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Transaction ID 46949187
Case No. 7304-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHRISTOPHER J. FEELEY, AK-FEEL, LLC, a Delaware limited liability company, and OCULUS CAPITAL GROUP, LLC, a Delaware limited liability company,	)	
Plaintiffs,	)	
v.	)	C.A. No. 7304-VCL
NHAOCG, LLC, a New York limited liability company, ANDREA AKEL, GEORGE AKEL, DAVID NEWMAN, and DANIEL HUGHES,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: August 23, 2012
Date Decided: October 12, 2012

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LASTER, Vice Chancellor.

Plaintiff Christopher J. Feeley serves as the managing member of AK-Feel, LLC, a Delaware limited liability company. AK-Feel serves as the managing member of Oculus Capital Group, LLC ("Oculus"), also a Delaware limited liability company. Oculus employs Feeley as its President and CEO. During late 2011, defendant NHAOCG, LLC ("NHA"), a New York limited liability company, purportedly declined to renew Feeley's employment agreement with Oculus. In early 2012, NHA attempted to remove Feeley from his positions as President and CEO, replace AK-Feel as managing member, and take over management of Oculus. Feeley responded by filing this action.

After an initial flurry of activity, the parties entered into a stipulation designed to eliminate the near-term control dispute. NHA agreed that AK-Feel and Feeley had not been removed but did not concede that it had acted improperly.

After settlement discussions broke down, Feeley, AK-Feel, and Oculus filed an amended complaint. NHA answered, and the plaintiffs moved for judgment on the pleadings. Their motion is largely granted.

I. FACTUAL BACKGROUND

The facts are drawn from the pleadings and the documents they incorporate by reference, including Oculus's limited liability company agreement (the "Oculus Operating Agreement" or "OOA"), AK-Feel's limited liability company agreement (the "AK-Feel Operating Agreement" or "AOA"), and correspondence sent by NHA. The standard for a motion for judgment on the pleadings calls for drawing all reasonable inferences in favor of the non-movant. In this case, the standard has little practical effect.

NHA does not dispute the relevant facts, and the plain language of the governing agreements dictates the outcome.

A. A New Business Relationship

Before the events giving rise to this litigation, Feeley worked as a real estate professional for NorthMarq Capital Group, LLC. Defendant Andrea Akel worked for NorthMarq as Feeley's financial analyst.

In late 2009, Feeley and Andrea Akel began thinking about forming their own real estate company. After exploring potential funding sources, Andrea Akel turned to her father, defendant George Akel, who was a commercial real estate developer. George Akel had invested in real estate projects with defendant David Newman. Newman in turn had invested in real estate projects with defendant Daniel Hughes.

B. The Parties Form Oculus.

In January 2010, the parties formed Oculus. Its members were NHA and AK-Feel, each with a 50% interest. NHA's members were entities affiliated with Newman, Hughes, and George Akel. AK-Feel's members were Feeley and Andrea Akel.[1]

The Oculus Operating Agreement designated AK-Feel as the initial Managing Member. OOA § 4.1(a). Except for a list of items that required unanimous member approval, *see id* § 4.1(b), AK-Feel had

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[1] The parties seem unable to capitalize "AK-Feel" consistently, frequently using both "AK-Feel" and "Ak-Feel." Because the entity's moniker is an amalgamation of the names of its two human members, an earlier jurisdictional decision used "Ak-Feel." *See Feeley v. NHAOCG, LLC*, 2012 WL 966944 (Del. Ch. Mar. 20, 2012). The AK-Feel Operating Agreement uses "AK-Feel," so this decision uses that formulation.

> full, exclusive, and complete discretion, power, and authority, subject in all cases to the other provisions of this Agreement and the requirements of applicable law, to manage, control, administer, and operate the business and affairs of [Oculus] for the purposes herein stated, and to make all decisions affecting such business and affairs . . . .

Id. § 4.1(a).

