IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EUGENE M. JULIAN, Plaintiff, v. RICHARD J. JULIAN, FRANCIS R. JULIAN, INTERFLEX I, L.L.C., PENFLEX III, L.L.C., PENFLEX IV, L.L.C., SENTINEL SELF STORAGE, L.L.C., STANFLEX 1, L.L.C., FIRST STATE GOLD CENTER, L.L.C., EASTERN STATES LEARNING L.L.C., SOUTHFLEX I, L.L.C. and SHELLFLEX, L.L.C., Defendants.	)	Civil Action No. 4137-VCP

MEMORANDUM OPINION

Submitted: April 23, 2009
Decided: September 9, 2009

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PARSONS, Vice Chancellor.

This action presents yet another dispute among three brothers whose family controls a multitude of companies.[1] One brother is requesting a judicial determination of the fair value of seven family-owned limited liability companies ("LLCs") from which he purportedly has resigned. That same brother alleges breaches of fiduciary duty at two other LLCs from which he has not resigned. The other brothers have filed various motions to dismiss some of the claims or to stay this case in favor of a later-filed arbitration that presently covers a subset of the companies. For the reasons expressed in this memorandum opinion, I deny the motion to dismiss on ripeness grounds made by one of the LLCs, grant the motion to dismiss the claims against several of the other LLCs based on the existence of an adequate remedy at law in the form of arbitration, and deny the motion to stay the claims involving the remaining LLCs. In addition, I deny the motion of one of the defendant brothers to dismiss a breach of fiduciary duty claim against him in connection with one of the remaining LLCs.

I. BACKGROUND

A. Parties

Plaintiff, Eugene Julian ("Gene"), and Defendants Francis R. Julian ("Francis") and Richard J. Julian ("Richard") are members of nine Delaware limited liability

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[1] Two other actions in this unending tale of internecine strife are *Julian v. E. States Constr. Serv., Inc.*, No. 1892-VCP (Del. Ch. filed Jan. 18, 2006) and *Julian v. Julian*, No. 4099-VCP (Del. Ch. filed Oct. 16, 2008).

companies (the "Julian LLCs").[2] Gene also named each of the Julian LLCs as Defendants. They are: Eastern States Leasing, LLC ("ESL"), Interflex I, LLC ("Interflex"), Penflex III, LLC ("Penflex III"), Penflex IV, LLC ("Penflex IV"), Sentinel Storage LLC ("Sentinel"), Stanflex I, LLC ("Stanflex"), Southflex I, LLC ("Southflex"), Shellflex, LLC ("Shellflex"), and First State Golf Center, LLC ("FSG"). With the exception of FSG and Sentinel, which respectively operate a driving range and a storage facility, the Julian LLCs hold real estate for lease to third parties. A management company allegedly controlled by Francis and Richard runs the operations for the Julian LLCs in return for management fees.

B. Facts

Beginning in 2005 or thereabouts, significant disputes arose between Gene on the one hand and Francis and Richard on the other. These disputes led to multiple civil lawsuits and even criminal charges. In 2007, the situation deteriorated further as a result of the litigation. According to the Complaint, "Francis, with the consent of Richard, retaliated against Gene by dramatically increasing the fees his management company charged the Julian LLCs."[3] Even though no additional services were provided, the management fees allegedly increased by 400% and now exceed $500,000 per year. According to Gene, the increased fees were not approved by any disinterested party,

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[2] For the sake of brevity, I refer to the Julian family members bearing the same surname by their first names. No disrespect is intended.

[3] Compl. ¶ 10.

reviewed for fairness by any outside consultant, or presented to Gene for his approval before they took effect. On May 1, 2008, Gene tendered his resignation from all the Julian LLCs other than Shellflex and Southflex.[4]

The agreements governing the seven LLCs from which Gene allegedly resigned are silent as to his right to resign. A member's right to resign from an LLC is governed by the terms of the LLC agreement unless, as here, the agreement is silent, in which case any such right is governed by 6 *Del. C.* § 18-603. Two different versions of § 18-603 apply to the seven LLCs from which Gene purportedly resigned. The first version governs LLCs that filed a certificate of formation effective on or before July 31, 1996. The second governs all LLCs formed after that date. FSG, Interflex, Penflex III, and Stanflex were formed before July 31, 1996 and are governed by the earlier version of § 18-603.[5] ESL, Penflex IV, and Sentinel were formed after July 31, 1996 and, thus, are governed by the current version of § 18-603.[6]

Six of the nine LLCs are governed by agreements that include an arbitration clause. The remaining three—FSG, Shellflex, and Southflex—are not subject to such a clause.

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[4] With the exception of Southflex and Shellflex, Gene contends that each of the agreements for the Julian LLCs permits a member to resign. Compl. ¶ 12.

[5] Under the prior version of 6 *Del. C.* § 18-603, a member of an LLC has the right to resign upon not less than six months prior written notice.

[6] The current version prohibits members from resigning prior to the dissolution and winding up of the company unless such resignation is allowed by the LLC agreement. 6 *Del. C.* § 18-603.

