IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FISK VENTURES, LLC, Petitioner/ Counterclaim Respondent, v. ANDREW SEGAL, Respondent/ Counterclaim Petitioner, and GENITRIX, LLC, Nominal Respondent.	)	Civil Action No. 3017-CC
ANDREW SEGAL, Third-party Petitioner, v. H. FISK JOHNSON, STEPHEN ROSE, and WILLIAM FREUND, Third-party Respondents.	)	

MEMORANDUM OPINION

Date Submitted: April 3, 2008
Date Decided: May 7, 2008

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CHANDLER, Chancellor

Contractual language defines the scope, structure, and personality of limited liability companies. The personality of Genitrix, LLC is one of balance. The language of its LLC Agreement carefully protects the interests of its two primary classes of members by requiring a supermajority vote of the Genitrix Board for all essential decisions. The necessary corollary to such a governance structure, of course, is that either membership class effectively has a veto power over the other. Exercising that veto power may paralyze the entity, but it nevertheless remains a contractually bargained for right. Perhaps unsurprisingly then, Genitrix now stands frozen in place, enfeebled by the inability of its two leading membership classes to agree on much of anything. The leader of one of those classes, Dr. Andrew Segal, now accuses the other class of damaging the Company.

Presently pending before the Court are two motions aimed at defeating Dr. Segal's claims. The first, filed by third-party respondent H. Fisk Johnson, asks this Court to dismiss the claims against him pursuant to Rule 12(b)(2)[1] for lack of personal jurisdiction. The second, filed by the counterclaim and third-party respondents, asks this Court to dismiss all of Dr. Segal's claims pursuant to Rule 12(b)(6)[2] for failure to state a claim.

Although Dr. Johnson played a significant role in the formation of Genitrix and has subsequently poured a sizeable amount of money into it, Segal is unable to

[1] Ct. Ch. R. 12(b)(2).
[2] Ct. Ch. R. 12(b)(6).

establish a nexus between Johnson's contacts with the state and the claims against him. Furthermore, Segal's substantive allegations against Johnson and the others reflect not breaches of contractual or fiduciary duties, but rather reflect an exercise of bargained for contractual rights. For these reasons and others explained below, the Court grants both motions to dismiss.

I. BACKGROUND

Petitioner Fisk Ventures, LLC ("Fisk") initiated this action to dissolve Genitrix, LLC ("Genitrix" or the "Company"), a limited liability company of which Fisk is a member, under 6 *Del. C.* §§ 18-801 and 18-802. Dr. Andrew Segal, the president and sole officer of Genitrix, answered the petition and filed counterclaims and third-party claims. Fisk and third-party respondents H. Fisk Johnson, Stephen Rose, and William Freund then moved to dismiss Segal's claims. Segal answered Dr. Johnson's motion to dismiss for lack of personal jurisdiction, but, in lieu of answering the motion to dismiss for failure to state a claim, Segal filed an amended counterclaim/third-party complaint. The parties completed briefing on Dr. Johnson's Rule 12(b)(2) motion on November 5, 2007, but did not complete the second round of Rule 12(b)(6) briefing until January 24, 2008. On April 3, 2008, the Court heard oral argument on both motions.

The facts below are gleaned from the well-pleaded allegations of Segal's amended answer and counterclaims/third-party claims.[3] On a motion to dismiss, the Court must assume such allegations are true and must make all reasonable inferences from such facts in favor of the non-movant.[4] The Court gives no credence, however, to conclusory allegations[5] and need not accept "every strained interpretation of the allegations proposed by the plaintiff."[6]

A. The Company, its Structure, and the LLC Agreement

Genitrix, LLC, is a Delaware limited liability company formed to develop and market biomedical technology. Dr. Segal founded the Company in 1996 following his postdoctoral fellowship at the Whitehead Institute for Biomedical Research. Originally formed as a Maryland limited liability company, Genitrix was moved in 1997 to Delaware at the behest of Dr. H. Fisk Johnson, who invested heavily.[7]

Equity in Genitrix is divided into three classes of membership. In exchange for the patent rights he obtained from the Whitehead Institute, Segal's capital account was credited with $500,000. This allowed him to retain approximately

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[3] *See, e.g.*, *Griffin Corporate Servs., LLC v. Jacobs*, C.A. No. 396-N, 2005 WL 2000775, at *1 n.1 (Del. Ch. Aug. 11, 2005).
[4] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[5] *Id.*; *see also In re Coca-Cola Enters., Inc. S'holders Litig.*, C.A. No. 1927-CC, 2007 WL 3122370, at *2 (Del. Ch. Oct. 17, 2007) ("An allegation is conclusory when it merely states a generalized conclusion with no supporting facts.").
[6] *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).
[7] Segal stresses that Johnson's investment was contingent upon the LLC's legal residence in Delaware, and notes that he unsuccessfully opposed this position in negotiations.

55% of the Class A membership interest. The remainder of the Class A interest was apparently granted to other individuals not involved in this suit. In the initial round of investment, Johnson contributed $843,000 in return for a sizeable portion of the Class B membership interest. The remainder of the Class B interest is held by Fisk Ventures, LLC, and Stephen Rose. Finally, various other investors contributed over $1 million for membership interests in Class C. These Class C investors are apparently mostly passive; the power in the LLC is essentially divided by the LLC Agreement (the "Agreement") between the Class A and Class B members.

Under the Agreement, the Board of Member Representatives (the "Board") manages the business and affairs of the Company. As originally contemplated by the Agreement, the Board consisted of four members: two of whom were appointed by Johnson and two of whom were appointed by Segal. In early 2007, however, the balance of power seemingly shifted. Because the Company failed to meet certain benchmarks, the Board expanded to five seats and the Class B members were able to appoint a representative to the newly created seat. Nevertheless, because the Agreement requires the approval of 75% of the Board for most actions, the combined 60% stake of Fisk Ventures and Johnson is insufficient to control the Company. In other words, the LLC Agreement was drafted in such a way as to require the cooperation of the Class A and B members.