The Oculus Operating Agreement limited the circumstances under which AK-Feel could be replaced as Managing Member. The sole circumstances were "(i) with or without cause upon the unanimous consent of all Members or (ii) as provided in Section 4.7 below." *Id.*; *accord id.* § 4.1(b)(ii) ("subject to the rights of NHA set forth in Section 4.7 below, the removal of the Managing Member" requires the "prior unanimous consent of the Members"). Section 4.7 granted NHA the right to remove AK-Feel under specified circumstances:

> <u>Removal of [AK-Feel] as Managing Member</u>. In the event either (i) Andrea Akel is terminated for "Good Cause" pursuant to the terms of her employment agreement with [Oculus], (ii) Christopher J. Feeley is no longer an employee of [Oculus], or (iii) [AK-Feel], as Managing Member, is in default of its obligations under the terms of this Agreement and such default is not cured within ten (10) days following [AK-Feel's] receipt of notice of default from NHA; NHA shall have the right, upon ten (10) days prior written notice to [AK-Feel], to remove the [sic] [AK-Feel] as Managing Member and designate itself as the new Managing Member.

Id. § 4.7.

Also in connection with Oculus's formation, Feeley and Oculus entered into an employment agreement pursuant to which Feeley agreed to serve as President and CEO of Oculus. Am. Compl. Ex. C (the "Employment Agreement"). The agreement provided that Feeley was an employee "at will" and could be terminated *by Oculus* "at any time for any or no reason and with or without Good Cause." *Id.* § 5.1.

C. NHA Tries To Remove Feeley And AK-Feel.

For reasons that are heavily disputed and not relevant to the motion for judgment on the pleadings, NHA's principals decided to end their business relationship with Feeley. By letter dated November 10, 2011, NHA advised Feeley that Oculus did "not intend to renew the Employment Agreement between you and [Oculus], which will terminate on January 14, 2012." Am. Compl. Ex. D (the "Non-Renewal Letter"). The Non-Renewal Letter stated that "[t]he termination of your Employment Agreement is not a termination of your employment with [Oculus] and your employment with [Oculus] shall continue after January 14, 2012." *Id.* Newman signed and sent the Non-Renewal Letter on behalf of Newman Holdings, LLC, acting in its capacity as a member of NHA. *See* Answer ¶ 69. The Non-Renewal Letter did not explain how NHA could take this action under the terms of the Oculus Operating Agreement, given that the Managing Member of Oculus had exclusive authority to act on its behalf and NHA was not the Managing Member.

On Thursday, February 23, 2012, Feeley received a call from Newman and George Akel, who told him that NHA was firing him. Am. Compl. ¶ 78. Shortly thereafter, Feeley received a letter in which NHA terminated his employment as President and CEO of Oculus "effective immediately." Am. Compl. Ex. E (the "Termination Letter"). According to the letter, "the undersigned [*viz.,* Newman] will be your sole contact on any [Oculus] or related entity matters." *Id.* Like the Non-Renewal Letter, the Termination Letter did not explain how NHA could act on behalf of Oculus.

Contemporaneously with terminating Feeley, NHA reached out to Oculus's business partners and clients. In just one example, Newman wrote to the Preiss Company, signing on behalf of Oculus as a representative of NHA. The letter stated:

> It was good speaking with you earlier today. I enjoyed our discussion and look forward to personally working with you moving forward. Pursuant to our discussion, Christopher Feeley is no longer employed by or otherwise associated with, Oculus Capital Group, LLC or affiliated entities other than Ak-Feel, LLC. Effective immediately, he has no authority to represent Oculus Capital Group, LLC or any affiliated entities in any manner. . . . More immediately, please be advised that the managing member of [Oculus] is now NHA OCG, LLC, represented by myself, Jeff Smetana and Andrea Akel.

Am. Compl. Ex. H.

Also on February 23, 2012, NHA's counsel emailed Feeley to give notice that NHA was exercising its right to remove AK-Feel as Managing Member pursuant to Section 4.7 of the Oculus Operating Agreement. *See* Am. Compl. Ex. F (the "Manager Replacement Letter"); Answer ¶ 84. The Manager Replacement Letter stated: "[E]ffective March 4, 2012 (ten (10) days from the date hereof), Ak-Feel, LLC is removed as manager of Oculus Capital Group, LLC and replaced with NHA OCG, LLC." Am. Compl. Ex. F. Ironically, the Manager Replacement Letter thereby conceded that NHA had not been the Managing Member of Oculus when declining to renew Feeley's employment agreement and had not yet become the Managing Member when terminating Feeley or contacting Oculus's clients and business partners.