C. Procedural History

Gene filed a complaint (the "Complaint") on November 3, 2008 seeking an award of fair value for his membership interests in the seven LLCs from which he purported to resign and alleging breaches of fiduciary duty in the remaining two. On December 29, 2008, Francis, Richard, FSG, Southflex, and Shellflex filed answers. On the same day, Francis, Richard, ESL, Interflex, Penflex III, Penflex IV, Sentinel, and Stanflex moved to dismiss or compel arbitration. On February 25, 2009, Francis, ESL, Penflex IV, and Sentinel initiated an arbitration against Gene seeking declarations that Gene remained a member of, and Francis did not breach his fiduciary duties respecting the management fees charged to, those entities.[7] On February 27, 2009, Francis, Richard, Southflex, and Shellflex moved to stay the proceedings in this action until the completion of the arbitration. Also on February 27, FSG moved for judgment on the pleadings on the ground that the claim against it is not ripe.

Count I of the Complaint seeks an award of fair value for Gene's interests in the four pre-July 31, 1996 LLCs from which he resigned—FSG, Interflex, Penflex III, and Stanflex.[8] Defendants moved to dismiss the fair value claims in Count I against FSG as not ripe and against the remaining three LLCs as being subject to arbitration.

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[7] *See* Merkins Aff. Ex. E.

[8] Defendants do not contest Gene's resignation from these companies pursuant to the statutory right afforded by the pre-July 31, 1996 version of 6 *Del. C.* § 18-603.

Count II seeks an award of fair value of Gene's interests in the three post-July 31, 1996 LLC from which he purportedly resigned—ESL, Penflex IV, and Sentinel. At argument, Gene's counsel conceded that all claims relating to Count II should be pursued in arbitration for reasons of efficiency and practicality.[9] Accordingly, I hereby dismiss Count II of the Complaint.[10]

Count III is a derivative claim for damages on behalf of Shellflex and Southflex, as well as any other LLC of which Gene is still a member, for the recovery of excess management fees.[11] Gene maintains that Defendants Francis and Richard caused Shellflex and Southflex to pay management fees in excess of what is reasonable and customary, and in excess of fees Francis and Richard have incurred for similar management services provided by third parties. Defendants seek to stay prosecution of Count III until completion of the pending arbitration. Richard also contends that Count

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[9] Defendants' counsel, Mr. Friedlander, stated: "I believe Mr. McNally is saying that for [ESL], Penflex IV, and Sentinel, . . . all claims related to those entities should be dismissed." Arg. Tr. at 43, Apr. 23, 2009. Gene's counsel, Mr. McNally, responded: "That's correct, your honor." *Id.* at 44.

The issues covered by Count II include the claim for fair value of Gene's interests in the three post-July 31, 1996 entities from which he purportedly resigned, the dispute over whether Gene actually had a right to resign under the LLC agreements of those entities, and any derivative claims for breach of fiduciary duty Gene might pursue on behalf of those entities if he is found not to have resigned.

[10] The dismissal of Count II here is with prejudice to any attempt by Gene to pursue those claims outside the pending arbitration, but without prejudice to the merits of the claims.

[11] As indicated above, the claims relating to the three post-July 31, 1996 LLCs have been dismissed. Consequently, the only entities as to which Gene now maintains derivative claims for damages in this Court are Southflex and Shellflex.

III of the Complaint fails to state a claim against him for breach of fiduciary duty in that he did not owe any fiduciary duty to Southflex. Gene disagrees and argues that under the plaintiff-friendly motion to dismiss standard, the Complaint states a claim for breach of fiduciary duty or aiding and abetting a breach of fiduciary duty against Richard.

In summary, based on the dismissal of Count II, the only issues remaining before the Court are (1) the motion to dismiss the claim against FSG on ripeness grounds, (2) the motion to dismiss the claims against Interflex, Penflex III, and Stanflex in favor of arbitration, (3) the motion to stay the claims involving FSG, Southflex, and Shellflex, and (4) the motion to dismiss the breach of fiduciary duty claim against Richard. Having considered the parties' briefs and oral argument on these motions, I address them seriatim below.

II. ANALYSIS

A. Applicable Standards

There are three operative motions before me: a motion to dismiss, a motion for judgment on the pleadings, and a motion to stay. A court should not grant a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6), "unless it can be determined with reasonable certainty that the [nonmoving party] could not prevail on any set of facts reasonably inferable" from the pleadings.[12] The court must assume the truthfulness of the well-pleaded allegations and must afford the nonmoving party "the benefit of all

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[12] *In re Primedia, Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006) (quoting *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002)).

reasonable inferences."[13] Mere conclusory allegations, however, will not be accepted as true without specific supporting allegations of fact.[14]

In considering a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, the court must address the nature of the wrong alleged and the remedy sought to determine whether a legal, as opposed to an equitable, remedy is available and adequate.[15] If a claim is arbitrable, *i.e.*, properly committed to arbitration, this Court lacks subject matter jurisdiction because arbitration provides an adequate legal remedy.[16] Delaware's public policy strongly favors arbitration, but arbitration is consensual, so the parties must have agreed to it.[17] Accordingly, if the parties to the contract in issue agreed to submit claims, such as those asserted in the Complaint here, to arbitration, this Court will dismiss those claims for lack of subject matter jurisdiction.[18]

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13 *Id.*

14 *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996).

15 *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001).

