreements. The Employee Plaintiffs persisted, and a provision was added to the Separation Agreements, stating, "The parties agree that this Agreement shall not waive your rights to the Common Class A Units beneficially owned by you. You are one hundred percent vested in [xxx] Common Class A Units."[4] Padavano is alleged to have promised the Employee Plaintiffs that ARG would redeem their

[3] The Defendants contest that ARG was obligated to redeem the Employee Plaintiffs' Class A units upon their termination. They point to the Section 7(a) of the Unit Holders Agreement, which provides that "[i]f Investor's employment with the Company . . . terminates for any of the reasons set forth below. . . , the Company *may* repurchase some or all of the Units of Investor. . . ." Compl. Ex. 2 at 3 (emphasis added).

[4] *See, e.g.*, Compl. Ex. 10 ¶ 1(C).

Class A units at the full value of $24.75 per unit upon the closing, and from the proceeds, of the sale of two properties in November 2007. In addition, ARG's counsel allegedly represented to Stathakis that ARG would "not put anything in writing" regarding the redemption of the Class A units out of concern that ARG would have to treat other Class A unit holders in the same manner, but nevertheless assured him that "you will get most favorable treatment."[5] It was allegedly in reliance upon these representations that the Employee Plaintiffs signed the Separation Agreements and sold their Class B units at less than full value.

By way of these Agreements, ARG agreed to purchase the Employee Plaintiffs' Class B units for a total amount paid to the three of nearly $1.3 million.[6] The Separation Agreements each additionally included a broad general release (the "Releases") which provided that:

> In exchange for the consideration described in Paragraph 1 and except for your rights (i) to vested benefits under Releasees' established benefit plans; and (ii) to enforce this Agreement, you hereby release the Releasees or any one of them from any and all known or unknown actions, causes of action, claims or liabilities of any kind which have [been] or could be asserted against the Releasees, or any one of them, arising out of or related to your employment and/or separation from employment and/or any other occurrence up to and including the date of this Agreement, including, but not limited to:

[5] Compl. ¶¶ 129-31.

[6] Senkevitch sold his 27,193 Class B units to ARG for $673,027. Compl. Ex. 8 ¶ 1.B. Stathakis sold his 17,036 Class B units for $286,887. Compl. Ex. 10 ¶ 1.B. Sopko sold his 12,705 Class B units for $314,448.75. Br. in Support of Defs.' Mot. for J. on the Pleadings and to Dismiss Ex. C ¶ 1.B.

A. Claims, actions, causes of action or liabilities arising under Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, as amended ("ADEA"), the Fair Labor Standards Act, the Pregnancy Discrimination Act, the Equal Pay Act, the Employee Retirement Income Security Act of 1974, as amended, the Americans with Disabilities Act, the Family and Medical Leave Act, the Worker Adjustment and Retraining Notification Act, the Reconstruction Era Civil Rights Act, as amended, the Sarbanes-Oxley Act, the Occupational Safety and Health Act of 1970, and/or any federal, state, municipal, or local employment discrimination statutes, regulations or ordinances including, but not limited to, the New Jersey Law Against Discrimination, the New Jersey Wage Payment Law, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, the New Jersey Equal Pay Act, the New Jersey Domestic Partnership Act, the retaliation provisions of New Jersey's Workers' Compensation statute (including any and all amendments to the above).

B. Claims, actions, causes of action or liabilities arising under any other federal, state, municipal, or local statute, law, ordinance or regulation; and

C. Any other claim whatsoever including, but not limited to, claims for severance pay, attorneys fees and costs, expenses, benefits, bonus, commissions or other incentive compensation, breach of contract, back pay, future wage loss, front pay, wrongful termination, defamation, intentional infliction of emotional distress, tort, personal injury, invasion of privacy, violation of public policy, negligence and/or any other common law, statutory, regulatory or other claim whatsoever arising out of or relating to your employment with and/or separation from employment and/or any of the other Releasees, but excluding any claims which by law you cannot waive.[7]

[7] Compl. Exs. 8, 10 ¶ 3. The Agreement defines "Releasees" as "Advance Realty Group LLC . . . , together with its parents, subsidiaries, divisions and affiliates, whether direct or indirect, its and their limited liability companies, joint ventures and joint venturers (including their respective directors, officers, employees, shareholders, partners and agents, past, present and future), and each of its and their respective successors and assigns," thereby presumably capturing all of the relevant Defendants in this case. *Id.* at 1. The Plaintiffs dispute that the Releases necessarily cover all of the Defendants, arguing that the scope of the Releases is a

In addition, the Employee Plaintiffs acknowledged that the Agreements superseded all prior written or oral agreements or understandings related to the subject matter of the Agreements. Specifically, each Agreement stated:

> You acknowledge that this Agreement sets forth the entire agreement between you and Releasees, and fully supersedes any and all prior oral and written agreements or understandings between you and Releasees, or any of them, if any, pertaining to the subject matter hereof.[8]

The properties whose sales were to trigger the redemptions of the Employee Plaintiffs' Class A units were sold as expected in November 2007. Nevertheless, ARG did not redeem the Class A units at that time. Instead, Padavano allegedly reassured the Employee Plaintiffs that the Class A units would be redeemed at the beginning of 2008, following the sale of yet another property; however, ARG again failed to redeem the Employee Plaintiffs' Class A units once that sale occurred. To date, the Class A units have not been redeemed. It is on these facts that the Employee Plaintiffs bring their claims for breach of fiduciary duty against Padavano (Count 5), promissory estoppel against ARG (Count 6), fraudulent

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question of factual intent. Pls.' Br. in Opp'n to Defs.' Mot. for J. on the Pleadings and to Dismiss at 24 n.8. The only Defendant that could be sufficiently far removed from ARG to fall outside of the Releases would seem to be Rothschild; however, in such case, it is difficult to imagine how Rothschild could be subject to liability or to personal jurisdiction before this Court, such that a factual inquiry into the intent of the parties as to the identity of the "Releasees" would be necessary.

