IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROBERT J. VILA and BV.com LLC, a Delaware Limited Liability Company,	)	
Plaintiffs,	)	
v.	)	C.A. No. 4308-VCS
BVWEBTIES LLC, a Delaware Limited Liability Corporation, JHILL.com LLC, a Delaware Limited Liability Company, HI NOMINEE TRUST, a Massachusetts Nominee Trust and GEORGE J. HILL,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: July 6, 2010
Date Decided: October 1, 2010

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STRINE, Vice Chancellor.

I. Introduction

This case primarily presents the question of whether it is "reasonably practicable," under 6 *Del. C.* § 18-802, for a Delaware limited liability company to continue to operate in conformity with its LLC agreement. When two coequal owners and managers whose mutual agreement is required for any company action are deadlocked as to the future direction and management of the enterprise and the LLC agreement provides no mechanism by which to break the deadlock, it is not reasonably practicable for the LLC to operate consistently with its operating agreement and a judicial dissolution will be ordered.

II. Factual Background

A. The Company And The Dispute That Led To This Lawsuit

The LLC whose fate is at issue in this case is BVWebTies LLC ("WebTies" or the "Company"), which was formed by the plaintiff Robert J. Vila, and the defendant George J. Hill, on February 9, 2000. Vila is a well-known home improvement expert, having been the host for many years of the Public Broadcasting Service series, "This Old House." Hill is an experienced businessman.

As provided in its LLC Agreement, WebTies was formed for the purpose of "developing and operating . . . the website 'BobVila.com' . . . ." ("BobVila.com" or the "website").[1] BobVila.com is a home improvement website that offers visitors home improvement advice through various forms of media including step-by-step videos, how-to articles, product suggestions and endorsements, and online forums where users can

[1] BVWebTies LLC Agreement § 2 (the "LLC Agreement").

interact with one another regarding their own home improvement projects. The website's homepage prominently displays the tagline: "Do it yourself with help from home improvement and remodeling expert Bob Vila."[2]

As is often the case with business ventures, WebTies' founding emerged out of personal friendship. Vila and Hill both maintained residences on Cape Cod in the early 1990s, and hit it off when they met. They soon became fast friends and decided to go into business together.

At that time, Vila was hosting another home improvement television show, "Bob Vila's Home Again," and was the spokesman for the well-known Sears Craftsman® tools brand. Vila and Hill decided to create BobVila.com in the late 1990s to take advantage of Vila's prominence and the emergence of the internet as a force in commerce. As initially structured, the website was run as a joint venture between a Massachusetts general partnership ("BV/Hill Ventures") that Hill and Vila controlled, and Sears, Roebuck and Co. ("Sears"). This arrangement lasted for only a few years until the dot-com bust in 2000. At that time, Sears, which had invested millions of dollars in the website, allowed Hill and Vila to buy out its 60% interest for the nominal sum of $10.

After that transaction, Hill and Vila executed the LLC agreement forming WebTies (the "LLC Agreement"). In simple terms, WebTies has three owners: Hill, with a 49% stake personally and through an ownership vehicle;[3] Vila, with an identical

[2] BobVila.com Homepage.
[3] Hill's 49% interest in WebTies is held by the defendant JHill.com LLC, a Delaware limited liability company that Hill controls.

49% stake personally and through an ownership vehicle;[4] and HI Nominee Trust, a nominal defendant, which holds a 2% stake. HI Nominee Trust has appeared in this litigation but has affirmatively taken no position and indicated that it will live with any outcome rendered in the case.[5]

Under the LLC Agreement, Hill and Vila were named as the initial managers, with any additional managers requiring the consent of all members.[6] No additional managers have been named. Section 3.02 of the LLC Agreement states that "[a]ll decisions or actions to be made or taken by the Managers shall require the 'Approval of the Managers,' which shall mean the affirmative vote of at least a majority in number of the Managers."[7] Thus, in order for the Company to take any action or make a decision regarding the course of the business, Hill and Vila, as the only managers, must agree.

To run BobVila.com obviously required that WebTies be able to use Vila's name. Therefore, Vila and WebTies executed a formal licensing agreement (the "License Agreement") on December 31, 2002 which gave WebTies the right to use Vila's exclusive intellectual property rights in his name, image, and likeness, including a trademark in the name "Bob Vila" (collectively referred to as the "Vila IP"). In consideration of the license, for which Vila received no direct monetary remuneration under either the LLC Agreement or the License Agreement, WebTies covenanted, among other things, that it "shall use best efforts to preserve the prestige and goodwill of the

[4] Vila's 49% interest in WebTies is held by the plaintiff BV.com LLC, a Delaware limited liability company that Vila controls.
[5] Pre-Tr. Stip. at 6.
[6] LLC Agreement § 3.01.
[7] LLC Agreement § 3.02 (emphasis in original).

[Vila IP] . . . and shall not take any action that would denigrate the value of the [Vila IP]."[8] Furthermore, WebTies agreed that it "is not, and will not become by virtue of this [License] Agreement, the owner of any right, title or interest in and to the [Vila IP]," and that it "waives all rights . . . to challenge, . . . *either during or after the term of this [License] Agreement, the Licensor's rights to the [Vila IP]*. . . ."[9] Section 4 of the License Agreement provides:

> 4.1 The term of this [License] Agreement shall . . . continue until the earlier of (i) the effective date of termination by mutual agreement of the parties . . . , [or] (ii) *the thirtieth (30th) day after the delivery of notice by one party to the other, which notice may be given for any reason or no reason* . . . .
>
> 4.2 *Upon termination of this [License] Agreement, all rights, title, and interests in the [Vila IP] . . . shall revert to Licensor*. The Licensee shall thereafter have no further rights in any License granted under this [License] Agreement, shall be prohibited from using the [Vila IP], and shall promptly cease using the Vila Name in all forms. Upon such termination, the Licensee shall remove or erase the [Vila IP] and all attributes thereof from the [BobVila.com] Site and from any and all advertising or promotional materials as soon as commercially and technically practicable, but in no event . . . more than thirty (30) days following termination of this [License] Agreement.[10]

Thus, by its plain terms, the License Agreement contemplates that either party, including Vila, may terminate the agreement for "any" or "no reason" at all. Vila demanded the absolute right to terminate the License Agreement because he was "entering into a business with a number of individuals who had no real credentials or

[8] License Agreement § 2.1.
[9] *Id.* § 1.3(ii), (iii) (emphasis added).
[10] *Id.* § 4 (emphasis added); Tr. at 33 (Vila).

track record from the point of view of business and management."[11] Hill, who signed the License Agreement on behalf of WebTies, did not contest the inclusion of this provision.[12]

At the time these agreements were executed, WebTies operated out of a 4,000 square-foot office in the Leather District in Boston, which its ten to twelve employees at one point shared with Vila's production company, Bob Vila Television Productions.[13] Yet even when WebTies rented this space, several of its key employees either worked in whole, or in part, from home. For instance, Hill, WebTies' CEO, maintained his home and office, from which he oversaw his other active businesses, on Cape Cod. Greg Vazzana, WebTies' office manager, lived in Orlando, Florida.[14] Dan Newberry, the Company's head of advertising and sales, lived and worked in Brooklyn. The Company's COO, Melanie Marchand, also lived on Cape Cod but worked out of the Boston office four days each week. In sum, WebTies had a relatively small staff and operated with a good deal of informality.