16 *Id.*

17 *Id.*; *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

18 *See Brown v. T-Ink, LLC*, 2007 WL 4302594, at *10 (Del. Ch. Dec. 4, 2007). Neither side argued that a different result would obtain if the Federal Arbitration Act (the "FAA") or the Uniform Arbitration Act, as enacted by Delaware (the "DUAA"), applied. *Compare* 9 U.S.C.A. §§ 1-16 *with* 10 *Del. C.* §§ 5701-5725. In this respect, this court previously has held that the DUAA is consistent with the FAA. *See Country Life Homes, Inc. v. Shaffer*, 2007 WL 3196337, at *3 n.17 (Del. Ch. Jan. 31, 2007). Moreover, the Supreme Court has observed that "Delaware arbitration law mirrors federal law." *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006). Therefore, this opinion focuses on all

A Rule 12(c) motion is similar but not identical to a Rule 12(b)(6) motion. Rule 12(c) provides: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." A party is entitled to judgment on the pleadings when, accepting as true and drawing all reasonable inferences from the nonmoving party's well-pleaded facts, "there is no material fact in dispute and the moving party is entitled to judgment under the law."[19]

Finally, this Court possesses the inherent power to manage its own docket and may, on the basis of comity, efficiency, or common sense, issue a stay pending the resolution of an arbitration, even for those claims that are not arbitrable.[20]

B. Are the Claims against FSG Ripe?

Count I seeks an award of fair value as to Gene's interests in FSG, Interflex, Penflex III, and Stanflex. Defendants argue that the claim against FSG is not ripe. "Ripeness, the simple question of whether a suit has been brought at the correct time, goes to the very heart of whether a court has subject matter jurisdiction."[21] A ripe dispute

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relevant decisions of the Delaware courts, whether they arose in the context of the DUAA or the FAA.

19 *In re Seneca Invs. LLC*, 970 A.2d 259, 262 (Del. Ch. 2008) (quoting *Warner Commc'ns Inc. v. Chris-Craft Indus. Inc.*, 583 A.2d 962, 965 (Del. Ch.), *aff'd*, 567 A.2d 419 (Del. 1989)).

20 *See Salzman v. Canaan Capital Partners, L.P.*, 1996 WL 422341, at *5 (Del. Ch. July 23, 1996) (citing *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (1964); *Phillips Petroleum Co. v. ARCO Alaska, Inc.*, 1983 WL 20283, at *2 (Del. Ch. Aug. 3, 1983) (granting stay in favor of pending arbitration based on "common sense")).

21 *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006).

arises where litigation "sooner or later appears to be unavoidable" and where "the material facts are static."[22] In deciding whether a claim is ripe for decision, Delaware courts look at "whether the interests of those who seek relief outweigh the interests of the court and of justice in postponing review until the question arises in some more concrete and final form."[23]

Defendants maintain that Count I is unripe because Gene filed this action two days after the effective date of his resignation from FSG. Delaware law provides a limited liability company "a reasonable time after resignation" of a member to compute and distribute "the fair value of [a resigning] member's limited liability company interest as of the date of resignation."[24] Defendants contend that two days is not a reasonable time.

In circumstances like this—*i.e.*, where family members are engaged in litigation with other family members on multiple fronts regarding a myriad of valuation and other business issues—it is reasonable to infer that the members would not have agreed on FSG's fair value regardless of whether Gene waited two days, two months, or much longer to file suit. Therefore, I do not consider the timing of Gene's commencement of this litigation against FSG to be contrary to the statutory scheme applicable here. This is especially true where, as in this case, valuation is based on facts as they existed at the

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22 *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 481 (Del. 1989) (quoting *Stabler v. Ramsey*, 88 A.2d 546, 555 (Del. 1952)).

23 *Bebchuk*, 902 A.2d at 740 (citation omitted).

24 6 *Del. C.* § 18-604.

time of the LLC member's resignation, even though it might take some time thereafter to gather the necessary information and to perform the valuation. In addition, nothing in the Complaint suggests that the allegedly early filing of Gene's claim prevented or interfered with FSG's ability to make an offer of fair value to Gene.

Moreover, dismissing the claim against FSG at this juncture would not further judicial efficiency. Gene presumably could re-file the action tomorrow. In these circumstances, Defendants' ripeness argument is hypertechnical and ill-founded. Thus, I deny the motion to dismiss the valuation claim against FSG on ripeness grounds.

C. Are the Claims Against Interflex, Penflex III, and Stanflex Arbitrable?

Defendants urge the Court to dismiss or stay the claims for the fair value of Gene's interests in Interflex, Penflex III, and Stanflex because the LLC agreements for those entities contain arbitration clauses.[25] In determining whether a claim should be decided before an arbitrator, Delaware courts divide the issue into questions of "procedural arbitrability" and "substantive arbitrability."[26] Questions of procedural arbitrability deal with whether the parties have complied with the terms of the arbitration clause.[27] For example, a contract might provide that to arbitrate a dispute one party must provide notice to another party within thirty days of some event. Whether a party seeking

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[25] These three entities were created before July 31, 1996; thus, they are governed by the version of 6 *Del. C.* § 18-603 in effect before August 1, 1996. Under this prior version of § 18-603, a member of an LLC has the right to resign upon not less than six months prior written notice. *See supra* notes 5-6 and accompanying text.