[8] Compl. Exs. 8, 10 ¶ 11. The provision in Sopko's Agreement is slightly different from the other two in that it preserved his obligations under prior confidentiality and restrictive covenant agreements with ARG. Br. in Support of Defs.' Mot. for J. on the Pleadings and to Dismiss Ex. C ¶ 12.

inducement against Padavano and ARG (Count 9), breach of the covenant of good faith and fair dealing in dealing with the Plan against ARG (Count 10), and tortious interference with the Plan against all Defendants other than ARG (Count 11). It is primarily in their continuing role as Class A unit holders that the Employee Plaintiffs bring their other causes of action against the Defendants.[9]

D. *The Parties' Contentions*

In their motion for judgment on the pleadings, the Defendants argue that dismissal of Counts 5 through 13 with respect to the Employee Plaintiffs is appropriate because the Employee Plaintiffs released all claims based upon, or arising from, events that occurred before or at the same time they signed the Releases. They also seek partial dismissal of the Employee Plaintiffs' breach of fiduciary claims in Counts 1 through 3 to the extent that they are based upon events that allegedly occurred before the signing of the Releases. In addition, the Defendants argue that those claims involving the representations made by Padavano on behalf of ARG regarding the Class A units, alleged above—specifically, Counts 5 and 6 and Count 9—should be dismissed under the parol evidence rule.

[9] Senkevitch also brings employment-related claims for breach of fiduciary duty (Count 12) and tortious interference with a contract (Count 13) relating to a performance agreement under which, Senkevitch alleges, he would have received additional Class A units but for Defendants' inappropriate interference with the underlying performance benchmarks.

The Employee Plaintiffs assert that the Releases are limited only to claims associated with their Class B units or arising out of their employment, and that the rights or claims connected with their status as owners of the Company by way of their Class A units were specifically preserved under the Agreements. In addition, they argue that, under New Jersey law, the existence of a fully integrated written agreement does not operate to preclude claims that might otherwise be released which stem from fraud in the inducement.[10] As such, they contend that the Defendants' motion is premature as, based on the facts alleged, they are entitled to take discovery on the issue of the representations that they allege led them to sign the Agreements that the Defendants now argue bar their claims.

The Defendants also seek to have all claims against Rothschild dismissed under Court of Chancery Rule 12(b)(2) for lack of personal jurisdiction because it is a foreign corporation that conducts no business in the State of Delaware. The Plaintiffs respond that Rothschild should not be dismissed for lack of personal jurisdiction because it waited too long to pursue such a defense, having actively participated as a party in this case, including filing an answer, defending against and filing motions, and serving and responding to discovery. As a consequence, the Plaintiffs claim that Rothschild has waived any personal jurisdiction defense. Moreover, even if the defense has not been waived, personal jurisdiction over

[10] The parties agree that New Jersey law governs the substantive issues in this case.

Rothschild is appropriate either under Delaware's long-arm statute, 10 *Del. C.* § 3104, or under Delaware's "implied consent" statute for limited liability companies, 6 *Del. C.* § 18-109.

III. THE MOTION FOR JUDGMENT ON THE PLEADINGS

A. *The Applicable Standard*

A motion for judgment on the pleadings pursuant to Court of Chancery Rule 12(c) will succeed when there are no material issues of fact and the movant is entitled to judgment as a matter of law.[11] The standard for a motion for judgment on the pleadings is "almost identical" to the standard in a Rule 12(b)(6) motion to dismiss.[12] As such, the Court must assume the truthfulness of all well-pleaded facts and draw all reasonable inferences in favor of the non-moving party, and otherwise must accord parties opposing a Rule 12(c) motion the same benefits as a plaintiff resisting a motion under Rule 12(b)(6).[13] In order to award judgment on the pleadings in favor of the defendants, the Court must conclude either that plaintiffs have utterly failed to plead facts supporting an element of the claim or that under no reasonable interpretation of the facts alleged in the complaint (including reasonable inferences) could plaintiffs state a claim upon which relief

[11] *McMillan v. Intercargo Corp.*, 768 A.2d 492, 499 (Del. Ch. 2000).
[12] *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 1456494, at *4 (Del. Ch. Nov. 5, 2001).
[13] *McMillan*, 768 A.2d at 500.

might be granted.[14] As with a Rule 12(b)(6) motion, the Court need not accept as true conclusory statements contained in the pleadings that are unsupported by specific factual allegations.[15] Further, the Court is permitted to consider documents incorporated into the pleadings by reference in making its determination.[16]

B. *Did the Employee Plaintiffs Release their Claims?*

The Defendants assert that the bulk of the claims in the Complaint must be dismissed with respect to the Employee Plaintiffs, either under the parol evidence rule or as a consequence of the Releases they signed upon their termination. The Employee Plaintiffs take the position that the claims associated with their Class A rights fall outside of the scope of the Releases, and that neither the Releases nor the parol evidence rule apply to preclude Class B claims either, because they were fraudulently induced into signing the Separation Agreements.

1. The Class A Claims

Under New Jersey law, the scope of a release is determined by the intention of the parties as expressed in the terms of the particular instrument that contains

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[14] *Wallace ex rel. Cencom Cable Income Partners II, L.P. v. Wood*, 752 A.2d 1175, 1179-80 (Del. Ch. 1999).

[15] *Interactive Corp. v. Vivendi Universal, S.A.*, 2004 WL 1572932, at *8 (Del. Ch. June 30, 2004).

[16] *See, e.g., Albert v. Alex. Brown Mgmt. Services, Inc.*, 2005 WL 1594085, at *12 (Del. Ch. June 29, 2005). For its purposes here, the Court does not rely upon the various affidavits provided by Plaintiffs and Defendants except to the extent to which they inform the question of personal jurisdiction over Rothschild.

the release, considered in light of all facts and circumstances.[17] When the language of a release is clear and unambiguous, it must be enforced as written.[18] The Defendants argue that the plain language of the Releases does not limit their scope to the employment context alone, as the Plaintiffs assert, but encapsulates all claims based on events that occurred before they were signed.

Specifically, the Defendants point to the language in the Releases stating that the Employee Plaintiffs release the "Releasees" from any and all actions, claims, or liabilities of any kind "arising out of or related to [their] employment and/or separation from employment and/or *any other occurrence up to and including the date of this Agreement*. . . ."[19] They read the "any other occurrence" language as expanding the Release to reach not only the Employee Plaintiffs' employment-related claims, but also all claims "of any kind" based on events which occurred before the signing of the Releases, including claims that they could otherwise have brought as Class A holders of ARG.