This worked tolerably well for Vila at first. During the early and mid-aughts, WebTies continued to benefit from Vila's presence on broadcast television and from his ongoing business relationship with Sears, BobVila.com's largest advertiser. But in 2007, WebTies and Vila suffered a double blow. Vila's syndicated television broadcasting, the primary source of many of the video clips available on the website and a source of broad

[11] Tr. at 32 (Vila).
[12] *Id*. at 33 (Vila); License Agreement.
[13] *Id.* at 25-26 (Vila).
[14] Vila testified that Vazzana "has not been seen at the office in probably eight years." *Id.* at 27 (Vila).

exposure that had sparked advertisers' interest, was canceled. Coincident with this loss, Sears ended its relationship with Vila and ceased being the major advertiser on the website.

In the wake of these adverse developments, Vila began to focus more closely on the future of WebTies. For several years, Vila had been concerned about the informal nature of WebTies' operations and the lack of a managerial leader with deep internet and marketing experience. Hill, content with his role as CEO of a small team of employees with whom he was comfortable, had shrugged off Vila's attempts to engage on these points. But the double blow of losing Sears and syndicated broadcasting made Vila's worries more urgent.

The dual setbacks WebTies suffered in 2007 also came at a time when the overall American economy was entering a deep recession, and the housing bubble was about to burst. As Vila testified, "[t]he website was profitable as long as Sears was advertising heavily on it and doing other business with it. Once that business dried up, the website had to scramble to stay in the black."[15] Believing that these trying times posed a "sink or swim" situation for the website, Vila decided that it was time to "reinvent" BobVila.com.[16] Specifically, Vila had come to believe that WebTies was being run "as a mom and pop shop out of a small town in Massachusetts" and "wasn't going

[15] *Id*. at 10 (Vila). WebTies' net income had declined each year between 2005 (when net income was $586,428) and 2008 (when net income was $206,440). JX-2 (profit and loss statement summary for BobVila.com (March 21, 2010)).
[16] Tr. at 11 (Vila).

anywhere."[17] Vila also was weary from being, in his view, the financial backstop whenever the Company ran into difficult times, infusing additional capital but never receiving a salary or royalties.[18]

To move forward, Vila spelled out to his fellow manager, Hill, a new strategic direction for the Company that he hoped Hill would embrace. First, Vila proposed that the Company decline to renew its lease in Boston and move its office to New York, a city that in Vila's opinion represented "the center of the e-commerce and advertising" industry.[19] Second, Vila suggested that an additional $1 million be invested in the Company, the burden of such investment being borne equally by both him and Hill.[20] Lastly, and premised on Vila's feelings that WebTies needed to be run as a goal-oriented company and not a "club for the employees' benefit," Vila urged that WebTies should hire a professional general manager, capable of invigorating a website that held a license to, in his view, the name of a nationally recognized symbol of home improvement excellence.[21]

Although never indicating assent to the capital infusion or relocation, Hill, at least initially, agreed that a professional general manager with experience in the internet

[17] *Id.*
[18] *Id.* at 23 (Vila).
[19] JX-6 (letter from Vila to Hill (December 19, 2008)); *see* Tr. at 19 (Vila) ("We have to . . . move the business to New York City, which is the center of the advertising industry.").
[20] JX-6; Tr. at 19 (Vila).
[21] JX-6; Tr. at 12, 19 (Vila). Vila also expressed the belief that as an internet business, WebTies should be managed under the direction of someone that was "young fresh and creative." Tr. at 12 (Vila).

industry would be beneficial to the Company.[22] To that end, Vila and Hill utilized the services of a commercial headhunter who ultimately identified Gretchen Grant, a Harvard Business School M.B.A. with extensive experience as an internet consultant and mobile business planner, as a good candidate.[23] After both had the chance to interview her, Vila and Hill agreed that Grant was the one for the job, and that she should be hired.[24] But this agreement soon broke down because Hill, citing the precarious condition of the economy in November 2008, decided that WebTies could not afford Grant's salary demands of approximately $300,000 annually. On the basis of this disagreement, Grant was ultimately not hired.[25]

That disagreement was indicative of a larger break in vision. Vila wished to respond to the loss of Sears and his broadcasting platform by deepening and professionalizing WebTies' efforts. By contrast, Hill, fixated on a poor economy, was of the opinion that in order to survive, WebTies had to "hunker down" and leave the ultimate day-to-day management to the current CEO — namely, to himself.[26] Instead of envisioning an energetic, capital-infused expansion of the website, Hill believed that simply staying in business with a modest, but functioning operation was not only desirable, but laudable given the dire financial crisis facing the nation.[27] To that end, Hill

[22] Hill admitted at trial that both he and Marchand, before working for WebTies, had no experience running a website. Tr. at 158-59 (Hill).
[23] *Id.* at 96 (Grant); JX-12 (resume of Gretchen Grant).
[24] Tr. at 15 (Vila); *id.* at 147 (Hill).
[25] *Id.* at 16 (Vila); JX-11 (email from Vila to Hill (November 25, 2008)).
[26] JX-11; Tr. at 16 (Vila).
[27] "Sure, we're flat, but we're in business . . . a lot of people aren't in our — in our area." Tr. at 151 (Hill).

decided the best way forward was to reinvest revenue in an attempt to increase web traffic and advertisement revenues.[28]

In a last ditch effort to bridge this divide about the Company's strategy, Vila authored a letter to Hill on December 19, 2008, in which he set forth the previously enumerated proposals for the Company, and in conformity with § 3.02 of the LLC Agreement, asked for Hill's formal assent.[29] Hill, again citing the poor economy, and his perception that the Company was operating successfully and at a profit, again rebuffed Vila.[30] Instead, Hill proceeded, without Vila's assent, to continue the bare bones approach to operating the business and exploiting the Vila IP.

B. Litigation Breaks Out And The Deadlock Deepens

Unable to resolve the dispute about how WebTies should move forward, Vila filed a verified complaint seeking a judicial order of dissolution pursuant to 6 *Del. C.* § 18-802 in this court on January 23, 2009. By the summer of 2009, with the deadlock between Vila and Hill still not broken and this suit pending, WebTies' lease came due for renewal. Vila had formerly guaranteed that lease personally but refused to do so again. Hill let the lease expire, one supposes because he either could or would not put up his own personal guarantee. Since that time, the Company has continued to operate, at the direction of Hill, through a "virtual office" in which (or through which) the remaining employees,

[28] *Id.*
[29] JX-6.
[30] JX-61 (email from Hill to Vila (January 5, 2009)); JX-63 (email from Hill to Vila (January 14, 2009)). Hill claims that Vila's focus on the recent decline in net income was not warranted because rather than pay taxes on its income, the Company had reinvested revenue into content production for the website. *Id.*

excluding Vila, communicate via a combination of telephone, email, instant messaging, and video chatting.[31] In addition, a once weekly meeting is held on Tuesdays in rented office space in Boston, where most, but not all, of WebTies' current employees come together to discuss the Company's business and affairs.[32] Vila does not attend these meetings, and Hill and Vila do not speak directly. Instead, Vila now receives weekly summaries and financial updates through his counsel.