[26] *James & Jackson, LLC v. Willie Gary, LLC* , 906 A.2d 76, 79 (Del. 2006).

[27] *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *10 (Del. Ch. Dec. 4, 2007).

arbitration provided adequate notice would be a procedural question. A presumption exists that questions of procedural arbitrability will be handled by arbitrators and not by courts.[28]

Substantive arbitrability, the "gateway question" concerning the applicability of an arbitration clause, is more nuanced.[29] It includes a determination of both the scope of an arbitration provision and the broader issues of whether the contract or the arbitration clause is valid and enforceable. When examining substantive arbitrability, the underlying question is "whether the parties decided in the contract to submit a particular dispute to arbitration."[30] Where the parties bargain for an arbitration provision in a contract, Delaware courts generally favor arbitration of particular disputes and "ordinarily resolve any doubts in favor of arbitration."[31]

Before determining substantive arbitrability, however, courts must address a threshold question that involves the second-order issue of "who should decide 'whether the parties decided in the contract to submit a particular dispute to arbitration or to a court.'"[32] In *First Options v. Kaplan*, Justice Breyer aptly described this threshold

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28 *See Willie Gary*, 906 A.2d at 79.

29 *See id.*

30 *Id.*

31 *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155-56 (Del. 2002).

32 *See Carder v. Carl M. Freeman Cmtys.*, 2009 WL 106510, at *3 (Del. Ch. Jan. 5, 2009).

question as "rather arcane."[33] When sitting at the bargaining table, the parties to an LLC agreement may not be thinking about the "significance of having arbitrators decide the scope of their own powers."[34] Hence, the presumption favoring arbitrability is reversed as to this threshold question. As the Delaware Supreme Court held in *DMS Properties*, "the question of whether the parties agreed to arbitrate is generally one for the courts to decide and not for arbitrators."[35] Consequently, courts should presume the parties did not agree to arbitrate arbitrability, unless there is "clear and unmistakable evidence that they did so."[36]

Accordingly, this Court's initial task is to determine who should decide whether the parties intended in the relevant Julian LLC agreements to submit the particular disputes at issue here to arbitration. If the answer is the arbitrator, I need not address whether the particular claims asserted by Gene are covered by the arbitration clause.

In *Willie Gary*, the Supreme Court provided an example of what would constitute "clear and unmistakable evidence" of the parties' intent to arbitrate arbitrability.[37] The Court adopted the majority federal rule that reference in an arbitration clause to a set of arbitration rules that empower arbitrators to decide arbitrability, such as the American

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33 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).

34 *Id.*

35 *DMS Properties-First, Inc. v. P.W. Scott Assoc., Inc.*, 748 A.2d 389, 391-92 (Del. 2000).

36 *Willie Gary*, 906 A.2d at 79 (quoting *First Options*, 514 U.S. at 944).

37 *Id.* at 80.

Arbitration Association ("AAA") rules, combined with an "arbitration clause [that] generally provides for arbitration of all disputes" would constitute clear and unmistakable evidence that the parties intended to submit arbitrability issues to an arbitrator.[38]

Thus, *Willie Gary* articulated a two-pronged method for determining whether an arbitration clause constitutes "clear and convincing evidence" of the parties' intent to arbitrate arbitrability. This evidentiary standard is satisfied if an arbitration clause (1) generally refers all disputes to arbitration and (2) references a set of arbitral rules that empowers arbitrators to decide arbitrability.[39]

Turning to the arbitral clause at issue in this case, the LLC agreements for Interflex, Penflex III, and Stanflex have identical arbitration provisions, which provide:

> Any controversy or claim arising out of or relating to the Agreement shall only be settled by arbitration in accordance with the rules of the American Arbitration Association, one arbitrator, and shall be enforceable in any court having competent jurisdiction.[40]

There is no serious dispute that these arbitration provisions generally refer all disputes to arbitration. In *Carder*, this Court characterized the language "arising under in any way" in an arbitration clause as broad for purposes of determining who should decide

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38 *Id.*

39 As I have observed before, the premise that the Supreme Court would find arbitrability to be arbitrable based on a very broad clause in the absence of a reference to a set of rules that empowered arbitrators to decide the scope of their own jurisdiction is, at least, debatable. *See Carder*, 2009 WL 106510, at *6 n.28.

40 Compl. Ex. C, Interflex LLC Agreement, § 5.13; Compl. Ex. D, Penflex III LLC Agreement, § 5.13; Compl. Ex. G, Stanflex LLC Agreement, § 5.13.

substantive arbitrability, even though the clause did not include even more expansive language, such as "related to" or "in connection with." Here, the arbitral clause contains not only the "arising under" language, but the additional, broadening, "related to" language, which explicitly extends the scope of the arbitration provision "beyond the four corners of" the LLC agreements.[41] Thus, the clause is sufficiently broad to satisfy the first prong of the *Willie Gary* test by generally referring all disputes to arbitration.

Additionally, the operative arbitration clause explicitly references the rules of the American Arbitration Association ("AAA Rules"). Rule 7(a) of those rules provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."[42] Thus, the LLC agreements for Interflex, Penflex III, and Stanflex satisfy the second prong of the *Willie Gary* test.