D. The Delaware Litigation

After Feeley pointed out NHA's lack of authority to send the Non-Renewal Letter, the Termination Letter, and the Manager Replacement Letter, the defendants backpedaled. By letter dated March 2, 2012, NHA's counsel purported to "defer the removal of Ak-Feel, LLC until March 7, 2012." Am. Compl. Ex. G (the "Deferral Letter"). In doing so, NHA again conceded that it had not been the Managing Member of Oculus when it acted on Oculus's behalf.

On March 5, 2012, the plaintiffs filed this lawsuit and sought a temporary restraining order blocking the removal of AK-Feel as Managing Member. Count I sought to determine the validity of the removal of AK-Feel and Feeley. Counts II-XI asserted various claims for breach of contract, tort, and statutory violations. On March 7, I entered a standstill order to preserve the status quo pending resolution of the control dispute. On March 8, NHA and its member entities moved to dismiss the complaint for lack of personal jurisdiction. During oral argument on the motion to dismiss, "counsel for NHA stated that NHA did not then claim to be the Managing Member of [Oculus], and that prior representations to the contrary were in error (which they clearly were under the terms of the [Oculus] Operating Agreement)." Answer ¶ 98. The motion was denied as to NHA and a ruling deferred as to NHA's members pending the outcome of jurisdictional discovery. *See Feeley v. NHAOCG, LLC*, 2012 WL 966944 (Del. Ch. Mar. 20, 2012).

On March 23, 2012, the parties entered into a stipulation designed to resolve the near-term control dispute, avoid the need for an expedited trial, and facilitate settlement discussions. Dkt. 57 (the "Control Stipulation"). When settlement discussions failed, the plaintiffs filed the Amended Complaint. NHA answered, and the plaintiffs moved for judgment on the pleadings on Counts I and II.

II. LEGAL ANALYSIS

"In determining a motion under Court of Chancery Rule 12(c) for judgment on the pleadings, a trial court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993) (footnote omitted). AK-Feel and Oculus have moved for judgment on the pleadings as to Counts I and II, which are substantively identical. Both counts contend that NHA breached the Oculus Operating Agreement by trying to replace AK-Feel as Managing Member and terminate Feeley. Count I frames the issue as requests for declarations that particular actions taken by NHA were contrary to and unauthorized by the Oculus Operating Agreement. Count II reframes the same conduct as material breaches of the Oculus Operating Agreement. With limited exceptions, the motion for judgment on the pleadings is granted.

A. Mootness

In its lead argument, NHA contends that the Control Stipulation mooted Counts I and II. NHA is partly right with respect to Count I, but otherwise wrong.

In Count I of the Amended Complaint, AK-Feel and Oculus seek declarations regarding the validity of the actions taken by NHA when replacing Ak-Feel and terminating Feeley. *See* Am. Compl. ¶ 107. To issue a declaratory judgment, there must be an actual controversy meeting the following prerequisites:

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; [and] (4) the issue involved in the controversy must be ripe for judicial determination.

Gannett Co. v. Bd. of Managers of the Del. Criminal Justice Info. Sys., 840 A.2d 1232, 1239 (Del. 2003) (quotation marks and citation omitted).

Under this standard, the following requests for declarations no longer meet the prerequisites for declaratory relief:

> - [AK-Feel] is the lawful Managing Member of [Oculus] pursuant to the [Oculus] Operating Agreement. Am. Compl. ¶ 107(c).
> - Mr. Feeley is the lawful President and CEO of [Oculus] pursuant to the [Oculus] Operating Agreement. *Id.* ¶ 107(h).

The following paragraphs of the Control Stipulation rendered these issues moot:

> 1. [AK-Feel] always has been and is currently the Managing Member of [Oculus].
>
> 2. NHA is not and never has been the Managing Member of [Oculus].
>
> * * *
>
> 10. The intention of this stipulation is to restore [AK-Feel] and Mr. Feeley to the level of control that they possessed over [Oculus] prior to the purported termination of Mr. Feeley's employment agreement

> starting in November 2011, thereby eliminating any issues as to rightful control of [Oculus] going forward.

Dkt. 57.

Other requests for declarations seek determinations as to the validity of actions taken by NHA and are not moot. These include:

- The Management Replacement Letter and other letters sent by NHA relating to the replacement of AK-Feel as Managing Member of Oculus were invalid and void because the triggering events for NHA to exercise its removal authority under Section 4.7 had not occurred. *See id.* ¶¶ 107(d)-(f).