On September 2, 2009 — while this action was pending — Vila informed Hill and WebTies of Vila's election under § 4.1 of the License Agreement to terminate that agreement in its entirety.[33] In response to that letter, Hill initiated a suit in a Massachusetts Superior Court on September 9, 2009 (the "Massachusetts Action") seeking, among other relief, a preliminary injunction against Vila and his purported termination of the License Agreement.[34] The Massachusetts court, applying Massachusetts law,[35] held that the plain language of the License Agreement entitled Vila to terminate it, and denied Hill's motion on November 10, 2009.[36]

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[31] Tr. at 29 (Vila); *id.* at 143 (Hill).
[32] For instance, Dan Newberry attends one of the Tuesday meetings each month, and Greg Vazzana attends only "a couple of times a year," but both regularly participate in Company conference calls. *Id.* at 180 (Marchand); *id.* at 143 (Hill).
[33] JX-10 (letter from Rugg to Needham (September 2, 2009)).
[34] JX-64 (Massachusetts Action verified complaint (September 9, 2009)); JX-65 (motion for preliminary injunction (September 9, 2009)).
[35] Section 6.1 of the License Agreement provides that the contract shall be governed by Massachusetts law.
[36] *See* JX-68 (Massachusetts Superior Court's order denying motion for preliminary injunction (November 10, 2009)) ("JHill.com argues that Vila has a duty to continue to grant Hill an unrestricted license to Vila's name, image and other intellectual property interests connected to Vila. That proposition, however, is in direct conflict with the plain terms of [the License Agreement], which grants Vila the right to terminate for any reason or no reason.").

In reliance on the Massachusetts court's ruling denying Hill injunctive relief, Vila's counsel sent a letter to Hill's counsel on November 19, 2009 demanding that WebTies, Hill and its other employees "stop infringing Mr. Vila's intellectual property rights."[37] Hill refused, indicating, through counsel, that absent a court-ordered injunction to that effect, WebTies would continue to use the Vila IP.[38] Since that time, Hill has continued to operate BobVila.com himself under a strategy not approved by Vila, and has continued to use the Vila IP unabated.[39] Indeed, WebTies embarked on a Twitter initiative in February 2009 that provides additional home improvement advice impliedly written by Vila, but in fact authored by Marchand.[40]

III. Legal Analysis

A. The Parties' Claims

This case has an odd conglomeration of claims.

For his part, Vila hewed until very late in the case to a focused approach, by which he sought to obtain one objective: an order judicially dissolving WebTies because it was not reasonably practicable to continue to carry on WebTies in conformity with the LLC Agreement. After trial, however, Vila asked for additional relief in the form of an order enjoining Hill from any further use of the Vila IP. But Vila did not move to amend his complaint to allege a breach of the License Agreement, nor did he explain why this court

[37] JX-45 (letter from Rugg to Needham (November 19, 2009)).
[38] JX-69 (letter from Needham to Rugg (November 25, 2009)).
[39] In fact, Hill expressly authorized Masher and Marchand to continue using the Vila IP. Tr. at 174 (Hill); *id.* at 190 (Marchand); *id.* at 207 (Masher).
[40] *Id.* at 143 (Marchand).

should address that issue, when there is still pending litigation in the Massachusetts Superior Court over the License Agreement.[41]

Meanwhile, Hill has asserted a number of thinly pled counterclaims, which he did little at trial to try to prove. These largely consist of the notion that Vila breached the LLC Agreement's explicit or implicit terms, or his fiduciary duties, by engaging in conduct competitive with BobVila.com. On their face, these counterclaims are not pled as affirmative defenses to Vila's dissolution request. Nonetheless, they have the flavor of issues injected in order to thwart Vila's claim for dissolution by suggesting that Vila is a disloyal fiduciary who should not therefore receive his requested relief.

I address these various claims in this order. First, I address the major issue dealt with at trial, which is Vila's request for dissolution. Then, I address Hill's counterclaims. Finally, I address Vila's late-made request for injunctive relief in the course of addressing the appointment of a liquidating trustee to preside over the dissolution.

B. Vila's Claim For Dissolution

1. Standard For Dissolution Of A Limited Liability Company

Section 18-802 of the Delaware Limited Liability Company Act provides:

> On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement.[42]

[41] *Hill v. Vila*, No. 09-3842 (Mass Super. Ct.) (the Massachusetts Action).
[42] 6 *Del. C.* § 18-802.

In an action under 6 *Del. C.* § 18-802 for a judicial decree of dissolution of a Delaware LLC, the party seeking dissolution must prove by a preponderance of the evidence that he is (i) a member or manager, and (ii) that it is "not reasonably practicable to carry on the business in conformity with a limited liability company agreement."[43] "Section 18-802 has the 'obvious purpose of providing an avenue of relief when an LLC cannot continue to function in accordance with its chartering agreement.'"[44] Yet, in the case where the standard for judicial dissolution is met, the ultimate determination of whether a decree of dissolution should issue is committed to this court's equitable discretion.[45]

2. Judicial Dissolution Of WebTies Is Warranted

Here, there is no dispute that Vila is both a manager and member of WebTies. The key question therefore is whether it is reasonably practicable to carry on WebTies' business in conformity with the LLC Agreement. Vila makes two related arguments regarding why it is not.

The first is that the purpose of WebTies is to "develop[] and operat[e] (directly or indirectly) the website 'BobVila.com,'"[46] and that given Vila's own decision to terminate the License Agreement and revoke WebTies' right to use the Vila IP, it is impossible for WebTies to function in accordance with its contractually stated objective. The second

[43] *Haley v. Talcott*, 864 A.2d 86, 94 (Del. Ch. 2004).
[44] *Fisk Ventures, LLC v. Segal*, 2009 WL 73957, at *3 (Del. Ch. Jan. 13, 2009), *aff'd*, 984 A.2d 124 (Del. 2009) (quoting *Haley*, 864 A.2d at 94).
[45] *Haley*, 864 A.2d at 93 (quoting 6. *Del. C.* § 18-802) ("the Court of Chancery *may* decree dissolution") (emphasis added).
[46] LLC Agreement § 2.

argument is premised on the fact that the LLC Agreement entrusts the governance of WebTies to the managers. Rather than govern in accordance with that Agreement, Hill has unilaterally arrogated to himself decisionmaking authority over WebTies, and is pursuing a business strategy that Vila adamantly opposes. Vila contends that the record is clear that he and Hill are at an impasse, that he and Hill embrace fundamentally different business strategies, and that it is not reasonably practicable for them to agree on and execute a business strategy in harmony as the LLC Agreement requires.