Even though the arbitral provisions clearly satisfy the test for having the arbitrator decide questions of substantive arbitrability, Gene seems to contend that his claims so clearly do not arise out of or relate to the LLC agreements that a court, and not the arbitrator, should determine that they fall outside the broad scope of the applicable arbitral provisions. Gene emphasizes that his request for an award for fair value as to Interflex, Penflex III, and Stanflex is based on a statute, 6 *Del. C.* § 18-604, and not the

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41 *See Carder*, 2009 WL 106510, at *5.

42 AAA Commercial Arbitration Rule Stat. 7(a), *available at* http://www.adr.org/sp.asp?id=22440#R7.

parties' agreement. In his opposition brief, Gene also argued that his breach of fiduciary duty claims do not arise out of or relate to the LLC agreements because the agreements are merely "bare bones."[43] In so doing, Gene relies upon language from the Delaware Supreme Court in the *Parfi* case: "Generally, purportedly independent actions do not touch matters implicated in a contract if the independent cause of action could be brought had the parties not signed a contract."[44]

Gene's argument in this respect is interesting and fairly subtle. Nevertheless, I find it unpersuasive for a number of reasons. The major problem is that Gene asks this Court to decide whether his claims arise out of or relate to the LLC agreements. That is, he wants this Court to find that his statutory claims for fair value clearly do not relate to the various LLC agreements and, therefore, should not be referred to the arbitrator for any purpose. If I were to follow Gene's reasoning, however, I arguably would subvert *Willie Gary*. In the guise of answering the second-order question of "who decides

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[43] Based on the concessions made by Gene's counsel at argument, however, any dispute as to whether a breach of fiduciary duty claim for an entity other than Shellflex and Southflex, for which Defendants have no right to arbitration, may be submitted to arbitration is now moot.

[44] *Parfi*, 817 A.2d at 156 n.24. The *Parfi* case dealt with an arbitration clause in an underwriting agreement and only addressed the first-order question of substantive arbitrability, not the second-order question of who decides substantive arbitrability. The Supreme Court in that case examined whether a fiduciary duty claim arose under the parties' contract containing an arbitration clause. The Court held the claim did not arise under the contract and, thus, did not have to be arbitrated. The Court noted, however, that a fiduciary duty claim would have required arbitration if it had "touch[ed] on the obligations created in" the underlying agreement. *Id*. at 157.

substantive arbitrability," I effectively would be deciding the first-order question of substantive arbitrability itself. That would turn *Willie Gary* on its head.

Yet, in the abstract Gene raises a valid point. His common sense argument suggests that before determining whether the parties intended to arbitrate arbitrability, there must be some type of preliminary evaluation of whether the arbitration clause even arguably covers the underlying dispute. The point is well articulated in the following quotation from the United States Court of Appeals for the Tenth Circuit:

> If two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. . . . [I]t is simply fortuitous that the parties happened to have a contractual relationship.[45]

While the issue the Tenth Circuit addresses in *Coors Brewing*, like the quotation from the *Parfi* case relied upon by Gene,[46] is clearly a first-order substantive arbitrability question and not a second-order question of who decides substantive arbitrability, a similar rationale could be applied when deciding the second-order question. For instance, if Company A and Company B entered an emergency-vehicle purchase agreement containing a broad arbitration clause that referenced the AAA Rules, it stands to reason

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45 *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1516 (10th Cir. 1995), cited with approval in *Parfi*, 817 A.2d at 156 n.22.

46 *See supra* note 44 and accompanying text. Indeed, Gene's counsel relies heavily on these first-order substantive arbitrability cases to make his point. Arg. Tr. at 36.

that in a later suit between the companies over an obviously unrelated issue, such as a business tort claim stemming from a different nucleus of operative facts, neither company should be forced to submit the question of who decides substantive arbitrability as to that issue to an arbitrator, even though the arbitral clause meets both prongs of the *Willie Gary* test.

At the same time, it would be completely inconsistent with the Supreme Court's holding in *Willie Gary* if the question of whether the parties agreed to arbitrate arbitrability were to turn on a court's definitively answering whether the underlying claims relate to or arise out of the agreement, as would be the case if the court were deciding substantive arbitrability. In any event, the issues presented here do not require any deviation from the approach established in *Willie Gary*. When deciding who decides substantive arbitrability in a case like this, a court conceivably could consider a preliminary question of whether or not there is a colorable basis for the court to conclude that the dispute is related to the agreement. If there is such a colorable basis, along with a broad clause and reference to the AAA Rules or something analogous to them, then the question of substantive arbitrability should be sent to the arbitrator.[47]

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[47] The result might or might not be the same even if the claim were not colorably related, such as an assault claim by one party against the other having no relation to the contract containing the arbitral clause. That question, however, is not before me.