- The Termination Letter was invalid and void because it did not come from Oculus's Managing Member as required by Section 4.1(c)(iii) of the Oculus Operating Agreement. *See id.* ¶ 107(g).

- The defendants' actions to terminate Feeley's employment and strip him of his officer position with Oculus were unlawful and void. *See id.* ¶ 107(i).

- The defendants' representations that Feeley had been properly removed as President and CEO of Oculus were unlawful. *See id.* ¶ 107(h).

Far from rendering these issues moot, the following paragraphs of the Control Stipulation preserved the parties' ability to litigate these points:

> 14. None of the parties admit having engaged in any wrongdoing or actionable behavior. The sole purpose of this stipulated judgment is to confirm that there are now no disputes concerning the rightful control of [Oculus].
>
> 15. All parties reserve the right to pursue whatever rights and remedies they believe they possess pursuant to any agreement or any applicable law in the event the settlement discussions fail and the prosecution and defense of the action resumes.

Dkt. 57.

As to these issues, the jurisdictional prerequisites for declaratory relief remain. Whether NHA breached the Oculus Operating Agreement when it attempted to take over as Managing Member and terminate Feeley is a controversy involving the rights of AK-Feel and Oculus, the parties seeking declaratory relief. NHA has an interest in contesting the claim, because a finding of breach could result in liability for NHA. NHA's interests are real and adverse to the plaintiffs. The issues are ripe for judicial determination, because the facts surrounding NHA's efforts to replace AK-Feel and terminate Feeley are established.

A similar analysis applies to Count II, in which AK-Feel and Oculus assert a claim for breach of the Oculus Operating Agreement against NHA. The alleged breaches parallel the declarations sought in Count I. AK-Feel and Oculus contend that NHA materially breached the Oculus Operating Agreement by:

> a. Usurping [AK-Feel's] role as Managing Member of [Oculus];
>
> b. Removing Mr. Feeley as officer of [Oculus], in derogation of [AK-Feel's] sole right to remove [Oculus's] officers;
>
> c. Falsely notifying third parties of these unlawful changes in [Oculus's] structure;
>
> d. Falsely instructing third parties that Mr. Feeley has been terminated from [Oculus], when in fact NHA has no authority to terminate Mr. Feeley . . . .

Am. Compl. ¶ 115. AK-Feel and Oculus seek "monetary compensation to make them whole for the damages caused by NHA's repeated material breaches." *Id.* ¶ 118.

As with the declaratory judgments about the validity of NHA's past actions, the claim for breach of the Oculus Operating Agreement was not mooted by the Control Stipulation. That stipulation resolved the on-going dispute over who controlled Oculus at the time, as well as the forward-looking dispute over who would control Oculus in the future. It did not resolve whether NHA had breached the Oculus Operating Agreement in the past and could be held liable for damages. The Control Stipulation expressly provided that "[n]one of the parties admit having engaged in any wrongdoing or actionable behavior." Dkt. 57, ¶ 14. Having preserved its position that it did nothing wrong, NHA cannot legitimately argue that the issue of whether it breached the Oculus Operating Agreement became moot.

B. Breach Of The Oculus Operating Agreement

The plaintiffs seek judgment on the pleadings against NHA with respect to the non-moot declarations sought in Count I and liability for breach in Count II. The pleadings establish the merits of the plaintiffs' claim.

The Oculus Operating Agreement is a contract. *See* 8 *Del. C.* §§ 18-101(7), 1101(b). "When interpreting a contract, the Court will give priority to the parties' intentions as reflected in the four corners of the agreement." *GMG Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012). Unambiguous contract terms will be enforced in accordance with their "plain meaning." *BLGH Hldgs. LLC v. enXco LFG Hldg.*, LLC, 41 A.3d 410, 414 (Del. 2012). Ambiguity does not exist in a provision "simply because the parties do not agree upon its proper construction." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1196 (Del. 1992).

A contract is only ambiguous when the challenged language is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Id.*

Under the plain language of the Oculus Operating Agreement, Oculus is managed by its Managing Member. OOA § 4.1(a). Except as to matters identified in Section 4.1(b), AK-Feel, in capacity as the Managing Member, had (and has)

> full, exclusive, and complete discretion, power, and authority, subject in all cases to the other provisions of this Agreement and the requirements of applicable law, to manage, control, administer, and operate the business and affairs of [Oculus] for the purposes herein stated, and to make all decisions affecting such business and affairs . . . .