In response, Hill argues that WebTies and its team have been proceeding forward and earning a modest profit, and thus it is reasonably practicable to continue WebTies' existence. Indeed, Hill says that WebTies can function without the Vila IP because even though Vila's image appears on every page of the website, the name could be changed. Hill also contends that a majority of the content now on the website does not require the use of the Vila IP in any form.[47] Starkly framed, Hill contends that if one manager of an LLC required to be governed by the mutual agreement of all the managers is unilaterally directing the business and no disaster has occurred, the business is proceeding in accordance with the LLC agreement despite the fact that the manager has claimed for himself authority that is required to be exercised jointly under that agreement.

In addressing these contentions, I focus primarily on Vila's second argument, which provides an indisputable basis for dissolution.

[47] Marchand, WebTies' COO, testified that of the 411,900 pieces of content exhibited on BobVila.com, only 1,900 of them are "Bob Vila content." Tr. at 181-82 (Marchand).

This case is one in which an LLC has two managers whose agreement is contractually required for WebTies to move forward with a properly authorized strategy. Neither manager can act in isolation for WebTies without the assent of the other. This sort of deadlock has classically provided the basis for a dissolution in the corporate context when a joint venture with two coequal shareholders faces a deadlock; indeed, a specific section of the DGCL, § 273, addresses that scenario.[48] Given that a deadlocked management board is a quintessential example of a situation justifying a judicial dissolution, it is not surprising that this court has looked to § 273 of the DGCL by analogy in determining whether alternative entities, like LLCs, should be dissolved because it is not reasonably practicable for them to operate under their governing instruments.[49] Section 273 "essentially sets forth three prerequisites for a judicial order of dissolution: 1) the corporation must have two 50% stockholders, 2) those stockholders must be engaged in a joint venture, and 3) they must be unable to agree upon whether to discontinue the business or how to dispose of its assets."[50] The reason that the § 273 analysis is useful in the LLC context is obvious: when an LLC agreement requires that there be agreement between two managers for business decisions to be made, those two

[48] *See In re McKinney-Ringham Corp.*, 1998 WL 118035 (Del. Ch. Feb. 27, 1998) (applying 8 *Del. C.* § 273 to a deadlocked joint venture corporation with two equal 50% shareholders and dissolving it); *In re Venture Advisers, Inc.*, 1988 WL 127096, at *3 (Del. Ch. Dec. 1, 1988) (citing *In re Data Processing Consultants, Ltd.*, 1987 WL 25360, at *1 (Del. Ch. Nov. 25, 1987)) (same).

[49] *See Haley*, 864 A.2d at 94 (applying the analysis under DGCL § 273 to a deadlocked LLC); *see also In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *10 n.82 (Del. Ch. Aug. 18, 2005) (citing *Haley* for the proposition that where an LLC has two deadlocked owners, the court should analogize to 8 *Del. C.* § 273); *Re: The Homer C. Gutchess 1998 Irrevocable Trust v. Gutchess Co., LLC*, 2010 WL 718628, at *1 (Del. Ch. Feb. 22, 2010) (same).

[50] *Haley*, 864 A.2d at 94.

managers are deadlocked over serious issues, and the LLC agreement provides no alternative basis for resolving the deadlock, it is not "reasonably practicable" to continue to carry on the LLC business "*in conformity* with [its] limited liability company agreement."[51]

The trial record indisputably demonstrates that Vila and Hill are deadlocked over serious managerial issues. Uncontradicted evidence establishes that Vila and Hill are unable to agree on a strategic vision for, or the current operation of, WebTies. They have disagreed on several major initiatives, the strategic direction and capitalization of WebTies, and important operational decisions, including failing to reach an agreement on renewing the Company's office lease, with the result that the Company operates out of cyberspace, ad hoc office suites, and coffee shops. Both Vila and Hill agree that they have not communicated directly with each other for nearly two years since this lawsuit was filed in early 2009.[52]

[51] 6 *Del. C.* 18-802 (emphasis added). *See Silver Leaf*, 2005 WL 2045641, at *11 ("Silver Leaf is no longer able to carry on its business in a reasonably practicable manner. The vote of the members is deadlocked and the [LLC] Agreement provides no means around the deadlock. . . . Therefore, . . . the court dissolves Silver Leaf."); *Fisk Ventures, LLC*, 2009 WL 73957, at *7 (when the management board of an LLC was deadlocked, "if that deadlock cannot be remedied through a legal mechanism set forth within the four corners of the operating agreement, dissolution becomes the only remedy available as a matter of law."); *Haley*, 864 A.2d at 88 ("With no reasonable exit mechanism [in the LLC agreement], I find that Haley is entitled to exercise the only practical deadlock-breaking remedy available to him, . . . the right to seek judicial dissolution.").

[52] Tr. at 153 (Hill); *id.* at 9 (Vila).

Now that Vila has withdrawn the Vila IP, it is silly to think that WebTies can continue to operate "BobVila.com." It cannot.[53] Moreover, the fact that Hill says that WebTies can make profits running a website that does not use the Vila IP is beside the point. Vila did not sign up for such a business strategy and, in any event, does not support it.

Furthermore, this is not a case in which Vila in bad faith manufactured a phony deadlock, pulled the rights to the Vila IP on short notice, and sought dissolution so that he could take profits for himself that would come to WebTies otherwise. Quite the contrary is true.[54] The record reveals that Vila sincerely hoped to make WebTies more profitable by more effectively utilizing the Vila IP. To that end, Vila proposed to personally commit an additional $500,000 of capital and sought to implement managerial changes he hoped would transform BobVila.com from a small and loosely managed Boston firm into a New York City-based national home improvement powerhouse complete with professional management. In other words, Vila was prepared to make an even greater investment in WebTies.

Under the LLC Agreement that Hill, a sophisticated businessman assisted by counsel, signed, Hill was of course free not to agree with Vila, who had been disagreeing with Hill's preferred strategy for several years. But his defense of this case suggests that

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[53] *See, e.g., Silver Leaf*, 2005 WL 2045641, at *11 (noting that where the LLC had lost its operative asset — a sales and marketing agreement — it had no more business to operate and an order of judicial dissolution was proper.).