In arguing that the Releases are limited to their Class B claims alone, the Employee Plaintiffs rely on provisions throughout the document that suggest that the clear intent of the Separation Agreements was simply to address the separation and termination of the Employee Plaintiffs' employment with ARG, not their

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[17] *Bilotti v. Accurate Forming Corp.*, 188 A.2d 24, 35 (N.J. 1963).
[18] *E. Brunswick Sewerage Auth. v. E. Mill Assocs., Inc.*, 838 A.2d 494, 497 (N.J. Super. Ct. App. Div. 2004) ("When the terms of a contract are clear, the court must enforce them as written.").
[19] *See, e.g.*, Compl. Ex. 10 ¶ 3 (emphasis added).

status as owners of ARG. In particular, the Plaintiffs suggest that the clause recognizing the Employee Plaintiffs' "rights to the Common Class A Units" demonstrates an understanding and intent to exclude those rights; that, if the Employee Plaintiffs were retaining their rights to the Class A units, they were retaining all rights, not just an unstated select group of rights that excluded the right to bring suit. In addition, the Employee Plaintiffs contend that the contract's title of "Separation and Release Agreement" and the language in the preamble stating that "[t]his letter agreement . . . sets forth our agreements concerning the termination of your employment relationship with Advance Realty Group, LLC" indicate an intent to limit the scope of the Agreements to the employment relationship.

The Defendants counter that, if the parties had intended to limit the Releases to employment-related claims only, they would have never included the "any other occurrence" language in each Release, and that to adopt the Plaintiffs' interpretation of the clause would mean disregarding that phrase entirely, which would be contrary to the canon of contract construction that effect should be given to all of a contract's provisions and that no provision should be rendered "useless or inexplicable."[20] The Defendants further argue that "certain general language" in the preamble should not overrule the "clear and specific language in the release

[20] *Norwest Bank Minn., N.A. v. Blair Rd. Assocs. L.P.*, 252 F. Supp. 2d 86, 99 (D.N.J. 2003).

provisions" because doing so would run contrary to the canon of construction that "specific provisions control general terms or clauses."[21]

In interpreting contractual language, there is a presumption that the parties intended every part of the agreement to mean something and that "an interpretation that gives effect to every part of the agreement is favored over one that makes some part of it mere surplusage."[22] Contracts must be construed as a whole without undue emphasis on any one section to the disregard of others.[23] If possible, arguably conflicting provisions should be harmonized, such that effect is given to all parts.[24]

Although the Defendants contend that limiting the Releases only to employment-related claims renders the "any other occurrence" language useless, their own construction of this clause as encapsulating all claims that arose before the signing of the Agreements would seem to depart more acutely from canons of interpretation in rendering the preceding two clauses—releasing claims related to the Employee Plaintiffs' "employment and/or separation from employment"—completely unnecessary. On the other hand, it is possible to read the Releases as limited to employment-related claims in a way that each of the terms retains

[21] *Isko v. Engelhard Corp.*, 367 F. Supp. 2d 702, 710 (D.N.J. 2005).
[22] E. Allen Farnsworth, Contracts § 7.11 (4th ed. 2004).
[23] *G. Pacillo Contracting, Inc. v. Township of South Orange Village*, 2008 WL 2811540, at *5 (N.J. Super. Ct. App. Div. July 23, 2008).
[24] *Id.*

meaning—an outcome apparently unavailable under the Defendants' reading of the provision. A reading of the Releases that would harmonize these provisions would be that the "any other occurrence" language picks up any claim indirectly connected to those claims based upon the Employee Plaintiffs' employment but that might not be appropriately characterized as directly related to either their employment or their termination.

Furthermore, the list of the types of statutory and common law claims that are enumerated following the disputed language as being covered under the Releases suggests that such a reading is the more appropriate one, and that the clause was intended to be limited to the Employee Plaintiffs' employment-related claims only. The various statutes identified as falling within the scope of the Release, including the Fair Labor Standards Act, the Pregnancy Discrimination Act, the Equal Pay Act, and the Occupational Safety and Health Act, all establish, at least in part, rights and privileges accorded employees in the context of their employment. Similarly, the list of common law claims included among those being released likewise appears limited to those claims that would arise within an employment context while omitting claims that would traditionally arise outside of that context. Such a lengthy list would also seemingly be superfluous if the Releases operated to bar any and all claims arising before the signing of the Separation Agreements.

Moreover, the list of released common law claims ends with the catchall provision "and/or any other common law, statutory, regulatory or other claim whatsoever arising out of or relating to your employment with and/or separation from employment." This is similar to the operative language of the Releases in dispute here, but which omits the "any other occurrence" language, further suggesting that the types of claims being released were confined to the universe of the Employee Plaintiffs' employment or termination. The provision's silence as to any other, non-employment contexts under which the Releases might apply suggests that the otherwise broad "any other occurrence" language in the Releases should not be interpreted as expansively as the Defendants insist.

Finally, as the Employee Plaintiffs point out, such a reading is fully consistent with the representations made throughout the document as to the intended scope of the Separation Agreements and the preservation of certain rights with respect to the Employee Plaintiffs' Class A units. Indeed, as Williston explains, in reconciling both general and specific language in a contract, the specific words should inform the interpretation of more general language where the specific language was in the contemplation of the parties:

> Even absent a true conflict, specific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate. Thus, it is an accepted principle that the general words in a release are limited always to that thing or those

> things which were specially in the contemplation of the parties at the time when the release was given.[25]

Thus, even if there is ambiguity in the meaning of the "any other occurrence" language in the Releases, the Court should rely upon the surrounding language to interpret its scope; doing so here, the Court concludes that such language should be construed narrowly to exclude the Employee Plaintiffs' Class A claims.[26] Consequently, Counts 1 through 3, as fiduciary claims brought by the Employee Plaintiffs as Class A unit holders, survive, even as to events that occurred before the signing of the Releases.[27]

2. The Employment-Related Claims

Regardless, the Defendants assert that those claims related to the Employee Plaintiffs' Class B units should be dismissed because such claims are clearly within the scope of the Releases and the Plaintiffs are not seeking to have the Agreements rescinded. On this count, the Defendants specifically seek the dismissal of the Employee Plaintiffs' breach of fiduciary duty claim against Padavano (Count 5), promissory estoppel claim against ARG (Count 6), breach of

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[25] 11 Williston on Contracts § 32:10 (4th ed. 2009).