Turning to the facts of this case, Gene faces a significant difficulty: LLCs are creatures of contract. Indeed, the Delaware Limited Liability Company Act specifically requires the existence of a limited liability company agreement:

> A limited liability company agreement shall be entered into or otherwise existing either before, after or at the time of the filing of a certificate of formation and, whether entered into or otherwise existing before, after or at the time of such filing, may be made effective as of the formation of the limited liability company or at such other time or date as provided in or reflected by the limited liability company agreement.[48]

In this sense, the request for fair value of a resigning member's interest in a Delaware LLC inevitably relates, at least to some degree, to the existence of an LLC agreement and its relevant terms. I cannot say, therefore, that Gene's claims for fair value of his membership interests do not at least colorably relate to the agreements that arguably made him a member in the first place.[49] Paraphrasing the words of the Supreme Court in

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[48] 6 *Del. C.* § 18-201(d).

[49] A limited liability company is "formed at the time of the filing of the initial certificate of formation in the office of the Secretary of State." 6 *Del. C.* § 18-201(b). Nevertheless, the Act defines a limited liability company as a "limited liability company formed under the laws of Delaware and *having 1 or more members*." 6 *Del. C.* § 18-101(6) (emphasis added). A member's admission, in turn, is predicated on an agreement to admit a member or to be a member. *See* 6 *Del. C.* § 18-301(a-b). One potential implication of this chain of reasoning, which deserves further attention, is that (i) an LLC must have at least one member, (ii) a member is only a member by virtue of an agreement—whether oral or written—providing for the admission of members, and, therefore, (iii) an LLC must have an agreement of some kind, which is precisely what 6 *Del. C.* § 18-201(d), as quoted in the accompanying text, was amended to say. *See* 76 *Del. Laws*, c. 105 (2007) (substituting "shall" for "may" in 6 *Del. C.* § 18-201(d)). Indeed, the fact that the LLC Act was amended after certain LLCs already had been formed under the LLC Act may explain the apparent backdating that § 18-201(d) allows. For one

Parfi, it is not clear that Gene's purportedly independent action under the LLC Act seeking fair value of the interests of a member who resigned could be brought in the absence of an LLC agreement.[50]

Further, I consider it a colorable argument that Gene's claim for fair value implicates issues that can only be resolved by interpreting the LLC agreements, which contain broad arbitration clauses. For example, a provision in each of the LLC agreements at issue under Count I contains the following language: "The Manager(s) may pay compensation to any Member as they deem reasonable."[51] Also, section 5.2 of these agreements defines the standard of liability for the LLCs' managers as "gross negligence or willful default."[52] Gene counters that these are the default standards generally applicable to LLCs when an LLC agreement is silent, so determination of fair value does not turn on the provisions in the agreements. Regardless of whether these contractually defined duties perfectly track the default duties of managers where an LLC agreement is silent, it is at least plausible that resolution of the disputes relating to Interflex, Penflex III, and Stanflex will require interpretation of the respective LLC

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perspective touching on these issues, see Robert K. Symonds, Jr. & Matthew J. O'Toole, *Symonds & O'Toole on Delaware Limited Liability Companies* § 5.02 (2007 ed.) ("Agreement, not only of existing members and/or other applicable decision makers, but also of the person being admitted, stands as an implicit aspect of admission as a member.").

50 *See Parfi*, 817 A.2d at 156 n.24. As discussed *supra* note 44, *Parfi* addressed only the first order question of substantive arbitrability.

51 Interflex Agreement § 2.5; Penflex III Agreement § 2.5; Stanflex Agreement § 2.5.

52 *Id.*

agreements.[53] In this sense, Gene's claims differ markedly from the hypothetical assault claim referred to in the *Coors Brewing* case.

Thus, under the *Willie Gary* test, the arbitration clause at issue here reflects a decision of the parties to use arbitration to resolve a wide range of disputes and references AAA Rules that empower the arbitrator to determine questions as to her own jurisdiction. Unlike the clause at issue in *Willie Gary*, the relevant clause here provides generally for arbitration of all disputes related to the agreement and contains no carve-outs or exceptions. Additionally, as discussed above, there is at least a colorable argument that the Interflex, Penflex III, and Stanflex claims relate to their respective LLC agreements. To the extent there is any basis for doubt about these findings, I conclude that, consistent with the holding in *McLaughlin*, this Court "should defer to arbitration, leaving the arbitrator to determine what is or is not before her."[54] I, therefore, hold that the parties must present their disputes under Count I as to substantive arbitrability concerning the fair value of Gene's interests in Interflex, Penflex III, and Stanflex to the arbitrator in the first instance.

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[53] Gene's argument reveals how much gravitational pull the underlying substantive arbitrability question has whenever the court is asked whether the parties agreed to arbitrate arbitrability. Keeping the analysis on the threshold question of who decides substantive arbitrability can be difficult. *Cf.* Ortega y Gasset, *The Dehumanization of Art* (1956) ("[M]aking an effort we may withdraw attention from the garden; and by retracting the ocular ray, we may fixate it upon the glass. Then the garden will disappear in our eyes and we will see instead only . . . the glass. Consequently to see the garden and to see the glass in the window pane are two incompatible operations.").

[54] *McLaughlin v. McCann*, 942 A.2d 616, 625 (Del. Ch. 2008).