[54] Indeed, Vila testified that despite his proposed transformation and relocation to New York, he has no plans to completely "throw . . . out" the loyal employees of WebTies — the "pioneers." Tr. at 74-75 (Vila). Instead, Vila testified that he plans to keep a "satellite office" for BobVila.com in Boston. *Id.*

Hill has a playground sense of his rights. According to Hill, he called "LLC," and was entitled, in the face of drastic changes in the business circumstances facing WebTies, to continue WebTies on an inertial path even when his co-manager Vila adamantly disagreed. Hill believes he can do that even though the website is named for Vila, Vila's face is on every page of the website, the new Twitter initiative leads users to believe they are receiving advice endorsed by Bob Vila personally, and even though the LLC Agreement requires that all the managers agree on how WebTies should be run.[55]

In prior cases, this court has rejected the notion that one co-equal fiduciary may ignore the entity's governing agreement and declare himself the sole "decider." In *Haley*, for example, one co-owner of a restaurant business forbade the other from physically entering the restaurant premises, and defended in part on the ground that the restaurant was doing just fine under his sole dominion.[56] The court rejected that defense because under the LLC agreement, both co-owners were to make the decisions, not just the one who had changed the locks and managed the restaurant as he saw fit.[57] As in *Haley*, other decisions under alternative entity statutes have held that a business is not being operated in accordance with its governing instrument when one fiduciary acts as sole manager in a situation where the agreement of others is required.[58] In this case,

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[55] LLC Agreement § 3.02.
[56] *Haley*, 864 A.2d at 91-92, 96.
[57] *Id.* at 96.
[58] *See Silver Leaf*, 2005 WL 2045641, at *10 (Del. Ch. Aug. 18, 2005); *Sriram v. Preferred Income Fund III L.P.*, 22 F.3d 498, 502 (2d Cir. 1994) (applying Delaware law) (dissolving a Delaware limited partnership despite a partner's contentions that under a proposed restructuring plan the partnership would become a viable and profitable entity when the operation of the limited partnership under the restructuring plan would be in contravention of the existing partnership agreement and the other partner, whose approval was required for any amendment to

WebTies' LLC Agreement could not be any clearer that WebTies is to be managed by "the Managers," and not by a single manager acting independently of his co-equal manager.[59]

Although Hill has at times tried to minimize the serious nature of his disagreements with Vila,[60] the documentary evidence contains admissions on his own

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the partnership agreement, objected); *Connors v. Howe Elegant, LLC*, 2009 WL 242324 (Conn. Super. Ct. Jan. 8, 2009) (citing *Haley*, 864 A.2d 86) (applying a provision identical to 6 *Del. C.* § 18-802 and dissolving a Connecticut LLC where one coequal manager locked the other out of the LLC premises, closed the LLC's bank account, and took sole control of it).

[59] *See, e.g.*, LLC Agreement § 3.02 ("All decisions or actions to be made or taken by the Managers shall require the . . . affirmative vote of at least a majority in number of the Managers."); § 3.01 ("the term "Managers" shall mean the Managers of the LLC in the aggregate acting as the governing body of the LLC.") (emphasis in original); § 3.03 ("The Managers may cause the LLC to enter into one or more agreements, leases, contracts or other arrangements . . . ."); § 6.01 ("Except as provided in Section 6.02 and at such times as the Managers shall determine in their discretion, all LLC funds, which are available for distribution, shall be distributed . . . ."); § 6.02 ("upon such period of time as the Managers shall deem advisable . . . ."); § 6.03 ("during each fiscal year of the LLC in which the Managers determine that there is Members' Estimated Tax Liability, the Managers shall cause the LLC to make a distribution . . . ."); § 6.04 ("Except as the Managers may otherwise determine . . . ."); § 7.03 ("such allocation to be made by the Managers in accordance with any method allowed by the Treasury Regulations and elected by the Managers."); § 7.04 ("Any elections or other decisions relating to allocations of income, gain, deduction, loss or credit . . . shall be made (or not made) by the Managers in their sole discretion."); § 7.05 ("For purposes of determining the income, gain, loss, deduction or credit . . . such items shall be determined . . . by the Managers . . . ."); § 8.01 ("No Member may Transfer such Member's Percentage Interest in the LLC . . . except (1) with the Approval of the Managers . . . ."); § 10.03(1) (liquidation distributions for contingent liabilities, "if any, determined by the Managers to be appropriate for such purposes . . . ."); § 11.02 ("Bank accounts . . . of the LLC shall be maintained in such banking and/or financial institution(s) as shall be selected by the Managers, and withdrawals shall be made and other activity conducted on such signature or signatures as shall be designated by the Managers."); § 11.04 ("Any subsequent 'tax matters partner' shall be designated from time to time by the Managers.").

[60] *See, e.g.*, Def. Op. Post-Tr. Br. at 1 (WebTies has operated "successfully since its formation in February 2000" and "[p]revious disagreements as to the management of the Company have been minor and, in any event, have been resolved without affecting the operations of the Company.").

part of how widely and deeply they are divided.[61] Furthermore, given the clarity of the License Agreement and the fact that Vila only terminated the License Agreement after making good faith efforts to resolve the disagreement and to revitalize WebTies, there is no apparent way for WebTies to force Vila to restore the Vila IP to it. Whether Hill and his staff wish to admit it or not, WebTies was premised on building around Vila's name and reputation. WebTies cannot do that now. That Hill and his staff say that WebTies can be profitable under a different website name and without content involving the Vila IP further makes Vila's point, and cuts against Hill's argument opposing dissolution. What Hill wishes to do is to pursue a business having nothing to do with the basic purpose for which WebTies was formed and to do so over the objection of one of its two managers.

Of course, the existence of a deadlock would not necessarily justify a dissolution if the LLC Agreement provided a means to resolve it equitably.[62] But the LLC Agreement does not contain a buy-sell arrangement or any other provision (such as one providing for the appointment of an agreed-upon third manager) to resolve the deadlock. Rather, the LLC Agreement contemplates that a member or manager may seek judicial dissolution.[63] This is what Vila has done, and he has succeeded in proving that dissolution is warranted.

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[61] *See, e.g.*, JX-3 (email from Hill to Sawitsky (March 13, 2008)) ("[Vila's] paranoia [that Hill will selfishly damage the Vila IP] . . . *has made it almost impossible to move [WebTies] forward* . . . .") (emphasis added).

[62] *Fisk Ventures, LLC*, 2009 WL 738957, at *5; *see also Haley*, 864 A.2d at 88 ("If an equitable alternative to continued deadlock had been specified in the LLC Agreement, arguably judicial dissolution . . . might not be warranted.").

[63] LLC Agreement § 10.02 ("The LLC shall be dissolved upon . . . the entry of a decree of judicial dissolution under the [Delaware Limited Liability Company] Act.").

C. Hill's Counterclaims

Hill spent most of his energy defending against dissolution. But he also asserted several counterclaims for breach of the express and implied terms of the LLC Agreement and for breach of fiduciary duty against Vila. His pleading in support of his counterclaims was almost entirely cursory. With the exception of one specific allegation of fact related to a distribution to Vila to which, as we shall see, Hill acquiesced, Hill simply lobs conclusory allegations. Illustrative is paragraph ten of the eleven "paragraph" fact section supporting his counterclaims, which states in whole: "Vila has wrongfully competed against the Company in violation [of] paragraph 12.02 of the LLC agreement, which prohibits outside ventures that are 'in direct competition with the business and activities of the LLC.'"[64] I put paragraph in quotation marks because only one of the paragraphs has more than one sentence, paragraph six, which has two. Coming into trial, Hill did little to flesh out these cursory allegations and that remained the case throughout the trial.

Although Hill did not explicitly plead these counterclaims as a secondary "Vila is a bad guy" defense to the dissolution, his arguments in favor of them have that flavor. For the sake of completeness, therefore, let me briefly reiterate my prior finding as to Vila's loyalty to WebTies.