[26] Moreover, had the Court determined that the meaning behind the "any other occurrence" language in the Release was ambiguous, the *contra proferentem* rule of contractual interpretation mandates that any ambiguities in a contract should be construed against the drafter—here, ARG—where the parties have unequal bargaining power. *See, e.g.*, *Pacifico v. Pacifico*, 920 A.2d 73, 78 (N.J. 2007).

[27] Likewise, to the extent that the Defendants have argued that the Employee Plaintiffs' claims for breach of fiduciary duty by Defendant Patricia K. Sheridan (Count 4) and for civil conspiracy (Count 14) should also be dismissed, even though not sought in their original motion, these claims, too, survive judgment on the pleadings as Class A unit holder claims.

contract claim under the Unit Holders Agreement against ARG (Count 7), tortious interference with contract claim relating to the Unit Holders Agreement against all Defendants other than ARG (Count 8), fraudulent inducement claim against Padavano and ARG (Count 9), breach of duty of good faith and fair dealing claim under the Plan against ARG (Count 10), and tortious interference claim against the Defendants other than ARG relating to the Plan (Count 11), as well as Senkevitch's claims for breach of the duty of good faith and fair dealing under a 2001 performance agreement (Count 12), and for tortious interference with Senkevitch's performance agreement against the Defendants other than ARG (Count 13).

The Employee Plaintiffs respond that, under New Jersey law, the Releases do not bar those claims based on the Defendants' fraud. They point to long-standing case law that teaches that a release provision in a fraudulently induced agreement does not necessarily operate to bar a party's claims under the agreement, whether for equitable or legal relief.[28]

The Defendants note that the Employee Plaintiffs received additional separation pay beyond the redemption of their Class B units, "[i]n full and complete satisfaction of all known and unknown claims against the Releasees,"

[28] *Bilotti*, 188 A.2d at 34-35; *Raroha v. Earle Fin. Corp.*, 220 A.2d 107, 109 (N.J. 1966) ("[I]n the absence of fraud, misrepresentation or overreaching by the releasee . . . , it is the law of this State that the release is binding and that the releasor will be held to the terms of the bargain he willingly and knowingly entered.").

and that the Releases clearly bar claims arising out of the Employee Plaintiffs' employment or termination.[29] Yet, in bringing this action, the Employee Plaintiffs have neither offered to return these payments nor sought to rescind the contracts, but instead seek monetary damages only for these claims. However, *Bilotti* held that avoidance of the contract was unnecessary and that a plaintiff could either seek rescission based on the fraud *or* seek money damages because "[w]ithout question, New Jersey recognizes that a defrauded party may affirm a tainted transaction and sue at law in deceit,"[30] which is what the Employee Plaintiffs seek to do here. Nevertheless, the Defendants argue that the Employee Plaintiffs' decision to affirm the supposedly fraudulently induced Agreements requires that all of the provisions of these Agreements—including the Releases—be given their full effect; consequently, that these claims should be dismissed.

Additionally, under New Jersey law, "[c]laims or demands arising contemporaneously with delivery [of the release, including fraudulent inducement claims] are not discharged unless expressly embraced therein or falling within the fair import of the terms employed."[31] As such, the Employee Plaintiffs assert that it would not be appropriate to dismiss their fraudulent inducement claim (Count 9)

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[29] Br. in Support of Defs.' Mot. for J. on the Pleadings and to Dismiss at 21. The Employee Plaintiffs received an amount equal to two weeks pay for each year of completed service with ARG, plus a pro-rated amount for any additional service of less than one year.
[30] *Bilotti*, 188 A.2d at 34.
[31] *Id.* at 35.

on a motion for judgment on the pleadings because such a claim raises a material question of fact as to the intent of the parties in including such a claim within the scope of the release provisions. For this, the Employee Plaintiffs again cite *Bilotti*, which held that the question of whether or not fraudulent inducement claims were intended to be included within the scope of a release, where not expressly stated therein, raised a question as to the intent of the parties, which is a factual issue. The Plaintiffs argue that the Court may not make such a determination at this stage absent any facts before it on this issue. The Defendants respond that no discovery is necessary where the release is clear on its face. At best, the Releases, including the "any other occurrence" language, are vague as to the fraudulent inducement claims—which would seem to be outside of the scope of the employment-related claims to which the Releases pertained. Consequently, Defendants' motion for judgment on the pleadings as to Count 9 on grounds of release is denied.[32]

As to the other claims that the Defendants assert involve the Employee Plaintiffs' employment, because Count 5 (for breach of fiduciary duty against Padavano), Count 6 (for promissory estoppel), Count 7 (for breach of the Unit Holders Agreement), and Count 8 (for tortious interference with the Unit Holders

[32] The Defendants deny in their answer that the representations allegedly made by Padavano upon which the Plaintiffs' fraudulent inducement claims rest were ever made. Answer and Countercl. ¶¶ 130-31. Whether it was reasonable for sophisticated parties to rely on extra-contractual representations made in the context of a likely less-than-amicable separation is not for the Court to determine on a motion for judgment on the pleadings.

Agreement) involve ARG's alleged obligation to repurchase the Employee Plaintiffs' Class A units and Defendants' promises regarding the same, they fall outside of the scope of the Releases, and, thus, should not be dismissed by virtue of any release.

On the other hand, Count 10 (breach of ARG's duty of good faith and fair dealing in terminating the Employee Plaintiffs' employment and fraudulently inducing them to sell their Class B units for less than fair value), Count 11 (tortious interference with the Plan), Count 12 (breach of ARG's duty of good faith and fair dealing by preventing Senkevitch from achieving benchmarks set forth in his performance agreement), and Count 13 (tortious interference with Senkevitch's performance agreement), involve agreements underlying the Employee Plaintiffs' Class B units or employment and, consequently, do fall within the scope of the Releases.[33]

The Employee Plaintiffs' argument that, because the Releases were fraudulently induced, the Releases should not operate to preclude the Employee Plaintiffs' employment-related claims, even if they do not seek a rescission of the Separation Agreements is unavailing where those claims are not directly related to the underlying fraud. Although a successful claim of fraud in the inducement may

[33] Counts 12 and 13 are employment-related claims even though they deal with the right to receive Class A units because such units were to have been awarded to Senkevitch under an incentive agreement that he had with ARG.

allow a releasor to rescind and therefore nullify a release, where rescission is not being sought the provisions of the underlying contract must still be applied by the Court.[34] The Releases clearly covered the Employee Plaintiffs' employment-related claims, including Class B unit holder claims. As the Separation Agreements remain in force, so do the Releases with respect to those claims that fall within their scope.