Id. The matters identified in Section 4.1(b) require "the prior unanimous consent of the Members," meaning that NHA could not unilaterally take any of the actions identified in Section 4.1(b). *Id.* § 4.1(b).

When NHA replaced AK-Feel, terminated Feeley, and informed third parties of its actions, AK-Feel was the Managing Member. NHA was not the Managing Member and did not have authority under Section 4.1(a) to take any of those actions. Absent other provisions in the Oculus Operating Agreement authorizing NHA to act as it did, NHA breached the Oculus Operating Agreement, and its actions were unauthorized and void.

Rather than supporting NHA's position, other provisions of the Oculus Operating Agreement make clear that NHA did not have authority to replace Feeley or AK-Feel. As to removing Feeley from his positions as President and CEO, Section 4.1(c) of the Oculus Operating Agreement confirms that only the Managing Member had authority to take those steps. It states:

> (c) Officers.
>
> > (i) Election or Appointment. The Managing Member may elect or appoint a President, a Chief Operating Officer, and such other officers as it may determine.
> >
> > (ii) Term. All officers shall be elected or appointed to hold office for a term designated by the Managing Member. Each officer shall hold office for the term for which he or she is elected or appointed, and until his or her successor has been elected or appointed and qualified.
> >
> > (iii) Removal. Any officer elected or appointed by the Managing Member may be removed by the Managing Member with or without a cause.

OOA § 4.3(c). Read together, these provisions establish that only AK-Feel as Managing Member had (and has) authority to appoint officers, set the terms of their office, and remove them. By removing Feeley from his positions as President and CEO of Oculus, NHA acted without authority and breached the plain language of Sections 4.1(a) and 4.3(c).

In an effort to defeat judgment on the pleadings by creating an issue of fact as to the power to remove officers, NHA observes that Feeley's Employment Agreement was not signed by AK-Feel, but rather signed by Newman, whom the signature block designated as acting for Oculus. NHA argues that Newman's signature shows that a party other than the Managing Member appointed Feeley as an officer, implying that someone other than the Managing Member should be able to remove Feeley as an officer.

Based on the various documents and on representations made by counsel in the briefs and during oral argument, I suspect what actually happened was that the parties executed the Employment Agreement first, before forming Oculus or AK-Feel. According to NHA (the non-movant), the Employment Agreement was executed in December 2009, Oculus was formed in January 2010, and AK-Feel in August 2010. *See* Ans. Br. at 28-29. The Employment Agreement does not contain any reference to NHA and assumes that Feeley and Newman are members of Oculus in their individual capacities. The parties likely decided later that Oculus's members would be two entities, one for each side of the deal. When the parties actually drew up the Oculus Operating Agreement, they used the revised structure, but they never updated the Employment Agreement.

Newman's signature on the Employment Agreement is extrinsic evidence that cannot be used to contradict the plain meaning of the Oculus Operating Agreement. *BLGH*, 41 A.3d at 414. Regardless, the only reasonable inference from the pleadings is that if Newman's action was unauthorized, the members unanimously ratified it by having Feeley serve as President and CEO of Oculus for over two years. *See* OOA § 4.3 (permitting the members by unanimous consent to authorize someone other than a Member to bind Oculus). As Managing Member, AK-Feel could ratify Newman's actions by exercising its authority under Sections 4.1(a) and 4.1(c). Newman's signature therefore does not create a factual dispute about AK-Feel's exclusive power to appoint and remove officers.

As to NHA's attempt to remove AK-Feel as Managing Member, the specific provisions of the Oculus Operating Agreement are equally clear. Section 4.1(a) states that AK-Feel "may be replaced either (i) with or without cause upon the unanimous consent of all Members or (ii) as provided in Section 4.7 below." OOA § 4.1(a).

