SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-1215-20
A-1221-20

CARE ONE, LLC, DANIEL E. STRAUS, DES HOLDING CO., INC., DES-C 2009 GRAT, and DES 2009 GST TRUST,

Plaintiffs-Respondents,

v.

ADINA STRAUS and JEFFREY RUBIN,

Defendants-Appellants.

Argued October 25, 2022 – Decided November 18, 2022

Before Judges Sumners, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-000026-19.

David C. Rose (Pryor Cashman LLP) of the New York bar, admitted pro hac vice, argued the cause for appellant Jeffrey Rubin in A-1215-20 (Arseneault & Fassett LLP and David C. Rose, attorneys; David W. Fassett and David C. Rose, on the briefs).

Anthony M. Gruppuso argued the cause for appellant Adina Straus in A-1221-20 (Brown Moskowitz & Kallen, PC, attorneys; Anthony M. Gruppuso, on the briefs).

Warren A. Usatine argued the cause for respondents Care One, LLC, DES Holding Co., Inc., and DES-C 2009 GRAT in A-1215-20 and A-1221-20 (Cole Schotz PC and K&L Gates LLP, attorneys; Michael D. Sirota, Warren A. Usatine, Rosemary Alito, George P. Barbatsuly, Rachel A. Mongiello, Michael C. Klauder, of counsel and on the briefs; Jeffrey M. Sauer, on the briefs).

Thomas P. Scrivo and Christopher L. Weiss argued the cause for respondents in A-1215-20 and A-1221-20 (O'Toole Scrivo, LLC, attorneys for respondent Daniel E. Strauss; Ferro Labella & Weiss LLC, attorneys for respondent DES 2009 GST Trust; Thomas P. Scrivo, James DiGiulio and Christopher L. Weiss, of counsel and on the joint brief; Julia E. Duffy and Russell T. Brown, on the joint brief).

PER CURIAM

These consolidated appeals involve the removal of two minority members of plaintiff Care One, LLC, a Delaware limited liability company (LLC), and the compensation paid to those minority members for their respective ownership interests. The essential issues are whether plaintiff Daniel E. Straus,[1] the

[1] We refer to individuals sharing the surname Straus by their first names. We mean no disrespect.

majority and sole managing member of Care One, who controlled a supermajority of voting interests in Care One, acted within his authority under the Care One operating agreement and Delaware law, when in 2015 he: (1) removed all individual minority members of Care One, including defendants Adina Straus (his sister) and Jeffrey Rubin (his former brother-in-law), who each owned a 4.412 percent interest in Care One; and (2) amended the Care One operating agreement to establish a formula for determining the amount to be paid when removing members through a purchase of their membership interests. As to the purchase, the issues include whether the formula should have calculated the "fair value" rather than the "fair market value" of the membership interests,[2] and, if fair market value was the appropriate amount, it was reasonably calculated.

Adina and Rubin appeal from the summary judgment dismissal of all their counterclaims. Adina also appeals from: (1) the court's denial of discovery from

[2] The Internal Revenue Code defines fair market value as "[t]he price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge or relevant facts." 26 U.S.C. § 1.170A-1(c)(2). The Financial Accounting Standards Board's Generally Accepted Accounting Practices defines fair value as "[t]he price that would be received to sell an asset . . . in an orderly transaction between market participants at the measurement date."

Care One's outside counsel, who advised the company with respect to amending the operating agreement and the repurchase transaction; and (2) the court's denial of her motion for leave to amend the pleadings to add third-party claims and additional counterclaims. We affirm in part and reverse and remand in part.

I.

The Straus siblings, Daniel, Adina, Moshael Straus, and Bethia Straus inherited a nursing home business, Multicare, from their father, Joseph Straus, who died in 1978. After their father's death, Daniel and Moshael ran the business. Adina did not work for the business.

Multicare was sold in 1997. Shortly thereafter, Daniel formed Care One under Delaware's LLC law. Care One owns and operates skilled nursing homes and assisted living facilities. The original members of Care One and their ownership interests were: Daniel (Class A and B) (43.8955%), Moshael (25.7787%), Rubin (Adina's then husband) (21.9477%), Bethia (7.7336%), and Joel Jaffee (a family advisor) (0.6445%). The parties dispute whether Rubin made any cash or capital contributions to the company. The operating agreement identifies transferred assets, but plaintiffs take the position that Daniel provided 100 percent of the financing. However, Delaware's LLC law allows an individual to become a member of an LLC and to receive an interest in an LLC, "without making a contribution or being obligated to make a contribution to the [LLC]." Del. Code Ann. tit. 6, § 18-301(d). See also Del. Code Ann. tit. 6, § 18-501 ("The contribution of a member to a [LLC] may be in cash, property or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.").

The 1999 Operating Agreement

The first iteration of Care One's operating agreement is dated April 1, 1999. The 1999 Operating Agreement states the agreement "shall be governed by the laws of the State of Delaware."

Daniel was appointed as manager of Care One, with exclusive responsibility for "management, operation, and control of the business" and its affairs. As manager and "tax matters partner," Daniel determined the allocation or distribution of profits, gains, and losses among Care One's members. Members "have no right to remove Daniel as manager."

Daniel's exclusive control was not unlimited. Section 6.4(a)(i) required "the written consent of the Class A members by Supermajority Vote" for "admitting any new Members or removing any existing members." The Operating Agreement defined a supermajority vote as "the affirmative vote of any Class A Member holding a Relative Interest or Class A Members collectively holding an aggregate Relative Interest, as the case may be, greater than 85 [percent] . . . ."

The agreement also contains provisions addressing exculpation and indemnification. As for exculpation, Section 7.1(a) provides Daniel could not be held liable to the company or any of its members for any act or omission taken in connection with the affairs of the company or the operating agreement "unless a final judgment or other final adjudication adverse to" him established that his acts or omissions "were in bad faith or involved intentional misconduct or a willful violation of law or this Agreement." Daniel was permitted to

> consult with legal counsel and accountants with respect to the Company's affairs and shall be fully protected and justified in any action or inaction that is taken or omitted in good faith, in reliance upon and in accord with the opinion or advice of such counsel or accountants, provided they shall have been selected in good faith.

As for indemnification, Section 7.2(a) provided that Care One must indemnify Daniel, to the extent permissible under the law, for any claims arising out of or in connection with the affairs of Care One or the performance of any of his responsibilities under the agreement or matters contemplated by the agreement, except to the extent that his conduct was "determined by a final judgment or other final adjudication adverse to [him] to have constituted bad faith, intentional misconduct or a willful violation of law or of this Agreement."

Section 9 limited the ability of members to transfer their interests in the company, particularly to third parties. Section 11.11(b) provided there was no right of a Member to resign from the company prior to the dissolution or winding up of the company's business and affairs, specifically providing that any attempt to resign would not entitle a member "to receive the fair value of its interest in the Company prior to the dissolution and winding up of the Company's business and affairs."

Finally, Section 11.4 permitted the manager to amend the agreement "with the written consent of the Class A members by Majority Vote." Even without the consent of any Class A member, the manager could amend any provision of the agreement to reflect "the admission, substitution or withdrawal of Members in accordance with" the agreement. However, Section 11.4 prohibited any amendment of the agreement that would

> reduce any Member's share of the Company's distributions, income or gains, increase any Member's share of the Company's losses, or otherwise reduce the rights granted to any Member or increase the obligations of any Member if such reduction or increase would adversely affect such Member, without the consent of each Member to be adversely affected by the amendment. . . .

Conspicuously absent from the 1999 version of the operating agreement is any provision addressing the amount to be paid to members removed by a supermajority under Section 6.4(a)(i).

The 2006 Amendment

The Operating Agreement was amended in 2006. The relevant provisions were largely unchanged, except for the following. First, Section 6.4(a)(i) was amended to require a supermajority vote of members (not just Class A members) to admit or remove any existing members. Second, a supermajority vote was redefined to require only a vote of any member (not only a Class A member) holding a relative interest greater than 75 percent (not 85 percent). Finally, Schedule 1 was amended to reflect changes in the members' relative interests.

Healthbridge Management, Inc. was added as a member, with a relative interest of 21.75744 percent. Rubin's relative interest was reduced without objection to 8.82413 percent. Daniel's relative interest increased to 52.45718 percent. Since Healthbridge, now known as DES Holding, was controlled by Daniel, Daniel controlled a supermajority of relative interests.

As part of their divorce, Adina obtained half of Rubin's membership interest in Care One, resulting in Rubin and Adina each owning 4.412 percent.

The 2009 Amendment

A 2009 amendment to the Operating Agreement permitted DES GRAT, a grantor-retained annuity trust formed in 2009, admitted as a member. Daniel served as both grantor and sole trustee of DES GRAT, with Daniel assigning a portion of his membership interests to the trust. Also in 2009, Daniel, who held a supermajority of relative interests, removed William Burris as a Class C member of Care One without compensation. Rubin stopped working for Care One in 2009 but retained his membership interest.

The 2010 Amendment

Section 7 of the Operating Agreement was modified in 2010 to focus on the manager's insulation from liability and his entitlement to indemnification for actions or inactions taken with respect to the company. Although the scope of the exculpatory provision (Section 7.1(a)) remained largely the same, Section 7.2(a) expanded and eliminated the exclusion for actions or omissions adjudicated to have constituted bad faith, intentional misconduct, or a willful violation of law or of the agreement.