This is because the harm that the Employee Plaintiffs claim to have suffered is unrelated to those claims that were given up by way of the Releases, even if fraudulently induced.[35] In particular, the alleged fraudulent inducement stems solely from the promises allegedly made by the Defendants with respect to claims outside of scope of the Separation Agreements. The Employee Plaintiffs agreed to accept a reduced amount for their Class B units and to forego any future claims related to their employment, including tort claims and claims involving incentive compensation, in alleged reliance upon promises allegedly made by Padavano and ARG to repurchase their Class A units at a price of $24.75 per unit. As such, if the Plaintiffs successfully establish that such promises were made and relied upon, the

[34] *See Merchants Indem. Corp. v. Eggleston*, 179 A.2d 505, 513 (N.J. 1962) ("When a contract is obtained by fraud, the law grants the injured party a choice. He may rescind or affirm. If he rescinds, he must return what he received. . . . On the other hand, he may choose to affirm the contract, whereupon he retains the consideration he received and has as well as claim for money damages for deceit. . . . But the defrauded party must thus elect which course he wishes to follow. He cannot pursue both. If he elects to continue with the contract, the election is final and the contract is affirmed, not because he wants it to be, but because the law makes it so.").

[35] In this way, this case is distinct from *Bilotti*.

Employee Plaintiffs will be made whole by receiving the amount owed to them for their Class A units. If they fail to establish the existence of such promises, then the Releases cannot be found to have been fraudulently induced and, thus, there would be no grounds for allowing otherwise released claims to persist. Consequently, Counts 10 through 13 are dismissed as to the Employee Plaintiffs.

C. *Does the Parol Evidence Rule Preclude the Claims Related to the Alleged Fraudulent Inducement?*

The Defendants argue that the Employee Plaintiffs' claims for breach of fiduciary duty against Padavano (Count 5), promissory estoppel (Count 6), and fraudulent inducement (Count 9) should be dismissed because "under no circumstances can extrinsic evidence be used to address matters that are expressly covered in an integrated agreement."[36] They argue that the inclusion of the provision stating that "this Agreement shall not waive . . . rights to the Class A Units" operates to include within the subject matter of the Agreements the rights of the Employee Plaintiffs with respect to their Class A units, and that, as a consequence, any claims related to Class A units are subject to the parol evidence rule, and all evidence of representations or promises made relating to Class A units

[36] Br. in Support of Defs.' Mot. for J. on the Pleadings and to Dismiss at 24.

may not be introduced at trial, and no relief may be granted based on such alleged promises or representations.[37]

Although the Agreements included language that they "set[] forth the entire agreement" between the Employee Plaintiffs and the Defendants and "fully supersede[] any and all prior oral and written agreements or understandings between" them and the Defendants, thereby functioning as an integrated written agreement, this is limited to the "the subject matter" of the Agreements, namely "the termination of [their] employment relationship" with ARG. As such, promises allegedly made by Padavano with respect to Class A units may be considered at trial and are not disallowed as a consequence of the parol evidence rule.

The parol evidence rule functions to preclude the admission of antecedent understandings and negotiations for the purpose of "varying or contradicting" the express terms of a fully integrated contract.[38] Contrary to the Defendants' assertions, evidence that Padavano made an oral promise to redeem the Employee Plaintiffs' Class A units at $24.75 per unit no later than November 2007 does not

[37] The Defendants point out that the Plaintiffs have asserted that the clause represented "the intention of the parties with respect to any rights related to the [Employee] Plaintiffs' Class A Units." Pls.' Br. in Opp'n to Defs.' Mot. for J. on the Pleadings and to Dismiss at 18.

[38] *Filmlife, Inc. v. Mal "Z" Ena, Inc.*, 598 A.2d 1234, 1235-36 (N.J. Super. Ct. App. Div. 1991). *See also Winoka Village v. Tate*, 84 A.2d 626, 628 (N.J. Super. Ct. App. Div. 1951) (holding that representations were not admissible where they were "contradictory of the undertakings expressly dealt with by the writings").

contradict or modify the terms of the Agreements. With respect to Class A units, the Agreements merely state that the "Agreement shall not waive . . . rights to the Class A Units." Instead of functioning to subsume Class A rights into the Agreements, this provision instead recognizes that such rights are expressly not a part of these Agreements. Indeed, it would be surprising that the Employee Plaintiffs' attempts to protect their Class A rights by pushing to include this provision in the Agreements should be interpreted to serve as the mechanism for curtailing those rights. As such, Counts 5 and 6 survive judgment on the pleadings.

Similarly, although fraudulent inducement claims are not allowed where the underlying promises are inconsistent with or flatly contradict the terms of an integrated written agreement,[39] here, however, the oral promises allegedly made by Padavano are not inconsistent with, or contradictory of, the mere reference to preserved rights to the Class A units in the Agreements. As such, they fall within the "well recognized exception to the parol evidence rule" for extrinsic evidence proving fraud in the inducement.[40] Thus, the Court also may not dismiss Count 9.

[39] *Id.* at 1236.
[40] *Id.* at 1235.