My review of the record persuades me that Vila hoped to make WebTies a successful company that would take advantage of his reputation in the home improvement field. Hill resisted over a course of several years. Reasonable

[64] Ans. & Countercl. at 4 ¶ 10.

businesspersons could disagree on what was best for WebTies, but what is important for present purposes is that Vila's point of view was one that was well motivated and rational, and Vila did not seek dissolution as a bad faith stratagem to injure WebTies.

With that context in mind, I turn to the resolution of Hill's counterclaims. I do so tersely because Hill's evidence in support of those counterclaims largely consisted of only his own inadequate, cursory testimony.

1. Breach Of The LLC Agreement

In his first counterclaim, Hill alleges that Vila breached § 6.01 of the LLC Agreement when he withdrew $100,000 without the assent of Hill as required by § 3.02 of the LLC Agreement.[65] Section 6.01 states in pertinent part that "[e]xcept as provided in Section 6.02 [(governing distributions at dissolution)] and at such times as the Managers shall determine in their discretion, all LLC funds, which are available for distribution, shall be distributed . . . ."[66] At trial, Hill testified that although he initially opposed the distribution, he later "acquiesce[d]" to the distribution.[67] Having acquiesced to the distribution as a manager using his authority under § 3.02 of the LLC Agreement, Hill cannot challenge the distribution now and his counterclaim fails.[68] Furthermore, Hill

[65] At the same time Hill seeks to peg liability on Vila for allegedly breaching § 6.01, he bases his previously discussed defense to dissolution that no paralyzing deadlock exists on his ultimate agreement to the $100,000 withdrawal. *See* Def. Op. Post-Tr. Br. at 6, 18 (arguing that no deadlock exists because although Hill initially objected to the $100,000 distribution, he later "acquiesced.").
[66] LLC Agreement § 6.01.
[67] Tr. at 145 (Hill) ("Q: [D]id you acquiesce on the hundred thousand dollars?" A: I did.").
[68] *See, e.g., Julin v. Julin*, 787 A.2d 82, 84 (Del. 2001) ("Acquiescence is an equitable defense which is assertable against a party who remains inactive for a considerable period of time, or who recognizes the validity of the complained of act or who acts in a manner inconsistent with the subsequent repudiation and thus leads the other party to believe the act has been approved.");

did nothing at trial to prove that it was inequitable, given Vila's capital and other contributions to WebTies, for Vila to receive the $100,000.

In his second counterclaim for breach of contract, Hill alleges that Vila breached § 12.02 of the LLC Agreement by purportedly engaging in several activities that constitute impermissible direct competition with WebTies.[69] Section 12.02 states that managers of WebTies may "engage in and possess interests in other business ventures and investment opportunities, *provided, however*, that no such other business venture or investment opportunity . . . shall be in direct competition with [WebTies]."[70] Specifically, Hill contends that Vila's 2007 deal with the Home Shopping Network to sell Bob Vila branded tools constituted competition with BobVila.com in contravention of § 12.02.

This contention comes with ill grace. Hill and Vila together own 98% of WebTies and are its only managers. Hill himself approved this transaction and entered into an agreement entitling him to 10% of the commissions on the sales of the Home Shopping Network tool line he now complains impermissibly competed directly with BobVila.com.[71] By their joint conduct, Hill and Vila, as WebTies' managers, waived any

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see also 13 WILLISTON ON CONTRACTS § 39:27 (waiver of a contractual right may be express or implied by a party's conduct; "[u]nder the doctrine of 'implied waiver,' a waiver of contractual rights may be found to exist where the conduct or acts of the party charged with waiver have either: (1) clearly manifested an intention to waive the contract provision or term allegedly waived or (2) reasonably induced the nonwaiving party to rely upon an apparent waiver of such term or provision . . . .").

[69] Def. Op. Post-Tr. Br. at 18.

[70] LLC Agreement § 12.02 (emphasis in original).

[71] JX-87 (chart showing distributions to Hill under Home Shopping Network deal (June 24, 2009)); Tr. at 41-43 (Vila).

contractual right of WebTies to prevent Vila — and Hill — from doing this deal.[72] Although this conduct arguably injured BobVila.com, Hill's complicity in this conduct and the personal benefit he accepted from it estops him from complaining on behalf of WebTies and WebTies' only other owner, HI Nominee Trust, has affirmatively disclaimed any interest in joining issue on the claims in this litigation.[73] In addition, Hill's sketchy trial testimony does not persuade me that the Home Shopping Network deal directly competed with BobVila.com or that it otherwise harmed WebTies. In fact, the publicity that might be generated by use of the Bob Vila name on the Home Shopping

[72] *See Realty Growth Inv. v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982) ("Waiver is the voluntary and intentional relinquishment of a known right."); *Components, Inc. v. Western Elec. Co.*, 267 A.2d 579, 582 (Del. 1970) (party can waive contractual or statutory rights); 13 WILLISTON ON CONTRACTS § 39:14 (generally, a party may waive — by words or conduct — any contractual right or obligation, and a party who intentionally permits the other party to openly breach a contractual obligation is estopped from later seeking judicial enforcement of the waived contractual obligation); *McElroy v. B.F. Goodrich Co.*, 73 F.3d 722, 724 (7th Cir. 1996) (The rule that one may waive his contractual rights "rest[s] on an idea no more complicated than that any competent adult can abandon a legal right and if he does so he has lost it forever.").

[73] *See, e.g., Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 176 (Del. 1991) (quoting 3 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES § 804, at 189, 245 (1941)) (internal citations omitted) ("Estoppel and acquiescence are related doctrines of equity. '[E]stoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded . . . from asserting rights which might perhaps have otherwise existed, . . . as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse . . . .' Similarly, "[a]cquiescence in the wrongful conduct of another by which one's rights are invaded may often operate, upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled.'"); HENRY M. HERMAN, 2 COMMENTARIES ON THE LAW OF ESTOPPEL AND RES JUDICATA 1191-92 (F.D. Linn & Company 1886) ("[I]f one has knowledge of an act, or it is done with his full approbation, he can not afterwards have relief. He is estopped by his acquiescence, and can not undo that which has been done. . . . When a man with full knowledge . . . and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation . . . there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity.").

Network could have increased web traffic to BobVila.com, a site premised on providing home improvement advice.

Hill's final two claims for breach of § 12.02 of the LLC Agreement can also be dispensed with tersely, due to the lack of evidence supporting them. Hill argues that Vila competed with WebTies by attempting to create a television show, entitled "Our Green House," that would have its own proprietary website that would compete with BobVila.com. But the sketchy record evidence that Hill presented indicates that this project never made it out of the initial planning stages, the production companies responsible for the project were dissolved in the spring of 2009, and the project was abandoned.[74] Hill's sparse evidence comes well short of showing that this exploration was necessarily of a website that would in fact directly compete with BobVila.com as expressly required by the LLC Agreement.[75] As important, to receive relief for breach of contract, a plaintiff must prove that it suffered damages as a result of the alleged breach.[76] At trial, Hill proffered no evidence supporting the contention that WebTies suffered any damages as a result of this preliminary planning.[77]

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[74] JX-30 (email from Dreyfous to Vila (March 26, 2009)), JX-31 (email from Dreyfous to Vila (March 26, 2009)).