D. Should the Remainder of the Action be Stayed Until the Arbitration is Completed?

Having effectively removed the litigation involving six of the LLCs to arbitration, Defendants also seek to stay the remaining claims in this action involving FSG, Southflex, and Shellflex until the arbitration against the other entities has concluded. This Court possesses the inherent power to manage its own docket, including issuing a stay pending the resolution of an arbitration, on the basis of comity, efficiency, or common sense.[55] When considering a stay of claims that are not subject to arbitration, this Court looks to the preclusive effects of a pending arbitration elsewhere on the action before the Court and vice versa, as well as the burden imposed by litigating actions in different fora.[56]

Each of the three remaining LLCs is governed by an agreement conspicuously lacking an arbitration clause. Given the inclusion of a broad arbitration clause in the other LLC agreements, failure to include any such clause in the agreements governing FSG, Southflex, and Shellflex evinces the parties' intent to keep claims regarding those entities out of arbitration. Typically, the parties' bargained-for agreement should be given full effect. Thus, the motion to stay the prosecution of the FSG, Southflex, and Shellflex claims pending resolution of the arbitration should be granted only if

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55 *See supra* note 20.

56 *Salzman v. Canaan Capital Partners, L.P.*, 1996 WL 422341, at *4-5 (Del. Ch. July 23, 1996).

Defendants have met their burden of showing good cause as to why the claims should be stayed. This they have not done.

While similarities exist, the claim against FSG and the claims asserted on behalf of Southflex and Shellflex rest on different principles. Thus, I will first examine the motion to stay the Southflex and Shellflex claims. Gene, as a member of Southflex and Shellflex, brings a derivative action for breach of fiduciary duty against Francis and Richard alleging that these two have, for the past few years, charged the LLCs excessive and improper management fees. The claims Gene asserts on behalf of Southflex and Shellflex involve unique entities managing unique properties in many locations. The number, type, and location of these properties differ from those properties managed by the other LLCs. Additionally, the LLC agreements governing Southflex and Shellflex, which are important to understanding the breach of fiduciary duty claims, contain provisions materially different from those found in the other LLC agreements.

A close examination of the terms of the Southflex and Shellflex agreements relating to breach of fiduciary duty illuminates some of the material differences between those agreements and the agreements of the other Julian LLCs. First, though many of the LLC agreements contain provisions permitting managers to pay members "as they deem reasonable," there is no such provision in the Southflex agreement.[57] Additionally, the Shellflex agreement contains limitations on self-dealing and sections delineating the

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[57] *Compare* Penflex III Agreement § 2.5 *with* Compl. Ex. H, Southflex LLC Agreement.

Manager's rights and powers, which are not in the other agreements.[58] The manager indemnification clauses in the Southflex and Shellflex agreements also differ from the indemnification clauses in the arbitrable agreements.[59] Simply examining the length of the respective agreements illustrates the potential for other differences.[60] Defendants did not rebut the argument that these differences may be material to the resolution of Gene's claims.

Despite these differences, Defendants conclusorily assert that a stay is necessary because allowing the case to proceed in this Court against Southflex and Shellflex while simultaneously arbitrating the claims against the other entities will create a tactical race to judgment as well as the possibility of inconsistent judgments.[61] In making this argument, Defendants rely largely on the holding in *Salzman*. There, then-Vice Chancellor Chandler held that the relative burden of simultaneous litigation and arbitration of claims relying on the same basic facts surrounding three limited

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58 Compl. Ex. I, Shellflex LLC Agreement, §§ 5.2, 5.5, 5.7, & 5.10.

59 For instance, the Southflex agreement does not indemnify Managers for liability arising "by reason of willful misconduct, fraud or gross negligence on the part of such . . . Manager." Southflex Agreement § 17. Similarly, the Shellflex agreement does not indemnify Managers for "gross negligence, gross misconduct, breach of fiduciary duty, or breach of a material term, representation, condition, or covenant of" the agreement. Shellflex Agreement § 14.2. In contrast, the Interflex, Penflex III, and Stanflex agreements remove indemnity only for a Manager's "gross negligence or willful default." Penflex III Agreement § 5.2.

60 The Interflex, Penflex III, and Stanflex agreements are each seventeen pages long. The Southflex Agreement, on the other hand, runs nine pages and the Shellflex Agreement is thirty-seven pages in length.

61 Arg. Tr. at 22.

partnerships, one of which was required by contract to arbitrate disputes, warranted staying the action against the other two partnerships to "avoid inefficient and potentially conflicting results."[62] In Gene's case, however, the differences in entities, agreements, and properties significantly reduce the risk of potentially conflicting results. Additionally, the claims brought in behalf of Southflex and Shellflex for breach of fiduciary duty are separate and distinct from the fair value claims asserted against Interflex, Penflex III, and Stanflex and the purported member resignation and fair value claims asserted against ESL, Penflex IV, and Sentinel, all of which will have to be arbitrated.[63] Thus, I am not convinced that staying this proceeding against Southflex and Shellflex would produce any material benefit to the parties or otherwise promote the cost-effective and efficient administration of justice in the circumstances of this case.

For similar reasons, I decline to stay the claim against FSG. In stark contrast to the other eight LLCs, seven of which hold real estate for lease to third parties and one of which operates self-storage centers, FSG operates a golf driving range. Additionally,

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62 *See Salzman*, 1996 WL 422341, at *15.