B. The Parties

1. Andrew Segal

Dr. Andrew Segal, fresh out of residency training, worked for the Whitehead Institute for Biomedical Research in Cambridge, Massachusetts from 1994 to early 1996. While there, Segal researched and worked on projects relating to how the human immune system could be manipulated effectively to attack cancer and infectious diseases. In early 1996, Dr. Segal left the Whitehead Institute and obtained a license to certain patent rights related to his research.

With these patent rights in hand, Dr. Segal formed Genitrix. Intellectual property rights alone, however, could not fund the research, testing, and trials necessary to bring Dr. Segal's ideas to some sort of profitable fruition. Consequently, Segal sought and obtained capital for the Company. Originally, Segal served as both President and Chief Executive Officer, and the terms of his employment were governed by contract (the "Segal Employment Agreement"). Under the Segal Employment Agreement, any intellectual property rights developed by Dr. Segal during his tenure with Genitrix would be assigned to the Company.

As alluded to above and as discussed more fully later, much of that capital came from Johnson and Fisk, but, even with that capital, the Company has ultimately stalled. In his counterclaims and third-party claims, Dr. Segal contends

that the Company's failings were caused by the counterclaim and third-party defendants' breaches of contractual and fiduciary obligations.

2. Fisk Ventures, LLC

Fisk Ventures is a Delaware limited liability company controlled by Dr. H. Fisk Johnson, who owns 99% of it. Fisk is a Class B member and is entitled to appoint one person to the Board. Fisk filed the initial petition in this action seeking dissolution of the Company.

3. H. Fisk Johnson

Dr. Johnson is the controlling member of Fisk and is himself a Class B shareholder in the Company who is personally now entitled to appoint two members to the Board.[8] Johnson is also the chief executive officer and controlling shareholder of S.C. Johnson & Son, Inc.[9] As discussed above, Dr. Johnson insisted that Genitrix be formed under Delaware law before he would invest in the Company.[10] Although Johnson has previously served on the Board, he stepped down in 1998 and appointed others in his place, though he occasionally still attended board meetings.

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[8] During the time period in question in the counterclaims and third-party claims, Dr. Johnson's appointees were Stephen Rose and William Freund.

[9] Segal notes that in his capacity with S.C. Johnson, Johnson has appeared in television commercials that aired in Delaware.

[10] Dr. Segal emphasizes this point repeatedly. He further notes that the purchase agreement he executed with Dr. Johnson, pursuant to which Johnson purchased his Class B membership interests, was drafted by Johnson's attorneys and was governed by Delaware law.

Johnson's appointees, Rose and Freund, indicated to Segal that they conferred with Johnson before taking positions with respect to important issues with Genitrix. Moreover, during jurisdictional discovery Segal found some evidence of these discussions in the form of a few emails between Johnson and his appointees regarding matters before the Genitrix Board.

4. Stephen Rose and William Freund

Stephen Rose and William Freund are Class B Members of the Company and are Class B Representatives on the Board who were appointed by Johnson. Johnson also employs both Rose and Freund in a number of capacities outside of Genitrix, and Segal alleges that they are therefore dependant on Johnson or his affiliates for their livelihood.

C. The Company's Woes

Over the course of its existence, the Company has encountered several periods of financial instability and hardship. The story of Genitrix—and of Dr. Segal's claims—is the story of many startup companies: difficulty raising money.

1. Early Difficulties, the Fisk Ventures Note, and the Class B Put Right

From its inception, Genitrix found itself strapped for cash. Segal's allegations contain numerous references to the tight budget and reminders that he worked for the Company for little or no pay in order to ease Genitrix's financial pain. In the earliest part of this decade, the Company hobbled along on grants

from the National Institutes of Health and a series of relatively small financing transactions. Between November 2000 and August 2002, Johnson contributed another $550,000 in convertible debt, much of which was subsequently converted to Class B equity, and other investors provided $100,000 in convertible debt that was subsequently converted to Class C equity.

This influx of financing was insufficient, however. In the summer of 2003, Segal communicated to the Board that the Company would require $2.6 million to allow for human trials of the technology. Johnson, who by that point had contributed about $1.4 million, stated that he was unwilling to be the sole financier of the Company. Nevertheless, Johnson and Fisk Ventures agreed to contribute another $2 million in convertible debt if the Company agreed to try to raise an additional $5 million from other investors over the following two years.

Over the course of negotiating the terms of the Fisk Ventures note, Segal proposed that the "Put Right" of the Class B investors be suspended to allow him to more easily woo other investors. Pursuant to Section 11.5 of the LLC Agreement, the Class B Members may, at any time, force the Company to purchase any or all of their Class B membership interests at a price determined by an independent appraisal. If the purchase price exceeds 50% of the Company's tangible assets, the Members who exercised the Put Right would receive notes secured by all of the assets of the Company. In other words, the Put—if

exercised—would subrogate what would otherwise be senior claims of new investors. Though Segal believed this right would scare off potential investors, the Class B Members refused to suspend or relinquish their contractual rights, though they did communicate that they had no immediate or foreseeable intention of exercising the right. Segal alleges that, based on his conversations with Rose, he believed the Class B Members would be "more flexible with respect to the Put" once there was a prospective investment "on the table."[11]

2. Failed Efforts to Raise Money from New Investors

To meet the $5 million challenge put forth in the Fisk Ventures Note, the Company retained an investment banking consultant to help it raise money from venture capital funds. This effort failed to generate any investment.[12] By the summer of 2005—almost two years after the creation of the Fisk Ventures Note—the Company had failed to raise the needed $5 million, and the Fisk Ventures Note was scheduled to convert to Class B equity by the end of August. If the Company failed to meet the fundraising challenge by the conversion deadline, the Company's valuation would be adversely affected and, of course, the interests of the Class A and C members would be diluted. Segal threatened to resign if he

[11] Am. Verified Answer, Affirmative Defenses, Countercls. and Third Party Claims in Resp. to Pet. for Judicial Dissolution of Andrew Segal ¶ 122.

[12] Dr. Segal alleges that some of these funds expressed a hypothetical interest in providing support if the Company were better focused on infectious diseases. Segal also alleges that he wanted the Company to do so, but that the Class B Members—Johnson in particular—had disagreed at early board meetings in 1998 on this issue.

could not raise the required funds by the conversion deadline, and Fisk Ventures agreed to postpone conversion.

While negotiating the terms of the postponement, Dr. Segal turned his attention to individual, high-net-worth investors. Early indications were positive, but, Segal alleges, several potential investors complained about the Class B Put Right, one of whom called it a "deal killer." Thus, Segal again asked the Class B members to relinquish or suspend the Put Right. The Class B members again refused. Segal alleges that an agent of the Class B Members orally represented to him that they were willing to suspend the Put Right and hold back on exercising the conversion for four months. However, Segal says, they changed their minds shortly thereafter and, in November 2005, the Class B Members exercised their conversion rights and maintained their Put Right. Despite his threats, Dr. Segal did not resign.

3. The Private Placement Memorandum, the Tilson Term Sheet, and the Proposed Buy Down

Meanwhile, in August 2005, Segal took it upon himself to draft a proposed private placement memorandum ("PPM") for use in connection with any investment by the high-net-worth individuals.[13] Segal circulated a draft to the other Board members in August, but did not distribute it to potential investors until

[13] Segal alleges that he was forced to draft the PPM because the Company's legal counsel, a partner with Ropes & Gray, "was busy."

the Company nearly ran out of funds in December 2005. When he attempted to get the approval of the Board in December, the Class B representatives refused to consent, citing the haste with which Segal was then acting. Once again, moreover, Segal wanted the Class B members to suspend or relinquish their Put Right. The Class B members asked to discuss the PPM at a Board meeting, but no such meeting occurred.

Segal stressed the Company's need to quickly secure additional funding and encouraged the Class B members to authorize the use of his PPM, but the Class B Members instead offered a counterproposal of $500,000 in convertible debt from Fisk Ventures. The terms of that note would have required the Company to meet certain benchmarks. If the Company failed to meet them, the Class B members would obtain control of the Board. Moreover, the Class B counterproposal would have amended the Segal Employment Agreement.

Recognizing that the Class B members would not accept his PPM proposal and refusing to go along with the Class B counterproposal, Segal next requested an equity term sheet from Scott Tilson, a Class C member of Genitrix (the "Tilson Term Sheet"). The Tilson Term Sheet offered a $500,000 investment, but required that the Class B Put Right be withdrawn or suspended and that Tilson have a right to sit in on Board meetings for a defined period of time. The Class B members agreed to suspend their Put Right for eight months, but Tilson stated that the Put

should be abolished or deferred for three years. In February 2006, the negotiations ceased.[14]

4. Segal's Removal as CEO

The LLC Agreement contains a provision that allows the Class B members to replace Segal's Board representatives if the Company fails to adhere to certain covenants while Segal serves as CEO. Concerned that the Company was dangerously close to breaching those covenants and worried that he would lose his Board representation, Segal circulated to the Board in March 2006 a proposal to remove himself as CEO. Instead of discussing and approving this resolution, however, the Class B representatives, who represented over 50% of the Board, executed and circulated their own resolution, which replaced Segal with Chris Pugh, another employee of Genitrix, as "interim" CEO. The Class B Board representatives arranged a telephonic meeting with the Company's employees to tell them Pugh was now in charge.

5. The Company's Current State

In March 2006, the Company ran out of operating cash. Fisk Ventures provided another $125,000 capital contribution to pay the remaining employees

[14] Segal also includes lengthy allegations regarding the substance of Rose's communication with Tilson during the negotiations over the Tilson Term Sheet, summarily concluding that Rose was acting in bad faith.

and to cover some expenses, but larger problems loomed. The Board met in the third week of April to discuss its options.

Keeping with the common theme in this case, Dr. Segal and the Class B members had different ideas of what the Company should do. Dr. Segal proposed splitting Genitrix in two; the Class B members flatly rejected this proposal. The Class B members advocated a "buy down" proposal in which the Company would raise $3.5 million, in exchange for which the Class B members would find their interest in the Company reduced to 25% and would become largely passive investors. Although Dr. Segal initially expressed some interest in this proposal, he rejected it when he saw the actual terms set forth in writing by the Class B members about a month later.

In August 2006, Pugh left Genitrix to work for another firm, leaving the Company with just two employees (including Dr. Segal). That other employee left in May 2007. The Company has no office, no capital funds, no grant funds, and generates no revenue. The Board has not met since the fall of 2006 because the Class A representatives have refused to participate in any meetings.[15] In May 2007 and at the invitation of the Class B members, Dr. Segal proposed terms under which the Class B members might purchase his interest in the Company. The

[15] Kelli Rosenthal, the Class A Representative appointed by Dr. Segal who serves with him on the Board, did hold two telephonic conversations with Mr. Freund in March 2007. Their discussions proved unfruitful.

Class B members rejected those terms in June 2007 and subsequently Fisk Ventures initiated this suit, seeking dissolution of Genitrix.

D. The Counterclaims/Third-Party Claims and the Parties' Contentions

In answering the petition, Dr. Segal made counterclaims against Fisk Ventures and third-party claims against Johnson, Rose, and Freund. Specifically, Segal contends that the counterclaim/third-party defendants breached the LLC Agreement, breached the implied covenant of good faith and fair dealing implicit in the LLC Agreement, breached their fiduciary duties to the Company, and tortiously interfered with the Segal Employment Agreement. Segal passionately contends that the Class B defendants failed to comply with their duties to Segal and to the Company by standing in the way of proposed financing.

The counterclaim/third-party defendants now seek to dismiss Segal's claims and reduce this suit to its original form as a petition for judicial dissolution. Johnson moves under Rule 12(b)(2), claiming that, regardless of the merits of Segal's claims, the suit should be dismissed with respect to him because the Court has no personal jurisdiction over him. All counterclaim/third-party defendants move under Rule 12(b)(6), claiming that Segal has failed to state a claim upon which relief can be granted because his allegations reflect little more than the exercise of their contractual rights.

II. LACK OF PERSONAL JURISDICTION

Once a defendant moves to dismiss under Rule 12(b)(2), the burden rests on the plaintiff to demonstrate the two bedrock requirements for personal jurisdiction: (1) a statutory basis for service of process; and (2) the requisite "minimum contacts" with the forum to satisfy constitutional due process.[16] Segal argues that service of process was proper under either 10 *Del. C.* § 3104 or 6 *Del. C.* § 18-109. Johnson, Segal says, caused Genitrix to move its legal domicile to Delaware in the first place—over Segal's objection—and served for several years as a Board Representative. Although he has since stepped down from the Board, Johnson continues to control and direct the actions of his appointed representatives and should, Segal argues, be subject to jurisdiction in this state. Because the Court concludes, however, that neither statute provides a proper basis for service of process in this case, it need not even reach the due process arguments, and Segal's claims against Johnson are dismissed for want of personal jurisdiction.

A. Section 3104

Section 3104 is Delaware's long-arm statute, and courts have read it to "confer jurisdiction to the maximum extent possible under the due process

[16] *See Gantler v. Stephens*, C.A. No. 2392-VCP, 2008 WL 401124, at *6 (Del. Ch. Feb. 14, 2008); *Ruggiero v. Futuragene, PLC*, C.A. No. 2661-VCL, 2008 WL 344518, at *3 (Del. Ch. Feb. 1, 2008); *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007) ("The court engages in a two-step analysis: the court must first determine that service of process is authorized by statute and then must determine that the exercise of jurisdiction over the nonresident defendant comports with traditional due process notions of fair play and substantial justice.").

clause."[17] Specifically, section 3104 provides for personal jurisdiction over a nonresident where (1) the nonresident transacted some sort of business in the state, and (2) the claim being asserted arose out of that specific transaction.[18] Section 3104 is transactional: even a single transaction may be enough to provide a basis for jurisdiction, but only if the claim asserted relates to that in-state transaction.[19] Mere ownership of a Delaware company does not constitute a sufficient basis for personal jurisdiction.[20]

Although Segal tries mightily to throw every conceivable contact Johnson has had with Delaware at the wall of personal jurisdiction, nothing sticks. Indeed, Dr. Johnson caused Genitrix to become a Delaware LLC and demanded that its governing contracts utilize Delaware law, but Segal's claims against Johnson have

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[17] *Haisfield v. Cruver*, C.A. No. 12430, 1994 WL 497868, at *3 (Del. Ch. Aug. 25, 1994).

[18] *See* 6 *Del. C.* § 3104(c) ("As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent: (1) Transacts any business or performs any character of work or service in the state . . . ."). Section 3104(c)(4) has, on occasion, been considered statutory authority for the assertion of "general personal jurisdiction." *See Computer People, Inc. v. Best Intern. Group, Inc.*, C.A. No. 16648, 1999 WL 288119, at *7 (Del. Ch. April 27, 1999) (noting that section 3104 "authorizes jurisdiction in cases where the defendant (or the defendant's agent) has a 'general presence in the State'"). The Court notes that Johnson's contacts with Delaware are decidedly limited. To the extent Segal invites the Court to consider the "totality of contacts" Johnson has with Delaware, the Court holds that Johnson is clearly not subject to general personal jurisdiction.

[19] *See Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.*, C.A. No. 19890-NC, 2005 WL 578972, at *6 (Del. Ch. Mar. 3, 2005) (describing the need under section 3104 to find a "nexus" between the contact with Delaware and the injury alleged).

[20] *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 975 (Del. Ch. 2000) ("[O]wnership of a Delaware corporation is not, without more, a sufficient contact on which to base personal jurisdiction"); *Abajian v. Kennedy*, C.A. No. 11425, 1992 WL 8794, at *10 (Del. Ch. Jan. 17, 1992) ("Merely purchasing stock in a Delaware corporation does not supply the requisite contacts necessary for jurisdiction in a case of this kind.").

nothing to do with the formation of the Company. Indeed, Dr. Johnson has attended some of the Company's Board meetings, but Segal's claims do not stem from his mere presence before the Board. Indeed, Johnson has appeared on television sets throughout the state in his capacity with S.C. Johnson & Son, but Segal's claims that Johnson has acted in bad faith certainly do not relate to his on-screen acting ability. In short, Johnson does have some limited contacts with Delaware. However, Segal's claims against Johnson do not arise from and have no nexus with those limited contacts. Consequently, service of process under 6 *Del. C.* § 3104 is improper.

B. Section 18-109

Service of process is proper under Delaware's LLC consent statute, section 18-109, only as to managers of limited liability companies or those who "participate[] materially in the management of the limited liability company."[21] Moreover, the statute explicitly distinguishes between managers and the people who appoint them; in other words, the mere power to appoint a manager does not force a member of an LLC to impliedly consent to service of process under section 18-109.[22]

[21] 6 *Del. C.* § 18-109(a).
[22] *See id.* ("the power to elect or otherwise select or to participate in the election or selection of a person to be a manager as defined in § 18-101(10) of this title shall not, by itself, constitute participation in the management of the limited liability company").

Segal concedes that Johnson does not qualify as a manager under the first definition of section 18-109.[23] Instead, Segal bases his argument on the contention that Johnson "participates materially in the management" of Genitrix. Segal's argument proceeds on two fronts: first, Johnson participates materially in the management of Genitrix because he "controls" the actions of the Board representatives he appointed; second, Johnson participates materially in the management of Genitrix because the LLC Agreement gives him broad rights that essentially also make him a manager. Neither approach is persuasive.

There mere assertion that Johnson "controls" Rose and Freund is conclusory and is not supportive of the proposition that Segal needs to make (*i.e.*, that Johnson participates materially in the management of the Company).[24] Segal alleged that Rose and Freund occasionally conferred with Johnson prior to making decisions, and jurisdictional discovery unearthed some evidence of Johnson's involvement in the form of email messages related to one such issue, but these facts—even construed as favorably as possible for Segal—do not support the notion that Johnson was materially participating in the management of Genitrix. There is a difference between material participation in managing a company and offering

[23] *See* Segal's Answering Br. in Opposition to H. Fisk Johnson's Mot. to Dismiss at 16.
[24] *Cf. In re Coca-Cola Enters., Inc. S'holders Litig.*, C.A. No. 1927-CC, 2007 WL 3122370, at *4 n.28 (Del. Ch. Oct. 17, 2007) ("If a complaint were held sufficient simply because it restates the legal elements of a particular cause of action, Rule 8(a) would be rendered meaningless. Plaintiffs need not offer prolix tales of abuse belabored by needless details, but plaintiffs must allege *facts* sufficient to show that the legal elements of a claim have been satisfied.").

comments via email to one's appointed Board representatives. The latter is simply insufficient to permit this Court to rule that Johnson consented to personal jurisdiction in Delaware.

Segal's second theory—that the LLC Agreement gives Johnson so much power that he is a *de facto* manager—has been previously considered and rejected. In *Palmer v. Moffat*,[25] Judge Babiarz of the Superior Court confronted a dispute among members and managers of a Delaware limited liability company. There, plaintiffs argued that some of the LLC's members, though not called "managers," served as managers on account of the powers conferred to them by the LLC Agreement.[26] Specifically, the LLC Agreement in that case stated that "The Members shall have full, exclusive, and complete discretion, power and authority . . . to manage, control, administer and operate the business and affairs of the company for the purposes herein stated, to make all decisions affecting such business and affairs . . . ."[27] Despite this broad language, Judge Babiarz found it insufficient to render all members "managers" for the purpose of section 18-109, because another provision of the agreement stated that "[t]he operations of the Company shall be conducted by the Management Committee."[28]

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[25] No. 01C-03-114-JEB, 2001 WL 1221749 (Del. Super. Ct. Oct. 10, 2001).
[26] *Id.* at *2.
[27] *Id.*
[28] *Id.* at *2–3.

Here, the Genitrix LLC Agreement is even more specific. Section 7.1(a) states:

> Except as otherwise provided herein, the members shall conduct, direct and exercise full control over all activities of the company through their representatives of the board. Unless delegated by the Board, *all management powers* over the business and affairs of the Company *shall be exclusively vested in the board*.

As in *Palmer*, the LLC Agreement "designates members of the [board] as the Company's actual managers."[29] Johnson is not presently a Board representative and did not serve on the Board during the events in question. The fact that he has rights under the Agreement to affect the "activities of the Company" *through* his representatives to the Board does not mean he is participating materially in the management of Genitrix. Without some evidence that Johnson acted as a manager under either definition of section 18-109, I cannot hold that he has consented to this Court's *in personam* jurisdiction.[30]

III. FAILURE TO STATE A CLAIM

Remaining after dismissal of the claims against Dr. Johnson are those against Fisk Ventures, Rose, and Freund. Because, however, Dr. Segal has failed to state a claim for which relief can be granted, the Court must also dismiss these

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[29] *Id*. at *3.

[30] *Cf. Cornerstone Techs., LLC v. Conrad*, C.A. No. 19712-NC, 2003 WL 178959 (Del. Ch. Mar. 31, 2003) (Holding section 18-109 applicable where plaintiff alleged and produced evidence showing defendant was holding himself out in correspondence as the "President and Chief Executive Officer" of the LLC and where the LLC agreement stated that the Chief Executive Officer shall serve as one of the Managers").

remaining claims. On a motion to dismiss under Rule 12(b)(6), the burden is on the movant to show that the claimant is not entitled to relief under any set of facts stated in (or that can be reasonably inferred from) the complaint or, in this case, the counterclaims / third-party claims.[31] Because Segal has not stated facts that either show he is entitled or from which I can infer he is entitled to relief, I dismiss his claims.

A. Breach of Contract

The *sine qua non* of pleading an actionable breach is demonstrating that there was something to be breached in the first place. In other words, before the Court can start worrying about whether or not there was a breach, the Court needs to determine that there was a *duty*.[32] In the context of limited liability companies, which are creatures not of the state but of contract,[33] those duties or obligations

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[31] *See, e.g.*, *In re InfoUSA S'holders Litig.*, C.A. No. 1956-CC, 2007 WL 3325921 (Del. Ch. Aug. 13, 2007).

[32] *See, e.g.*, *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003) ("Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff."); *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, C.A. No. 13911, 1995 WL 662685, at *7 (Del. Ch. Nov. 2, 1995) ("To survive a motion to dismiss, a complaint stating a claim for breach of contract must identify a contractual obligation, whether express or implied, a breach of that obligation by the defendant, and resulting damage to the plaintiff.").

[33] *Compare Bouree v. Trust Francais des Actions de la Franco-Wyoming Oil Co.*, 127 A. 56, 60 (Del. Ch. 1924) ("In the first place it should be borne in mind that the Franco-Wyoming Oil Company is a corporate creature of this state. Into its corporate charter is written every pertinent provision of our Constitution and statutes."), *with TravelCenters of Am., LLC v. Brog*, C.A. No. 3516-CC, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008) ("Limited Liability Companies are creatures of contract, 'designed to afford the maximum amount of freedom of contract, private ordering and flexibility to the parties involved.'" (quoting *In re Grupo Dos Chiles, LLC*, C.A. No. 1447-N, 2006 WL 668443, at *2 (Del. Ch. Mar. 10, 2006)).

must be found in the LLC Agreement or some other contract.[34] Because Segal's counterclaims and third-party claims fail to allege breaches of duties found in the Genitrix LLC agreement, the Court must dismiss Count I under Rule 12(b)(6).

Dr. Segal's counterclaims and third-party claims contend—perhaps reasonably—that Genitrix suffered because the Class B members refused to accede to Segal's proposals with respect to research, financing, and other matters. It may very well be that Genitrix would be a thriving company today if only the Class B members had seen things Segal's way. However, it may very well be that Genitrix would also be a thriving company today if only Dr. Segal had gone along with what the Class B members wanted. Indeed, the LLC Agreement endows both the Class A and Class B members with certain rights and protections. In no way does it obligate one class to acquiesce to the wishes of the other simply because the other believes its approach is superior or in the best interests of the Company. To find otherwise—that is, to find that the Court must decide whose business judgment was more in keeping with the LLC's best interests—would cripple the policy underlying the LLC Act promoting freedom of contract.[35]

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[34] *See, e.g.*, Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 4 (2007) ("I conclude that parties to contractual entities such as limited liability partnerships and limited liability companies should be free—given a full, clear disclosure paradigm—to adopt or reject any fiduciary duty obligation by contract. Courts should recognize the parties' freedom of choice exercised by contract and should not superimpose an overlay of common law fiduciary duties . . . .").

[35] *See* Larry E. Ribstein, *The Rise of the Uncorporation* 3 (Illinois Law and Economics Research Papers Series, Research Paper No. LE07-026, 2007) ("[U]ncorporate firms have flexible control

That, however, is precisely what Segal asks this Court to do. Specifically, Segal points to various sections of the LLC Agreement that he says establish a "standard of conduct" that binds members of Genitrix. First, he directs the Court to section 9.1, which reads:

> Performance of Duties; no Liability of Officers. No Member shall have any duty to any Member of the Company except as expressly set forth herein or in other written agreements. No Member, Representative, or Officer of the Company shall be liable to the Company or to any Member for any loss or damage sustained by the Company or to any Member, unless the loss or damage shall have been the result of gross negligence, fraud or intentional misconduct by the Member, Representative, or Officer in question . . . .

Segal contends that this section demonstrates that the Company *can* create duties for Members and *did* in fact create such a duty. Moreover, Segal argues that this section establishes a "duty to act without gross negligence, fraud or intentional

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rules and permit contractual modification or even elimination of fiduciary duties."), *available at* http://ssrn.com/abstract=1003790; Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1616–17 (2004) ("The Delaware LLC statute stands out, however, for its lack of mandatory rules and its express policy to 'give maximum effect to the principle of freedom of contract.'"); Larry E. Ribstein, *Fiduciary Duty Contracts in Unincorporated Firms*, 54 WASH. & LEE L. REV. 537, 594 (1997) (recognizing that the Delaware LLC act allows parties "to alter default duties in their agreements as long as they are held to good faith compliance with their contracts").

misconduct."[36] He subsequently points to sections 9.2, 9.5, 13.11, and 13.12 with a similarly tortured reading.

This Court adheres to an objective theory of contracts.[37] As such, the Court must "interpret contracts to mean what they objectively say."[38] Nowhere in sections 9.1, 9.2, 9.5, 13.11, or 13.12 does the Genitrix LLC Agreement purport to create a code of conduct for all members; on the contrary, most of those sections expressly claim to limit or waive liability. Thus, Segal's interpretation rests all of its proverbial eggs in the single basket of the principle granting him, the nonmovant, all reasonable inferences. However, as the Supreme Court has noted in different circumstances, "[e]ven liberal construction has its limits."[39]

There is no basis in the language of the LLC Agreement for Segal's contention that all members were bound by a code of conduct, but, even if there were, this Court could not enforce such a code because there is no limit whatsoever to its applicability. Under Segal's reading, a Genitrix member would be liable to the Company or other members for *any* damage caused by gross negligence, willful misconduct, or a knowing violation of law. There is no guidance as to how or when this "code of conduct" applies, and this Court declines to follow Segal's

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[36] Respondent/Counterclaim and Third-Party Petitioner Andrew Segal's Answering Br. in Opp'n to Counterclaim and Third-Party Respondents' Mot. to Dismiss Amended Response at 15.
[37] *See United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007).
[38] *Seidensticker v. Gasparilla Inn, Inc.*, C.A. No. 2555-CC, 2007 WL 4054473, at *1 (Del. Ch. Nov. 8, 2007).
[39] *Nat'l Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d 892, 896 (Del. 1997) (interpreting the meaning of "occupant" in an insurance contract).

invitation to turn an expressly exculpatory provision into an all encompassing and seemingly boundless standard of conduct.[40]

Moreover, even if these provisions did somehow create a code of conduct for Genitrix members, Segal has not alleged facts sufficient to support a reasonable inference that Fisk, Rose, or Freund acted with gross negligence, willful misconduct, in bad faith, or by knowingly violating the law. At most, the facts in Segal's counterclaim/third-party claim demonstrate that the Class B members vigorously championed their own proposals and did not support Segal's plans. Perhaps Genitrix would have been more able to obtain financing if the Class B members had been willing to relinquish their Put Right, but their refusal to do so was not in bad faith,[41] Segal's conclusory assertions to the contrary notwithstanding.[42]

Segal also contends that he has adequately alleged a breach of section 7.02 of the LLC Agreement concerning the appointment of Pugh as interim CEO. That section states that at least 75% of the Board must approve the appointment of an

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[40] *Cf. Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 8 (Del. 2002) ("the liberal construction of any contract is necessarily limited by the terms of the document").

[41] *See In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005) (noting that "[d]eliberate indifference and inaction *in the face of a duty to act*" is bad faith conduct), *aff'd*, 906 A.2d 27 (Del. 2006). Here, there is no allegation that the Class B members had a *duty* to acquiesce to Segal's plans for Genitrix. On the contrary, the Class B members had a *right* to disagree and advocate their own position.

[42] *Cf. McMillan v. Intercargo Corp.*, 768 A.2d 492, 507 (Del. Ch. 2000) ("Although the complaint makes the conclusory allegation that the defendants breached their duty of disclosure in a 'bad faith and knowing manner,' no facts pled in the complaint buttress that accusation.").

officer of the Company. Because Pugh took over as CEO from Segal with a vote of just the Class B representatives, Segal argues, there was a breach of section 7.02. However, section 7.02 also states that "if the specific terms of this Agreement or the Segal Employment Agreement provide otherwise, then such terms shall govern." Indeed, paragraph 2(c) of the Segal Employment Agreement provides that, after a certain point, "the Company with the approval of at least 50% of the Member Representatives on the Board . . . may replace [Segal] as chief executive officer."

When interpreting contractual language, this Court relies on the "plain meaning" of words.[43] In this case, the plain meaning of "replace" is "to put something new in the place of" or "to take the place of especially as a substitute or successor."[44] Therefore, the Segal Employment Agreement endows the Board with the power to put someone "new in the place of" Segal as CEO with just a vote of 50%. Like Segal's claim about the Class B members' refusal to abdicate their Put Right, the Board's decision to replace Segal with Pugh was not a breach of some duty; it was merely the exercise of a contractual right.

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[43] *See, e.g.*, *Levitt Corp. v. Office Depot, Inc.*, C.A. No. 3622-VCN, 2008 WL 1724244, at *5 (Del. Ch. Apr. 14, 2008) (interpreting the meaning of the word "business" in the bylaws of an LLC according to the plain meaning, and referring to a dictionary to ascertain that plain meaning).

[44] Merriam-Webster Online, Replace, http://www.merriam-webster.com/dictionary/replace (last visited April 23, 2008).

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

Every contract contains an implied covenant of good faith and fair dealing that "requires a 'party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain."[45] Although occasionally described in broad terms,[46] the implied covenant is not a panacea for the disgruntled litigant. In fact, it is clear that "a court cannot and should not use the implied covenant of good faith and fair dealing to fill a gap in a contract with an implied term unless it is clear from the contract that the parties would have agreed to that term had they thought to negotiate the matter."[47] Only rarely invoked successfully,[48] the implied covenant of good faith and fair dealing protects the spirit of what was *actually bargained and negotiated for* in the contract.[49]

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[45] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (quoting *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985)).

[46] *See, e.g.*, *HB Korenvaes v. Marriott Corp.*, 1993 WL 205040, at *6 (Del. Ch. June 9, 1993) ("Indeed the contract doctrine of an implied covenant of good faith and fair dealing may be thought in some ways to function analogously to the fiduciary concept.").

[47] *Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, C.A. No. 3231-VCS, 2008 WL 963048, at *5 (Del. Ch. Apr. 10, 2008) (declining to use implied covenant to protect a party from dilution by cash dividends where parties failed to agree to such protection in the contractual language itself).

[48] *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, C.A. No. 1668-N, 2006 WL 2521426, at *6 (Del. Ch. Aug. 25, 2006) ("[I]mposing an obligation on a contracting party through the covenant of good faith and fair dealing is a cautious enterprise and instances should be rare."); *see also Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1032 (Del. Ch. 2006) ("Courts must be careful however not to overestimate the circumstances when it is appropriate to employ this intrinsically counterfactual and hindsight-bias prone test.").

[49] *See, e.g.*, *Frontier Oil v. Holly Corp.*, C.A. No. 20502, 2005 WL 1039027, at *28 (Del. Ch. Apr. 29, 2005).

Moreover, because the implied covenant is, by definition, *implied*, and because it protects the *spirit* of the agreement rather than the form, it cannot be invoked where the contract itself expressly covers the subject at issue.[50]

Here, Segal argues that Fisk, Rose, and Freund breached the implied covenant of good faith and fair dealing by frustrating or blocking the financing opportunities proposed by Segal. However, neither the LLC Agreement nor any other contract endowed him with the right to unilaterally decide what fundraising or financing opportunities the Company should pursue, and his argument is "another in a long line of cases in which a plaintiff has tried, unsuccessfully, to argue that the implied covenant grants [him] a substantive right that [he] did not extract during negotiation."[51] Moreover, the LLC Agreement *does* address the subject of financing, and it specifically requires the approval of 75% of the Board. Implicit in such a requirement is the right of the Class B Board representatives to disapprove of and therefore block Segal's proposals. As this Court has previously noted, "[t]he mere exercise of one's contractual rights, without more, cannot

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[50] *E.g.*, *In re IAC/InterActive Corp.*, C.A. No. 3486-VCL, 2008 WL 837032, at *25 (Del. Ch. Mar. 28, 2008); *Allied Capital*, 910 A.2d at 1032–33 ("[I]mplied covenant analysis will only be applied when the contract is truly silent with respect to the matter at hand, and only when the court finds that the expectations of the parties were so fundamental that it is clear that they did not feel a need to negotiate about them."); *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992) ("[W]here the subject at issue is expressly covered by the contract, . . . the implied duty to perform in good faith does not come into play."), *aff'd*, 609 A.2d 668 (Del. 1992).

[51] *Allied Capital*, 910 A.2d at 1024.

constitute . . . a breach [of the implied covenant of good faith and fair dealing]."[52] Negotiating forcefully and within the bounds of rights granted by the LLC agreement does not translate to a breach of the implied covenant on the part of the Class B members.

C. Breach of Fiduciary Duties

Count III of Segal's counterclaims/third-party claims merely dresses his breach of contract claim in fiduciary duties' clothing. In support of these supposed fiduciary duty claims, Segal cites the same provisions of the Genitrix LLC Agreement that he cited in support of his breach of contract claims. These makeweight fiduciary duty claims fail for at least two reasons.

First, the LLC Agreement, in accordance with Delaware law, greatly restricts or even eliminates fiduciary duties. Delaware's Limited Liability Act specifically provides:

> To the extent that . . . a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties *may be expanded or restricted or eliminated* by provisions in the limited liability company agreement . . . .[53]

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[52] *Shenandoah Life Ins. Co. v. Valero Energy Corp.*, C.A. No. 9032, 1988 WL 63491, at *8 (Del. Ch. June 21, 1988).

[53] 6 *Del. C.* § 18-1101(c) (emphasis added); *see also Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1063 (Del. Ch. 2006) ("In the alternative entity context, where it is more likely that sophisticated parties have carefully negotiated the governing agreement, the General

Pursuant to this provision, the Genitrix LLC Agreement eliminates fiduciary duties to the maximum extent permitted by law by flatly stating that members have no duties other than those expressly articulated in the Agreement. Because the Agreement does not expressly articulate fiduciary obligations, they are eliminated.

Second, even if Segal were correct that in the LLC Agreement there remained a fiduciary duty to not act in bad faith or with gross negligence, Segal has manifestly failed to allege facts sufficient to support a claim that anyone has breached such a hypothetical duty. As discussed above, the hollow invocation of "bad faith" does not magically render a deficient complaint dismissal-proof; this Court will not blindly accept conclusory allegations.[54]

D. Tortious Interference with Contract

Count IV of Segal's Amended Response attempts to state a claim that Rose and Freund tortiously interfered with Segal's rights under the Segal Employment Agreement. As Segal acknowledges, to properly plead such a claim, he must establish the existence of: "(1) a contract, (2) about which defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury."[55] Leaving aside the issue of whether or not Rose and Freund can be held liable for tortious interference on

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Assembly has authorized even broader exculpation, to the extent of eliminating fiduciary duties altogether.").

[54] *See, e.g.*, *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

[55] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 n.7 (Del. 2005) (quoting *Aspen Advisors LLC v. UA Theater Co.*, 861 A.2d 1251, 1265-66 (Del. 2004)).

account of the "stranger" requirement,[56] the Court may nevertheless dismiss this claim, because, as discussed above, Segal has not adequately pleaded facts indicating there was ever a breach of his Employment Agreement. Segal's own amended response and counterclaims/third-party claims concedes that "[u]nder the Segal Employment Agreement, at any time after the second anniversary of that agreement, the Company could decide to replace Dr. Segal in the office of CEO upon the vote of 50% of the Board."[57] That is precisely what happened.

IV. CONCLUSION

Anyone in Dr. Segal's position would be understandably frustrated by the demise of Genitrix, a company in which he has invested monetary, temporal, intellectual, and emotional resources. Nevertheless, such frustration cannot justify the *post hoc* refashioning of the bargain he struck with Johnson and the Class B investors in the LLC Agreement. For the reasons explained above, Dr. Johnson is not subject to the personal jurisdiction of this Court, and the allegations Segal makes in his amended response for breach of contract, breach of the implied

[56] *See Tenneco Auto., Inc. v. El Paso Corp.*, C.A. No. 18810-NC, 2007 WL 92621, at *5–6 (Del. Ch. Jan. 8, 2007) ("Imposition of liability for tortious interference with contractual relationship requires that the defendant be a stranger to both the contract and the business relationship giving rise to and underpinning the contract." (internal quotation omitted)). Rose and Freund were manifestly not strangers to the "business relationship giving rise to and underpinning the contract." Although Segal contends that this "stranger" requirement may not be implicated when the Company is a party to the contract and the directors or officers exceed the scope of their authority, Segal has failed to plead facts showing that such was the case here. *Cf. Goldman v. Pogo.com, Inc.*, C.A. No. 18532-NC, 2002 WL 1358760, at *9 (Del. Ch. June 14, 2002) (dismissing plaintiff's tortious interference claim because he made no "allegation in the Complaint to justify an inference that the directors acted outside the scope of their authority").

[57] ¶ 106.

covenant of good faith and fair dealing, breach of fiduciary duty, and tortious interference with contract fail to state a claim for which relief can be granted. Consequently, Segal's counterclaims/third-party claims are hereby dismissed under Rules 12(b)(2) and 12(b)(6).

IT IS SO ORDERED.