The 2012 Amendment and Event

The operating agreement was further amended in 2012 by adding a new section unrelated to these appeals. Also in 2012, Daniel, holding a supermajority of relative interests, removed Kevin Breslin, a Class C member of Care One, without compensation.

The Events Of 2014

In the summer of 2014, Adina received capital calls[3] from entities related to Care One. Thereafter, Daniel approached Adina about purchasing her interests. Adina expressed interest in a purchase of "all of her Care One interests," which she stated would require "a full [fair market value] analysis." In October, Adina was told the matter was "on hold for now." Adina nevertheless continued to request information and documentation regarding the value of her interests. Not satisfied with the information and documentation provided, see Del. Code Ann. tit. 6, § 18-305 (addressing LLC members' access to records), Adina filed a federal lawsuit in New Jersey asserting several claims against Care One affiliated entities, and seeking access to their books and records, but dismissed it six months later. While communications continued regarding the purchase of Adina's share, she rejected Care One's proposal.

Albert Lugo served as Care One's in-house counsel. Given the historically "challenging relationship" Daniel had with Adina, Lugo viewed Adina's

[3] In this context, a capital call (also known as a draw down) is the act of collecting funds from limited partners when the need arises.

repeated requests for documents that had already been produced, and her litigation, to be harassing, contentious, and conducted in bad faith, as well as a distraction from Care One's business. He recommended to Daniel that Adina be removed as a member of Care One. In a follow-up conversation with Daniel, he recommended that all minority members be removed to simplify the capital structure of the company and prevent further distractions. Daniel agreed with Lugo's recommendation and left implementation to Lugo and others.

Originally, Lugo planned for the minority members to be removed without compensation, as had been done in the past with Class C members, but ultimately concluded that the removed members would be paid fair market value for their interests, to achieve an amicable separation. Lugo perceived no breach of fiduciary duty arising from this process because he believed Daniel acted consistently with the authority granted to him under the operating agreement.

<u>The 2015 Amendments And Purchase Of Membership Interests</u>

To effectuate the removal of minority members, Care One retained outside counsel and, through counsel, a financial expert, Eureka Valuation Advisors (Eureka), to draft an amended operating agreement consistent with Delaware law, including developing a formula for calculating the fair market value of a member's interest to be incorporated into the amended operating agreement, calculating the fair market value consistent with the formula, and validating that formula and calculation. Care One also contemplated filing a declaratory judgment action to validate the actions taken.

The process continued for several months and involved extensive communications between and among the outside advisors and individuals within Care One. The communications included the exchange of draft documents, addressing how the repurchase price would be determined, the terms of the formula to be included in the operating agreement, and what entity would purchase the membership interests.

This process reached its culmination on August 25, 2015. First, Daniel, DES GRAT, and DES Holding, holding a majority of Class A membership interests in Care One, adopted the Second Amended and Restated [LLC] Agreement of Care One, LLC. The stated purpose of the amendment was "to simplify the capital structure of the Company and generally update the provisions of the Company's limited liability agreement." The 2015 amendment contained the same relevant provisions, including the right of a supermajority to remove existing members (Section 6.4(a)(i)), the manager's rights to exculpation and indemnification (Sections 7.1(a) and 7.2(a)), the manager's discretion to allocate and distribute profits, gains, and losses among members (Section 8.5), and the right to amend the agreement (Section 11.4).

However, the 2015 amendment added the following language to Section 6.1: "The Manager shall have no duties (including fiduciary duties) except as expressly set forth in this Agreement." Section 7.4, addressing "liability of members" was amended by similarly adding: "Members shall have no duties (including fiduciary duties) except as expressly set forth in this Agreement."

The 2015 amendment also added the following mechanism for removing members by purchase of their membership interests:

> 9.8 <u>Member Repurchase Option</u>
>
> (a) To simplify the capital structure of the Company or for any other reason, with or without cause, Members holding a Supermajority Interest (the "Purchasing Member or Members") may vote to purchase the Interest of any or all other Members, for a Member Affiliate to purchase the Interest of any or all other Members, or may cause the Company to purchase the interest of any or all other Members (a "Repurchase Vote"). Any Member whose interest is repurchased pursuant to a Repurchase Vote shall be referred to as a Disassociated Member.
>
> (b) In the event of a Repurchase Vote, the Purchasing Member or the Company shall, within fifteen (15) business days of such Repurchase Vote, send written notice (the "Repurchase Notice") to the Disassociated Members stating (i) that the Purchasing Member or Company is exercising the Repurchase Right, and (ii)

the identity of the appraiser engaged by the Company to determine the Repurchase Price pursuant to subsection (e) below.

(c) The Repurchase Price shall be payable in one lump sum payment by the Company to the Disassociated Members, with the payment to be made no later than ninety (90) days following the date on which the Company sends the Repurchase Notice to the Members. In the event that any Disassociated Member initiates any action, suit or proceeding challenging the repurchase of its shares or the Repurchase Price, the Company's obligation to pay any part of the Repurchase Price shall be suspended until such action, suit or proceeding is resolved through a final judgment or decision that is no longer subject to appeal.

(d) As to each Disassociated Member, the "Repurchase Price" shall mean the Aggregate Member Equity times the member's ownership percentage (%).

i. "Aggregate Member Equity" means the Enterprise Value, minus Net Indebtedness, less the Minority Interest Discount, and less the Lack of Marketability Discount. The Aggregate Member Equity shall be calculated as of the date of the Repurchase Vote.

ii. "Enterprise Value" means the Company's Consolidated Trailing Twelve Month Adjusted EBITDA times an 8.0X EBITDA Multiple. The multiple is based on the market prices of guideline public companies and transactions involving companies that serve similar markets.

iii. "Consolidated Trailing Twelve Month Adjusted EBITDA" means GAAP operating income excluding interest, taxes and depreciation/amortization expense; also giving consideration to adjustments for any non-recurring and/or one-time extraordinary expenses, as applicable.

iv. "Net Indebtedness" means Indebtedness minus Operating Cash.

v. "Indebtedness" means, without duplication, (i) all indebtedness of the Company for borrowed money, whether or not evidenced by bonds, debentures, notes or similar instruments, (ii) all capitalized lease obligations of the Company, (iii) all obligations of the Company to pay the deferred purchase price of property or services (excluding trade accounts payable in the ordinary course of business), (iv) all indebtedness secured by a lien on any property of the Company, whether or not such indebtedness shall have been assumed by the Company, (v) all obligations, contingent or otherwise, with respect to the face amount of all letters of credit (whether or not drawn) and banker's acceptances issued for the account of the Company, (vi) all obligations of the Company pursuant to derivative securities, (vii) all contingent obligations of the Company, (viii) all liabilities of any partnership or joint venture of which the Company is a general partner or joint venturer, and (ix) all obligations of the Company to make any payment in connection with any warrants or any other equity interest including, without limitation, any put, redemption and mandatory dividends, of the Company or any Affiliate thereof.

vi. "Operating Cash" means cash held by the Company for daily operations, and excludes cash held for tax obligations and distributions, and cash held by the Company pursuant to any loan or other obligations that imposes restrictions on the use of such cash.

> vii. "Minority Interest Discount" for purposes of this section is 20.0%
>
> viii. "Lack of Marketability Discount" for purposes of this section is 20.0%
>
> (e) In connection with any Repurchase Vote, the Manager, in its sole discretion, shall appoint an appraiser to determine the Repurchase Price, which shall be final and binding on all parties. Any appraiser appointed shall be a recognized MAI appraisal company, consulting firm, investment banking firm, accounting firm, or bank. The fees and other costs of the appraiser shall be borne by the Company. The Company shall provide the appraiser with full access to financial and other data, all of which the appraiser shall hold in confidence to the extent reasonably requested by the Company. In determining the Repurchase Price, the appraiser shall act impartially, in good faith and on an independent basis.
>
> (f) All appraisals required by this Section 9.8 shall be prepared and submitted to the Members within seventy-five (75) days after the Repurchase Vote.
>
> (g) From and after the date of the Repurchase Vote, a Disassociated Member is immediately considered a creditor of the Company and all other statutory or contractual rights associated with the Disassociated Member's Interests cease.

On August 24, 2015, Daniel, DES GRAT, and DES Holding, representing a supermajority of membership interests, adopted a resolution pursuant to

Section 9.8(a), authorizing DES Trust,[4] as "an Affiliate of Daniel E. Straus," to purchase the membership interests of Moshael, Rubin, Adina, Bethia, and the Joel Jaffe Family Trust.

Lugo recommended to Daniel that DES Trust purchase the membership interests. An offer to purchase was then made by McKinney to Moshael, as trustee, who made the decision for the trust to purchase the membership interests. Care One performed the purchase price calculations pursuant to the formula set forth in Section 9.8. Thereafter, Eureka reviewed those calculations for accuracy.