In opposing the motion for judgment on the pleadings, NHA has not relied on Section 4.7. In the Management Replacement Letter, however, NHA's counsel represented that NHA was exercising its right to remove AK-Feel pursuant to Section 4.7, and the plaintiffs seek a determination that Section 4.7 did not apply. The plain language of Section 4.7 makes clear that it did not. The only circumstances when Section 4.7 gave NHA a unilateral termination right were if (i) Andrea Akel was terminated for "Good Cause," as defined in her employment agreement with Oculus, (ii) Feeley was no longer an employee of Oculus, or (iii) AK-Feel had defaulted in its obligations as Managing Member and the default was not cured within ten days after AK-Feel received a notice of default from NHA. *See* OOA § 4.7. It is undisputed that Akel had not been terminated, much less terminated for "Good Cause," when NHA sent the Management Replacement Letter. It is likewise undisputed that NHA had never sent AK-Feel a notice of default. Although at the time NHA purportedly had terminated Feeley as President and CEO, NHA lacked authority to do so for the reasons already discussed. NHA therefore could not properly rely on Section 4.7 in the Management Replacement Letter.

Surprisingly, NHA has argued in opposing the motion for judgment on the pleadings that AK-Feel was removed "by the unanimous consent of all Members." Feeley did not cause AK-Feel to vote for its own removal. Absent some other means by which AK-Feel could have acted, there could not have been unanimous consent. NHA has proffered a creative theory, which I next address.

C. The Unanimous Consent Defense

As a defense to both Counts I and II, NHA contends that Andrea Akel validly caused AK-Feel to vote with NHA in favor of AK-Feel's removal, resulting in "the unanimous consent of all Members" and satisfying Sections 4.1(a) and 4.1(b)(ii). This defense fails under the plain language of the AK-Feel Operating Agreement.

Like Oculus, AK-Feel was also a manager-managed LLC. Section 6.1 of the AK-Feel Operating Agreement stated:

> [AK-Feel] shall be managed by the Managing Member in accordance with, and subject to the terms of, this Agreement. Except as set forth in Section 6.2 of this Agreement, the Managing Member shall have full, exclusive and complete discretion, power and authority, subject in all cases to the other provisions of this Agreement and the requirements of applicable law, to manage, control, administer and operate the business and affairs of [AK-Feel] for the purposes herein stated, to make decisions affecting such business and affairs of [AK-Feel], and to act for and bind [AK-Feel].

AOA § 6.1. Section 7.1 reinforced the allocation of authority to the Managing Member by providing that "no Member shall have authority to act for [AK-Feel] solely by virtue of being a Member, except as otherwise provided in this Agreement." AOA § 7.1. Section 6.2 identified a list of "Major Decisions" where the Managing Member could not take action unilaterally. Each Major Decision required the unanimous consent of both members.

The AK-Feel Operating Agreement defined "Managing Member" as "Christopher J. Feeley, or such other Member as designated, from time to time, by unanimous consent of all of the Members." AOA § 1.1. "Member" was defined as "any of Feeley, Akel, or any other Person admitted as a Member of [AK-Feel] from time to time in accordance with the terms of this Agreement." *Id.* The pleadings establish that Feeley held a 55% membership interest and Akel held a 45% membership interest. No one has alleged that any additional members were admitted. No one disputes that Feeley remained the Managing Member of AK-Feel.

Under these provisions, only Feeley could cause AK-Feel to act. He was the Managing Member. Andrea Akel was not the Managing Member and, in her capacity as a Member, had no authority to cause AK-Feel to act. She also could not replace Feeley and then cause AK-Feel to act. Replacing Feeley required unanimous consent, so Feeley could veto any attempt.

Faced with these realities, NHA relies on Section 6.3 of the AK-Feel Operating Agreement. It states:

> Officers. Members by unanimous consent may, but shall not be required to, appoint officers of [AK-Feel] with authority to exercise such powers and fulfill such duties of the Managing Member as the Members, by unanimous consent, may delegate. . . . All officers shall report to, and be subject to the direction and control of, the Managing Member. . . . *The Members hereby agree that initially Christopher Feeley shall be Chief Executive Officer and Andrea Akel shall be the Chief Operations Officer, and that Andrea Akel, as Member and Chief Operations Officer, may execute agreements on behalf of [AK-Feel] which are or have been authorized pursuant to the terms of this Agreement if the Managing Member is unavailable to do so.*

AOA § 6.3 (emphasis added). According to NHA, Feeley had a conflict of interest regarding whether to remove AK-Feel as Managing Member of Oculus, his self-interest disqualified him from causing AK-Feel to vote and rendered him "unavailable" for purposes of Section 6.3, and consequently Andrea Akel had authority to cause AK-Feel to vote as a member of Oculus in favor of AK-Feel's removal as Managing Member.