63 Based on the briefing and oral arguments, it seems that no fiduciary duty claims will be presented in arbitration. *See* Arg. Tr. at 45 (Gene's counsel disclaimed any intent to pursue, directly or indirectly, any fiduciary duty claim on behalf of Interflex, Penflex III, and Stanflex); *id.* at 43-44 (noting that all claims regarding ESL, Penflex IV, and Sentinel were being sent to arbitration). Moreover, even if such claims did arise in some oblique way in the arbitration, this Court only could speculate as to the nature and results of those claims. That is too tenuous a basis for staying this action and thereby depriving Gene of his bargained-for right to litigate his claims as to FSG, Shellflex, and Southflex.

Gene's claim for fair value of his interest in FSG is based on a six-page LLC agreement significantly different from the much longer agreements governing the other LLCs.[64]

Thus, Defendants have failed to show good cause for staying Gene's claims in this action involving FSG, Southflex, and Shellflex and I, therefore, deny their motion to stay. I do, however, encourage both sides to evaluate where they stand in light of the rulings in this memorandum opinion and cooperate as much as possible to streamline and coordinate the proceedings in this Court and before the arbitrator.

E. Did Gene Properly Plead Richard's Involvement?

Finally, Defendants contend that Gene has failed in his attempt to state a claim for breach of fiduciary duty against Richard on behalf of Southflex. First, Defendants contend that Richard is simply not a fiduciary of Southflex and, thus, cannot be held to answer for decisions made with regard to that entity.[65] In response, Gene makes little effort to show Richard is a fiduciary of Southflex. Instead, he asserts that Richard aided and abetted Francis's breach of fiduciary duty in causing Southflex to pay excessive management fees to a company he and Richard owned. On that point, Defendants deny that the Complaint pleads or adequately states a claim against Richard for aiding and abetting any breach of fiduciary duty by Francis. Because Gene focused only on the latter argument, I will do so as well.

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64 *See* Compl. Ex. B, First State Golf Center LLC Agreement.

65 Defendants have limited their challenge to claims against Richard as to his involvement with Southflex only, apparently conceding that Richard is a fiduciary of Shellflex.

At the motion to dismiss stage, the court must assume the truthfulness of well-pleaded allegations and afford the nonmoving party "the benefit of all reasonable inferences."[66] Aiding and abetting a breach of fiduciary duty requires both knowledge of the breach of a duty and participation in the wrongful conduct.[67] The Complaint alleges that Gene was engaged in litigation against Francis and Richard and that, some time after the litigation began, the management fees charged to Southflex and Shellflex suddenly skyrocketed by 400%. A management company allegedly controlled by Richard and Francis received the increased fees. Further, the Complaint alleges the fees were increased by "Francis, with the consent of Richard."[68]

Under the plaintiff-friendly motion to dismiss standard, the allegations that Richard consented to the increase in fees, which benefited a company controlled by Richard and Francis, are sufficient to support a reasonable inference that Richard participated in the alleged wrongdoing. The fact that Francis could have taken that action on his own as a manager does not negate a reasonable inference that Richard may have been involved in the decision. The evidence conceivably could show that Richard knew about the increase and supported it, even though he also knew that a fee increase of 400% would have been suspect, especially in light of the family feud he and Francis had with

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66 *In re Primedia, Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006) (quoting *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002)).

67 *See Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001).

68 Compl. ¶ 10.

Gene and the fact that he and Francis stood to benefit from the increased fees. Accordingly, I deny the motion to dismiss Richard from the Southflex claim under Rule 12(b)(6).[69]

III. CONCLUSION

For the reasons stated in this opinion, I hereby deny the motion to dismiss the claim against FSG on ripeness grounds. Additionally, I grant the motion to dismiss the claims against Interflex, Penflex III, and Stanflex based on the existence of an adequate remedy at law in the form of arbitration. Finally, I deny both the motion to stay the

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[69] Defendants emphasize that the LLC agreements give Francis wide discretion to make decisions for Southflex. *See* DOB at 17, citing Southflex Agreement § 6.A. Operating agreements of alternative entities may eliminate duties and may exculpate members and managers from breaches of their duties, except for breaches of what colloquially has been called the "duty of good faith and fair dealing." *See* 6 *Del. C.* § 18-1101(c) (a "member's or manager's . . . duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the . . . agreement may not eliminate the implied contractual covenant of good faith and fair dealing."); *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at * 5 (Del. Ch. Apr. 20, 2009) ("Count III . . . alleges that even if PKI was not obligated by the explicit terms of the LLC Agreement to ensure performance . . . the implied duty of good faith and fair dealing required it to do so.").

Defendants also argue that Gene failed to plead a claim for aiding and abetting in his Complaint and should be precluded from adding such a claim now under Court of Chancery Rule 15(aaa). The argument lacks merit because the facts alleged in the Complaint suffice to support an aiding and abetting claim. To the extent a formal amendment to the Complaint in that regard might be considered necessary, I find that a dismissal with prejudice would not be just under all the circumstances. The most that would be warranted in terms of relief is a dismissal without prejudice, and I find that unnecessary.

claims involving FSG, Southflex, and Shellflex and the motion to dismiss the breach of fiduciary duty claim against Richard with regard to Southflex.

IT IS SO ORDERED.