IV. THE MOTION TO DISMISS ROTHSCHILD FOR LACK OF PERSONAL JURISDICTION

A. *The Applicable Standard*

Personal jurisdiction over a non-resident defendant is proper where (1) there is a statutory basis for exercising personal jurisdiction; and (2) subjecting the non-resident defendant to jurisdiction in Delaware would not violate the Due Process Clause of the Fourteenth Amendment.[41] Under Court of Chancery Rule 12(b)(2), the plaintiff bears the burden of showing a *prima facie* basis for the Court's exercise of personal jurisdiction over a nonresident defendant;[42] however, "when no evidentiary hearing has been held, the plaintiffs' burden is a relatively light one—i.e., they must only make 'a prima facie showing that the exercise of personal jurisdiction is appropriate.'"[43] Consistent with this light burden, "the record is construed in the light most favorable to the plaintiff," and the plaintiff need not rely solely on the allegations in the complaint but may employ extra-pleading material as a supplement to establish jurisdiction.[44] Where the parties have taken discovery on the jurisdictional issue, "[t]he Court need not be blind to discovered materials, and should look beyond the façade of the pleadings."[45]

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[41] *LaNuova D & B, S.p.A. v. Bowe Co., Inc.*, 513 A.2d 764, 768-69 (Del. 1986).
[42] *See Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003).
[43] *Cornerstone Techs., LLC v. Conrad*, 2003 WL 1787959, at *3 (Del. Ch. Mar. 31, 2003) (citations omitted).
[44] *Id.*
[45] *Sears, Roebuck & Co v. Seals plc*, 744 F. Supp. 1297, 1301 (D. Del. 1990).

B. *Did Rothschild Waive its Right to Contest Personal Jurisdiction?*

The Defendants contend that Rothschild should be dismissed for lack of personal jurisdiction, a defense that Rothschild first raised in its Answer and Defenses.[46] The Plaintiffs assert that Rothschild waived its right to contest personal jurisdiction and has consented to the jurisdiction of this Court by having engaged in this litigation. Specifically, they point to Rothschild's involvement in the dispute over the motion to disqualify the Windels firm, the Defendants' first chosen counsel, as well as the fact that Rothschild has allowed for and been engaged in discovery since this case was first filed.

As our courts have explained, "[a] litigant must exercise great diligence in challenging personal jurisdiction or venue; he should do so at the time he makes his first defensive move."[47] Indeed, "[t]he personal jurisdiction defense 'may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct."[48] Where a party becomes an "active actor" in the case, in so doing it may waive the personal jurisdiction defense it previously raised.

Here, however, Rothschild has not been so actively involved in this case that it has waived the personal jurisdiction defense that it first raised in its Answer and

[46] Answer and Defenses of Def. Rothschild Realty, Inc. at 10.
[47] *Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 987-88 (Del. Super. 2000).
[48] *Id.* at 989.

Defenses. Although the Plaintiffs have provided an extensive list of the ways in which Rothschild has participated in the proceedings, none of these has transformed Rothschild into an active actor for purposes of waiver of a Court of Chancery Rule 12(b)(2) defense.

C. *May the Court Exercise Personal Jurisdiction over Rothschild?*

Rothschild contends that the exercise of personal jurisdiction over it by this Court would be improper because it "is a New York corporation and is headquartered in New York"; it "has no offices in Delaware and has never done business or been authorized to do business in Delaware"; and "none of its clients has had a physical presence in Delaware."[49] The Plaintiffs respond that Rothschild managed and controlled ARG through the Board seats held by FARS's representatives and, thus, can be appropriately haled into Delaware courts under either Delaware's long-arm statute, 10 *Del. C.* § 3104, or its "implied consent" statute, 6 *Del. C.* § 18-109.

1. Jurisdiction under the Long-Arm Statute

Under Delaware's long-arm statute, personal jurisdiction may reach a nonresident who in person or through an agent:

> (1) Transacts any business or performs any character of work or service in the State;
> (2) Contracts to supply services or things in this State;
> (3) Causes tortious injury in the State by an act or omission in this State;

[49] Br. in Support of Defs.' Mot. for J. on the Pleadings and to Dismiss at 29-30.

(4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
(5) Has an interest in, uses or possesses real property in the State; or
(6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.[50]

The Delaware Supreme Court has construed Section 3104(c) broadly "to confer jurisdiction to the maximum extent possible under the Due Process Clause."[51] Generally, "[t]his section should be construed liberally so as to provide jurisdiction to the maximum extent possible. . . . The only limit placed on § 3104 is that it remain within the constraints of the Due Process Clause."[52] Nevertheless, as the court in *Red Sail* explained, such liberal construction does not mean that trial courts should "ignore the specific words of Section 3104 and [] henceforth analyze all questions arising under Section 3104 only in the broad terms of fundamental fairness that guide determination of the constitutional question."[53] Although the Supreme Court has commanded that Section 3104 be liberally construed, "it has

[50] 10 *Del. C.* § 3104(c).
[51] *Hercules Inc. v. Leu Trust and Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (Del. 1992).
[52] *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1156-57 (Del. Super. 1997), *aff'd*, 707 A.2d 765 (Del. 1998).
[53] *Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, 1991 WL 129174, at *3 (Del. Ch. July 10, 1991).

not directed that the application of statutory words to the facts in hand be slighted."[54]

The Plaintiffs argue that Rothschild is subject to long-arm jurisdiction because it actively managed a Delaware company and thereby purposely availed itself of the laws of Delaware. Thus, Rothschild should have reasonably anticipated being brought into a Delaware court for a cause of action related to its management, and jurisdiction is proper under 10 *Del. C.* § 3104(c)(1) & (4).

Specifically, the Plaintiffs point to the fact that FARS, an affiliate of Rothschild, is entitled to appoint half of the Board and that the individuals selected for this position, McGurk and Aloian, were and have been officers and directors of Rothschild and were appointed managers of FARS at the time of its formation and remain in those positions in addition to their roles on the Board. Furthermore, Senkevitch has asserted in his affidavit that it was his understanding during his time as ARG's Chief Operating Officer and Chief Investment Officer that Rothschild was managing and controlling ARG by way of the Board.[55] The Plaintiffs have also submitted evidence that, they contend, supports this assertion, including documents from Rothschild that suggest that Rothschild, and not FARS, controlled the seats held by McGurk and Aloian.

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[54] *Id.*
[55] Senkevitch Aff. ¶ 30.

In effect, the Plaintiffs seek to achieve long-arm jurisdiction over Rothschild by way of its supposed agency relationship with FARS and/or McGurk and Aloian. Delaware courts have recognized that the agency theory may provide a basis for the exercise of personal jurisdiction over a nonresident parent corporation based upon the act of its subsidiary in Delaware. However, "[n]o statute exists . . . which permits Delaware courts to exercise personal jurisdiction over a nonresident principal based on the mere existence of a limited agency relationship with a Delaware corporation as agent."[56] Unlike the companion alter ego doctrine where courts ignore the corporate boundaries between an owner and its controlled corporate entity, the agency theory permits only the attribution to the principal of specific acts of the agent, not the attribution to the parent of the subsidiary's status as a Delaware entity. Thus, even under the agency theory based on a non-resident agent, the Plaintiffs would need, at least, to assert that the non-resident agent of Rothschild could have been sued in Delaware under the long-arm statute. This, the Plaintiffs have not done. As such, Rothschild cannot be subject to personal jurisdiction in Delaware based upon the long-arm statute alone.

[56] *Applied Biosystems, Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458, 1465 (D. Del. 1991).

2. Jurisdiction under the "Implied Consent" Statute

The Plaintiffs also look to 6 *Del. C.* § 18-109, the so-called "implied consent" statute, as a mechanism for obtaining personal jurisdiction over Rothschild. The statute reads, in relevant part:

> A manager . . . of a limited liability company may be served with process in the manner prescribed in this section in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability company, or any member of the limited liability company. . . .[57]

Under the statute, "manager" is defined to include: (1) a person designated as the manager of a limited liability company in the limited liability company agreement or similar agreement; or (2) a person who otherwise "participates materially in the management of the limited liability company," provided that the power to participate in the election or selection of the person designated as manager under the limited liability company agreement "shall not, by itself, constitute participation in the management of the limited liability company."[58]

Rothschild contends that it does not fall within the definition of "manager" under Section 18-109 because (1) ARG's operating agreement provides that the Company would be managed by the Board, comprised of four people, not by Rothschild (although two of the managers are designated by FARS); and (2) any

[57] 6 *Del. C.* § 18-109.
[58] 6 *Del. C.* § 18-109(a)(ii).

managerial authority that Rothschild could have exercised over ARG would have been by way of FARS's designees to the Board, McGurk and Aloian, but FARS, not Rothschild, had sole appointment authority, and, even if it could be established that Rothschild influenced the selection, the mere act of selecting management would be insufficient to constitute management of ARG.[59]

Nevertheless, the Plaintiffs have put forward evidence suggesting that Rothschild managed ARG beyond simple involvement in appointing representatives to the Board. For instance, according to Senkevitch:

> While I was ARG's Chief Operating Officer and Chief Investment Officer and served on ARG's Managing Board, defendants Pike Aloian and John McGurk, principals of [Rothschild] occupied seats on the ARG Board. . . . I frequently interacted with McGurk and Aloian in my capacity as senior management at ARG, and indeed reported to them. They managed ARG and Rothschild's investment in ARG through its FARS vehicle. At all such times, it was my understanding that I was reporting to ARG's Managing Board and that, through ARG's Managing Board, Rothschild was managing and controlling ARG. As such, I was in effect reporting to Rothschild.[60]

In addition, some exhibits to Senkevitch's affidavit are cited in an effort to show that Rothschild had materially participated in the management of ARG. Although certain of the "evidence" that Rothschild served as a manager of ARG for Section 18-109 purposes—such as the fact that McGurk and Aloian occasionally used their Rothschild email accounts and Rothschild letterhead to communicate

[59] Reply Br. in Support of Defs.' Mot. for J. on the Pleadings and to Dismiss at 16.
[60] Senkevitch Aff. ¶¶ 27, 29-30.

about and discuss issues surrounding ARG and its management—are admittedly consistent with this allegation, they provide only weak support, at best.[61]

Perhaps the strongest evidence that the Plaintiffs have thus far provided concerning Rothschild's management of ARG is a Rothschild memorandum, dated August 19, 2009, from McGurk to Brad Strum of the Ohio Public Employees Retirement System ("OPERS"), the principal investor in FARS, that states, in relevant part:

> Rothschild Realty Managers has control (2 of 3 Board seats) of Advance Realty Group which owns stabilized office and industrial properties in New Jersey and Maryland/Northern Virginia and a 10% interest in a major infill development in Harrison, New Jersey. It is our intention to liquidate these assets as the market permits. Toward that goal, we sold approximately $20 million of properties in 2007 and $137 million in 2008. . . . As the market permits, we will ramp up the sales effort, however, absent a major portfolio sale, we will retain proceeds at the Company through 2011 to meet capital needs rather than to distribute them.[62]

Furthermore, numerous allegations in the Complaint suggest that the decisions made by the Board were made in order to benefit FARS and Rothschild instead of ARG unit holders as a whole, including ARG's announced plan to sell all of the remaining assets in the Company's portfolio even though "[t]his liquidation will

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[61] Indeed, Exhibit 1 to Senkevitch's Affidavit, a June 16, 2006, letter from Aloian to Cocoziello written on Rothschild letterhead arguably undermines Plaintiffs' assertion of management by Rothschild. The letter argues in support of the sale of ARG's entire Washington, D.C. portfolio as an alternative to a transaction then being discussed. Presumably, if Rothschild materially managed ARG, its principals would not need to advocate formally for such actions to take place.

[62] Senkevitch Aff. Ex. 6. The Defendants point out that Realty Managers is a distinct entity from Rothschild and does not contest personal jurisdiction.

result in potentially adverse tax consequences for the remaining [non-FARS] Class A Unit holders, particularly since the proceeds of such sales will be used to pay outstanding debts and liabilities of the Company."[63]

Whether the Plaintiffs have satisfied their burden of establishing the *prima facie* basis for the Court's exercise of personal jurisdiction is an open question. Although this is a relatively light burden, the Court should exercise caution in extending jurisdiction over non-resident defendants whose direct ties to Delaware are, at best, tenuous. What constitutes material participation in the management of a limited liability company remains an open question in our jurisprudence. The statute does not offer much in the way of guidance, other than to note that the mere power to appoint a manager does not necessarily constitute implied consent to service of process under Section 18-109. Our case law is only marginally more helpful. Simply conferring with members of management on occasion and being involved in a single issue before the board has been found not to constitute material participation in management.[64] Similarly, having a direct role in the formation of the limited liability company and executing documents on its behalf likewise did not reach material participation in the limited liability company's management.[65] On the other hand, where the defendant was one of the founders of