Eureka did not perform an independent valuation or appraisal of Care One but based on its research opined that "the methodology and assumptions reflected in" the formula were "reasonable," including the selected market-based valuation approach, the selected earnings before interest, taxes, depreciation, and amortization (EBITDA) multiple, the selected lack of control, and lack of marketability discounts. Similarly, SOLIC, the expert retained by Care One for this litigation, which also did not perform an independent evaluation, opined

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[4] Established in 2009, DES Trust is an irrevocable generation-skipping trust benefitting Daniel's grandchildren. Daniel is the grantor of the trust; the trustees are his wife, Joyce and Moshael.

that the valuation methodologies utilized were appropriate and reasonable. In that regard, SOLIC's report stated:

> i) the "Market Approach" valuation methodology . . . is commonly used and reflects the most practical and appropriate methodology for determining the value of a company with the characteristics of Care One, ii) the Repurchase Price calculation is based on a widely accepted methodology for determining the value of a company's equity, and minority membership interests in that company, and iii) the valuation metrics used for the EBITDA Multiple, Minority Interest Discount, and Lack of Marketability Discount used to calculate the Repurchase Price were reasonable and well within the range of transaction multiples and discounts observed for comparable market transactions.

In accordance with the calculations performed by Care One and confirmed by Eureka, on August 25, 2015, DES Trust issued checks signed by Moshael, as trustee, to Adina and Rubin in the amount of $546,506.61 each. According to McKinney, copies of the 2015 amended operating agreement and the documents implementing the 2015 amendments and the purchase of their membership interests, were sent with the checks. The accompanying letter represented that pursuant to Section 9.8(e) of the amended operating agreement, "the manager designated Eureka . . . as the appraiser to determine the Repurchase Price. . . ."

Adina cashed her check, but Rubin did not. Adina claims the check came in an envelope with no other documents, and that she cashed the check after consulting with her accountant, thinking it was a distribution from Care One. She did not recall receiving or reading any of the documentation that Care One claimed to have sent along with the check, and said she discovered the purpose of the check only upon learning of the litigation Care One filed. Through counsel, Adina attempted to return the money, but Care One rejected her check.

On November 6, 2015 (after the declaratory judgment action had been filed), Care One provided defendants with a copy of Eureka's report, noting it was provided pursuant to Section 9.8(f), as "the appraisal prepared by Eureka."

Rubin and Adina retained FTI Consulting as their valuation expert. FTI determined that the "fair value" (as opposed to the fair market value) of each of Rubin and Adina's 4.412 percent interests in Care One was $18,300,000 as of August 24, 2015, and opined that "fair value" was the appropriate valuation to use under Delaware law where, as here, there had been an involuntary taking of an interest in a company. In doing so, FTI separately valued Care One's operations and its real estate, finding that its business operation was valued at $446 million, and its real estate was valued at $277 million. FTI subtracted total debt of $347.9 million and added cash of $38.6 million to arrive at a fair value of $413.7 million. That amount was multiplied by .04412 to determine the fair value of Rubin's and Adina's respective interests, equating to $18,252,444 each.

While FTI acknowledged that a market approach for valuation would be reasonable, it found that applying Section 9.8's formula raised concerns. FTI was critical of: (1) the formula's treatment of Care One's debt, which was mostly mortgage debt, without valuing the underlying real estate; (2) the formula's EBITDA multiplier, which FTI contended was too low; and (3) the formula's consideration of a minority discount and a lack of a marketability discount. FTI acknowledged the discounts were appropriate when performing a fair market value assessment but not when performing a fair value assessment.

The Litigation

In August 2015, Care One filed a complaint against Adina in federal court in New Jersey seeking to remove her as a participant in a medical plan sponsored by one of Care One's constituent entities. Three days later, Care One filed a first amended complaint against Adina, Rubin, Moshael, Bethia, and the Joel Jaffe Family Trust, adding a claim for declaratory judgment that defendants no longer held membership interests in Care One, pursuant to a purchase of those interests that occurred on August 25, 2015.

In January 2016, Care One voluntarily dismissed its claims against the Joel Jaffe Family Trust, without prejudice. In February 2016, it voluntary dismissed its claims against Moshael and Bethia, without prejudice.

Following significant discovery and the passage of over three years, on February 5, 2019, by consent order, the District Court judge dismissed the sole federal claim with prejudice and the pendant state law claims without prejudice, allowing them to be pursued in state court.

On January 22, 2019, plaintiffs commenced this lawsuit, asserting claims for declaratory judgment that Care One's 2015 operating agreement was valid and binding, and for specific performance of the operating agreement to remove defendants as members of Care One and preclude their assertion of claims challenging their removal. Plaintiffs also sought declaratory judgment that Adina's acceptance of the payment tendered for her membership interest in Care One constituted an accord and satisfaction.

Adina and Rubin asserted counterclaims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) breach of fiduciary duties of loyalty and care; (4) aiding and abetting breach of fiduciary duty; and (5) an accounting.

<u>The Motion Practice at Issue</u>

Defendants jointly moved for leave to amend their pleadings to: (1) add counterclaims for damages against Daniel for civil conspiracy and fencing, <u>see</u> N.J.S.A. 2C:20-7.1, under N.J.S.A. 2C:20-20; and (2) a third-party complaint against Moshael, Lugo, and McKinney, asserting claims of aiding and abetting Daniel's breach of fiduciary duty, civil conspiracy, and fencing, N.J.S.A. 2C:20-20. The trial court denied the motion, finding: (1) the claims for aiding and abetting breach of fiduciary duty and conspiracy were time-barred by Delaware's three-year statute of limitations (rather than New Jersey's six-year statute); and (2) the fencing claims under N.J.S.A. 2C:20-20 were meritless because the statute did not apply in the context of a dispute over the repurchase of LLC membership interests, and there had been no effort on the part of any of the proposed defendants "to sell, transfer, or dispose of the membership interests or distributions thereof as contemplated by the statute." We denied Adina and Rubin's motion for leave to appeal those interlocutory rulings.

A case management order imposed a deadline by which defendants could move to compel the production of documents that Care One claimed were privileged. The parties ultimately reached agreement over the production of some documents, and on August 6, 2019, the court entered a consent order regarding those documents. Regarding additional documents from Care One's privilege log, the court issued an order and written opinion, in which it ordered the production of certain documents but not others, and permitted additional questioning of specifically identified Care One witnesses regarding the documents to be produced.

The trial court subsequently appointed a special master to oversee discovery of the remaining disputed documents. In November 2019, the special master issued a report that recommended the court reject the parties' requests for additional discovery, including Adina's requests for discovery from Care One's outside counsel. Rubin objected to the special master's report as to valuation-related discovery. The court rejected the objections and adopted the special master's recommendations.

In February 2020, the parties cross-moved for summary judgment. On November 23, 2020, the court issued five orders and a written decision granting summary judgment to plaintiffs on their affirmative claims and dismissing defendants' counterclaims in their entirety with prejudice, and two orders denying defendants' motions for partial summary judgment.

Defendants filed separate appeals from the summary judgments granted to plaintiffs and the dismissal of their counterclaims.[5] Adina also appealed from: (1) an order granting a motion to quash non-party subpoenas, which resulted in

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[5] Rubin's appeal was assigned Docket No. A-1215-20. Adina's appeal was assigned Docket No. A-1221-20.

the denial the denial of discovery from Care One's outside counsel, who advised the company with respect to amending the operating agreement and the repurchase transaction; and (2) the denial of her motion for leave to amend the pleadings to add third-party claims against Care One's in-house counsel and a trustee of DES 2009 GST Trust, and additional counterclaims for civil conspiracy and fencing. We granted Rubin's motion to consolidate the appeals.

Adina raises the following points for our consideration:

POINT I

THE TRIAL COURT ERRED IN GRANTING DANIEL SUMMARY JUDGMENT DISMISSING THE FIDUCIARY DUTY CLAIM AND DENYING ADINA SUMMARY JUDGMENT ON THAT CLAIM.

A. The Trial Court Erred in Finding that the Mere Existence of [Section] 6.4 Authorized Daniel to Unilaterally and Covertly Adopted [Section] 9.8 and Effectuate the Repurchase.

B. The Trial Court Erred as a Matter of Law by Failing to Apply Governing Delaware Law that Required the [Fiduciary Duty] Claim to Be Adjudicated Separately and Independently from the Contract Claims.

1. The [Fiduciary Duty] Claim Arises from Obligations Imposed by Delaware Law, Not the Care One Operating Agreements.

2. Daniel's Self-Dealing Required Application of Delaware's Entire-Fairness

Standard to the Repurchase and Entitled Adina and Rubin to Equitable and Legal Remedies that Are Available Only for Breach of the Duty of Loyalty.

3. The Universe of Facts Relevant to the [Fiduciary Duty] Claim is Much More Expansive than that Relevant to the Contract Claims.

4. The [Fiduciary Duty] Claim is Much Broader in Scope, Both Factually and Legally, then the Contract Claims.

POINT II

THE TRIAL COURT ERRED BY FAILING TO GRANT ADINA LEAVE TO PURSUE DISCOVERY FROM CARE ONE'S OUTSIDE TRANSACTION COUNSEL REGADING THE REPURCHASE.

POINT III

THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING ADINA LEAVE TO FILE AN AMENDED PLEADING THAT WOULD HAVE ADDED LUGO, MCKINNEY, AND MOSHAEL AS PARTIES AND ALLEGED ADDITIONAL CAUSES OF ACTION FOR CIVIL CONSPIRACY AND VIOLATIONS OF N.J.S.A. 2C:20-20.

A. The Trial Court Erred by Finding the [Aiding and Abetting] Claim and the Conspiracy Claim Time Barred.

B. The Trial Court Erred by Applying to the Conspiracy Claim Delaware's State of

Limitations Rather Than New Jersey's Statute of Limitations.

C. The Trial Court Erred by Ruling that Adina Did Not State a Claim Under Section 20 for Stealing the Interests and Cash Distributions and Transferring Them to DES Trust.