NHA's inventive interpretation of Section 6.3 fails on multiple levels. The plain language of Section 6.3 does not state that Andrea Akel can make decisions on behalf of AK-Feel or cause AK-Feel to take action whenever Feeley is "unavailable." It rather envisions a limited scenario in which Akel can "execute agreements" on behalf of AK-Feel if two prerequisites are met: first, the agreement must have been "authorized pursuant to the terms of [the AK-Feel Operating Agreement]," and second, Feeley must be "unavailable." AOA § 6.3. Section 6.3 by its own terms does not authorize Akel to approve anything, merely to "execute" an agreement that has already been "authorized." That authorization must come from some other section of the AK-Feel Operating Agreement, both because Section 6.3 does not contain authority-conferring language and because otherwise Section 6.3 would be circular.

In light of the fact that any "agreement" that Andrea Akel can "execute" must have been previously "authorized pursuant to the terms of [the AK-Feel Operating Agreement]," the use of the term "unavailable" plainly contemplates a situation in which for some reason Feeley cannot hold the pen. Feeley might have gotten on a plane, been vacationing in remote parts of the Amazon, or been quarantined after falling sick with an unpleasant and infectious disease. If the agreement in question fell within Feeley's authority as Managing Member and he had approved it previously by exercising his authority as Managing Member under Section 6.1, or if the agreement involved a "Major Decision" requiring unanimous member consent and both Feeley and Akel had approved it previously as required by Section 6.2, then under those circumstances Akel could "execute [the] agreement[] on behalf of [AK-Feel]" in reliance on Section 6.3. AOA § 6.3. The plain language of Section 6.3 does not contemplate that Feeley would become "unavailable" whenever a decision implicated his personal interests, thereby empowering Akel unilaterally to make decisions on behalf of AK-Feel.

Read as a whole, the AK-Feel Operating Agreement indicates that Feeley would not be rendered "unavailable" for transactions in which he had a self-interest. As noted, Section 6.2 of the AK-Feel Operating Agreement identifies a list of "Major Decisions" that require approval of both members. The list includes transactions in which Feeley or Andrea Akel could have an interest, such as "the entering into of any employment agreement, compensation arrangement, or consulting agreement pursuant to which [AK-Feel] is obligated to make payments in any one year in amounts in excess of $40,000 or amend [sic], modify [sic], supplement [sic] or terminate [sic] or waive [sic] any of [AK-Feel's] rights under any such agreement." AOA § 6.2(i). If NHA's reading were correct, then the "unavailable" exception would rewrite the decision rule for "Major Decisions" involving Feeley. In lieu of the unanimous approval of both members, those "Major Decisions" could be approved by Akel acting unilaterally. Oddly, Feeley would not possess any similar right for decisions involving Akel. If the parties had intended a substantial and one-way departure from the approval requirements, they would have done so explicitly. They would have not done so obliquely by using the term "unavailable."

NHA's disqualification concept recalls the venerable common law rule, developed during the eighteenth and nineteenth centuries, that "directors [of a corporation] having an interest in a contract or transaction were incapable of voting on its approval." Blake Rohrbacher, John Mark Zeberkiewicz, & Thomas A. Uebler, *Finding Safe Harbor: Clarifying the Limited Application of Section 144*, 33 Del. J. Corp. L. 719, 722-23 (2008) [hereinafter *Safe Harbor*]. It followed that interested corporate directors could not be counted for quorum purposes. *Id.* at 723. Consequently, "a contract or transaction in which a majority of voting directors or officers had an interest was generally presumed to be voidable." *Id.* at 722. "By the 1930s, corporate articles and bylaws frequently included provisions authorizing contracts with directors, and such provisions were regularly upheld by the courts." Kenneth B. Davis, Jr., *Approval By Disinterested Directors*, 20 J. Corp. L. 215, 222 (1995). By the mid-twentieth century, the vast majority of American jurisdictions had changed the common law rule by statute. *See id.* at 222-25.

The Delaware General Assembly altered the common law rule by adopting Section 144 in 1967 as part of a wholesale modernization and update of the General Corporation Law. *Safe Harbor* at 719. Section 144(a) provides that a transaction which falls into one of its three safe harbors will not be invalidated solely because of director self-interest. 8 *Del. C.* § 144(a). Section 144(b) states explicitly that "[c]ommon or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the contract or transaction." 8 *Del. C.* § 144(b).

Nothing about the Delaware Limited Liability Company Act (the "LLC Act") suggests a desire on the part of the General Assembly to transplant into a new and flexible form of entity an old and rigid common law rule that had been displaced substantially over the prior century, first by private ordering and later by statute. It is even less likely that the General Assembly sought to reject Section 144(b)'s specific authorization of voting by interested parties in favor of the abandoned common law approach. Although the drafters of LLC agreements have the contractual freedom to adopt pre-1967 corporate default rules, the language and structure of the AK-Feel Operating Agreement does not suggest such a choice. In short, the "unavailability" provision did not provide authority by which Andrea Akel could cause AK-Feel to vote to terminate itself as the Managing Member of Oculus.

D. The Relief

As a result of the foregoing analysis, AK-Feel and Oculus are entitled to a subset of the declaratory judgments sought in Count I. The first two declarations need not be addressed. *See* Am. Compl. ¶¶ 107(a)-(b). The first was added by plaintiffs when they amended the complaint to anticipate the unanimous consent defense discussed above. The second sought an overarching declaration of breach that the more specific declarations render superfluous.

First, judgment is entered declaring that the Management Replacement Letter and other letters sent by NHA relating to the replacement of AK-Feel as Managing Member were invalid and void because Oculus's members did not act unanimously and none of the triggering events for NHA to exercise its removal authority under Section 4.7 had occurred. *See* Am. Compl. ¶¶ 107(d)-(f).

Second, judgment is entered declaring that the Termination Letter was invalid and void because it did not come from Oculus's Managing Member as required by Section 4.1(c)(iii) of the Oculus Operating Agreement. *See id.* ¶ 107(g).

Third, judgment is entered declaring that the actions taken by the defendants to terminate Feeley's employment and strip him of his officer positions with Oculus were unlawful and void. *See id.* ¶ 107(i). Only AK-Feel had the power to terminate Feeley's employment or remove Feeley from his officer positions.

Fourth, judgment is entered declaring that the representations made by the defendants to third parties to the effect that AK-Feel and Feeley had been removed were incorrect. *See id.* ¶ 107(h). The pleadings do not permit a determination as to the defendants' mental state. They could genuinely have believed their statements, or they could have acted with *scienter*. Resolving that issue will require an evidentiary hearing.

The foregoing analysis dictates that judgment be entered holding that NHA materially breached the Oculus Operating Agreement. NHA did so by replacing AK-Feel, terminating Feeley, and taking other actions as the Managing Member of Oculus, including contacting third parties. Judgment on the pleadings is not granted as to the amount of damages resulting from the breach. Making that determination will require an evidentiary hearing.

E. Indemnification

In both Counts I and II, the plaintiffs seek a determination that they are entitled to indemnification as "specifically guaranteed in [the Oculus] Operating Agreement § 2.10." Am. Compl. ¶ 108; *accord id.* ¶ 119. Section 2.10 does not grant a right to indemnification; it is an exculpation provision. Section 4.5 of the Oculus Operating Agreement addresses indemnification. It states:

> Company Indemnification. To the maximum extent permitted under the Delaware [LLC] Act, the Company shall indemnify, defend and save and hold harmless each Member ("Indemnitee") from and against all losses, claims, liabilities and demands relating to or arising out of the business of the Company or the exercise by the Indemnitee of any authority conferred on it hereunder or the performance by the Indemnitee of any of its duties and obligations hereunder; provided that no indemnitee shall be indemnified to the extent any action or inaction of [sic] its part has been adjudged liable [sic] for fraud, gross negligence, or willful misconduct. The foregoing shall not limit the Company's power to indemnify others to the extent permitted by the Delaware [LLC] Act.

OOA § 4.5.

The plaintiffs did not cite Section 4.5 in the Amended Complaint, their motion for judgment on the pleadings, or the supporting briefs, and they did not press their right to indemnification in their papers or at oral argument. A claim for indemnification is typically "premature . . . prior to the final disposition of the underlying action." *Paolino v. Mace Sec. Intern., Inc.*, 985 A.2d 392, 397 (Del. Ch. 2009). Plaintiffs have not provided sufficient grounds for addressing indemnification at this juncture. The motion for judgment on the pleadings for indemnification is denied without prejudice.

III. CONCLUSION

The plaintiffs' motion for judgment on the pleadings as to Counts I and II is granted to the extent set forth herein. The parties will prepare a form of order.