[75] LLC Agreement § 12.02.

[76] In order to prevail on a breach of contract claim, a plaintiff must prove by a preponderance of the evidence: (1) the existence of a contractual obligation; (2) a breach of that obligation; and (3) as a result of that breach, the plaintiff suffered damages. *H-M Wexford LLC v. Encorp. Inc.*, 845 A.2d 1031, 1035-39 (Del. 2004).

[77] Hill emphasizes the fact that Grant admitted at her deposition that any published website for "Our Green House" would compete with BobVila.com. Dep. Tr. at 73-75 (Grant). But this admission is obviated by her clarification that Vila "has not gone ahead to create ["Our] [G]reen [House"] as a web entity because it would compete [with BobVila.com]. *Id.* at 75. Put differently, Vila was cognizant of his contractual obligations under § 12.02 and refrained from creating any competing website. This case can be further contrasted from cases in which a

Similar flaws plague Hill's final breach of contract claim. Hill claims that Vila is developing or has developed an iPhone application ("App") that would involve sponsorship of wood products that were appropriate for green home improvement projects with advice from Bob Vila, and that a user's ability to bypass BobVila.com and download the App directly from the Apple iTunes Store would constitute impermissible direct competition under § 12.02. Again, the evidence offered by Hill was sparse and although it is conceivable that this application would directly compete with BobVila.com, it is also conceivable that it could and would have been structured in a way that actually helped BobVila.com. What does emerge with clarity, however, is that the App never got out of the initial development stages and therefore there has been no App released by Vila or his companies.[78] Thus, Hill failed to allege or establish any damage to WebTies.

2. Breach Of The Implied Covenant Of Good Faith And Fair Dealing

Hill also contends that Vila breached the implied covenant of good faith and fair dealing in the LLC Agreement. Although his pleading lumps together all of his previously discussed cursory allegations and says they all support claims for breach of the express and implied terms of the LLC Agreement, and for breach of fiduciary duty, his briefs focus his implied covenant claim on two issues.

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contracting party unequivocally manifests an intention to breach his contractual obligations in the future (i.e., his actions constitute an anticipatory repudiation). *Compare PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014 (Del. Ch. 2004) (finding anticipatory repudiation where contracting party "unequivocally" manifested to promissee that he would not perform under the contract); *with* RESTATEMENT (SECOND) OF CONTRACTS § 250 cmt. b ("Mere expression of doubt as to . . . willingness or ability to perform is not enough to constitute a repudiation [of a contractual promise to perform].").

[78] Tr. at 38-39 (Vila); *id.* at 127 (Grant) (testifying that the iPhone App is nothing more than "a concept on paper.").

First, Hill argues that Vila breached the implied covenant of good faith and fair dealing by bringing this action. As I have already found, Vila did not violate any implied provision of the LLC Agreement by pressing a non-frivolous, indeed winning action, for dissolution. Dissolution is a remedy expressly contemplated by the LLC Agreement.[79]

Likewise, Hill's assertion that Vila breached an implied term of the LLC Agreement by refusing to accept supposed offers to purchase WebTies is without merit. Specifically, Hill claims that Vila refused to consider a sale of WebTies to Ripplewood Holdings, an LLC that sent a letter to Hill in late 2007 expressing an *interest* in making an offer to acquire WebTies for the purchase price of "approximately" $8 million.[80] Hill also claims that Vila refused to talk to Eric Thorkilsen, an entrepreneur who had expressed an interest in acquiring WebTies.[81]

The problem with this counterclaim is that Hill offers no proof to support his contention that Vila acted disloyally. That is, Hill makes no showing that Ripplewood or Thorkilsen made firm offers that Vila refused to consider in bad faith, or that $8 million was a fair price.[82] In fact, the evidence is to the contrary. Vila, based on a valuation done by Grant, believed that the $8 million price was far too low if Ripplewood wanted

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[79] LLC Agreement § 10.02. To the extent that Hill also seeks to pluck my equitable heartstrings by pointing to compensation schemes for WebTies' employees that are tied to WebTies' performance, his argument is without force. Vila is no more obligated to fold in the face of Hill's views than Hill is obligated to fold in the face of Vila's. In winding up WebTies' affairs, both Hill and Vila will, as members of WebTies, have to face the economic consequences of addressing any contractual rights of the employees. Those rights provide no basis to conclude that Vila's pursuit of this action is somehow impliedly barred by the LLC Agreement.

[80] JX-50 (letter from Ripplewood to Hill (October 16, 2007)).

[81] JX-70 (emails from Thorkilsen to Hill (January 22, 2009)).

[82] Thorkilsen told Hill in an email that on the basis of the dispute between Hill and Vila, he was no longer interested in an acquisition. JX-70 (email from Thorkilsen to Hill (May 29, 2009)).

the Vila IP and a license to use it.[83] Moreover, the record does not support the proposition that either Ripplewood or Thorkilsen wished to purchase WebTies at the $8 million figure without the Vila IP, an asset that does not belong to WebTies.[84] Finally, Hill cites no law for the proposition that Vila, as an equity owner, was under a contractual duty to consider selling his interest in WebTies at a price that he viewed as suboptimal, particularly when that price involved Vila giving up his ownership of the Vila IP.[85] This claim is without merit.

3. The Breach Of Fiduciary Duty Counterclaim Fails As Superfluous

Hill has also brought claims for breach of fiduciary duty against Vila, based on the same conduct that was the focus of his express breach of contract claims.

They fail for essentially the same reasons. As to the $100,000 distribution, Hill admittedly acquiesced in the distribution as a manager, is estopped from challenging it now, and has failed to prove that the distribution was in any way unfair to WebTies in

[83] Tr. at 85 (Vila) ("[I]f [Ripplewood] wants to buy the website with the license to operate using the Bob Vila name . . . a number of [$]30 million would not be . . . out of whack."); *id* at 91 (Vila).

[84] *Id.* at 84 (Vila) ("[Ripplewood] quickly disappeared . . . when they realized that what was being offered to them by [Hill] did not include my trademarks or license to use my name.").

[85] Indeed, our law imposes no such general duty and the LLC Agreement implies nothing to the contrary. *See Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) (Stockholders may act in their own self interest and "a stockholder is under no duty to sell its holdings in a corporation, even if it is a majority shareholder, merely because the sale would benefit the minority."); *see also Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (citing *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005)) (A court "will only imply contract terms when the party asserting the implied covenant [of good faith and fair dealing] proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected."); *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) ("One generally cannot base a claim for breach of the implied covenant [of good faith and fair dealing] on conduct authorized by the agreement.").

light of Vila's various contributions to the firm.[86] As to the alleged competition with WebTies, the LLC Agreement explicitly allowed Vila to engage in other business activities so long as they did not directly compete with WebTies. Because this restriction on direct competition is an explicit provision of § 12.02 of the LLC Agreement, Hill's vague attempt to broaden the provision by pointing to traditional corporate law principles is an improper attempt to supplant the primacy of the LLC Agreement in the alternative entity context.[87] As our Supreme Court has plainly stated, "[i]t is a well-settled principle that where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. . . . [A]ny fiduciary claims *arising out of the same facts that underlie the contract obligations* would be foreclosed as superfluous."[88] Here, the fiduciary duty claims Hill makes are factually identical to his claims for breach of § 12.02 of the LLC Agreement.

Even were that not the case, Hill has not proven his claims. As to the Home Shopping Network issue, Hill seeks to condemn Vila for conduct that Hill himself engaged in as a willing participant, and thus may not challenge. As to the other instances of alleged wrongdoing, Hill presented only vague testimony showing that Vila was engaged in a course of activity that could have, if it had resulted in an actual business deal, possibly constituted direct competition with WebTies. This evidence is too sketchy

[86] *Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 176 (Del. 1991) (quoting 3 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES § 804, at 189, 245 (1941)).
[87] *See* 6 *Del. C.* § 18-1101(b) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.").
[88] *Nemec*, 991 A.2d at 1129 (citing *Blue Chip Capital Fund*, 906 A.2d 827, 833 (Del. Ch. 2006); *Gale v. Bershad*, 1998 WL 118022, at *5 (Del. Ch. March 4, 1998)) (emphasis added).

to form a reliable basis to find that Vila breached any fiduciary duty to WebTies, particularly given that the activities could also have taken a shape that was beneficial to WebTies, and also given that the activities were occurring at a time when Hill had arrogated unto himself without any legal basis the unilateral right to shape WebTies' business strategy. And, as with the contract theory, Hill fails to produce any evidence from which one could conclude that WebTies was harmed by Vila's conduct. In that regard, Hill made no showing at trial and no argument in his briefs that the other parties were interested in working directly with WebTies or that Vila somehow usurped an "LLC opportunity" that WebTies was equipped to take.

IV. Remedy: Vila's Application For The Appointment Of A Liquidating Trustee Is Granted But His Post-Trial Motion For A Permanent Injunction Is Denied

When Vila filed this suit, his complaint contained one count — an application for the dissolution of WebTies and the appointment of a liquidating trustee tasked with winding up WebTies' affairs and liquidating its assets.[89] At no point did Vila move to amend his complaint to allege a claim for breach of the License Agreement. Then, after trial, Vila made a motion to permanently enjoin WebTies from using the Vila IP.

Although Vila may have a strong claim for injunctive relief under the License Agreement, raising the issue after trial for dissolution is unfair and inappropriate, especially when there is still pending litigation in Massachusetts dealing with the License Agreement.[90] Most important to me as a judge is that the failure to raise this issue pre-

[89] Compl. ¶¶ 18-20.
[90] *Hill v. Vila*, No. 09-3842 (Mass. Super. Ct.) (the Massachusetts Action).

trial leaves me unsure about the consequences of an injunction, and thus the balance of the harms.

Although it seems overwhelmingly likely that Hill has caused WebTies to engage in unauthorized activity using the Vila IP for over a year now, it could be that there are some uses of the Vila IP that Vila himself could not prevent, irrespective of the License Agreement. If, for example, Vila authorized WebTies to enter into a contract with a third-party premised on WebTies' ability to use the Vila IP and that contract had a durational provision extending beyond September 2009, Vila's ability to claw back his IP and require WebTies to violate a contract he himself approved is something that would seem to be the basis for colorable dispute. Although the trial record admittedly contains no such contract, the point is that that absence could be because Vila did not ask for an injunction until the trial was over.

In my view, the prudent direction is to appoint a liquidating trustee for WebTies with the broadest possible fiduciary powers to wrap up its affairs in a responsible manner that preserves value for the members while honoring the legal obligations WebTies owes to others, including to Vila. For his part, Hill refused to tender a name to serve as liquidating trustee, maintaining that dissolution should not be required. Meanwhile, Vila tendered the name of Martin G. Mand, a business executive and arbitrator, who has successfully handled this role before when appointed by this court.[91] When pressed by

[91] Pl. Pre-Tr. Br. Ex. AC (resume of Martin G. Mand); *see also Fulk v. Washington Servs. Assocs.*, 2002 WL 1402273 (Del. Ch. May 10, 2002) (appointing Martin G. Mand as Receiver/Custodian following an order dissolving a joint venture corporation under DGCL § 273).

me to come up with another name, Hill again failed to do so but did indicate that he had no objection to Mand.

I am comfortable with appointing Mand as liquidating trustee. But, given the ongoing legal strife, the need for him to decide about whether and when WebTies should discontinue using the Vila IP and make other decisions that could be controversial and result in further proceedings in this and other courts, I believe it important that he have his own counsel from the outset. Therefore, I intend to issue an order appointing Mand as liquidating trustee and having him retain James L. Holzman of the law firm of Prickett, Jones & Elliott, P.A. as his counsel. As the first order of business, Mand and Holzman shall take the first crack at an order of appointment and attempt to gain the assent of Hill and Vila as to form. That order shall extend to Mand the broadest authority consistent with the Delaware Limited Liability Company Act to decide how to dissolve WebTies and wrap up its affairs, accomplish his duties, and shall limit, to the extent consistent with the Act, the extent to which this court can second-guess his decisions. In other words, Mand should be empowered broadly to act under a business judgment rule standard if the Act so permits.[92]

Finally, given the lengthy pendency of this dispute and the reality that Hill has long known that he was unilaterally directing WebTies to pursue a strategy over the objections of Vila, Mand shall propose a plan that winds up WebTies' affairs promptly. Hill and his team have had ample opportunity to make offers to buy Vila out, and have

[92] *See, e.g.,* 6 *Del. C.* § 18-406 (providing that a liquidating trustee shall be exculpated from liability for a decision involving the disposition of the LLC's assets made in good faith reliance on the LLC's records, reports, and information).

had more than enough breathing room to make future plans. Vila has had the same chance. Neither Hill nor Vila appear to place a high value on WebTies, but they have failed to reach an agreement on how to part, this ongoing struggle being the last thing that still binds these former close friends together.

Given these realities, pleas by either Hill or Vila for a lengthy winding-up or auction process will not be indulged. Although Mand should assess the Vila IP issue in the first instance, given the trial record and the clarity of the License Agreement giving Vila the right to terminate it for "any reason or no reason," attempts by Hill to slow up the process by claiming that WebTies "owns" the Vila IP and that it should be the subject of sale in an auction as one of WebTies' assets will come with little grace and could risk an application by Mand and Vila for remedies.

V. Conclusion

For the foregoing reasons, Vila's claim for judicial dissolution of BVWebTies LLC is meritorious and BVWebTies LLC shall be DISSOLVED. Hill's counterclaims are DISMISSED. Vila's request for a mandatory injunction is DENIED. Martin G. Mand will be liquidating trustee of BVWebTies LLC and his counsel, James L. Holzman, shall present an implementing order, upon notice as to form to Hill and Vila, within ten days.