[63] Compl. ¶ 105(i).
[64] *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *7 (Del. Ch. May 7, 2008).
[65] *Vichi v. Koninklijke Philips Electronics N.V.*, 2009 WL 4345724, at *7 (Del. Ch. Dec 1, 2009).

the company, maintained a large equity stake in the company, and had at one time claimed to be its President and Chief Executive Officer, he was determined to be a "manager" for Section 18-109 purposes despite the fact that the defendant later disclaimed at trial ever having been a manager.[66] The Plaintiffs suggest that, if there are insufficient grounds for determining whether to grant personal jurisdiction over Rothschild, the Court should grant additional discovery on the question of jurisdiction. Given the uncertainty surrounding Rothschild's role in the management of ARG, the Court concludes that additional jurisdictional discovery is necessary before deciding the issue.[67]

The Court also notes that several conflicting factual assertions have been made with respect to the relationship between Rothschild and FARS, FARS's legal domicile, and the relationship between Rothschild and Realty Managers. For instance, the Complaint alleges that FARS is wholly-owned and controlled by

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[66] *Cornerstone*, 2003 WL 1787959, at *10-11.

[67] As to the second prong of the test for personal jurisdiction—whether the exercise of such jurisdiction would offend notions of due process—the critical question in making such a determination is "whether a reasonable person would have anticipated that his actions might result in the forum state asserting personal jurisdiction over him in order to adjudicate disputes arising from those actions." *Palmer v. Moffat*, 2001 WL 1221749, at *3 (Del. Super. Oct. 10, 2001). This Court has stated that "[w]hen nonresidents agree to serve as directors or managers of Delaware entities, it is only reasonable that they anticipate that under [certain] circumstances . . . they will be subject to personal jurisdiction in Delaware courts," and that it is the "rights, duties, and obligations which have to do with service as a [manager] of a Delaware [LLC] which make a [manager] subject to personal service in Delaware." *Assist Stock Mgmt., L.L.C. v. Rosheim*, 753 A.2d 974, 975, 979 (Del. Ch. 2000). As the crux of Plaintiffs' case deals with fiduciary duty breaches by the managers of ARG, extending personal jurisdiction over Rothschild would not offend the notions of due process should it turn out that Rothschild materially participated in its management.

Rothschild.[68] The Defendants, in contrast, state that Rothschild's relationship to FARS was purely contractual: that Rothschild provided investment advisory services to FARS in exchange for an asset-management fee, and that none of the FARS funds was owned, in whole or in part, by Rothschild.[69] The Plaintiffs assert that FARS is a limited liability company organized under the laws of New York,[70] an assertion that Defendants deny in their Answer.[71] Senkevitch notes in his affidavit that FARS is a Delaware limited liability company,[72] relying on language in FARS's annual financial statements for 2006, attached as Exhibit 4 to the affidavit, in making this assertion.[73] Finally, and perhaps most importantly, there appears to be some question about the timing of the breaches asserted in the Complaint and the restructuring at Rothschild (as well as differences in operational responsibilities between Rothschild and Realty Managers) after which Realty Managers took over control of FARS.[74] These facts may be important in

[68] Compl. ¶¶ 19, 32. The Defendants deny this allegation. Answer and Countercl. ¶¶ 19, 32.
[69] McGurk Aff. ¶ 3. At oral argument, Defendants clarified that FARS is not owned by Rothschild, but by OPERS and, in part, by another affiliate of the Rothschild companies, but not Rothschild. Tr. at 25.
[70] Compl. ¶ 21.
[71] Answer and Countercl. ¶ 21.
[72] Senkevitch Aff. ¶ 32.
[73] Senkevitch Aff. Ex. 4 at 6.
[74] At oral argument, the Plaintiffs quoted from an email produced after briefing was completed from McGurk to several ARG employees explaining the reorganization of Rothschild, stating: "Rothschild Realty Managers is the successor to [Rothschild], though we do business under the [Rothschild] name. Managers is now the Advisor to the FARS entities. . . . Managers will be the day to day entity that will make the decisions in [ARG]. All [ARG] decisions will be made by representatives of Managers: Aloian and McGurk." Tr. at 66. The Defendants countered that

determining whether or not to subject Rothschild to personal jurisdiction in Delaware. Perhaps with the benefit of additional discovery, the truth with respect to these questions can be appropriately established.[75]

V. CONCLUSION

For the foregoing reasons, the Defendants' motion for judgment on the pleadings is denied with respect to Counts 1 through 9 and 14, but it is granted with respect to Counts 10 through 13. The Defendants' motion to dismiss Rothschild under Court of Chancery Rule 12(b)(2) for lack of personal jurisdiction is deferred, pending jurisdictional discovery. An implementing order will be entered.

Realty Managers is "no longer part of the Rothschild family of companies" and "use[s] the Rothschild name pursuant to a license." Tr. at 69.

[75] The Defendants have objected to the exercise of personal jurisdiction over Rothschild on Section 18-109 grounds because the Plaintiffs did not properly serve process according to the requirements of the statute. It may well be that this failure ultimately provides cause to dismiss. *See, e.g.*, *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *21 (Del. Ch. May 4, 2005) (finding that, because plaintiffs did not comply with statutory service requirements under 10 *Del. C.* § 365, personal jurisdiction under the statute was not proper and that personal jurisdiction would only be found if permitted by the long-arm statute). However, the rules of this Court prescribe no definite time limit for effecting service of process. Ct. Ch. R. 4. Instead, this Court looks to the actions of both parties in determining if service of process has been made in a timely manner, specifically considering (1) whether the failure to make service is the result of dilatory conduct on the part of the person obligated to make service; (2) whether the party to be served received actual notice of the suit; and (3) whether the failure to make timely service has resulted in prejudice. *Hovde Acquisition, LLC v. Thomas*, 2002 WL 1271681, at *6 (Del. Ch. June 5, 2002). The Court has also denied motions to dismiss under Rule 12(b)(2) involving inadequate service of process where defendants were properly served pursuant to a different statute and had actual notice of the suit. *See, e.g.*, *Cornerstone*, 2003 WL 1787959, at *13; *Hovde Acquisition*, 2002 WL 1271681, at *3. Ultimately, there has not been sufficient briefing on this issue to allow for a proper determination by the Court.