Rubin raises the following substantive points for our consideration:

POINT II

THE TRIAL COURT ERRED BY DENYING RUBIN SUMMARY JUDGMENT ON HIS CLAIM THAT THE 2015 AGREEMENT BREACHED [SECTION] 11.4 OF THE 2006 AGREEMENT.

A. The Trial Court Erred in Finding that Respondents Did Not Breach the 2006 Agreement When Amending It in 2015 to Provide for the Payment of Less than Fair Value for the Interests of Removed Members.

1. The Trial Court Erred in Finding Fair Market Value, Not Fair Value, to be the Standard of Compensation Due Rubin Under the 2006 Agreement.

2. Even Were Fair Market Value the Appropriate Measure of Compensation Under the 2006 Agreement, the Trial Court Erred in Failing to Determine Whether the Formula Actually Provided for Fair Market Value.

a. The Trial Court Erred by Failing to Consider Evidence Establishing that the Formula Does Not Provide Fair Market Value for the Interests.

B. The Trial Court Erred in Finding That Amendments of the 2006 Agreement to Eliminate Straus's Fiduciary Duties and Provide Him with Indemnification Even for Bad Faith, Did Not Reduce Rubin's Rights.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT STRAUS DID NOT BREACH HIS FIDUCIARY DUTIES IN AMENDING THE 2006 AGREEMENT AND IMPLEMENTING THE REPURCHASE TRANSACTION, AND THUS IN DENYING RUBIN SUMMARY JUDGMENT OWING TO THOSE BREACHES.

A. The Trial Court Erred in Holding That Straus Could Not Have Breached His Fiduciary Duties If He Did Not Breach the Operating Agreement.

B. Straus Breached His Duty of Loyalty Because the Amendment Benefitted Him Alone and He Stood on Both Sides of the Repurchase Transaction.

C. The Trial Court Erred in Failing to Address Whether Straus's Breach of the Duty of Loyalty Triggered the Entire Fairness Standard of Review.

D. The Undisputed Evidence Established that Straus Breached His Duty of Care by Shunning Knowledge and Oversight of the Amendment and the Repurchase Transaction.

E. The Trial Court Erred in Dismissing Rubin's Claims for Aiding and Abetting Breach of Fiduciary Duty.

POINT IV

THE TRIAL COURT ERRED IN DENYING RUBIN SUMMARY JUDGMENT ON HIS CLAIMS FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

POINT V

THE TRIAL COURT ERRONEOUSLY FAILED TO AWARD RUBIN SUMMARY JUDGMENT ON HIS CLAIM THAT CARE ONE BREACHED THE REQUIREMENTS OF [SECTIONS] 9.8(e)-(f) OF THE 2015 AGREEMENT.

POINT VI

THE TRIAL COURT ERRED IN NOT GRANTING RUBIN SUMMARY JUDGMENT ON HIS CLAIM THAT CARE ONE FAILED TO MAKE TAX DISTRIBUTIONS (Issue Not Addressed by Trial Court Decision).

POINT VII

THE TRIAL COURT ERRED BY DISMISSING RUBIN'S CLAIM FOR AN ACCOUNTING (ISSUE NOT ADDRESSED BY TRIAL COURT DECISION).

POINT VIII

THE TRIAL COURT ERRED IN FAILING TO REACH THE ISSUE OF DAMAGES (ISSUE NOT ADDRESSED BY TRIAL COURT DECISION).

II.

We review the grant or denial of summary judgment de novo, applying the same standard as the trial court. Stewart v. N.J. Tpk. Auth., 249 N.J. 642, 655 (2022). We accord no deference to the trial court's legal conclusions. Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019).

Summary judgment is appropriately granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); accord Stewart, 249 N.J. at 655. Under this standard,

> [the] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
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> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).]

A.

We first address the breach of contract claims, removal of defendants as members, adoption of Section 9.8, and compensation paid to defendants. Defendants argue the trial court erred by denying them summary judgment on their breach of contract claim because Section 9.8 of the 2015 agreement breached Section 11.4 of the 2006 agreement.

"Under Delaware law, plaintiffs must establish the following three elements to succeed on a breach of contract claim: (1) the existence of a contract, whether express or implied; (2) breach of one or more of the contract's obligations; and (3) damages resulting from the breach." Geico Gen. Ins. Co. v. Green, 276 A.3d 462, ___ (Del. 2022) (citing VLIW Tech., L.L.C. v. Hewlett-Packard Co., 840 A.2d 606, 612 (Del. 2003)). "Questions of contract interpretation are reviewed de novo." GXP Cap., LLC v. Argonaut Mfg. Servs., 253 A.3d 93, 98 (Del. 2021); Alliance Data Sys. Corp. v. Blackstone Cap. Partners V L.P., 963 A.2d 746, 759-60 (Del. Ch.) (stating that contract interpretation presents question of law), aff'd, 976 A.2d 170 (Del. 2009).

"An issue regarding interpretation of a contract clause presents a purely legal question that is particularly suitable for decision on a motion for summary judgment," Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 4:46-2

(2023), unless there are material facts in dispute, Driscoll Constr. Co. v. State, Dep't of Transp., 371 N.J. Super. 304, 314 (App. Div. 2004).

The primary issue is whether Daniel, who was the majority owner and sole managing member of Care One, and who controlled a supermajority of voting interests in the LLC, acted within his authority under the operating agreement and Delaware law, when in 2015 he: (1) removed all individual minority members of Care One, including Adina and Rubin, who each owned a 4.412 percent interest in Care One; and (2) amended the Care One operating agreement to establish a formula for determining the amount to be paid when removing members through a purchase of their membership interests. Regarding the second issue, the dispute is whether the formula should have calculated the "fair value" rather than the "fair market value" of the membership interests, and, if fair market value was the appropriate calculation, whether the formula represented a reasonable calculation of fair market value.

The essence of defendants' argument is that, under Delaware law, Care One members were entitled to receive "fair value" for their membership interests if they were removed as members pursuant to Section 6.4(a)(i). Section 9.8 was added to the operating agreement as part of the 2015 amendments. It provided that upon removal, members would be paid only "fair market value" for the purchase of their membership interests, rather than "fair value." Rubin and Adina contend Section 9.8 violated Section 11.4 because it "otherwise reduce[d] the rights granted to" members and "adversely affect[ed]" members "without [their] consent." In the alternative, they contended that an unfair, inaccurate formula was used to measure fair market value.

Section 11.4 permitted amendment of the operating agreement "with the written consent of the Class A members by Majority Vote." However, it prohibited any amendments that would "reduce any Member's share of the Company's distributions, income or gains, . . . or otherwise reduce the rights granted to any Member . . . if such reduction . . . would adversely affect such Member, without the consent of each Member to be adversely affected by the amendment."

At the same time, Section 6.4(a)(i) of the agreement permitted a supermajority of Class A members to admit new members or remove any existing members. Adina maintains that plaintiffs did not utilize Section 6.4(a)(i) of the operating agreement to effectuate defendants' removal as members of Care One, but instead used Section 9.8 to purchase defendants' economic interests. She contends Section 6.4(a)(i) did not permit defendants' involuntary removal as members of Care One because Section 9.5 "prohibited any forced sale of a member's interest unless more than 50 [percent] of all interests were sold."

The trial court found that "Daniel, DES GST and DES GRAT held a Supermajority of the Relative Interests [in Care One] giving them the right and ability" under Section 6.4(a)(i) of the operating agreement "to admit new members and eliminate current members, including Adina and Mr. Rubin." The court further held that Section 11.4 of the agreement did not limit the right of removal set forth in Section 6.4(a)(i). The court did not otherwise address Adina's argument regarding the applicability of Section 9.5 to limit the removal right set forth in Section 6.4(a)(i).

Next, relying upon its interpretation of Delaware statutory and case law, the court disagreed with defendants' argument that prior to 2015 they would have been entitled to receive "fair value" for their membership interests, and held instead that they were entitled only to "fair market value." Finally, the court found "that the formula employed by Eureka was consistent with the terms of the 2015 LLC Agreement and was appropriately adopted by a 'supermajority vote.' Accordingly, the repurchase formula as set forth in the 2015 LLC Agreement complies with Delaware law and the terms of the Care One operating agreements."

Care One was established under Delaware law, and its operating agreement states that it "shall be governed by the laws of the State of Delaware." Therefore, Delaware law must be applied in resolving this appeal. See Del. Code Ann. tit. 6, § 18-1101(i) ("[An LLC] agreement that provides for the application of Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms.").

Delaware's LLC Act, Del. Code Ann. tit. 6, §§ 18-101 to 1203, is modeled on its Limited Partnership Act (LP Act), Del. Code Ann. tit. 6, §§ 17-101 to 1110. Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 290 (Del. 1999). Accordingly, "[u]nder the [LLC] Act, a member of an LLC is treated much like a limited partner under the LP Act." Ibid.

Both statutes emphasize "[t]he policy of freedom of contract." Ibid. Thus, Delaware law recognizes that: "An LLC is primarily a creature of contract, and the parties have wide contractual freedom to structure the company as they see fit." Seneca Invs., LLC v. Tierney, 970 A.2d 259, 261 (Del. Ch. 2008). See also Del. Code Ann. tit. 6, § 18-1101(b) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of [LLC] agreements."); Nemec v. Shrader, 991 A.2d 1120, 1126 (Del. 2010) ("Parties have a right to enter into good and bad contracts, the law enforces both."); Walker v. Res. Dev. Co., LLC, 791 A.2d 799, 813 (Del. Ch. 2000) ("LLC members' rights begin with and typically end with the Operating Agreement.").

In terms of contract interpretation, Delaware applies an "objective theory of contracts," construing contracts in a way that a reasonable, objective, third party would. Leaf Invenergy Co. v. Invenergy Renewables LLC, 210 A.3d 688, 696 (Del. 2019); Salamone v. Gorman, 106 A.3d 354, 367-68 (Del. 2014). When interpreting a contract, the court's goal is to effectuate the parties' intent, as expressed in the contract's terms. Leaf Invenergy Co., 210 A.3d at 696; Salamone, 106 A.3d at 368; Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 739 (Del. 2006). The court should view the contract as a whole and give effect to all its provisions. In re Viking Pump, Inc., 148 A.3d 633, 648 (Del. 2016); Alta Berkeley VI C.V. v. Omneon, Inc., 41 A.3d 381, 386 (Del. 2012). It also should apply the plain meaning of a contract's terms unless some special meaning is intended. Leaf Invenergy Co., 210 A.3d at 696; Norton v. K-Sea Transp. Partners, L.P., 67 A.3d 354, 360 (Del. 2013).

The court is not permitted to look beyond the words of the contract to determine the parties' intent unless it finds some ambiguity in the contract language. Viking Pump, 148 A.3d at 648; GMC Cap. Invs., LLC v. Athenian

Venture Partners I, L.P., 36 A.3d 776, 780 (Del. 2012). Moreover, the court should not strain to find ambiguity where there is none. Lorillard, 903 A.3d at 739. Contract terms are not ambiguous unless they are "fairly or reasonably susceptible to more than one meaning." Alta Berkeley, 41 A.3d at 385.

The August 2015 resolution removed defendants as members of Care One. The clear and unambiguous language of Section 6.4(a)(i) permitted the involuntary removal of Adina and Rubin as members of Care One by a supermajority vote. The removal of Adina and Rubin as members of Care One by a supermajority vote was valid under the operating agreement and Delaware law. See Del. Code Ann. tit. 6, § 18-702(e) ("Unless otherwise provided in the [LLC] agreement, a [LLC] may acquire, by purchase, redemption or otherwise, any [LLC] interest or other interest of a member or manager in the [LLC]. Unless otherwise provided in the [LLC] agreement, any such interest so acquired by the [LLC] shall be deemed canceled.").

The removal was effectuated by a purchase of their membership interests under the formula set forth in Section 9.8. Specifically, in the August 2015 resolution, the supermajority expressed its "desire [to] redeem the membership interests of those members who hold smaller interest and are not involved in the operation of the Company" through a purchase of their membership interests under Section 9.8(a). With the purchase of their interests, those members become "disassociated members" pursuant to Section 9.8(a).

We reject Adina's argument that the right of removal under Section 6.4(a)(i) is limited by the terms of Section 9.5. Section 9.5 only applies in the event Daniel, as manager, wishes to sell his interests in Care One to a third-party purchaser. In that circumstance, a "drag-along right" is created, such that Daniel has the right to require the other members to sell their interests to the third-party purchaser, subject to the terms specified. Section 9.5 is not implicated in this case because at no time has Daniel sought to sell his interests to a third party and compel other members to do so as well. Instead, consistent with Section 6.4(a)(i) and the new Section 9.8, a supermajority of Class A members voted to remove other members from the company through a purchase of their interests. Contrary to Adina's argument, removal of a member under Section 6.4(a)(i) expels the member; it does not simply strip the member of their voting rights.

Having concluded that the removal of defendants as members of Care One was valid, the next step is determining the amount Adina and Rubin were entitled to receive upon their removal, which requires determining whether the adoption of Section 9.8 violated Section 11.4 because it reduced the value to be paid to Adina and Rubin upon their removal. The trial court determined that under Delaware law, Adina and Rubin were entitled to receive only "fair market value" for their membership interests, rather than "fair value," because their interests in Care One were "akin to limited partnership interests" rather than general partnership interests. We disagree and reverse.

We provide the following survey of relevant Delaware case law. In Gelfman v. Weeden Investors, L.P., 859 A.2d 89, 95 (Del. Ch. 2004), the court considered a limited partnership in which there was one "General Partner" (a corporation solely owned by Donald Weeden), and originally the only form of partnership units that existed were "Basic Units." The limited partnership agreement provided that Basic Units "were not subject to involuntary redemption by the General Partner except in circumstances when the General Partner acquired 90 [percent] or more of the units." Ibid. "In that circumstance, the General Partner could involuntarily redeem the Basic Units at fair market value." Ibid.

Later, the limited partnership created a new class of partnership units, known as "Callable Units," which the General Partner could call back at book value when employees left the business. Id. at 97. The partnership agreement was later amended to create a "Redemption Schedule," which "enable[d] the General Partner to redeem the former Basic Units at book value and to escape the provisions of the Partnership Agreement that limited redemption to a situation when the General Partner owned 90% of the units and that required the payment of fair market value in that situation." Id. at 104.

In the lawsuit that ensued, the plaintiffs argued "the Redemption Schedule and the amendments that preceded it were adopted in breach of the Partnership Agreement and the defendants' fiduciary duties. By squeezing out the Outside Investors at prices less than fair market value, the defendants engaged in bad faith conduct." Id. at 110. The court agreed. Id. at 117-25.

The court found that, in adopting the Redemption Schedule, the defendants had not complied with the provision in the partnership agreement addressing the "resolution of conflicts of interest." Id. at 111-12, 117, 121. Therefore, "default standards of fiduciary duty appl[ied]," which involved application of the "exacting standard of entire fairness." Id. at 121. The court concluded the entire fairness standard had not been satisfied, because the defendants had acted in bad faith and in furtherance of their own self-interest in devising the Redemption Schedule. Id. at 121-25. As a remedy, the court awarded the fair market value of each basic unit held before the Redemption Schedule was implemented, less deductions for the distributions they had already received, and any amounts paid upon redemption. Id. at 125.

The court stated it "select[ed] fair market value because [it was] reluctant to import into the limited partnership context all of the artificial complexities of our corporate appraisal jurisprudence." Ibid. Moreover: "Fair market value [was] also a standard that relate[d] to the facts of this case, as this was the pre-amendment price at which Basic Units could be taken in the event the General Partner owned 90 [percent] or more of the units under the Partnership Agreement." Id. at 125-26. The court concluded "that fair value in the strict and jurisprudentially specific sense used in our appraisal decisions is not the governing standard in the limited partnership context." Id. at 127.

Two years later in Hillman v. Hillman, 910 A.2d 262 (Del. Ch. 2006), the court considered a complaint filed by a former general partner of a limited partnership, who claimed: (1) his general partnership interest had been converted to a limited partnership interest, when he had been removed from his position as general partner; and (2) the defendants had breached their fiduciary and contractual duties. The court dismissed the complaint, finding that under the terms of the LP agreement, upon his removal as general partner, the plaintiff "was deprived of any option to become a limited partner," and "[b]ecause he was no longer a partner of any kind, [he] lack[ed] standing to complain of actions taken by the new general partner and the Limited Partners after his removal."

Id. at 264-65. However, his removal did not "work a forfeiture of his . . . capital contribution." Id. at 265.

> Rather, drawing on the default principles in Delaware's general partnership statutes that apply because there is no guidance on this issue in the Limited Partnership Agreement and no binding provision of the Delaware Revised Uniform Limited Partnership Act . . . [the court] conclude[d] that [the plaintiff] [was] entitled to the fair value of his partnership interest at the time of his removal.
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> [Ibid.]

As to compensation, the Hillman court concluded the plaintiff could not be viewed as a "withdrawing partner" under the LP Act, which would entitle him to "fair value" of his partnership interest, see Del. Code Ann. tit. 6, § 17-604, because he did not voluntarily withdraw from the limited partnership, Hillman, 910 A.2d at 272-76. Rather, he was involuntarily "removed" or "expelled," as permitted under the terms of the LP agreement, and the partnership continued without him. Id. at 276.

However, the LP Act did not address a removed or expelled partner. Id. at 276-77. The court found the closest analogy to be the Delaware Revised Uniform Partnership Act, Del. Code Ann. tit. 6, §§ 15-101 to 1210, which provided that in the context of an expulsion that did not result in dissolution of the partnership, the expelled partner was entitled to receive the "fair value" of his economic interest in the partnership. Id. at 277 (citing Del. Code Ann. tit. 6, § 15-701(a)-(b)). Accordingly, the plaintiff was entitled to receive the fair value of his interest in the limited partnership. Id. at 277-78.

Applying these cases, the trial court concluded that "under Delaware law, the determination of the appropriate formula to be employed depends on whether the membership interests to be acquired are akin to general partnership interests or limited partnership interests." The court found defendants were entitled to receive only "fair market value" for their membership interests, rather than "fair value," because their interests in Care One were "akin to limited partnership interests" rather than general partnership interests. We disagree.

The decisions in Gelfman and Hillman were not based upon the status of the plaintiff as a general partner or limited partner. Instead, the decisions were guided by the terms of the operating agreements, and in the absence of any relevant provision in those agreements, from the most closely applicable statutory provisions—the Delaware LP Act or the Delaware partnership statute.

In Gelfman, the limited partners ultimately received "fair market value" for their interests. The court's holding was compelled by the terms of the LP agreement, which provided for limited partners to receive fair market value, and which the court found had been wrongfully amended in violation of the agreement's conflict of interest provision to reduce the amount to be paid to below fair market value.

In Hillman, the general partner ultimately received "fair value" for his partnership interest in a limited partnership. The "fair value" award was based upon the court's application of Delaware's partnership law, in the absence of any governing provisions of the parties' contractual agreement, or Delaware's LP law, respectively.

Applying these principles, we first look to Care One's operating agreement. Although Section 6.4(a)(i) permitted the involuntary removal of members, prior to 2015, no provision of Care One's operating agreement addressed the payment to be made upon the involuntary removal of a member. At most, Section 11.11(b) addressed the amount a member would receive at dissolution or wind-up of Care One's business.

In the absence of a governing provision from Care One's operating agreement, we next look to Delaware's LLC Act for any applicable rule. We find no provision of the LLC Act that governs the compensation to be paid in the context of a forced removal/expulsion of a member of an LLC.

In the absence of a governing provision in the operating agreement or the LLC Act, we resort to the default provision of the LLC Act, under which "the rules of law and equity . . . shall govern." Del. Code Ann. tit. 6, § 18-1104. Because Care One opted for a single managing member with other generally passive, non-managing members, a governance structure closely resembling and often used as an alternative to a limited partnership, the parties should expect a court to draw on analogies to limited partnership law. See Elf Atochem, 727 A.2d at 290 (noting Delaware's LLC statute is modeled on its LP statute). However, Delaware's LP Act likewise does not contain a provision addressing the compensation to be paid when a limited partner is involuntarily removed.

Given this vacuum, we conclude the court should consider whether Care One more closely resembles a partnership, i.e., a member-managed governance arrangement, such that Delaware's partnership statute should be applied (as in Hillman), or a corporation, i.e., a manager-managed entity, with a board of directors, and other corporate features, such that Delaware corporate law should be applied.

Viewing the management structure of Care One, the company more closely resembles a partnership than a corporation. That is, Care One is managed by a single member, Daniel, with some decisions requiring the vote of additional members of the LLC. There is no oversight by any board of directors, nor are there any other attributes of a corporation. See Del. Code Ann. tit. 8, §

141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."). For federal tax purposes, Care One chose to be treated as a partnership rather than a corporation.[6]

Therefore, Delaware case law suggests the court should apply Delaware's Revised Uniform Partnership Act to determine the amount to be paid to a removed/expelled member of Care One. Under that statute, removed/expelled partners are entitled to receive the "fair value" of their partnership interests. Del. Code Ann. tit. 6, § 15-701(a)-(b); Hillman, 910 A.2d at 277-78. Therefore, prior to the 2015 amendments, defendants were entitled to receive "fair value" for their membership interests in Care One, and not "fair market value."

Pursuant to Section 11.4 of the operating agreement, no amendment could be adopted that would have the effect of "reduc[ing] the rights granted to any Member . . . if such reduction . . . would adversely affect such Member" without their consent. Consequently, the adoption of Section 9.8 as part of the 2015 amendment to Care One's operating agreement was invalid and unenforceable.

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[6] The operating agreement refers to sections of the Internal Revenue Code relating to partnerships (citing 26 U.S.C. §§ 732, 734, 743, and 754). The K-1 forms reflect that income is reported as partnership income.

Section 9.8, which was adopted and implemented without defendants' consent, imposed a formula for repurchasing membership interests at "fair market value." Section 9.8 violated Section 11.4 because it significantly and improperly diminished defendants' right to receive "fair value" for their membership interests.

We remand for the entry of judgment in defendants' favor on their breach of contract claim and for further proceedings to determine the amount of compensation Adina and Rubin should receive for their membership interests under a fair value analysis, minus any amount they have already received. On remand, in the context of any further motion or trial practice, the parties may argue about the admissibility of the defense expert's opinion or the weight to be given to it. N.J.R.E. 702, 703.

Considering our ruling, we do not reach the issue of whether the formula set forth in Section 9.8 constituted an accurate measurement of fair market value. We decline to develop a formula to replace the formula included in Section 9.8. That issue shall be addressed in the first instance by the trial court.

We likewise do not reach defendants' alternative argument that plaintiffs violated sub-parts (e) and (f) of Section 9.8 because Daniel did not appoint "an appraiser to determine the Repurchase Price."

B.

We next address the defendants' claims of breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and breach of the covenant of good faith and fair dealing. The trial court dismissed these claims with prejudice.

Defendants argue Daniel breached his fiduciary duties of loyalty and care by: (1) acting in his self-interest and standing on both sides of the repurchase transaction by arranging for defendants' membership interests to be purchased by the DES Trust, and (2) failing to oversee the 2015 amendment of the operating agreement and the repurchase transaction, which was effectuated without any notice to defendants. Defendants also argue that DES Holding, DES GRAT, and DES Trust aided and abetted Daniel's breach of fiduciary duty by participating in the 2015 amendments and the repurchase transaction.

The trial court rejected defendants' argument that the amendments to Section 6.1 (to eliminate Daniel's fiduciary duties) and to Sections 7.1 and 7.2 (to shield Daniel from liability), violate Section 11.4 of the operating agreement. The court reasoned:

> The provisions relating to Daniel's fiduciary duties and indemnification do not reduce a member's ability to share in Care One's distributions, income or gains, do not increase that member's share of Care One's losses, reduce rights granted to the members or increase the member's obligations or change the voting

> requirements of the Class A members or the manager required to take action under the 2015 LLC Agreement. Simply put, [Section] 11.4 has no applicability to the amendments to [Sections] 6.1, 7.1 and 7.2.

The trial court also rejected defendants' arguments that Daniel breached any fiduciary duty, or that DES Holding, DES GRAT, and DES Trust aided and abetted Daniel in breaching a fiduciary duty, or that there was a breach of the covenant of good faith and fair dealing. The court explained:

> (i) the termination of the membership interests of Adina and Mr. Rubin was contemplated by the operating agreement and (ii) the termination of th[ese] membership interests was implemented under the specific provisions of the operating agreements. Thus, such actions cannot serve as the basis of a breach of fiduciary duty claim. As to the claim of aiding and abetting Daniel's alleged breach of fiduciary duty, such a claim requires the existence of a fiduciary relationship, the breach of the fiduciary duty and a knowing participation in that breach by the alleged aider and abettor. Here, since the court has determined that Daniel did not breach his fiduciary duty to Adina and Mr. Rubin, there can be no aiding and abetting claim. As to the claim for breach of the implied covenant of good faith and fair dealing, the court finds that Daniel and DES GST complied with their obligations under the operating agreements. Therefore, the covenant of good faith and fair dealing cannot give Defendants any better contractual protections than they themselves negotiated.
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> [(citations omitted).]

Delaware law explicitly permits LLCs to include in their operating agreements provisions that limit or eliminate fiduciary duties that otherwise would apply in the absence of such contractual terms. See Del. Code Ann., tit. 6, §§ 18-108 and 18-1101(c)-(e). In the absence of a contractual term that expressly modifies or eliminates fiduciary duties, LLC managers owe the traditional fiduciary duties of care and loyalty. William Penn P'ship v. Saliba, 13 A.3d 749, 756 (Del. 2011).

Where fiduciary duties exist, whether under the terms of the operating agreement or by operation of law, there are two elements to the breach of fiduciary duty claim: (1) defendant owed a fiduciary duty; and (2) defendant breached the duty. Estate of Eller v. Bartron, 31 A.3d 895, 897 (Del. 2011).

A breach of the duty of care requires proof of gross negligence, which includes a failure to inform oneself of available material facts. In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 64-65 (Del. 2006). However, under Section 7.1(a) of Care One's operating agreement, as well as Delaware's LLC Act, Del. Code Ann. tit. 6, § 18-406, Daniel was permitted to rely in good faith upon the advice of officers and employees of Care One and outside professionals.

A breach of the duty of loyalty requires proof that the fiduciary did not act in the best interests of the organization. A classic example of such a breach is when a fiduciary acts in his self-interest and against the interest of the organization. Walt Disney Co. Derivative Litig., 906 A.2d at 66.

Delaware also recognizes a claim for aiding and abetting a breach of fiduciary duty, which requires proof of: (1) a fiduciary relationship; (2) breach of the fiduciary's duty; (3) participation in the breach by a third party who is not a fiduciary; and (4) damages proximately caused by the breach. See RBC Cap. Mkts., LLC v. Jervis, 129 A.3d 816, 861-62 (Del. 2015); Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 172 (Del. 2002).

Delaware law provides that breach of fiduciary duty claims may not duplicate claims for breach of contract. "[W]here a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous." Nemec, 991 A.2d at 1129. Dismissal of the breach of fiduciary duty is required where it "wholly overlaps with a concurrent breach of contract claim." Bäcker v. Palisades Growth Cap. II, L.P., 246 A.3d 81, 109 (Del. 2021).

Defendants further argue that by adopting Section 9.8 of the operating agreement in 2015, and implementing the repurchase of defendants' membership interests through an unfair formula that calculated fair market value, rather than fair value, Daniel breached the covenant of good faith and fair dealing.

Delaware's LLC Act provides that LLC agreements "may not eliminate the implied contractual covenant of good faith and fair dealing." Del. Code Ann., tit. 6, § 1101(c) and (e). The implied covenant "infer[s] contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated." Nemec, 991 A.2d at 1125. The court will imply contract terms where "the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected." Id. at 1126; see also Kuroda v. SPJS Holdings, LLC, 971 A.2d 872, 888 (Del. Ch. 2009) (stating that implied covenant of good faith and fair dealing requires that contracting parties refrain from conduct that would prevent each other from receiving fruits of their bargain).

However, the court will not imply terms to the parties' contract where the contract expressly addresses the conduct at issue. Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC, 202 A.3d 482, 507 (Del. 2019); Nemec, 991 A.2d at 1125-26; Kuroda, 971 A.2d at 888. Thus, one cannot state a claim for breach of an implied covenant based upon conduct that is explicitly permitted by the contract. <u>Nemec</u>, 991 A.2d at 1127; <u>Dunlap v. State Farm Fire & Cas. Co.</u>, 878 A.2d 434, 441 (Del. 2005).

Turning to defendants' arguments, the 2010 amendment to Section 7.2(a) of Care One's operating agreement, which was continued in 2015, did not alter or eliminate Daniel's fiduciary duties or exculpate him from any behavior not covered by the original operating agreement. Instead, the 2010 amendment expanded Daniel's right to indemnification by eliminating the exclusion for actions or omissions adjudicated to have constituted bad faith, intentional misconduct, or a willful violation of law or of the operating agreement. Thus, the amendment did not prevent defendants from pursuing claims for breach of fiduciary duty or breach of the covenant of good faith and fair dealing. At most, the amendment affected what entity would pay damages on successful claims. We therefore concur with the trial court that the amendment to Section 7.2(a) did not violate Section 11.4 of the agreement since it did not reduce the rights granted to any member or adversely affect any member.

We recognize that the 2015 amendment to Section 6.1 added the sentence: "The Manager shall have no duties (including fiduciary duties) except as expressly set forth in this Agreement." However, as we have discussed, defendants were validly removed as members of Care One at the same time the operating agreement was amended. Therefore, defendants have no standing to contest the validity of the 2015 amendment to Section 6.1, because they were not adversely affected by it. Morris v. Spectra Energy Partners (DE) GP, LP, 246 A.3d 121, 128-29 (Del. 2021) (noting that to establish standing a plaintiff asserting a direct claim against a corporation must have suffered an injury); Dover Historical Soc'y v. City of Dover Planning Comm'n, 838 A.2d 1103, 1110 (Del. 2003) (stating elements of standing, including that plaintiff has suffered an injury). Accord In re Camden Cnty., 170 N.J. 439, 449 (2002) ("To possess standing in a case, a party must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision.").

While defendants have standing to pursue claims that accrued before their removal, as the trial court found, those claims fail because they are duplicative of the breach of contract claim, and are explicitly covered by Sections 6.4(a)(1) and 11.4 of the operating agreement. That is, in their counterclaims defendants alleged that plaintiffs breached the covenant of good faith and fair dealing and their fiduciary duties by secretly amending the operating agreement to achieve an unfair purchase price, lower than the "fair value" defendants were entitled to receive prior to the adoption of Section 9.8. And with respect to the claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty, defendants alleged that this lower purchase price somehow benefited Daniel, who acted in his own self-interest by arranging for defendants' interests to be purchased by DES Trust. As a remedy for these claims, defendants seek only damages for themselves (as opposed to the business), that is, "fair value" for their membership interests, or alternatively to retain their membership interests in Care One (i.e., rescission of the transaction).[7]

In their breach of contract claim, defendants similarly allege that the secret adoption of Section 9.8 violated Section 11.4 of the operating agreement by producing an unfair purchase price, lower than the "fair value" they were entitled to receive, without defendants' consent. And on this claim defendants seek damages only for themselves (not the company), amounting to the "fair value" of their membership interests, or alternatively to retain their membership interests in Care One.

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[7] Rescission is an equitable remedy available for breaches of fiduciary duty. Harman v. Masoneilan Int'l, Inc., 442 A.2d 487, 489, 500 (Del. 1982). "Rescission requires that all parties to the transaction be restored to the status quo ante, i.e., to the position they occupied before the challenged transaction." Strassburger v. Earley, 752 A.2d 557, 578 (Del. Ch. 2000).

Thus, notwithstanding the additional factual allegation that Daniel did not adequately supervise the contractual amendments and repurchase transaction (breach of the duty of care), and the arguably contradictory allegation that Daniel secretly and self-interestedly interfered in the amendment process and repurchase by having defendants' membership interests purchased by the DES Trust (breach of the duty of loyalty), the facts underlying the claims for breach of fiduciary duty and of the covenant of good faith and fair dealing are substantively identical to the breach of contract claims and were correctly dismissed.

Defendants maintain their claims for breach of fiduciary duty are not repetitive of their breach of contract claims because they are entitled to receive rescissory damages for breach of fiduciary duty. Rescissory damages are equitable damages, which could be available to reinstate defendants as members of the LLC if it were determined they were wrongfully removed. However, defendants acknowledged that Daniel had the right to remove them as members of the LLC and that he exercised that right in 2015. The only question is whether he did so fairly, because they were paid only "fair market value" rather than "fair value." Therefore, damages for the removal would be either "fair value" or "fair market value" for their membership interests. Defendants are not eligible to receive rescissory damages in addition to the breach of contract damages.

Defendants' reliance on William Penn P'ship for the proposition that they could be awarded counsel fees if successful on a claim for breach of the duty of loyalty, is misplaced. In that case, the plaintiffs were awarded counsel fees because they were "left without a typical damage award." William Penn P'ship, 13 A.3d at 758-59. That is not the situation here.

C.

Rubin argues that the trial court erred by not granting him summary judgment on his claim that Care One failed to make tax distributions in 2015, and in failing to address this issue in its written decision as required under Rules 1:7-4 and 4:46-2(c). According to Rubin:

> For 2015, Care One allocated on Form K-1s (but never paid) over $800,000 in taxable ordinary business income to each of Rubin and Adina based on their respective 4.4103437% Class A Interests in Care One. Yet, Care One did not make any tax distribution to Rubin or Adina pursuant to § A1.9. Thus, Care One owes each of Rubin and Adina a tax distribution for the 2015 tax year as a matter of law and summary judgment in their favor should be granted.

Three sections of the operating agreement govern allocation of tax distributions. Section 8.5 provides that "[a]ll matters concerning the allocation of distributions of profits, gains and losses among the Members (including the tax treatment thereof) . . . shall be determined by the tax matters partner (unless the Manager shall otherwise determine), whose determination shall be final and conclusive as to all of the Members." Under Section 8.4, Daniel was designated the tax matters partner.

In turn, Annex Section A1.9 provides:

> Notwithstanding the provisions of Section A1.8, if it is anticipated that the allocations of Net Profit and income and gain for any year will result in the [Members] recognizing taxable income with respect to the Company for such year, distributions of Company cash for such year shall be made to each of such Members in an amount equal to 40% multiplied by the amount of Net Profits allocated to such Member for such year pursuant to Section A1.3(c).[8] Such distributions shall be made at such times as shall be appropriate to permit the Members to pay income tax (including estimated income tax) on such taxable income. Any such distribution shall be treated as an advance against amounts otherwise distributable to the Member under Section A1.8.

Annex Section A1.8 provides: "No Member shall be entitled to receive any distribution from the Company except as provided in this Agreement."

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[8] Annex Section A1.3(c) addresses the allocation of net profit, which under Section 8.5 is a discretionary matter.

The 2015 K-1 forms show that in 2015, defendants were allocated ordinary business income from Care One in the amount of $884,738. However, no distributions of Care One income were made to defendants in 2015, nor were any tax distributions made to defendants. Plaintiffs maintain that defendants were not entitled to receive tax distributions for tax year 2015 under Annex Section A1.9, because they had been removed in August 2015 and were no longer members of Care One. Plaintiffs contend that because defendants had been removed and were no longer members of Care One, they "were not entitled to receive any discretionary distributions under Section A1.8."

The record is insufficient to address the issue for the first time on appeal. Instead, the issue of defendants' entitlement to tax distributions in 2015 shall be addressed by the trial court on remand. See Christian Mission John 3:16 v. Passaic City, 243 N.J. 175, 190-93 (2020).

D.

Defendants contend the trial court erred by dismissing their demand for an accounting. They claim they are entitled to recover rescissory damages, including tax and profit distributions in the years that followed their improper removal, which requires an accounting.

Considering our rulings that defendants were properly removed as members of Care One in August 2015, and affirming the dismissal of their claims for breach of fiduciary duty, we discern no need for an accounting of the tax and profit distributions for the period following their removal as members.

E.

Adina argues the trial court erred by failing to grant her leave to pursue discovery from Care One's outside transaction counsel regarding the repurchase of her membership interests. We review a trial court's discovery rulings for abuse of discretion. Brugaletta v. Garcia, 234 N.J. 225, 240 (2018).

The subject discovery issue first arose in 2018, during the federal proceedings. Ultimately, in September 2018, Adina agreed, without prejudice, to withdraw a subpoena served on a law firm that Care One had retained in connection with the repurchase of defendants' membership interests.

The issue arose again after the case had been remanded to state court. Specifically, in September 2019, the court issued an opinion and order (the Garner order), see Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), requiring Care One to produce discovery regarding its communications with outside counsel under the fiduciary duty and at-issue exceptions to the attorney-client privilege.

Plaintiffs produced the documents at issue, which included correspondence between Care One and the outside counsel Care One had retained with respect to the repurchase transaction. Thereafter, Adina sought leave to subpoena documents from Care One's outside counsel, including legal memoranda reflecting counsel's understanding of Delaware law, and to depose several attorneys. The court referred the request to a special discovery master, who denied the request. The special master explained:

> Defendants have already received through the recent "Garner Order" all documents and correspondence between the Care One parties and their outside counsel relating to the Repurchase Transactions. In addition to the documents already produced, Defendants argue that the Care One parties should be ordered to produce any and all communications, drafts, memoranda, and other documents in outside counsel's possession that were not shared with Care One, and seek the depositions of two outside attorneys involved in the transaction, claiming that Care One has abandoned claims of privilege on these documents and they fall within the Garner Order. While Defendants claim that the contents of the produced Garner documents are "shocking," they have not indicated what information they are seeking or expect to receive through this further information.
>
> The production of additional documents that Care One never received will not shed light on any knowledge Care One had during the Repurchase Transaction, and thus, Care One already has the documents relevant to their inquiry. The question is not what outside counsel discussed internally, but rather what information was relayed to and legal advice

> provided by these attorneys – all information which Defendants have in their possession. Similarly, the requested deposition testimony will not inform on the relevant question – what the Care One parties knew, not what their counsel discussed outside their presence. Instead, permitting the discovery of outside counsel will require more lawyers joining the case and opens the possibility for a plethora of new discovery disputes. I also conclude that this discovery, if permitted, would not be proportional to what is necessary in this case.

Rubin filed a partial objection to the special master's ruling, but only with respect to valuation-related discovery. The trial court rejected Rubin's objections for the reasons expressed by the special master.

The discovery ruling was consistent with governing law. In Kerr v. Able Sanitary & Envtl. Servs., Inc., 295 N.J. Super. 147, 155 (App. Div. 1996), we addressed discovery from counsel, stating:

> [A]ttorney depositions frequently interfere with the adversarial process by inviting delay, disruption, harassment, and perhaps even disqualification of the attorney from further representation of the client in the underlying litigation. Hence, we are convinced that an order requiring adverse counsel to submit to a deposition must rest on a clear determination that the information sought is not only relevant, but is within the proponent's legitimate discovery needs as determined in the context of the particular case.

In Kerr we held that "the request to depose a party's attorney itself constitutes 'good cause' for a protective order under [Rule] 4:10-3(a)," and to overcome the presumptive good cause "the party requesting the deposition must show that the information sought is relevant to the underlying action and is unlikely to be available by other less oppressive means." Id. at 158-59. Moreover:

> In evaluating the propriety and need for the deposition of the opposing attorney, the court should consider the following factors: (1) the relative quality of the information purportedly in the attorney's knowledge, and the extent to which the proponent of the deposition can demonstrate the attorney possesses such information; (2) the availability of the information from other sources that are less intrusive into the adversarial process, i.e., the extent to which all other reasonable alternatives have been pursued to no avail; (3) the extent to which the deposition may invade work product immunity or attorney-client privilege; and (4) the possible harm to the party's representational rights by its attorney if called upon to give deposition testimony, i.e., the extent to which the deposition will affect attorney preparation or participation on behalf of the client. Consideration of these or any other relevant factors, either singly or in combination, will determine in a particular case whether the party seeking the deposition of opposing counsel has overcome the presumptive "good cause" for the protective order. If such showing is not made, a protective order should issue.
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> [Id. at 159.]

When considering discovery demands made upon a non-party, we recently emphasized the need to closely scrutinize such demands, including consideration of the burden imposed on the non-party, whether the information sought from the non-party was truly needed, and whether the information could be obtained from the defendant, or could be obtained through less burdensome means. Trenton Renewable Power, LLC v. Denali Water Sols., LLC, 470 N.J. Super. 218, 227-32 (App. Div. 2022).

The information relevant to defendants' claims had already been produced pursuant to the Garner order. As the special master found, Adina was not entitled to obtain documents or testimony relating to matters counsel did not discuss with Care One. See Del Code. Ann. tit. 6, § 18-406 (protecting managers who rely in good faith upon advice of professionals). We discern no abuse of discretion.

F.

As we have noted, defendants sought leave to amend their counterclaims to add claims against Daniel for civil conspiracy and dealing in stolen property (fencing) under N.J.S.A. 2C:20-20. They also sought leave to file a third-party complaint against Moshael, Lugo, and McKinney, asserting claims of aiding and abetting Daniel's breach of fiduciary duty, civil conspiracy, and dealing in stolen property under N.J.S.A. 2C:20-20.

The court denied the motions. First, the court found that it would be futile to permit defendants to assert new claims against Moshael, Lugo, and McKinney for aiding and abetting Daniel's breach of fiduciary duty, because such claims were barred by Delaware's three-year statute of limitations. The court found that defendants knew of their alleged injury in 2015 "and they had the responsibility to determine who, if anyone else, was involved."

Next, the court found that the proposed civil conspiracy claim was "indistinguishable" from the claim for aiding and abetting Daniel's alleged breach of fiduciary duty. Therefore, the claim was also governed by Delaware's three-year statute of limitations and time barred.

Finally, the court found defendants' proposed claims under N.J.S.A. 2C:20-20 were futile because the statute did not apply to the facts alleged since "there has been no effort to sell, transfer or dispose of the membership interests or the distributions thereof as contemplated by the statute."

Motions for leave to amend "shall be freely given in the interest of justice." R. 4:9-1. The decision whether to grant such a motion is left to the court's discretion considering the circumstances that exist at the time the motion is made. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006). "That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Ibid. We discern no abuse of discretion.

Delaware applies a three-year statute of limitations to causes of action for breach of fiduciary duty. Del. Code Ann. tit. 10, § 8106; Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 860 A.2d 312, 319 (Del. 2004). The cause of action accrues "at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action." Wal-Mart, 860 A.2d at 319.

Defendants knew of Moshael's involvement in 2015, when he signed the checks issued to defendants for their membership interests. As to Lugo and McKinney, it is significant that defendants were members of Care One, and that Rubin had worked at a high level within the organization. Although defendants claim to have had no knowledge of Lugo or McKinney's involvement in the repurchase of their membership interests, they knew or should have known of the roles Lugo and McKinney served as in-house counsel to Care One, and they were at the very least on "inquiry notice" of Lugo and McKinney's potential involvement in amending the operating agreement and removing defendants as members of the company. Wal-Mart, 860 A.2d at 317.

The proposed third-party claims against Lugo, McKinney, and Moshael, for aiding and abetting Daniel's alleged breach of fiduciary duty, fail for the same reasons those claims fail against the originally named defendants. Delaware's three-year statute of limitations applies because the fiduciary obligations upon which the aiding and abetting claim are predicated arise under the LLC agreement, which is governed by Delaware law. The cause of action for aiding and abetting breach of fiduciary duty accrued in August 2015. Defendants did not seek to name Lugo, McKinney, or Moshael as defendants to the aiding and abetting claims until 2019. The claims are time-barred.

The same result obtains with respect to defendants' proposed claims for civil conspiracy against Daniel, Lugo, McKinney, and Moshael. Delaware recognizes a cause of action for civil conspiracy upon proof that: (1) two or more persons conspired together; (2) an unlawful act was committed in furtherance of the conspiracy; and (3) actual damage caused to the complainant. Nicolet, Inc. v. Nutt, 525 A.2d 146, 149-50 (Del. 1987). However, civil conspiracy "is not an independent cause of action." Ramunno v. Cawley, 705 A.2d 1029, 1039 (Del. 1998). Instead, it must "arise from some underlying wrong." Ibid. In the absence of an actionable wrong, a civil conspiracy claim will fail. Here, the record supports the court's conclusion that the civil conspiracy claims merely duplicated defendants' claims for aiding and abetting breach of fiduciary duty. Accordingly, Delaware's three-year statute of limitations for civil conspiracy claims applies. Atlantis Plastics Corp. v. Sammons, 558 A.2d 1062, 1064 (Del. Ch. 1989).

Finally, as for the proposed theft-related claims against Daniel, Lugo, McKinney, and Moshael, the trial court correctly held that N.J.S.A. 2C:20-20 has no application to the facts of this case. In turn, N.J.S.A. 2C:20-7.1(b)(1) provides that "[a] person is guilty of dealing in stolen property if he traffics in, or initiates, organizes, plans, finances, directs, manages or supervises trafficking in stolen property . . . ." Here, there was no "stolen property" that was "trafficked" within the meaning of N.J.S.A. 2C:20-7.1 and 2C:20-20.

III.

In sum, we reverse the grant of summary judgment to plaintiffs dismissing defendant's breach of contract claims relating to Section 9.8 and remand for the trial court to enter summary judgment to defendants on those claims relating to the adoption of the repurchase formula, and for proceedings to determine the amount of damages to be awarded to Adina and Rubin for the "fair value" of their membership interests in Care One, minus any amount already received. On remand, the trial court shall also address defendants' claim that Care One failed to make required tax distributions in 2015.

We affirm the dismissal of defendants' claims for breach of contract in connection with the amendments to Sections 6.1 and 7.2(a), as well as their claims for breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty.

We also affirm the denial of Adina's motion for discovery from Care One's outside counsel, and the denial of her motion to amend the pleadings to add third-party claims and additional counterclaims.

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION