IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SAL GILBERTIE, CORY MULLEN-RUSIN, STEVE KAHLER, CARL MILLER III, and TEUCRIUM TRADING, LLC,	:	
Plaintiffs,	:	
v	:	C. A. No. 2020-1018-LWW
DALE RIKER and BARBARA RIKER,	:	
Defendants.	:	

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, April 6, 2022
11:00 a.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

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TELEPHONIC RULINGS OF THE COURT ON PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

APPEARANCES:

MATHEW A. GOLDEN, ESQ.
Potter, Anderson & Corroon LLP
-and-
BARRY S. POLLACK, ESQ.
JOSHUA L. SOLOMON, ESQ.
of the Massachusetts Bar
Pollack Solomon Duffy LLP
for Plaintiffs Sal Gilbertie, Cory Mullen-Rusin, Steve Kahler and Carl Miller III

PAUL D. BROWN, ESQ.
Chipman Brown Cicero & Cole LLP
-and-
COURTNEY WORCESTER, ESQ.
ROGER A. LANE, ESQ.
of the Massachusetts Bar
Holland & Knight LLP
for Defendants Dale Riker and Barbara Riker

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THE COURT: Good morning. This is Vice Chancellor Will.

Who do we have on the line?

ATTORNEY GOLDEN: Good morning, Your Honor. This is Mathew Golden of Potter Anderson on behalf of the individual plaintiffs. And with me on the line today is Barry Pollack and Joshua Solomon from Pollack Solomon Duffy.

THE COURT: Thank you very much.

VARIOUS COUNSEL: Good morning, Your Honor.

THE COURT: Good morning.

ATTORNEY BROWN: Good morning, Vice Chancellor. This is Paul Brown on behalf of defendants and counterclaim plaintiffs, Dale and Barbara Riker. On the line with me, I believe, are Roger Lane and Courtney Worcester of Holland & Knight.

THE COURT: Great. Thank you very much.

Is there anyone else who wishes to make an appearance this morning?

(No response.)

THE COURT: Okay. Before we kick it off, can I confirm that we have a court reporter on

the line?

THE COURT REPORTER: I'm here, Your Honor. Good morning.

THE COURT: Great. Thank you.

As you know, the purpose of today's call is for me to provide you with a ruling on the plaintiffs' motion to dismiss counterclaims. And given the number of the counterclaims, I thought this would be the most efficient way for me to get a ruling to you quickly.

It's going to take a while for me to work through the various claims and arguments, so I am going to ask that you please mute your lines. And I'll give you an opportunity to ask any questions that you have at the end.

For the sake of the record, I'm going to start with a discussion of the factual background, which is drawn from the pleadings in this action. Because I already described the facts underlying this case in sufficient detail in an August 12th, 2021 ruling on a previous motion to dismiss the plaintiffs' claims, I'm going to keep this relatively brief. And I'll refer the parties to the prior rulings in this case for additional details on the facts.

Plaintiffs and counterclaim defendants Sal Gilbertie and Carl Miller III founded Teucrium Trading -- which I'll refer to as "the company" during the ruling -- along with defendant and counterclaim plaintiff Dale Riker in 2009. The company is a Delaware limited liability company that sponsors certain agriculturally-focused exchange traded funds available on the New York Stock Exchange.

Gilbertie and Riker each own about 45.5 percent of the company's voting units. Miller holds the remaining 9 percent. Gilbertie, Riker, and Miller are all Class A members of the company.

Riker acted as the company's CEO from September 2011 until around September 2018, when he was removed.

Defendant and counterclaim plaintiff Barbara Riker is a former chief financial officer, chief accounting officer, and chief compliance officer of the company. She was replaced by plaintiff and counterclaim defendant Cory Mullen-Rusin in September 2018.

Plaintiff and counterclaim defendant Steve Kahler served as COO of the company from September 2012 to September 2018, when he resigned.

He was rehired in the same capacity in October of 2018.

In the aftermath of his removal as CEO, and because he had "legitimate concerns regarding how Teucrium Trading was being run," Riker made a books and records request to the company in December of 2018.

Litigation followed, with the plaintiffs initiating this action in November 2020 and filing their amended complaint on February 18th, 2021. The defendants moved to dismiss, and two of the plaintiffs' nine counts were, in fact, dismissed on August 12th, 2021.

The defendants filed an answer on September 3rd, 2021, bringing 12 counterclaims. The plaintiffs filed a motion to dismiss those counterclaims on October 15th, 2021, and I heard oral argument on the motion on January 20th, 2022. That motion to dismiss the counterclaims is what I have before me today.

That brings me to my legal analysis. I'll say a few words about the legal standard first, before discussing each of the counterclaims in turn. I'm going to begin by addressing Mr. Riker's direct

counterclaims, and then the derivative counterclaims, and finally Ms. Riker's counterclaims.

In considering the plaintiffs' motion, I apply the standard required by Court of Chancery Rule 12(b)(6). When considering a motion to dismiss pursuant to Rule 12(b)(6) "(i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof." That's from *Savor, Inc. v. FMR Corp.*, 812 A.2d 894.

Nevertheless, "a trial court is required to accept only those 'reasonable inferences that logically flow from the face of the complaint' and 'is not required to accept every strained interpretation of the allegations proposed by the plaintiff.'" Now I'm quoting from *In re General Motors Shareholder Litigation*, 897 A.2d 162.

Mr. Riker's direct counterclaims are Counts III, VI, VII and VIII. I'll begin with

Count VIII.

In Count VIII, Mr. Riker seeks specific performance of an alleged oral contract he claims he formed with Gilbertie. He asserts that the pair reached an oral agreement on September 11th, 2018 for a $5 million sale of Mr. Riker's Class A member units in the company.

The plaintiffs argue that -- even taking Riker's allegations as true -- he has not stated a viable claim because of an unsatisfied condition precedent for sales in Section 9.2 of the company's LLC agreement.

Mr. Riker, for his part, contends that Section 9.2 does not apply to so-called permitted transfers and, furthermore, that it only applies if a member receives an offer in writing. Because the sale was a permitted transfer and there was no original offer in writing, he argues, he and Gilbertie entered into an enforceable contract.

Section 9.1 of the company's LLC agreement states that members shall not "indirectly or directly sell" membership units except pursuant to the terms or as contemplated by Section 9.2 or to a permitted transfer.

The counterclaim complaint does not provide a reasonable basis to infer that the alleged oral agreement met either of those two exceptions, and the arguments in Riker's brief are unconvincing to me.

First, Section 9.2 is plainly not relevant here. As the plaintiffs note, Section 9.2 can only create an exception to Section 9.1 if an offeror member receives a *bona fide* offer.

The term "*bona fide* offer," as defined in the LLC agreement means "a *bona fide* offer in writing to acquire all or a portion of the Membership Units held by the Offeror Member."

Mr. Riker does not allege that Gilbertie made him an offer in writing that could have triggered this Section 9.2 exception. As a result, an enforceable contract could not conceivably have been formed under Section 9.2.

Second, I cannot reasonably infer that the alleged sale is a permitted transfer. The term "permitted transfer" is defined in Section 9.1, which states that a permitted transfer can be one of five things. The third listed is "a Transfer of all or a portion of the Membership Units owned by such Class A member to another Class A member."

What that means exactly is dependent on what is meant by "such Class A member."

Mr. Riker seems to want the Court to read the word "such" out of the permitted transfer definition, but I cannot. That word is operative.

The second possible permitted transfer in Section 9.1 -- the one just before the word "such" is used -- states, "in the event of a Member's death, a Transfer of all of the Membership Units owned by such deceased Member to the executor, administrator, personal representative or estate of such deceased member."

The exception Mr. Riker points to is therefore inapplicable based on a plain reading of the LLC agreement. At the motion to dismiss stage, "if [the contract] is clear and unambiguous, and does not support the claim of breach, the complaint asserting the claim will be dismissed." That's from *Obsidian Financial Group v. Identity Theft Guards Solutions*, 2021 WL 1578201.

The language about a deceased member just prior to the phrase "such Permitted Transfer" leaves no ambiguity. The exception that Mr. Riker points to does not appear to apply to the alleged oral

agreement because it does not deal with the sale of a deceased member's units.

The counterclaim complaint does not make the allegations necessary to sustain the breach of contract counterclaim. Count VIII is therefore dismissed. It is dismissed, however, without prejudice, as requested by the plaintiffs at oral argument, to allow Mr. Riker to replead.

I'll turn next to Count VI. In Count VI, Mr. Riker seeks a declaration that September 12th, 2018, and October 10th, 2018, Class A member meetings, at which, respectively, the plaintiffs allegedly authorized an investigation into Kahler's resignation and reinstated him as COO, were not properly noticed; that a July 2019 attempt at ratification was without legal effect or authority; and that the actions taken at those meetings are therefore null and void.

The movants seek to dismiss by arguing that any improper notice was properly ratified in July 2019, when Gilbertie and Miller met and allegedly ratified the actions taken at the September and October 2018 meetings, as well as "all actions previously performed, or to be performed, by the

Officers of the Company in connection with the actions approved at the meetings."

Mr. Riker contends that ratification cannot validly occur as a matter of law. He asserts that the LLC agreement does not give the company's members that power, and that the LLC Act, unlike the DGCL, does not provide a default power of ratification.

First, as a technical matter, Mr. Riker appears to be mistaken about the LLC Act. The Act was amended on June 10th, 2021, specifically to grant LLC members a default ratification power. See Section 18-106(e).

Regardless, based on the pleadings, the plaintiffs appear to have ratified their actions under the default common law rule, which distinguishes between void acts (which are not ratifiable) and voidable acts (which are ratifiable).

In *Nevins v. Bryan*, 885 A.2d 233, which was affirmed by the Delaware Supreme Court, this Court clarified the distinction between void and voidable acts.

It explained that void acts are not ratifiable because "the corporation cannot, in any

case, lawfully accomplish them. Void acts are illegal acts or acts beyond the authority of the corporation. In contrast, voidable acts are ratifiable because the corporation can lawfully accomplish them if it does so in the appropriate manner."

In *CompoSecure LLC v. CardUX, LLC*, the Delaware Supreme Court cited *Nevins* and applied an identical understanding of void and voidable when considering acts taken by an LLC. That's 206 A.3d 807. Though that case dealt with implied ratification and New Jersey law, the basic common law principles apply here.

Gilbertie and Miller, holding a majority of the company's voting units, unquestionably had the authority under Section 8.3 of the LLC agreement to authorize an investigation into Kahler's resignation and to elect him as COO. Because Gilbertie and Miller had the authority to take these actions, but simply failed to do them in an appropriate manner, their actions were voidable, but not void. Therefore, the allegedly improper acts could be ratified.

Count VI is therefore dismissed.

I'll next address Count III, which is

a claim for a breach of contract.

In Count III, Mr. Riker alleges that Gilbertie and Miller breached the LLC agreement in three ways.

First, by removing Mr. Riker as CEO and by failing to make certain distributions and payments to him under the agreement; second, that Gilbertie breached the agreement when he told Mr. Riker he would consider certain of Mr. Riker's governance proposals while "simultaneously acting secretly to remove [him]"; and, third, by allegedly instructing VedderPrice -- the company's outside counsel -- to state that Mr. Riker was terminated for cause.

The parts of the LLC agreement that Count III focuses on are Sections 8.2 and 8.10.

In the former, Section 8.2, Gilbertie and Miller covenanted to "commercially reasonable efforts in managing the Company."

The latter, Section 8.10, reads: "[t]he members and officers shall perform their respective duties in good faith, in a manner reasonably believed to be in the best interests of Teucrium Trading, and with such care as an ordinarily

prudent person in a like position would use under similar circumstances."

The elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff. See *Cedarview Opportunities Master Fund v. Spanish Broadcasting System*, 2018 WL 4057012.

The contractual duty of good faith, when undefined in the LLC agreement, is "analyzed ... in the context of the larger provision -- or value -- it [seeks] to protect."

It is also considered as the mirror of bad faith, that is, as not encompassing actions "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." This is all from the *DV Realty Advisors* case, 75 A.3d 102.

Commercially reasonable efforts are undefined in the LLC agreement.

Certain of the acts in Count III cannot support a reasonably conceivable claim for the breach of the LLC agreement.

To start, it's unclear what damages

are allegedly associated with the claims that VedderPrice stated that Mr. Riker was terminated for cause and that Mr. Riker was allegedly lied to. I do not see how these acts could be perceived as so outside the bounds of reasonable judgment as to constitute bad faith or to be commercially unreasonable.

Further, as the movants' papers make clear, this issue of VedderPrice's statement was addressed at length in Mr. Riker's Section 220 action before Chancellor Bouchard.

At trial for that 220 action, counsel for Mr. Riker admitted that the letter issued by VedderPrice stating he was fired for cause was never publicly disclosed. In fact, the letter was never disclosed to anyone besides Mr. Riker and his counsel. Even accepting Mr. Riker's claim that Gilbertie "instructed" VedderPrice to make this statement, it does not support a reasonable inference that Gilbertie acted unreasonably or in bad faith, as alleged. That letter was not sufficient to establish a credible basis of corporate wrongdoing -- Delaware's lowest pleading standard -- in the books and records action. It is likewise insufficient to meet the higher

pleading standard of reasonable conceivability necessary today.

As for the alleged payments owed to Mr. Riker, the LLC agreement states that distributions are made at the discretion of a majority of the members and that salaries are fixed by the company's president.

Mr. Riker has not pleaded any facts indicating a violation of either of the relevant provisions or specified which terms within the LLC agreement were breached.

There is one set of allegations, however, that I conclude could support a reasonably conceivable claim for breach of contract.

With respect to Mr. Riker's removal as CEO, while Miller and Gilbertie exercised their powers under the LLC agreement, I cannot, at this stage, granting all reasonable inferences in the nonmovants' favor, determine that the removal was not done in bad faith.

The defendants allege in their counterclaims that Gilbertie and Miller tried to "push D[ale Riker and] B[arb Riker] apart so that they will not be united in their push against them."

They further allege that the plaintiffs began certain investigations in the hope that it would give them leverage to remove Riker from power, and generally that the decision to remove Riker was not grounded in a belief that it would be best for the company, but rather in personal animus.

Accepting these well-pleaded facts as true, as I must at this time, I conclude it is reasonably conceivable that Gilbertie and Miller breached the LLC agreement in removing Mr. Riker from his position as CEO.

As best I can tell from their papers and oral argument, the plaintiffs' only response to this is that the actions were, like those in Count VI, ratified.

Unlike the acts in Count VI, however, these acts would be void, not voidable.

Count III is therefore dismissed in part. The portion of the count that pertains to the allegation that Gilbertie and Miller acted in bad faith and in breach of the LLC agreement in removing Mr. Riker as CEO remains.

That brings me to Count VII, which is the last direct counterclaim.

In Count VII, Riker asserts that Gilbertie and Miller breached their fiduciary duties by failing to make certain distributions to him, not paying him certain compensation, and by seeking to enforce an overly broad noncompetition provision against him.

The plaintiffs seek dismissal of this claim on the grounds that it is duplicative of the other alleged contract claims.

This Court has explained that "[u]nder Delaware law, if [a] contract claim addresses the alleged wrongdoing by the [fiduciary], any fiduciary duty claim arising out of the same conduct is superfluous." That's from *In re WeWork Litigation*, 2020 WL 6375438.

Generally, such fiduciary duty claims will only survive a motion to dismiss when there's an independent basis for a fiduciary duty claim separate from a contract claim.

Determining whether an independent basis has been pleaded requires the court to consider whether the fiduciary claim "depend[s] on additional facts ... [is] broader in scope, and involve[s] different considerations in terms of a potential

remedy." That's also from the *WeWork* case.

Here, the counterclaims do not set forth an independent basis for the fiduciary duty claim in Count VII.

As an initial matter, Count VII does not depend on any additional facts separate from the contract claim in Count III. Rather, the facts relied upon in both counts are identical. They both concern Miller and Gilbertie's alleged refusal to distribute funds to Mr. Riker, their alleged failure to pay Mr. Riker's compensation, and their alleged efforts to enforce the LLC's noncompete provision.

In fact, the Rikers do not even argue that Counts III and VII differ in scope. They spend a portion of their opposition brief comparing Counts II and VII, but do not make the same arguments with regard to Counts III and VII, which, again, appear to rely on identical facts.

With respect to differing remedies, Riker's brief cites to the prayer for relief in his counterclaims for the proposition that "the breach of fiduciary duty claims seek remedies that are not contractual remedies."

But his attempt to distinguish the

claims by pointing to the prayer for relief is misplaced. In both Count III and Count VII, he seeks monetary damages. That he is generally seeking other forms of relief does not mean that Counts III and VII involve different considerations in terms of a potential remedy.

One final point on this count. The Rikers also contend that this claim should not be dismissed because, in the original lawsuit brought against them, this court declined to dismiss a breach of fiduciary duty claim against Mr. Riker as duplicative of a breach of contract claim.

But the situations are quite different. In the original suit, there was an independent basis pleaded for the fiduciary duty claim because the scope of that claim was broader than the scope of the contract claim.

Here, for the reasons I just described, there is no such different basis, and thus no independent basis for that claim here.

Riker did not plead a scope for Count VII that is any different from Count III.

Count VII is dismissed as a result.

I'm next going to address the

derivative counterclaims, which are Counts I, II, V, IX, and X.

I'll begin by discussing the threshold issue of derivative standing.

The plaintiffs argue that the derivative claims should be dismissed because Mr. Riker lacks standing to bring them. The crux of their argument is that because Mr. Riker is seeking to sell -- or has already contracted to sell -- his equity interest in the company, he cannot sue derivatively.

And as I explained above, Mr. Riker seeks specific performance of an oral contract to sell his company equity in Count VIII, which is dismissed without prejudice. Again, it is dismissed without prejudice at the plaintiffs' request.

If Mr. Riker does not successfully replead that claim or if he otherwise sells his equity, he will, of course, lack derivative standing. But I cannot reach that conclusion at this time.

The cases cited by the plaintiffs in their reply brief -- *Smollar*, *Ebix*, and *Scopas Technology* -- do not support the proposition that Riker's pending contract claim disqualifies him

from bringing derivative claims.

In the *Smollar* case, the Court rejected a proposed settlement agreement because the derivative plaintiff would have uniquely benefited from it. The Court did not say that the plaintiff lacked standing to sue derivatively.

In *Ebix*, the Court was concerned with a conflicted plaintiff's counsel. It was not concerned with the named plaintiff's standing.

And in *Scopas Technology*, the Court's discussion focused on the fact that the plaintiffs may be disqualified from bringing a suit derivatively when their interests were antagonistic to the interests of other shareholders.

This court has explained that the burden of a challenge to the adequacy of a representative plaintiff rests with the defendant. "The defendant must show a substantial likelihood that the derivative action is not being maintained for the benefit of the shareholders." That's from *Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242.

The movants have not met that burden at this time.

In their papers, they write that

"[Mr. Riker] cannot serve as a fair and adequate representative of Teucrium." But the only reason they give is that Mr. Riker seeks specific performance of an alleged oral contract to sell his equity. That fact alone is not enough to establish a "substantial likelihood" that Mr. Riker is not maintaining the derivative suit for the benefit of shareholders.

I want to be clear. I recognize the oddity of Mr. Riker's position, and there is obvious tension between his specific performance claim and his position as a derivative plaintiff. But as a matter of law, and for the time being, Mr. Riker maintains standing to pursue the derivative claims.

That brings me to Count II. The count alleges various instances of breach of fiduciary duty, largely based on facts already discussed in the direct counts. A few of these claims can be easily addressed on familiar grounds.

First, Mr. Riker brings a derivative claim centered around the allegation that Gilbertie and Miller breached their fiduciary duties by failing to provide proper notice for certain meetings. As already discussed with regard to Count VI, ratification dispenses with these allegations.

Second, Mr. Riker alleges that Gilbertie and Miller breached their fiduciary duties by authorizing "statements on behalf of Teucrium Trading that Mr. Riker's removal was for cause." Again, why this claim is not viable has already been explained with regard to Count III.

That leaves two Count II claims.

One, that Gilbertie and Miller breached their fiduciary duties by "authorizing a needless internal investigation" regarding Kahler's resignation in September 2018, holding an emergency meeting on the topic of the investigation, and failing to "communicate honestly about the existence of the investigation."

Two, that Miller violated his fiduciary duties by "failing to educate himself or ask even basic questions regarding the basis of Mr. Riker's removal."

I do not see any basis alleged in the counterclaims to support an inference that the company was harmed by either set of alleged facts, even if taken as true. The defendants proffer no explanation for why Gilbertie and Miller had a duty to disclose details of the internal investigation to members or in

public filings or why a lack thereof affected the company.

Miller's alleged lack of knowledge about the reasoning behind Mr. Riker's removal, meanwhile, is completely conclusory. That Miller, for instance, allegedly failed to ask questions at the meeting at which Mr. Riker was removed says nothing about his preparation before the meeting or whether he had thoughts on Mr. Riker's performance as CEO prior to the meeting.

Count II is therefore dismissed.

I will next consider Count I.

Count I -- brought against Gilbertie, Kahler, and Mullen-Rusin -- alleges that these officers breached their fiduciary duties by "knowingly caus[ing] materially misleading and incomplete information to be disseminated to Teucrium Trading's members and the stockholders of the Teucrium Funds."

At oral argument, the Rikers' counsel said that, despite the allegations about knowingly disseminating false and misleading information in Count I, they intended to bring a *Caremark* claim.

But I see nothing in the counterclaim complaint that reasonably supports that assertion,

other than a general paragraph about how Gilbertie, Kahler, and Mullen-Rusin owed a duty to the company to oversee and monitor its disclose and financial systems and procedures.

Apparently the officers somehow did not faithfully monitor these systems, while simultaneously having an intimate-enough understanding of the company's finances to allegedly cause the dissemination of misleading disclosures. Again, there is nothing in the briefing -- much less in the counterclaim complaint -- that could support a *Caremark* theory of liability.

In terms of the disclosure allegations, the plaintiffs point out that the contested disclosures were all forward-looking and argue that they were accompanied by cautionary statements that rendered an alleged omission or misrepresentations immaterial as a matter of law.

The Rikers retort that the plaintiffs knew, as of the time the disclosures were put out, that they were "materially inaccurate and unreasonable." The allegations in the counterclaim complaint, however, are purely conclusory.

At their core, the counterclaims fault

the plaintiffs for not exactly predicting expense ratios related to the company's various funds when providing projected "breakeven analyses" in the company's prospectuses. They also allege that the plaintiffs violated their fiduciary duties by not updating their breakeven analyses as, for example, the Federal Reserve reduced interest rates.

The defendants do not cite to any cases or law for the proposition that the plaintiffs were required to update their analyses in their fiduciary capacities, and I see no reason why market participants -- who could compare, for instance, interest rates at the time a breakeven analysis was issued to those at a later point in time and adjust their expectations accordingly -- would be materially misled by the prospectuses.

I do not see a reasonable basis to conclude that a party could view the breakeven expenses as projecting some absolute truth about a given fund until new prospectuses were filed. A representative example shows how these projections were disclosed.

A prospectus filed on April 29th, 2019 for the company's CANE fund that became effective on

May 1st estimated that the fund's expenses would amount to 1.06 percent of the assumed selling price, for example.

This projection was accompanied by language describing the analysis as based on a "hypothetical initial investment in a single share" and noting that it is "an approximation only." Explanatory notes to the analysis are also replete with words such as "estimated" and "anticipated" -- descriptions of the anticipated income state, for example, that "[t]he actual rate may vary and not all assets of the Fund will earn interest." The actual expense ratio for May 2019 and June 2019 were 1.07 percent and 1.31 percent, respectively.

Although the projected expense ratio was not equivalent to the actual one, it is not clear, again, how these projections could be materially misleading and only conclusory statements are put forth by the Rikers to indicate that the plaintiffs did not put forward their best efforts in providing these projections and instead knew they were misleading when issued.

Even the defendants couch their allegations with words like "essentially," and their

comparison of projections given at the start of the month to figures known at the end of the month are not relevant.

These conclusory allegations cannot support a viable claim for breach of fiduciary duty.

Count I is therefore dismissed.

Count IX, which I will address next, is related to Count I.

Count IX claims that the directors were unjustly enriched by the allegedly misleading financial figures because they received a portion of the company's allegedly inflated profits. That count relies on a description of the expense ratios projected in the company's prospectuses as "expense caps" that the plaintiffs caused the company to exceed, leading to "falsely and misleadingly inflated net income" that Gilbertie, Kahler, and Mullen-Rusin were allegedly able to benefit from as part of the company's profit-sharing plan.

The problem for the Rikers is that the projected expense ratios are not caps.

As I noted a moment ago, the expense ratios are projected figures. In particular, each ratio is an expression of the anticipated expenses

associated with a fund (derived from management fees, interest income, and other expenses) in relation to the historical share price of the fund.

As the plaintiffs rightfully note, nowhere in the company's prospectuses does it state that these expense ratios constitute a cap on the fund's expenses. Rather, again, as already discussed, the prospectuses make clear that the ratios are projected and subject to change.

Even drawing all reasonable inferences in the Rikers' favor, they have not stated a viable claim in Count IX. The claim relies on a reading of the company's prospectuses no reasonable inference can support.

Count IX is therefore dismissed.

The last derivative counts to address are Counts V and X, which I'll consider together.

In Count V, Riker alleges that Gilbertie, Miller, Kahler, and Mullen-Rusin were advanced legal fees and expenses in connection with previous litigation between the parties, which is *Gilbertie v. Riker et al.*, civil action number 2020-1018, in violation of the LLC agreement. This claim is dismissed. As the defendants concede

"without question, the LLC Act permits Teucrium Trading to advance expenses."

And, per the LLC Act, permissive advancement is "subject to such standards and restrictions, if any, as are set forth in [an LLC's] limited liability company agreement." That's from Section 18-108.

There is no language in the LLC agreement that limits permissive advancement. The language that the Rikers point to as supposedly limiting advancement simply lays out the terms for a mandatory advancement.

So the question here isn't whether mandatory advancement is owed, but whether the advancement provided to the plaintiffs was prohibited.

For this reason, *Gentile v. SinglePoint Financial*, 788 A.2d 111, which the defendants contend is "on all fours" with the situation here, is inapposite. That case concerned a director claiming that he was entitled to advancement under a mandatory advancement provision.

The only basis for contesting the advancement laid out in the counterclaims is that it was not commercially reasonable because it violated

the LLC agreement. But, as I just mentioned, it did not violate the plain text of the agreement given the lack of any limiting language -- and given, as the defendants recognize, that the LLC Act gives an LLC broad power to advance expenses as it sees fit. Count V is therefore dismissed.

Count X, an unjust enrichment corollary to Count V, alleges that Gilbertie, Miller, Kahler, and Mullen-Rusin unfairly benefited from being advanced monies to pay for their legal fees in the *Gilbertie v. Riker* case. Because the defendants have not pleaded viable counterclaims in Count V, Count X also must be dismissed.

That leaves us with Counts IV, XI, and XII -- which are the counterclaims brought by Ms. Riker.

Ms. Riker asserts three counterclaims: one for breach of contract against Gilbertie and Miller (in Count IV); 2) a fraud claim against Gilbertie (in Count XI); and 3) a conspiracy to commit fraud claim, again against Gilbertie and Miller (in Count XII).

I'll start with Count IV, the breach of contract claim.

Ms. Riker asserts that, as a former officer of the company, she has third-party beneficiary rights under the LLC agreement.

She claims that in removing her as an officer, Gilbertie and Miller breached provisions of the LLC agreement requiring them to use commercially reasonable and good faith efforts in managing the business.

But it's difficult to see how Ms. Riker could be considered a third-party beneficiary under Delaware law and the text of the LLC agreement.

To establish her status as a third-party beneficiary, Ms. Riker must "plead facts that allow a reasonable inference that (i) the [agreement] 'was intended for [her] benefit and (ii) 'the benefit to [her] is sufficiently immediate, rather than incidental.'" That's from *Skye Mineral Investors v. DXS Capital*, 2020 WL 881544.

Here, Gilbertie and Miller made no promises -- and certainly no direct or explicit promises -- to Ms. Riker in the LLC agreement. There is no language in the agreement that could lead me to reasonably conclude that she is a third-party

beneficiary.

Ms. Riker points to sections of the LLC agreement that speak to members' powers and duties in an effort to establish her third-party beneficiary status. But these sections do not make any promises to her or even to the company's officers generally that would allow her to bring a breach of contract claim. Thus, I cannot make a reasonable inference that the LLC agreement was made for her immediate benefit.

And given that fact, I need not address the plaintiffs' contention that Ms. Riker released this claim by entering into a separation agreement. Her claim fails, and Count IV is therefore dismissed.

That leaves Counts XI and XII, which are Ms. Riker's fraud claims.

Count XI alleges that Gilbertie defrauded Ms. Riker by representing to her that she would remain an officer and by failing to disclose his intention to remove her as an officer.

Count XII alleges that Gilbertie and Miller conspired to commit that alleged fraud.

To state a fraud claim, one of the

elements a claimant must plead is that they took "action or inaction taken in justifiable reliance upon [a false] representation." That's from *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069.

And "conspiracy to commit fraud is not an independent cause of action. It must be predicated on an underlying wrong: fraud." That's from *Boulden v. Albiorix*, 2013 WL 396254.

In other words, a conspiracy to commit fraud claim must adequately rely on a well-pleaded alleged underlying fraud to survive a motion to dismiss.

Here, Counts XI and XII must both be dismissed because Ms. Riker has failed to plead actionable fraud claims. She has not made well-pleaded allegations to support a reasonable inference that she justifiably relied on the purported misrepresentations.

Ms. Riker asserts that she resigned from the company and entered into the separation agreement in reliance on Mr. Gilbertie's misrepresentation. But I cannot reasonably conclude that she would have resigned from the company in reliance on a promise to keep her employed. It makes

no logical sense.

If Ms. Riker did rely on Gilbertie's promise in signing the separation agreement, that reliance was plainly not justifiable. It is difficult, if not impossible, to conceive of someone resigning in reliance on a promise to keep them employed, regardless of whether that promise is true.

In their opposition brief, the Rikers argue that the plaintiffs' position is a "strawman" which ignores the other aspects of their claim. But justifiable reliance is a necessary element of any common law fraud claim.

Far from presenting a strawman, the plaintiffs have rightly pointed out that the defendants have failed to adequately plead a fraud claim due to a lack of justifiable reliance. Counts XI and XII are dismissed.

That completes my ruling on all 12 of the counterclaims.

To reiterate, I am granting the plaintiffs' motion to dismiss the counterclaims, with the exception of portions of Count III. And Count VIII, while dismissed, is dismissed without prejudice.

The portion of Count III that survives is limited to the allegation that the plaintiffs acted in bad faith in violation of the LLC agreement in removing Mr. Riker as CEO.

I am going to ask that the parties confer on and submit an implementing form of order for this ruling within a week.

And I will pause there, since I've been talking for quite a long time, and ask if either side has any questions for me.

ATTORNEY GOLDEN: Your Honor, this is Mathew Golden. No questions at this time. We thank the Court for its time on this matter.

THE COURT: Thank you, Mr. Golden.

ATTORNEY BROWN: Your Honor, this is Paul Brown. No questions for me, subject to any questions regarding clarification from Mr. Lane or Ms. Worcester.

THE COURT: Thank you, Mr. Brown.

Any questions, Mr. Lane or Ms. Worcester?

ATTORNEY WORCESTER: No, Your Honor.

THE COURT: Okay. Thank you very much. Thank you for your patience as I worked through

my ruling. I will look for your proposed form of order.

I hope you enjoy the rest of the day. Thank you.

VARIOUS COUNSEL: Thank you, Your Honor.

(Proceedings concluded at 11:43 a.m.)

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CERTIFICATE

I, DOUGLAS J. ZWEIZIG, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 39 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 13th day of April, 2022.

/s/ Douglas J. Zweizig

Douglas J. Zweizig
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter