



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHRISTOPHER J. FEELEY, AK-FEEL, LLC, :
a Delaware limited liability company, :
and OCULUS CAPITAL GROUP, LLC, a :
Delaware limited liability company, :

Plaintiffs, :

v : Civil Action

No. 7304-VCL

NHAOCG, LLC, a New York limited :
liability company, ANDREA AKEL, GEORGE :
AKEL, DAVID NEWMAN, and DANIEL HUGHES, :

Defendants. :

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, September 26, 2012
2:02 p.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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ORAL ARGUMENT ON CROSS MOTIONS TO DISMISS, PLAINTIFFS'
AMENDED INTERIM FEE PETITION, and PARTIAL RULINGS OF
THE COURT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES:

2 ANDREW S. DUPRE, ESQ.
3 McCarter & English, LLP
4 for Plaintiffs

4 BRETT McCARTNEY, ESQ.
5 Morris James LLP
6 -and-

6 JEANETTE N. SIMONE, ESQ.
7 of the New York Bar
8 Hinman, Howard & Kattell, LLP
9 for Defendants NHAOCG, LLC, George Akel, David
10 Newman, and Daniel Hughes

8 MICHAEL W. McDERMOTT, ESQ.
9 Berger Harris, LLC
10 -and-

10 THOMAS A. RILEY, JR., ESQ.
11 JONATHAN W. BRADBARD, ESQ.
12 of the Pennsylvania Bar
13 Riley, Riper, Hollin & Colagreco
14 for Defendant Andrea Akel

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1 THE COURT: Welcome, everyone.

2 MS. SIMONE: Good afternoon.

3 MR. McCARTNEY: Good afternoon.

4 MR. RILEY: Good afternoon, Your
5 Honor.

6 THE COURT: I think I know everybody
7 at this point. So who's going to go first? We've got
8 two motions to dismiss and a fee motion.

9 MR. DUPRE: I will, Your Honor.
10 Mr. Kelly asked me to send his apologies to Your
11 Honor. He's stuck doing expert depositions in a big IP trial
12 before Judge Stark. So I'm on my own today, sir.

13 THE COURT: All right. It's
14 consistent with his minimal supervision.

15 MR. DUPRE: Maybe I should have said
16 modest.

17 THE COURT: Minimal, yet entirely
18 adequate to fulfill his ethical duties; right?

19 MR. DUPRE: And cover our insurance
20 duties as well.

21 Mrs. Simone and I agreed, Your Honor,
22 if it's okay with you, we'll just do the two motions
23 to dismiss at once. Then I'll sit down and let
24 Mrs. Simone respond, and then I'll turn to fees after.

1 THE COURT: That's fine.

2 MR. DUPRE: On the motions to dismiss
3 we have -- for the record, Andrew Dupre, McCarter &
4 English --

5 THE COURT REPORTER: Would you speak
6 into the microphone, please?

7 MR. DUPRE: For the record, Andrew
8 Dupre, McCarter & English, for all plaintiffs.

9 We have AFE's motion to dismiss and
10 Mr. Feeley, the individual's motion to dismiss the
11 counterclaims. Mr. Feeley's motion to dismiss is
12 everything. Mr. Feeley will be out of the case if he
13 wins. AFE, conversely, concedes that it has to answer
14 the breach of contract/gross negligence count. So it
15 will not result in a complete dismissal for AFE.

16 On the briefs, I thought there were
17 two interesting arguments that I'd like to focus on,
18 Your Honor, and that's USACafes, No. 1, and Auriga
19 Capital, No. 2. I'll briefly address the -- the
20 remaining counterclaims.

21 For the most part, they seem to be
22 either noncognizable or abandoned at this point, but
23 it's really a USACafes and Auriga Capital day.

24 Starting with USACafes on Mr. Feeley's

1 motion, USACafes is a 1991 Chancellor Allen opinion.
2 The case stands for the proposition that the principal
3 of a general partner can be sued by the LPs in the
4 limited partnership on a breach of fiduciary duty
5 theory. I don't think there's any dispute about what
6 the case stands for on that limited proposition.

7 USACafes itself says it's not -- it
8 doesn't extend to corporate opportunity or to waste
9 claims. And if it doesn't extend to those, it
10 obviously doesn't extend to other subspecies of the
11 duty of loyalty like Blasius and disclosure and
12 entrenchment and similar -- similar types of duty of
13 loyalty claims. It's just a misappropriation case
14 where there was merger consideration paid and these
15 bandits that were the principals of the GP made off
16 with the cash in a -- in a bribe side deal. When I
17 read that case, it seems like a perfect candidate for
18 a resulting trust rather than a -- an odd extension of
19 piercing the corporate veil, but there it is. That's
20 what it says and that's what it stands for.

21 So if the case, as it says on its face
22 in Note 3, doesn't apply to corporate opportunity or
23 waste claims, then for NHA's counterclaim to succeed,
24 it must have been extended somewhere in progeny case

1 law, because the only claims against Mr. Feeley are
2 gross negligence, a duty of care claim, which USACafes
3 also doesn't reach, and theft of corporate opportunity
4 claim for these two deals that are identified in the
5 counterclaim complaint. So that's all they're going
6 after him for. That's all there is is corporate
7 opportunity and duty of care.

8 When you look at the case law progeny
9 of USACafes, which is quite extensive, I have not been
10 able to find a single case that expressly says it --
11 the duty is extended to corporate opportunity claims.
12 And I think that makes sense. When you start with the
13 cases that the defendants cited for -- to advance an
14 extension of USACafes, we have Paige Capital, Auriga
15 Capital, and Bay Center. Bay Center is the case where
16 the Chancellor took USACafes out of the LP context and
17 put it in the LLC, unfortunately, not challenged by
18 the defendant in that case. Similarly, in Auriga
19 Capital, the defendant did not contest that. And that
20 was just a very colorful exchange in the oral argument
21 on the appeal of Auriga Capital last Wednesday.

22 Paige is a misappropriation case in
23 the sense that the -- the hedge fund manager, Michelle
24 Paige, locked up the capital in the hedge fund for no

1 purpose and with an indefinite holding period. She --
2 she could have held it forever and never gave it back.
3 Basically she took that \$40 million and would
4 gradually have whittled it away forever. Under the
5 facts of the case, it's clearly a misappropriation
6 case. There was no allegation of corporate
7 opportunity. It doesn't fit the facts of our case.

8 In Bay Center, the defendant was a
9 GP -- he was the director of a GP that was the
10 managing member of an LLC. And he caused the LLC to
11 pay off the loan that he was a personal guarantor on
12 instead of all the other loans. So basically he took
13 all the LLC's cash, paid off the one loan that had him
14 personally liable; and then when the construction
15 project ran into trouble, the whole LLC fell apart
16 because it didn't have any cash. So, again, it's a
17 misappropriation case. Take that cash, put it on your
18 own debt and not for the purpose of the LLC.

19 And then in Auriga Capital, that's a
20 fraudulent auction case. There's a golf course. The
21 principal of the GP of the LLC managing member wants
22 to steal the golf course from the LP. So he comes up
23 with a sham auction to buy it himself. Again, he's
24 stealing real property from the LPs. It's a

1 misappropriation case, and it fits the limitation in
2 the original USACafes opinion.

3 So those are all the cases that NHA
4 cited, and none of them apply on this motion to
5 dismiss. You kinds got to ask yourself why? Where's
6 the case that actually fits this claim? And it
7 doesn't exist because it doesn't make sense in the
8 context of a cestui que trust.

9 A cestui que trust is a Medieval
10 device where, you know, if it's 1096 in the Angevin
11 Empire and Urban II calls the First Crusade and I feel
12 called to take up the cross and I ask my friend, the
13 neighboring baron, to hold my castle so I don't have
14 to pay a tax to the Crown by leaving it to my heirs,
15 that's what a cestui que trust is. It's old French.
16 It's not Latin. It's not a usufruct. It's a
17 bailment. It's a simple bailment of real property.

18 So when you use USACafes to go get
19 this doctrine out of bailment law and cestui que trust
20 law, it applies to misappropriation. It's not -- it
21 doesn't go with corporate opportunity or disclosure or
22 Blasius claims or anybody else.

23 And there were a couple cases that I
24 found. Bay Center is one. There was another Vice

1 Chancellor Parsons case called Cargill where he was
2 talking about this in the statutory trust case where
3 they did a big survey of the law and went backwards
4 since 1991. Nobody found any cases that applied this
5 to duty of care or to corporate opportunity claims.

6 So I haven't found it. The Chancellor
7 didn't find it. Vice Chancellor Parsons didn't find
8 it. It's not cited in the answering brief. I don't
9 think it's there. I don't think anybody has ever done
10 that with USACafes. And this certainly is not a good
11 case to do it in.

12 THE COURT: You can envision a
13 successful corporate opportunity being analogous to
14 misappropriation, though, couldn't you?

15 MR. DUPRE: Sometimes. I think Paige
16 Capital is as close as Delaware law ever got to that.
17 So you could kind of view Paige Capital as
18 entrenchment if you wanted to try to stick it in a
19 different subset. But I think if you do that, you're
20 really straying outside of the original limited
21 holding of USACafes based on cestui que trust to no
22 purpose. Like, why would you do that instead of
23 relying on a conversion theory or resulting theory?
24 Why would you take this doctrine that's clearly an

1 insult to the law of the corporate veil and try to
2 expand it into everything, particularly duty of care?
3 All the money in this case is on duty of care. It's
4 about -- it's about the failed Gatherings transaction.
5 It's crystal-clear to me -- and Vice Chancellor
6 Parsons says it in Cargill -- that nobody has even
7 come close to applying USACafes to duty of care.

8 THE COURT: Is it possible to reframe
9 under this misappropriation concept the idea that
10 really what we're talking about here is it's almost
11 like a fraudulent conveyance, where you're chasing the
12 proceeds of the breach of loyalty?

13 MR. DUPRE: Yes. I think that's
14 correct, Your Honor, which is why I suggest, you know,
15 20-20 hindsight, USACafes would have been a great
16 resulting trust case.

17 THE COURT: But you'd need some --
18 walk me through the resulting trust analysis and how
19 that works on those facts.

20 MR. DUPRE: So there's money in -- in
21 USACafes there's money. It's meant to pay for this
22 company that merges into a -- basically an innocent
23 unrelated third-party entity. So there's a -- there's
24 a pot of money that's meant to pay for these goods.

1 Through corporate shenanigans and basically outright
2 bribery, half the pot of money ends up in the hands of
3 these individuals for whom it was not meant and never
4 really meant. And the logical outcome of that, I
5 think, is they just hold a resulting trust for the
6 shareholders of the entity that got bought out rather
7 than let's throw the corporate veil out the window,
8 ala USACafes, based on cestui que trust law.

9 You know, it's an old case. It's an
10 important case for personal jurisdiction. It's an
11 important case for aiding and abetting the breach of
12 duties. So it's got a lot of progeny; but obviously,
13 standing here, I'm not the first one to ever have
14 criticized that doctrine. The Chancellor lays into it
15 every time he -- every chance he gets. He did it in
16 Bay Center. He did it in Paige Capital. He did it in
17 Auriga Capital. He did it in Gotham Partners. He did
18 it in Weeden.

19 There's six or seven big-time
20 criticisms of this doctrine floating about in Delaware
21 law, which is why I suggest to Your Honor there's both
22 a narrow and a broad holding on offer here. A narrow
23 holding is "Look, they pled corporate opportunity and
24 duty of care. USACafes is a misappropriation

1 doctrine. You lose. That's it." The two possible
2 broader holdings are "Look, this just doesn't make any
3 sense. It can't be squared with the corporate veil or
4 a slightly narrower holding. Nobody's ever challenged
5 this in an LLC context before," unless you -- you view
6 that commentary in last week's oral argument in Auriga
7 Capital as true. Nobody has ever challenged it in an
8 LLC context. And there's a difference between LPs and
9 LLCs. If you just compare 18 17-403 to 18 -- or 6
10 18-303 upgrade, the default in a limited partnership
11 is that you can sue the GP on the debts of the
12 partnership.

13 So, arguably, USACafes at least kind
14 of fits partnership law. The default in an LLC is
15 that you can't sue the managing member for debts -- or
16 any of the members for debts or obligations of the
17 LLC. So there's this -- this narrow difference
18 between LPs and LLCs that can be applied here if Your
19 Honor was inclined to just eject it from LLC law but
20 not characterize it in its entirety, as the Chancellor
21 is want to do.

22 THE COURT: Chancellor has never
23 pulled the trigger on this.

24 MR. DUPRE: Very true. But if you

1 read Paige Capital, Auriga Capital, and Bay Center, he
2 criticizes the defendants in every one of those cases
3 for not launching a frontal assault on it. It seems
4 like he's -- he's daring somebody to -- to challenge
5 it as an insult to the corporate veil. It's almost as
6 if he's saying "Hey, I wrote Gotham Partners and
7 Weeden. Is anybody listening to me?" And my attitude
8 is well, at least in the LLC context, it doesn't
9 belong in here because of the difference between
10 17-403 and 18-303. But my -- my private opinion as a
11 Delaware lawyer is that it's bad law altogether.

12 THE COURT: Okay. What else should I
13 know?

14 MR. DUPRE: If --

15 THE COURT: You said that was one of
16 the two issues you wanted to stress?

17 MR. DUPRE: Yes. Your Honor, the
18 other one is this -- it's in AFE's motion. That was
19 in Mr. Feeley's motion. I should say the only reason
20 they can try to hold Mr. Feeley in this case is is
21 this USACafes thing. If this goes, he's out.

22 In AFE's motion we're really arguing
23 about Auriga Capital, its default fiduciary duties.
24 It's pretty clear after last Wednesday that the

1 Chancellor put what is a, sort of, 10-page exposition
2 of why there are default fiduciary duties in Delaware
3 LLCs, and it was -- it was reasoned on a law and
4 economics position that if there are not such duties,
5 then people will lose confidence in the Delaware LLC
6 as a corporate form. Justice Steele clearly does not
7 agree with -- with that view, as stated in all of
8 the -- all of its academic commentary. The answering
9 brief argues that Auriga Capital solved this issue
10 once and for all. I -- I just don't think it does.

11 Fisk Ventures, R&R Capital, Brog v
12 America TravelCenters, all those Chancellor Chandler
13 cases from 2008, 2009 where he's citing the Steele
14 contractarian law and economics position are all
15 floating around there. They're all good law. If it
16 was settled, it would have been settled in 2008
17 when -- when Vice Chancellor said "Hey, it's a
18 contractarian approach. You got nothing. If it's not
19 in the contract, then don't even enter the courthouse
20 doors or try a good faith and fair dealing claim."

21 I think there's -- there's obviously a
22 split of authority in Delaware law here. It may be
23 tempting to hope that the appeal of Auriga Capital
24 will resolve it; but the commentary from the Supreme

1 Court suggests to me that they view all that, all that
2 Chancellor Strine exposition, as dicta and they're
3 trying not to -- not to opine on it. It's the wrong
4 case. So I think we are stuck asking Your Honor for
5 your opinion rather than saying "Well, let's just put
6 it on the back burner until we get an opinion from the
7 Supreme Court on this." It seems unlikely that
8 they're going to give us that direct ruling on default
9 fiduciary duties in the LLC act.

10 THE COURT: Okay.

11 MR. DUPRE: If Your Honor will allow
12 me to briefly touch on the contract itself that kind
13 of goes in the Auriga claim. We're talking about
14 Section 2.10 in the contract. It's a page and a half
15 long. It's written in 2009. It doesn't say
16 exculpation. It doesn't reference 18-1001 at all.
17 It's certainly no marvel of draftsmanship. I think in
18 the briefs I called it rambling and turgid, but it --
19 it's there. It's part of the contract. It's up to
20 Your Honor to tell us, you know, based on this plain
21 language of a page and a half, what were these parties
22 trying to do? Were they trying to make an
23 exculpation, "Keep all the fiduciary duties but these
24 limited things you're exculpated from," or were they

1 trying instead to say "These are the things that we're
2 liable for and not other things," which is a
3 disclaimer?

4 On its face, it doesn't say it's doing
5 either. We need to use this rambling, long provision
6 to figure out if it's an exculpation or it's a
7 disclaimer. I think given the context of the law in
8 2009, which includes R&R Capital, Fisk Ventures,
9 Justice Steele's various commentary and articles, and
10 all the other ones that I said in the briefs, it's a
11 much fairer read of that long provision to say "Hey,
12 these are the only things we're liable for. We're
13 liable for gross negligence. We're liable for fraud,"
14 not "If we are liable on some unstated theory not
15 referenced in this provision, we'll be exculpated
16 unless it's fraud or willful misconduct."

17 It's -- it's certainly not the best
18 provision I've ever seen, but there's at least a
19 reasonable argument to be made, given the state of law
20 in 2009, that they were trying to say all of their
21 duties and not "We have duties and we are exculpated
22 in these events."

23 Just turning briefly to the other
24 couple claims that are in the case. It's not clear to

1 me what NHA is abandoning and what it's still fighting
2 for here. Count II is aiding and abetting breach of
3 contract. That just flat out doesn't exist in
4 Delaware law. Fitzgerald v Cantor. That's just a
5 mistake, and it can be summarily disposed of.

6 Count IV against both Feeley and AFE
7 is tort negligence. Again, maybe they're liable on
8 the fiduciary duty of care if Your Honor wants to
9 drastically expand USACafes; but they're certainly not
10 liable in tort negligence under Delaware law. That's
11 just BVI and Metro Comm. Holdings, Albert v Alex Brown
12 Services.

13 THE COURT: You didn't think that the
14 reference to gross negligence in the body of the
15 counterclaims is enough to elevate this to a gross
16 negligence claim as opposed to a pure negligence
17 claim?

18 MR. DUPRE: Well, it says "COUNT IV -
19 NEGLIGENCE." It doesn't say -- they're not arguing
20 that. They're arguing it's a fiduciary duty of care
21 claim in the answering brief. And they already have a
22 fiduciary duty of care claim. It's Count -- Count
23 III. So I would posit that that argument is a bit
24 disingenuous to show up in a reply brief. It's

1 clearly meant as to negligence or else it's -- it's
2 entirely superfluous to the duty of care claim
3 that's -- that's Count III.

4 That leaves the declaratory judgment
5 claim. Mr. Feeley is not a proper party to that.
6 They're trying to use the standard declaratory
7 judgment act, not the declaratory judgment power in
8 the LLC act, which is what the plaintiffs used to --
9 to get Mr. Feeley. But if you use the DJ act, you got
10 to do it with the parties that are the parties to the
11 contract. So they're trying to DJ on the OCG
12 operating agreement. Go ahead and try it against AFE,
13 but it fails on the plain language of the contract,
14 which I'll get to in a minute; but you can't even put
15 Mr. Feeley in that count as a party.

16 For AFE there are six provisions in
17 that contract -- and I list them there in the
18 answering brief on the last page -- that say "If we're
19 going to wind down this company and cease doing
20 business, this is how we do it so we don't blow up the
21 LLC and get sued by Freddie Mac and these third-party
22 investors that are the vast majority of the money."

23 These guys like RiverOak and Katz are
24 coughing up 90 percent, 92 percent, 95 percent of the

1 money. And NHA just doesn't understand the loan
2 contracts on these documents. Maybe it's because they
3 were drafted by Ballard Spahr, which NHA has fired and
4 now they -- they don't have the benefit of Ballard
5 Spahr's advice on how these contracts were drafted and
6 how they interlink and who the key man are and who the
7 nonrecourse principals are and what happens if you
8 fire the key man and who you're liable to; but those
9 wind-down provisions are in the contract for a reason.
10 And the reason is if we don't follow the wind-down
11 provision, we're going to get sued for breach of
12 fiduciary duty by these innocent third-party investors
13 and we're going to lose.

14 So this idea that in the liability
15 provision -- which, again, is Section 2.10 and it's
16 either a disclaimer or a -- an exculpation clause
17 depending on what Your Honor tells us -- that's a
18 unilateral right to suicide the company and just, you
19 know, throw the company out the window, third-party
20 investors be damned, loan contracts be damned; it's
21 NHA's unilateral right, no good faith read of the
22 contract can say that in the context of Section 11,
23 which is the dissolution and wind-down provision, and
24 all of its other sections.

1 Now, even if you wanted to go there,
2 they'd be stuck in the LLC act. You can't just -- if
3 you want the company to stop doing business, you're
4 either winding it down or dissolving it. And the --
5 nobody's petitioning for wind-down. Nobody is
6 petitioning for a default. Nobody is petitioning for
7 a For Sale with these properties or a receiver. And
8 the reason nobody is doing that is because we can't.
9 We'll blow up the loan contracts on the third party --
10 nominal third-party invested assets.

11 So, you know, we got this one phrase
12 that says if NHA causes the company to cease doing
13 business, NHA and not OCG has to pay Mr. Feeley and
14 Mrs. Akel severance. That reads just like it should
15 read. If NHA blows up the company, NHA gets stuck
16 with the severance and not OCG, because if OCG gets
17 stuck with the severance, Mrs. Akel and Mr. Feeley are
18 35 percent paying themselves their own severance based
19 only on NHA's malfeasance. When I read that
20 provision, that's the only -- the only conclusion that
21 I can draw from it.

22 THE COURT: Why isn't one possible
23 reading of that provision that you look at the Section
24 11.2 dissolution alternatives?

1 MR. DUPRE: Uh-huh.

2 THE COURT: And to the extent -- I'm
3 sorry; 11.1 dissolution alternatives. To the extent
4 one of the Section 11.1 dissolution alternatives
5 involves a determination by NHA, the company should
6 dissolve and cease business operations, then those
7 obligations are triggered. So the one that jumped out
8 at me was 11.1(b), "The vote or written consent of a
9 majority in interest of the Members." Because of the
10 way this company is set up, to trigger 11.1(b), that
11 would require the vote of both AK-Feel and NHA. NHA
12 would, thus, have made an affirmative determination
13 that the company should be dissolved. And under 2.10,
14 NHA then would have determined that the company shall
15 cease business operations as a result of that vote --

16 MR. DUPRE: Uh-huh.

17 THE COURT: -- and have voluntarily
18 taken on these payoff obligations. And you could
19 envision that -- and I don't know what they might be,
20 but you could envision there might be some 11.1(c)
21 scenario where that might happen as well.

22 Isn't that a way to read these
23 provisions together without having to make 2.10 a
24 blow-up-the-company alternative but, rather, just a

1 recognition if NHA is in the game on the wind-down and
2 is going along with it, then they pick up the cost?

3 MR. DUPRE: No, Your Honor. I -- I
4 can't agree with that.

5 THE COURT: Okay.

6 MR. DUPRE: And there are several
7 reasons. One, they're not asking for dissolution. So
8 they're not in this provision at all.

9 THE COURT: Oh, I know they're not
10 here.

11 MR. DUPRE: Uh-huh.

12 THE COURT: But isn't that what the
13 language -- isn't that what the language at the end of
14 2.10 means as opposed to giving them an automatic
15 termination right?

16 MR. DUPRE: I think there's a better
17 read, and it comes across in NHA's briefs, Your Honor.
18 NHA had the power of the purse. So if you read
19 Section 4.6, NHA has to cough up a line of credit for
20 this company between January 2010 and January 2012.
21 So NHA can vote with its power of the purse between
22 January 2010 and January 2012 and say "You know what.
23 We're just not doing any more deals. No, we're not
24 doing anything else. No matter what you bring to us,

1 we're going to say no," which they actually have said
2 that in many filings in this case, "and we're not
3 going to give you any more money on the line of
4 credit. Go home." And if there's no operating income
5 in OCG, that's game over. If -- AFE doesn't have any
6 money. NHA has functionally, through its power of the
7 purse, dissolved the company, and in that case it has
8 to pick up the severance because it's made a choice.

9 Now, that didn't happen here because
10 they have a home run investment in UV Slippery Rock
11 that's in the ownership entity and in the ownership
12 line, and it's paying money into the company. So OCG
13 can pay its own way. It is not subject to NHA's power
14 of the purse and, therefore, that 2.10 read doesn't
15 matter anymore. It would have mattered if -- if
16 Feeley came in on, you know, January 1, 2010, and NHA
17 decided they hated him on February 1, 2010, and said
18 "No more money. Get out of here. We're not doing
19 anything with you, you crook," that last sentence in
20 2.1 would have applied because AFE couldn't fund the
21 operation on its own.

22 THE COURT: They couldn't have shut
23 down the line of credit at that point, could they?
24 They guaranteed it for two years.

1 MR. DUPRE: Yeah, I suppose that's
2 true, Your Honor. What they could have done at the
3 end of two years, if the company had no good
4 investments like Paige Capital, they could have said
5 "Forget it. There's no money coming in."

6 THE COURT: You know, I would buy
7 that -- it doesn't seem to me why your reading of that
8 excludes 11.1 as another example. I mean, where
9 your -- the example you just gave would be an example
10 of a constructive determination, an effective
11 determination by NHA that the company shall cease
12 business operations. As a factual matter, NHA would
13 have made that decision by saying no to everything.

14 MR. DUPRE: Uh-huh.

15 THE COURT: So yeah, that would fit
16 within the last sentence. But I'm not clear why it
17 wouldn't also fit within a situation where they
18 actually agreed to shut down business operations.

19 MR. DUPRE: So your question, if I can
20 clarify, Your Honor, is NHA votes and it's 50-50, AFE
21 acquiesces, it also votes yes?

22 THE COURT: Yeah, they both vote yes.
23 So you vote-determine to cease the business
24 operations --

1 MR. DUPRE: But the vote comes from
2 NHA.

3 THE COURT: Yeah, they made a
4 determination.

5 MR. DUPRE: That seems reasonable to
6 me, too. So NHA votes yes and AFE says "Well, okay.
7 If you guys are really unhappy, we'll vote yes, too,
8 but you got to pick up the severance," that's a
9 reasonable read of that provision. What's not a
10 reasonable read is where we are now, which is NHA
11 votes yes and AFE votes no and "Okay. Well, AFE's
12 vote doesn't matter. We get to cut it down, anyway."

13 THE COURT: I mean, the problem with
14 that is there's no right language in here. There's
15 nothing in here that says "NHA shall have the right to
16 do X." It's a conditional one, "if NHA determines
17 that the company shall cease business operations."
18 There's no power associated with that conditionality.

19 MR. DUPRE: Other than the implied
20 power of the purse, Your Honor.

21 THE COURT: Sure. Which is another
22 provision, a separate provision.

23 MR. DUPRE: Yes.

24 THE COURT: Okay. What else should I

1 know?

2 MR. DUPRE: The only thing I have left
3 is this, sort of, Bell Atlantic v Twombly/Iqbal
4 problem with the self-dealing claims against AFE. So
5 we got five paragraphs in the counterclaims.
6 Mr. Feeley set up a different company and took these
7 corporate opportunities for himself with no mention of
8 AFE at all; and then you get down to Count I, AFE
9 breach of contract stealing the opportunities.

10 Now, if we could just cut through the
11 -- the posturing on this. Mrs. Akel works for NHA.
12 She knows that AFE doesn't have these opportunities.
13 We just filed AFE's taxes and gave them to Mrs. Akel.
14 They would be in the taxes if it owned anything. My
15 opinion of that count is that there's no fact
16 whatsoever that supports it in the counterclaims
17 because there is no allegeable fact in good faith that
18 could be alleged to keep AFE as opposed to Mr. Feeley
19 in there on the corporate opportunity claims.

20 It's Mr. Feeley on his own account,
21 Mr. Feeley in his own name, Mr. Feeley with a
22 different company, Mr. Feeley hiding it from
23 Mrs. Akel. It just goes on and on in paragraphs 225
24 to 231 of the counterclaims. AFE just doesn't belong

1 in that count, and it wants to be out of it because it
2 is a separate discovery expense that really lands on
3 Mr. Feeley. There's no reason for AFE to be paying
4 for that.

5 THE COURT: But subject to your other
6 arguments --

7 MR. DUPRE: Yes.

8 THE COURT: -- Feeley can be sued for
9 that.

10 MR. DUPRE: It would be a derivative
11 claim for OCG, and they can only get him in mandatory
12 arbitration. So sure, but he can't be sued here.

13 THE COURT: But that's because of your
14 view that it necessarily implicates the employment
15 agreement.

16 MR. DUPRE: The only way that he is --
17 or USACafes.

18 THE COURT: Yes.

19 MR. DUPRE: It's either an employment
20 agreement claim or we throw the employment agreement
21 out the window via USACafes. AFE is the managing
22 member. So there's this entity shield between Feeley
23 and NHA.

24 Now, OCG can get him because he's a

1 first party on the employment agreement or NHA can get
2 him if Your Honor is willing to dramatically extend
3 USACafes; but other than that, he's out.

4 THE COURT: I'll be honest with you,
5 it just seems -- that part of it seems a little weird
6 to me. I think that's where this -- whether we call
7 it USACafe tension or corporate shield tension, et
8 cetera. AFE's brain is the same brain as Feeley.

9 MR. DUPRE: Uh-huh.

10 THE COURT: So when that brain learns
11 of an opportunity --

12 MR. DUPRE: Right.

13 THE COURT: -- if that brain then
14 decides to use another entity to take advantage of it,
15 like whatever that was -- I forget the name of it, if
16 it's Dairy Queen, Feel, or whatever it was, whatever
17 the --

18 MR. DUPRE: College-Feel Inn.

19 THE COURT: College Inn Feel, like in
20 the soup.

21 MR. DUPRE: Uh-huh.

22 THE COURT: It has to be that you can
23 get somebody there.

24 MR. DUPRE: Sure. You can get Feeley,

1 but you just can't get him here. That's -- that's
2 really what we're arguing about. And it's kind of the
3 same argument that Mrs. Akel made two weeks ago, is
4 why are these individuals in this case? And at last,
5 when we get the answering brief, it's USACafes is duty
6 of care and corporate opportunity claims, which it
7 isn't. Other than that, no individuals. And if
8 you're going to allege that Feeley's out there taking
9 opportunities in his own name, they -- they chose to
10 plead the counterclaims that way, I think in good
11 faith, because they know that AFE doesn't have those
12 opportunities. They know if anybody has them, it must
13 be Feeley because Akel is on the defendants' side.

14 THE COURT: Well, what if -- what if
15 AK-Feel does the taking and effectuates the taking by
16 putting it in a third-party entity? It would be
17 pretty stupid for AK-Feel to do the taking within
18 itself because then Andrea gets 45 percent of it,
19 which is not something I think your guy wants.

20 MR. DUPRE: Precisely.

21 THE COURT: So AK-Feel isn't going to
22 take the opportunity and keep the opportunity. It's
23 going to divert the opportunity into some entity over
24 there.

1 So why, if -- if the allegation is
2 that AK-Feel, through its brain inside the head of
3 Mr. Feeley, has been diverting, why can't AK-Feel be
4 targeted for the diverted?

5 MR. DUPRE: The shortest answer is
6 that's not what the counterclaims say. It's not
7 alleged. But as a theoretical matter, outside of the
8 counter -- what the counterclaims say, the reason it
9 can't be charged is who gets the money? If it's in
10 this other entity that only Feeley has a hundred
11 percent and AFE goes down on a fiduciary duty of
12 loyalty and corporate opportunity claim, it lands
13 45 percent on Mrs. Akel, who's the innocent party.
14 And the counterclaims just don't allege that Mrs. Akel
15 and Mr. Feeley are in there colluding to stick it in
16 some other entity and split it up. They allege the
17 exact opposite. They allege that AFE is broken,
18 Feeley and Akel hate each other, Feeley is out there,
19 you know, twirling his mustache, cloak and dagger,
20 taking all this other stuff for himself in his
21 personal name or in his, you know, other entity names.

22 So if we read the contract in a
23 hypothetical basis the way Your Honor's doing, we
24 basically land this liability 40 percent on AK-Feel,

1 which is also my client, that it's not AK-Feel's
2 fault, as stated in the -- in the counterclaims. It's
3 Feeley's fault.

4 THE COURT: Right. So AK-Feel, then,
5 would have to turn around and seek to shift it.

6 MR. DUPRE: Well, they have to be
7 alter egos for that to be true. The Feeley
8 brain/AK-Feel brain argument basically says that
9 Feeley and AK-Feel are alter egos. And I think, first
10 of all, that argument has been expressly disclaimed in
11 the answering brief. And, secondly I think that's
12 pretty good law that even if you're a single-member
13 LLC with one guy who has all the capital and the --
14 and he's the manager, he's still not an alter ego
15 under 18-303. And even innocent third parties can't
16 sue him, not -- not -- sophisticated parties in a
17 corporate dispute have already been found to be
18 wrongdoing.

19 THE COURT: Why wouldn't that be the
20 one USACafes situation? Because there we would have a
21 diversion, we'd have a misappropriation where Feeley
22 had taken this thing through his actions as a member,
23 a managing member, and had diverted it somewhere else.
24 Just, instead of going into his pocket in the same

1 sense that cash goes into your pocket, it would go
2 into one of his other entities.

3 MR. DUPRE: You'd have to accept that
4 USACafes covers corporate opportunities. The case
5 specifically says that it doesn't. And I think the --
6 the analogy to cestui que trust, which is where it
7 came from -- Vice Chancellor Parsons just went over
8 this in comparing statutory trusts, cestui que trusts
9 in Cargill. That's a bridge too far. It's a -- that
10 doctrine is a bailment doctrine. It's not a
11 disclosure, entrenchment, waste, corporate
12 opportunity. Nobody's ever done that before. Your
13 Honor would be the first to expand USACafes in that
14 manner.

15 THE COURT: I'm a crazy guy. All
16 right. Well, look, it's a lot to think about. I'm
17 looking forward to thinking about it. I've been
18 thinking about it. Let me hear -- unless you have
19 anything else, let me hear the opposition.

20 MR. DUPRE: No, Your Honor. Thank you
21 very much.

22 THE COURT: Welcome back, Ms. Simone.

23 MS. SIMONE: Thank you, Your Honor.

24 I'm, again, here on behalf of NHA.

1 And first I'd just like to start out
2 by reading paragraph 244 of NHA's amended
3 counterclaims, which states, "Upon information and
4 belief" --

5 THE COURT: Hold on. Let me get
6 there. I got it right here.

7 MS. SIMONE: Okay.

8 THE COURT: Hold on. All right. Go
9 ahead.

10 MS. SIMONE: "Upon information and
11 belief, AFE has breached its contractual obligations
12 to NHA by failing to present investment opportunities
13 to NHA and then participating in such opportunities on
14 its own behalf."

15 I think -- and that's just one example
16 in the counterclaims. Contrary to what Mr. Dupre has
17 represented, the counterclaims do address the fact
18 that AFE has engaged in self-dealing. And, again, not
19 that it's important to your analysis, but Mr. Dupre
20 has represented that there's only two allegations of
21 self-dealing. I don't think our counterclaims are
22 limited to two allegations. I think there's many,
23 many more. There have just been two that we know
24 concretely have discovered, to which they have

1 admitted to.

2 But I think Your Honor was astute in
3 the questioning and comments to Mr. Dupre, that
4 Mr. Feeley is the brain of AK-Feel. And that's
5 exactly the case, and that's exactly why USACafes and
6 its progeny applies, because Mr. Feeley was using his
7 position of trust as managing member of AK-Feel and
8 advancing his own interests above that of the
9 fiduciaries, which is NHA. And that's the whole
10 purpose of USACafes, of Paige Capital, of Bay Center,
11 and of Auriga. It's where the brains of the managing
12 member or the entity that's controlling the -- the
13 partnership or the limited liability company uses that
14 position of trust to advance his or her own
15 self-interests above that of the fiduciaries.

16 And the express language in those --
17 in USACafes and its progeny doesn't limit the
18 application of fiduciary duty to only specific
19 instances of misappropriation. It may well be that in
20 those particular cases the types of breaches of
21 fiduciary duty sounded in misappropriation; but,
22 again, the distinction, I think, that Mr. Dupre
23 makes -- and it's a bit of splitting hairs -- is that
24 okay. You can sue somebody for robbing the bank, but

1 you can't sue them for holding up the armored car on
2 the way to the bank. And I don't think that's what's
3 meant by the holdings in any of those cases, and I
4 don't think that that's the purpose or the policy
5 behind allowing liability for breach of fiduciary
6 duties to extend to the brains of the operation.

7 THE COURT: What do you think this
8 means for George Akel and Mr. Newman and Mr. Hughes?
9 I know you think that NHA doesn't have duties because
10 it's a nonmanaging member, but assume I'm still stuck
11 on the idea that they acted as managers through NHA.
12 Why doesn't this put them in the box in terms of being
13 valid defendants on breach of fiduciary duty claims?

14 MS. SIMONE: Your Honor, a couple of
15 things. No. 1, I don't think that that has any
16 bearing on the plaintiffs' motion to dismiss and NHA's
17 counterclaims. But if Your Honor should find that
18 they were acting in a managerial capacity, which, you
19 know, we haven't done the factual discovery yet on the
20 jurisdictional issue and that type of thing; but if
21 Your Honor finds that they were somehow acting as
22 managers, then, as a manager -- because the duty flows
23 to the manager because they're in control of the
24 property. So in that instance, if during that

1 particular point in time that they were acting in
2 control of Oculus they did something that constituted
3 a breach of fiduciary duty, engaged in self-dealing,
4 acted with gross negligence, then certainly there
5 would be liability to them. And we're not contending
6 otherwise.

7 In addition, Mr. Dupre cited to Fisk
8 language when talking about the default fiduciary
9 duties. And the Fisk language I think actually
10 enhances NHA's position, because the language in Fisk
11 specifically stated in the operating agreement that
12 "No Member shall have any duty to any Member of the
13 Company, except as expressly set forth herein or in
14 other written agreements." And that's the language
15 that was key in disclaiming fiduciary duties. Fisk
16 doesn't stand for the proposition that there are no
17 default fiduciary duties. Fisk, instead, stands for
18 the proposition that in an LLC, the parties are free
19 to contract and they're free to contract away those
20 default duties. And in that particular case the
21 express language of the operating agreement contracted
22 away those fiduciary duties.

23 Section -- Section 2.10 of the
24 operating agreement for Oculus contains no such

1 language. It doesn't even use the word "duty"
2 anywhere. Instead --

3 THE COURT: Well, it does, but it says
4 you can take out D and O insurance coverage.

5 MS. SIMONE: Well, it refers -- the
6 heading is "Limited Liability of Members," and it
7 refers instead in Section 2.10 to limiting the
8 liability. So limiting the damages. It doesn't limit
9 the duties. It doesn't say that the managing member
10 does not have fiduciary duties to Oculus or to the
11 other members.

12 THE COURT: Yeah. No; I hear you, but
13 you go to the next page and it says, "In furtherance
14 of the foregoing, the Company shall bear all costs,
15 expenses, liabilities and obligations incurred in the
16 Company's activities, including, but not limited to:
17 (b) premiums for ... insurance for the purposes of
18 protecting the Company and its Members, officers,
19 employees and agents from liabilities to third parties
20 in connection with Company affairs, and protecting any
21 Person entitled pursuant to the provisions hereof to
22 indemnification against liability for any breach or
23 alleged breach of fiduciary duty to the Company."

24 So it does use the term "fiduciary

1 duty."

2 MS. SIMONE: Yes, Your Honor, but it
3 doesn't --

4 THE COURT: It uses it in the sense of
5 "And, by the way, because implicitly you've got
6 potential exposure for this, if you want to go out and
7 get insurance, the company won't pay for it for you."

8 MS. SIMONE: Exactly, Your Honor. So,
9 I mean, I think this language is clear the managing
10 member does have fiduciary duties. And just as a side
11 note, this is one of the things that NHA complains of
12 where AFE breached its fiduciary duty by not getting
13 any such insurance. So ...

14 THE COURT: Well, they weren't
15 required to get it, were they?

16 MS. SIMONE: Your Honor, I think that
17 that's -- that's an issue -- and, again, it's not
18 necessarily clear from the face of the contract; but
19 if you look at another provision of the contract --
20 and this is getting kind of off topic; but the duties
21 under Section, I think, 4.1 of the contract required
22 the managing member to procure insurance.

23 So I think it's ... yeah, subsection
24 -- 4.1, subsection (ix), ... purchase liability

1 insurance (including 'directors and officers'
2 liability insurance) and other insurance to protect
3 the Company's assets and business."

4 THE COURT: If -- if it helps anyone
5 in terms of their ability to assess claims, I read
6 4.1(a) as a list of powers. So what it says is,
7 "Except as set forth in Section 4.1(b) below, the
8 Manager shall have full, exclusive, and complete
9 discretion, power, and authority ..." to do any of the
10 following.

11 So what that is saying is "Let there
12 be no doubt, you, AK-Feel, singly by yourself, without
13 a vote of NHA, can, if you wish, do any of the
14 following things: You have the power to do that. So
15 you have the power, should you wish, to go out and get
16 liability insurance consistent with the terms of the
17 Budget."

18 It doesn't say that you are obligated
19 to do that. It doesn't say you have a duty to do
20 that. And, in fact, one of the interesting things
21 about it is is your client, NHA, has to participate in
22 the preparation of the budget, although if you can't
23 agree to the budget, it defaults to last year's
24 budget. So it's not as much of a deadlock as one

1 might think.

2 Anyway. But if it's helpful to
3 whoever is advising you and your colleagues advising,
4 4.1 is not a duty provision. I mean, it would be --
5 it would be -- if you read that as a duty provision,
6 there's a lot of stuff in here that -- that would be
7 pretty odd duty provisions.

8 So, for example, they have the power
9 to, under (v), "(v), borrow money and incur additional
10 indebtedness of up to \$25,000 in the aggregate on an
11 annual basis, in the name of the Company." Well, if
12 your suggestion is that (x) is a duty provision by
13 equal operation, paragraph (v) is a duty -- is a duty
14 provision, which means this dude, AK-Feel, was
15 required to go out and borrow \$25,000 every year. He
16 wasn't required to go out and borrow \$25,000 every
17 year. He was authorized to go out, if he needed it,
18 and borrow \$25,000 each year, the -- the fact being
19 that if you wanted to borrow more than that, he had to
20 get your consent, the consent of NHA. It didn't mean
21 he had to do it.

22 I mean -- I mean, there's other --
23 there's other ones in here that -- that are similar in
24 line with that. I mean, like (xii), "(xii) create

1 Subsidiaries." If you're reading this as a duty
2 section --

3 MS. SIMONE: Your Honor --

4 THE COURT: -- he has some obligation
5 to go out and create a, plural, number of subsidiaries
6 each year, that makes no sense.

7 MS. SIMONE: Your Honor -- Your Honor,
8 I agree. And I appreciate your analysis, and I didn't
9 mean to get us offtrack. My only suggestion was that
10 when read together with the Section 2.10 that the
11 company shall bear all costs for insurance, that
12 that's one of the reads. But I didn't mean to get us
13 off topic. And I appreciate --

14 THE COURT: But to the extent
15 that's -- is that somewhere in your counterclaims?
16 Because I actually didn't focus on that --

17 MS. SIMONE: I don't believe it's in
18 our counterclaims, no.

19 THE COURT: And don't bring it,
20 because that is not a claim that is colorable. What
21 this does, this combination provision says, plain
22 meaning of them, "You, AK-Feel, have the power to get
23 insurance, should you want to go do that as a
24 businessman." It does not say anywhere in here "Thou

1 shalt get insurance."

2 MS. SIMONE: Thank you, Your Honor.
3 Sorry to get us off topic.

4 THE COURT: That's okay.

5 MS. SIMONE: Unless Your Honor has any
6 more questions about NHA's position on the default
7 fiduciary duties in Auriga Capital and USACafes, then
8 I'll move on to address the other issues that
9 Mr. Dupre raised in his presentation.

10 With regard to the negligence claim,
11 you know, clearly our -- our title, our heading is
12 inartful as it says "NEGLIGENCE"; but I think it's
13 replete with the term "gross negligence" throughout.
14 So I think that's all I need to say about that issue.

15 With regard to the declaratory
16 judgment, what Mr. Dupre has raised are various
17 factual issues that aren't of record and, frankly,
18 aren't true. He's talked about Katz and RiverOak and
19 Oculus would get sued if the businesses are ceased and
20 that NHA has fired Ballard Spahr, which, frankly,
21 isn't true, and that we don't understand the loan
22 documents. All -- without getting into all of that,
23 that's not appropriate on a motion to dismiss. On a
24 motion to dismiss, the contract is either clear on its

1 face or it's not. And if it's not and it's ambiguous,
2 then we need facts and we need discovery and we need
3 to go forward.

4 I think it's -- you know, the language
5 says what it says. It says, "If NHA determines that
6 the Company shall cease business operations, that in
7 connection with such cessation, NHA shall assume any
8 and all severance liability that the Company may have
9 under existing employment agreements with Christopher
10 A. Feeley and Andrea Akel." It doesn't refer to
11 Section 11. It doesn't say -- it doesn't say that
12 dissolution is what's going to happen. It simply
13 talks about ceasing business operations and creating a
14 shell entity. And to the extent that there's an
15 ambiguity about how that works with the other
16 provisions of the contract, then it's a -- then it's a
17 discovery issue and not proper for summary judgment.

18 THE COURT: When were they allowed to
19 do this?

20 MS. SIMONE: Excuse me?

21 THE COURT: Is there any time
22 limitations, any temporal limitations on NHA's
23 determination?

24 MS. SIMONE: I don't see any temporal

1 limitations within the four corners of Section 2.10.
2 However, I think that the rest of the agreement and
3 the -- taken into consideration as well with the
4 employment agreement makes it clear this was a
5 two-year experiment, and anytime after the two-year
6 funding obligation, that NHA would have that ability
7 to cease business operations; and should there be any
8 severance liability, which we're not conceding that
9 there would be at all, that NHA would then undertake
10 that -- that responsibility.

11 THE COURT: Can you get -- go to
12 4.6(b)?

13 MS. SIMONE: Sure.

14 THE COURT: So the first sentence of
15 4.6(b) says, "The Company shall have the ability to
16 draw against the Operating Facility for a period of
17 two years." The second sentence says, "The Operating
18 Facility shall expire on the fifth anniversary of the
19 date of this Agreement unless extended by unanimous
20 consent of the Members."

21 What's the meaning of that second
22 sentence and how does that affect your view that your
23 client had the ability to terminate the relationship
24 at the end of two years?

1 MS. SIMONE: My understanding of that
2 sentence is that the operating facility had to be paid
3 back within the five years. And --

4 THE COURT: What would it be paid back
5 from?

6 MS. SIMONE: Paid back from the -- any
7 income coming into the company as set forth in the --
8 by the terms of the operating agreement. And the --
9 the intent of the parties at that point in time was
10 that the fees that Mr. Feeley and AK-Feel were
11 deriving and providing its consulting services to put
12 transactions together would be the income generator
13 for Oculus, not the ownership of any properties.

14 THE COURT: Why have that in there if
15 you-all can simply terminate after two years?

16 MS. SIMONE: Why have Section (b) in
17 there that the operating facility shall expire on the
18 fifth anniversary? Because -- my understanding was
19 that if everything was going smoothly, the
20 understanding was NHA wanted to be paid back in five
21 years. They didn't want the money out there
22 indefinitely, hanging out in this operating facility,
23 that it would be paid back on a timely basis.

24 THE COURT: So your reading of this

1 would be the operating facility, unless earlier
2 terminated, if NHA makes a decision to shut down the
3 business, "shall expire on the fifth anniversary of
4 the date of this Agreement."

5 MS. SIMONE: Well, I think there's a
6 difference between the operating facility, which is
7 basically a line of credit, and ceasing business
8 operations. So my understanding of ceasing business
9 operations, as intended by the parties, was simply to
10 leave it be as a passive shell entity that received
11 income in and distributed out pursuant to the terms of
12 the operating agreement, not a dissolution. And
13 that's why you have both the cease business operations
14 on the one hand and the ability to dissolve on the
15 other hand, because the cease business operations
16 leaves the shell intact, leaves the structure intact.

17 THE COURT: How would you get
18 transaction fees if all you're doing is a passive
19 business, it's a pass-through entity?

20 MS. SIMONE: Again, my understanding
21 of the way that the transaction fees work is that some
22 of them are ongoing, kind of like a -- the way I think
23 about it is when brokers are involved in a lease
24 transaction and the lease renews, they get additional

1 fees. So my understanding is that there would still
2 be ongoing fees coming in.

3 THE COURT: Can you go to Section 2.3?

4 MS. SIMONE: Sure.

5 THE COURT: One of the key points
6 you-all have been trying to hammer home throughout
7 this is that Feeley wasn't supposed to have Oculus be
8 a member or hold any interest in its single-purpose
9 investment entities and that was part of how he blew
10 it. But I keep stumbling on Section 2.3, which says,
11 "The Company is formed (i) to acquire on its own
12 behalf through wholly owned special purpose entities,
13 multifamily and commercial real estate assets."

14 Isn't this directly contrary to the
15 idea that you-all are advancing, that none of these
16 things were supposed to be owned by Oculus?

17 MS. SIMONE: No, Your Honor. And I
18 think, you know, it may be -- may be inartfully
19 drafted in this agreement --

20 THE COURT: Well, wouldn't actually
21 the fact that the company owned interests in these
22 entities be consistent with the idea that you'd have
23 an ongoing income stream after the two-year operating
24 agreement period to pay things off within the next

1 five years before the operating agreement expired?

2 MS. SIMONE: Sure, Your Honor. And
3 that's what we have. I mean --

4 THE COURT: Well, I mean, doesn't it
5 seem like you guys are, sort of, making things up?

6 MS. SIMONE: No, Your Honor. My
7 understanding of the intent of putting in Section 2.10
8 of the ceasing business operations was that if the --
9 if the operation wasn't working out and the parties
10 wanted to go their separate ways, they would have the
11 ability to cease business operations.

12 THE COURT: How about making stuff up
13 about this whole idea that Feeley was never supposed
14 to put a wholly owned subsidiary special-purpose
15 vehicle under Oculus? It's really -- it's hard for me
16 to get that, when Section 2.3(i) says that the company
17 is supposed to acquire on its own behalf through
18 wholly owned special-purpose entities, how you guys
19 come in and say "Well, no, no. Actually, the deal was
20 we were supposed to acquire these things through
21 entities in which Oculus wouldn't hold any investment
22 interest whatsoever."

23 MS. SIMONE: I think that --

24 THE COURT: How does that square?

1 MS. SIMONE: I think that's what was
2 meant by "wholly owned special purpose entities," and
3 I think --

4 THE COURT: You don't think it was
5 wholly owned by Oculus.

6 MS. SIMONE: Correct.

7 THE COURT: You don't think when it
8 says by Oculus "on its own behalf," it doesn't mean
9 that it is an Oculus wholly owned entity.

10 MS. SIMONE: I think -- I think Oculus
11 was supposed to go out and acquire and find the
12 opportunities and then transfer them into these wholly
13 owned subsidiaries. And I think that the -- you know,
14 in discovery and the course of conduct will show that
15 that's exactly what the parties intended and that the
16 correspondence involving Slippery Rock and they tried
17 to fix it and they couldn't fix it because it was too
18 late -- the documents had already been submitted to
19 Freddie Mac -- but every deal going forward will
20 reflect that that's what the parties intended and
21 that's the course of conduct.

22 THE COURT: Look, what actually fits
23 with the agreement is that 3.8(e) allows that
24 notwithstanding the general terms of the agreement,

1 the members can pursue -- I'm going to read you the
2 last sentence -- "... to mutually agree that the
3 Members may pursue such investment opportunity
4 independently and on their own behalf, and in such
5 event the Company would have no interest or
6 involvement in such opportunity."

7 So that would allow the members to
8 agree that it's a company opportunity; and in lieu of
9 the company participating directly, as is contemplated
10 by 2.3(i), that you'd go put it in a separate entity
11 in which the company would have no interest or
12 involvement in such opportunity whatsoever.

13 So what -- what fits with this is that
14 Feeley -- AK-Feel was actually required under 2.3 to
15 do through it a wholly owned sub, that that's what the
16 business deal was because that's what was going to
17 give them an ongoing income stream, but that that did
18 not prevent the parties from agreeing on a one-off
19 basis to do a separate entity.

20 So, I mean, it's just -- it's -- it's
21 awful hard, when you guys keep coming up with
22 arguments, that when I look at the agreement, seem to
23 be directly opposite or at least really inconsistent
24 with what the agreement says.

1 So, I mean, what you're telling me is
2 "Look, it was either infelicitously drafted or on its
3 own behalf" -- I mean, who would "its" be? Literally,
4 the company is formed to acquire on its own behalf.
5 As a plain English matter, what does "its" refer to?

6 MS. SIMONE: Oculus.

7 THE COURT: The company, yes.

8 MS. SIMONE: Correct.

9 THE COURT: So through wholly owned
10 special purpose entities -- "on its own behalf through
11 wholly owned special purpose entities." "Its" is
12 Oculus. So to acquire on Oculus' own behalf, through
13 wholly owned special purpose entities, it would be
14 really odd for that to mean for Oculus to acquire on
15 Oculus' own behalf through wholly owned special
16 purpose entities owned by a bunch of other people. It
17 doesn't say that. What it says is "on its own behalf
18 through wholly owned special purpose entities."

19 I mean, how -- how can I find any
20 ambiguity in that?

21 MS. SIMONE: Your Honor, all I'm
22 saying is that's not -- well, the intent --

23 THE COURT: Not what? That's not what
24 you guys meant? That's not what you guys meant when

1 you drafted a seemingly clear provision?

2 MS. SIMONE: I -- I think the
3 ambiguity is what's meant by "wholly owned special
4 purpose entities."

5 THE COURT: If I say something that is
6 wholly owned by you, what do I mean?

7 MS. SIMONE: You mean 100 percent is
8 owned by --

9 THE COURT: You.

10 MS. SIMONE: -- by me.

11 THE COURT: Right. So "its own behalf
12 through wholly owned special purpose entities."

13 MS. SIMONE: But what would "special
14 purpose" be unless it was wholly owned by Oculus? So,
15 I mean, I -- I think that -- that the ambiguity
16 becomes because it was the intent of the parties here
17 to create a special entity, as they did, in North
18 Carolina. It's OCG Raleigh that owns it.

19 And -- and the intent of the
20 parties -- my understanding of the intent of the
21 parties was to do just that, that it's the same
22 investors under the same terms, the
23 65 percent-35 percent split; and they go in and form
24 these special purpose entities to own it, to own the

1 properties. And the -- so the -- the issue is in all
2 these other entities, they're owned -- for example,
3 Slippery Rock. It's not -- it's only owned 8 percent
4 or 10 percent by OCG. The other 90 percent is
5 RiverOak. So there has to be other operating
6 agreements there and partnership agreements and things
7 like that.

8 So I don't think it was ever intended
9 by the parties that Oculus stay in the mix on each and
10 every one of these entities.

11 THE COURT: Right. So -- so what you
12 think the company was formed to do is to not acquire
13 on its own behalf at all but to simply go out and find
14 and then to acquire, through special purpose entities
15 owned by wholly different entities, multifamily and
16 commercial real estate assets. That's how you would
17 have drafted 2.3(i).

18 MS. SIMONE: Yes, Your Honor. I guess
19 that's how I would have drafted Section 2.3(i).

20 THE COURT: That's what I hear you
21 saying.

22 MS. SIMONE: Yeah. And, you know,
23 the -- the intent was Oculus goes out, finds the
24 transaction. Oculus enters into the agreement of sale

1 and then assigns its interest to the special entity
2 once it's formed.

3 THE COURT: There's at least some
4 tension between that and the language I'm looking at,
5 though; right?

6 MS. SIMONE: I understand that, Your
7 Honor.

8 THE COURT: Okay. And 2.4.

9 MS. SIMONE: Yes.

10 THE COURT: Why -- I mean, that's the
11 term of the entity.

12 MS. SIMONE: Correct.

13 THE COURT: Why doesn't it say
14 something in there about the two years?

15 MS. SIMONE: Well, the two years,
16 again, doesn't get rid of the existence of the
17 company. It just says the company shall cease doing
18 business operations. So the company is still in
19 existence. It's just a shell. It's a passive
20 company.

21 THE COURT: Okay.

22 MS. SIMONE: I think that's it with
23 regard to the motions to dismiss. Otherwise I'll just
24 defer to our briefs on those issues, unless Your Honor

1 has any more questions.

2 THE COURT: No. I think I'm good. As
3 I say, as I said to Mr. Dupre, you guys have given me
4 a lot to think about on this stuff. So ... what's
5 next?

6 MR. DUPRE: Would Your Honor hear any
7 rebuttal or should we just go --

8 THE COURT: Oh, sure. Absolutely. I
9 didn't mean to cut you short. If there's a couple
10 points you want to make quickly, that would be fine.

11 MR. DUPRE: On paragraph 244 where we
12 started, Your Honor, it's in the count. It's in Count
13 I, breach of contract. You know, if we're just
14 looking at Iqbal and Bell Atlantic v Twombly, we got a
15 hundred paragraphs of fact allegations that don't say
16 AFE took those corporate opportunities. They say
17 Feeley took them. And then you get the count --

18 THE COURT: I don't have to follow
19 Twombly. I just have to think about what's reasonably
20 conceivable. And it puts you at a disadvantage
21 because I'm a fairly creative guy. I can conceive of
22 an awful lot.

23 You know, we thought we were -- we
24 thought that Bell Atlantic and Iqbal had caught the

1 rest of the world up to us; but what we found in
2 Central Mortgage is, in fact -- mainly Chancellor
3 Strine, but we were all on board with. I thought he
4 was right -- we were all wrong. And, in fact, we were
5 somewhere in between the federal courts and -- under
6 Connolly and the federal courts under Iqbal and
7 Twombly. And what had happened is that they had
8 jumped over us. And so we are somehow in between with
9 reasonable conceivability.

10 So focus in, then, why is it not
11 reasonably conceivable?

12 MR. DUPRE: You've got to reasonably
13 conceive it without relying on an alter ego theory
14 that's been expressly disclaimed in jumping over the
15 18-303 bar, which says principals aren't liable for
16 LLC members. And then maybe, if you want, you got to
17 invert USACafes, turn it on its head to say "Okay.
18 Well, the company wouldn't be liable on this pleading
19 because it doesn't have any facts; but since the guy
20 is liable, I'm going to flip USACafes upside-down and
21 make the company liable." That's the only way to
22 reasonably conceive with the -- with the pleading that
23 Your Honor is stuck with. Maybe in a different
24 pleading there would be more scope for creativity;

1 but, you know, there's an express disclaimer of alter
2 ego theory in these pleadings.

3 It might simplify the case if -- if
4 NHA wins on this expansion of USACafes argument, are
5 we just going to drop this personal jurisdictional
6 challenge by Newman, Hughes, Akel? It might be -- it
7 might be nice to just get a representation on the
8 record so we don't have to do jurisdictional discovery
9 and three briefs on these guys.

10 THE COURT: No. What it would do,
11 then, is it would largely collapse merits discovery
12 and jurisdictional discovery, because what Ms. Simone
13 is saying is that if you can establish that these
14 fellows, in fact, took action as alternative entity
15 controllers, then under USACafes, she agrees that they
16 are potentially liable for any breach. She's not
17 conceding that they actually breached anything.

18 Now, that makes the merits
19 jurisdiction as to whether you can reach these folks
20 for liability purposes synonymous with the
21 jurisdictional issue because it's whether they were
22 operating as de facto controllers is what gives me
23 jurisdiction over them. So what it would mean, I
24 think, is that we could dispense with a separate phase

1 of jurisdictional discovery, let you get right to the
2 merits of discovery, and then we'd have the somewhat
3 procedural oddity of my having to rule on jurisdiction
4 later in the case. And I guess you could bifurcate it
5 or sequence it and say that to the extent that there
6 is a reasonably conceivable basis to believe that the
7 fellows were acting as controllers, that's enough for
8 jurisdiction. And then you go back and you do
9 liability discovery to find out if, in fact, by a
10 preponderance of the evidence they were acting as
11 controllers. So I guess you could sequence it that
12 way.

13 So what I would do in that sense, I
14 think -- and I'd be able to be dissuaded, but it would
15 basically depend on whether you and your colleagues
16 wanted one deposition or two. So if you wanted to
17 take these folks once for jurisdictional purposes
18 because of the jurisdictional motion that they've made
19 so as to be able to come back and say that they --
20 there was a reason -- it was reasonably conceivable
21 that they acted in this capacity, you would be able to
22 do that. We'd rule on the jurisdictional motion. But
23 absent some stipulation by your friends, you would
24 then be able to go back and push them again, because I

1 think that's -- that's the -- that's what naturally
2 follows from this position they're taking.

3 MR. DUPRE: Candidly, Your Honor, I'd
4 much prefer zero depositions than two -- than two in
5 this case.

6 THE COURT: You keep telling me you
7 guys are going to resolve this, but it doesn't happen.
8 So I'm just going to keep driving on. You know, my --
9 my job is to decide the things you bring to me. I --
10 I'd be more than happy to -- to have you-all resolve
11 your differences. But --

12 MR. DUPRE: I should say that standard
13 that you just elucidated sounds higher than the
14 standard that we have in 1809 on material --

15 THE COURT: And I may not have been
16 parsing the -- the language precisely, you're
17 absolutely right.

18 MR. DUPRE: Okay. You know, on D and
19 O insurance, Your Honor, I would love to have D and O
20 insurance because I wouldn't be making a fees motion
21 10 minutes from now if I did. But this company is not
22 that rich. It's kind of rational for a noncash-rich
23 company to just rely on the corporate veil to try to
24 protect itself and --

1 THE COURT: Yeah, noncash rich,
2 nonpublicly traded, no other minority investors other
3 than the people who directly sign on to the agreement.
4 No. As I say, we were just talking about in the sense
5 of whether there was a duty to get professional -- I'm
6 sorry; to get D and O insurance. There's nothing here
7 that says there's a duty to get directors' and
8 officers' insurance. There is authority to get
9 directors' and officers' insurance and a provision
10 that says that if you get directors' and officers'
11 insurance, then the company pays for it.

12 MR. DUPRE: I read it that way, too,
13 Your Honor, but it --

14 THE COURT: Now, it does have some
15 implications for -- there is a negative pregnant
16 there, that the fact that you can insure for breach of
17 fiduciary duty does have some -- create some inference
18 that perhaps there is some exposure for breach of
19 fiduciary duty. And that's the point that comes into
20 your argument that no; 2.10 is a broad elimination of
21 duties provision.

22 MR. DUPRE: Well, if we look at 2.10
23 for what it's being asserted as here by NHA, why would
24 you put a unilateral right to suicide the company at

1 two years in a -- in a exculpation provision that's
2 headed "Limitation of Liability?" It just --

3 THE COURT: You wouldn't. That's a
4 separate issue. Again, the separate issue is -- and
5 whether it's a suicide, the company -- I tend to view
6 it as a we-clean-up-our-mess provision. So it's "If
7 we decide under rights that we necessarily must have
8 elsewhere in the agreement since this language doesn't
9 give us any right -- it just says conditional -- then
10 we are obligated." It's saying that "If we exercise
11 one of those rights or part of a decision based on
12 something elsewhere where we are committing that,
13 having decided the company won't go forward, we're
14 covering Chris Feeley and Andrea Akel."

15 That's -- but that's a separate issue
16 than does the fact that they've mentioned fiduciary
17 duty as something that could be insured against,
18 suggests that 2.10 isn't a elimination of duties
19 provision but, rather, a exculpation provision. And
20 that's -- that's what I'm giving you the opportunity
21 to answer.

22 MR. DUPRE: You know, Your Honor, it
23 probably does cut the way you're saying, just in
24 candor to the tribunal. But why is it a page and a

1 half long, then? It seems to -- that they just
2 threw --

3 THE COURT: Turgid --

4 MR. DUPRE: Well --

5 THE COURT: -- is that what you called
6 it?

7 MR. DUPRE: -- they were rambling, but
8 they threw the whole kitchen sink.

9 THE COURT: I -- I could be also be
10 described as turgid and rambling. That's probably
11 where you first used that phrase. "Wow, that's got a
12 nice ring to it. I'm going to put it in my next
13 brief."

14 All right. Keep going. I interrupted
15 you. So it doesn't make sense to you that that's
16 dispositive, given the language elsewhere in the
17 provision?

18 MR. DUPRE: And it's also a limitation
19 of liability provision. So it's a belts and
20 suspenders thing. "Here's everything we're liable
21 for; but if you want to go get D and O insurance for
22 everything, including fiduciary duty, knock yourself
23 out. Oh, but the company doesn't have any money to
24 pay for it."

1 On the DJ count, I'm not asking Your
2 Honor for any fact determination. We threw up the six
3 provisions that prevent the declaratory judgment that
4 NHA is asking for, one of which you just cited, is
5 2.4. It says if you're going to stop doing business,
6 this is how you do it, and then it cross-references
7 Section 11, which is the wind-down and dissolution
8 provision. So we have six contract provisions that
9 say no. They have the -- one sentence in the
10 limitation of liability provision that they're also
11 arguing is an exculpation clause as the cease business
12 provision, even though there's this other cease
13 business provision in Section 11.

14 Your Honor was dead right on the
15 ability of the company to own property. It's not just
16 that one provision. It appears seven times in the
17 contract. It's in 2.3, 2.7, 4.1, 4.2, 11.2. The
18 contract says the company can own property. And in
19 reality, it owns 20 percent of an LP that owns the
20 property. So there's not even any tension between
21 wholly owned subsidiaries doing it through
22 subsidiaries, making corporate veil protection for
23 these entities that are single-property entities that
24 --

1 THE COURT: The special-purpose entity
2 in Slippery Rock, doesn't the company own its interest
3 in an intervening entity? What's the structure --

4 MR. DUPRE: I think there's two
5 intervening --

6 THE COURT: There's two intervening --

7 MR. DUPRE -- as I recall, but --

8 THE COURT: Are the intervening
9 entities at the top intervening entities a
10 special-purpose entity wholly owned by the company?

11 MR. DUPRE: Yes, I believe that's
12 correct.

13 THE COURT: A special-purpose entity
14 in the sense of being specially purposed for the
15 investment of Slippery Rock, which is the plain
16 meaning of the term, and it is wholly owned by the
17 company?

18 MR. DUPRE: Yes, I believe that's
19 correct, Your Honor. So there's a double layer of LPs
20 or LLPs, and the top one is wholly owned. So it gets
21 the 20 percent of the cash. We're in other contracts
22 here that aren't at issue in the case. So I'm
23 speaking from memory, but I believe that's correct.

24 But it doesn't matter. It says it can

1 own property. Let's assume the allegation is true,
2 that it does. So what? The contracts allow it to own
3 property.

4 All we're asking on the DJ count is
5 just a straight read of the contract. You don't need
6 to know any of the facts, but they put the facts in
7 the counterclaims. They said, "Oh, Freddie Mac is
8 fine with it. Just turn it into a zombie entity."
9 Well, why does Freddie Mac get a say? It gets a say
10 because there's key man in the loan agreement. So if
11 it's just going to ignore that provision, which is the
12 allegation that's made in the counterclaims, maybe,
13 but there was no way to know that before the first
14 complaint was even filed. When I went and asked
15 Ballard Spahr, that's not what they told me. They
16 said, "Run to Chancery Court." And here I am.

17 So unless Your Honor has any other
18 questions, that's it.

19 THE COURT: Nope. Thank you.

20 Do you want to turn to your fee motion
21 or what are we ...

22 MR. DUPRE: Sure, unless Mrs. Simone
23 had anything to add from that.

24 THE COURT: No. We've done opening,

1 answering, rebuttal on the motion to dismiss.

2 MR. DUPRE: We then turn to the
3 plaintiffs' amended interim fee application, Your
4 Honor.

5 I --

6 THE COURT: Why should I do this now?
7 I mean, I understand that you view that laches, et
8 cetera -- I'm sorry; unclean hands -- not laches --
9 that unclean hands is something that might relate, if
10 anything, to issues unrelated to the control dispute.
11 But why should I do this now as opposed to waiting and
12 seeing if your guy is really a bad guy?

13 MR. DUPRE: Basically, Your Honor,
14 because they made this frivolous unavailable argument
15 and because they breached the contract to seize the
16 company, and we had to run in and get it back to avoid
17 loan liability. They put my guy \$300,000 in the hole
18 before we even -- before we even got started. He --
19 they basically took all of his money that he needs to
20 spend to defend himself on this gross negligence claim
21 with these -- these awful claims that Your Honor has
22 characterized very harshly in terms that I argue are
23 synonymous with frivolousness. They're trying to
24 bleed the guy white. He's not even going to be able

1 to defend himself if you allow NHA to use up all of
2 his defense money, litigating things that were
3 preposterous on their face. That's why we need the
4 interim fee application. I mean that in complete
5 candor. The guy is not rich. He's 300,000 in the
6 hole. He needs to defend himself, and they took all
7 of his money on dumb stuff.

8 So there's a lot of case law cited in
9 NHA's brief to the effect that interim fee
10 applications are difficult to win. I agree. They are
11 hard to win, but we're going to leave my guy
12 remediless and basically unable to defend himself
13 based solely on frivolous and bad faith arguments made
14 by NHA. And it's just -- it's just not equitable.
15 The guy should be able to come in and defend himself
16 on the real claim, which is the gross negligence
17 claim.

18 This motion makes me a bit
19 uncomfortable for a lot of reasons, Your Honor.
20 I've -- I've been in the bar nine years. I've never
21 alleged bad faith before. I've never filed a
22 nine-page speaking motion and got a 49-page answering
23 brief back. I've never been personally accused of
24 billing fraud and running up the fees. So if my -- my

1 tone is a little tart here, I apologize in advance.

2 I'm going to -- you know, it was 49
3 pages. It's the kitchen sink. I'm going to try to
4 extract the three arguments that I think most warrant
5 being addressed in that answering brief. If Your
6 Honor disagrees with me and wants to just put your
7 finger on something else, please just cut me off.

8 No. 1 is Danenberg II. They started a
9 Danenberg II argument on page 10, and it continues
10 much later on page 35 to 41. They're asserting
11 Danenberg II for the proposition that I have to give
12 you a hundred-page time entry tomorrow and we have to
13 go over it line by line. Well, was this paralegal .1
14 or .3 for you to do an interim fee application. And
15 that just is not what Your Honor said in Danenberg II.
16 If you look at pages 9 and 10, you specifically said
17 that line item reviews are highly discouraged and it
18 wouldn't be valuable to go over an invoice. And
19 plaintiffs' counsel, acting in good faith on the
20 assumption that the plaintiff might lose and have to
21 bear its own fees, is more than enough hold on running
22 up a giant fee bill.

23 THE COURT: I mean, I -- I did say
24 that. I do believe that. At the same time, though, I

1 do think -- and this is where you're going to have to
2 help me because I don't seem to have it in front of
3 me. I do think that you need to give them your
4 billing statements so that they, should they wish, can
5 look them over. And if they see a, you know, gross
6 discrepancy, like a bunch of time entries that just
7 don't make any sense whatsoever, then they could make
8 a -- a large-scale attack.

9 What I'm not going to do is I'm not
10 going to quibble over -- I know I've got it here. I'm
11 not going to quibble over whether your billing rate
12 instead of 385 should be 305. I think if you're
13 charging your market rate at 385 and that's what
14 paying clients of McCarter & English bear, then that's
15 entirely fair and that's fine with me. And I don't
16 think that I am some -- that I should be taking that
17 and changing it. You can imagine -- you can imagine a
18 different situation. One of the things that we often
19 get is plaintiffs' attorneys, who primarily sue on
20 contingencies --

21 MR. DUPRE: Sure.

22 THE COURT: -- they come in and say
23 that their rates are \$900 an hour, a thousand dollars
24 an hour. No one in the history of the world has ever

1 paid one of those folks a thousand dollars an hour.
2 They're always suing on contingency. That's a
3 different story.

4 MR. DUPRE: Sure.

5 THE COURT: But McCarter & English is
6 a firm that actually has paying clients. So if you
7 tell me that 385 is 385, I'm not going to quibble with
8 385.

9 Likewise, if you have spent 12 hours
10 working on a brief, I'm not going to look at that line
11 item and engage in argument with you and say "Well,
12 no, Mr. Dupre. Actually, that should have been nine."

13 But I do think -- and this is where
14 you have to tell me. I do think that you need to give
15 the billing statements to the other side so that they
16 can look through them and figure out if there's some
17 gross problem.

18 I also think that you're absolutely
19 right, though, that it's a goose-and-gander issue. So
20 if they are going to ask you for those invoices,
21 you're within your rights to say "Okay. Well, if
22 you're going to challenge reasonableness, how much do
23 you guys spend?" And if there's not a gross
24 disparity, that's great evidence that what you did is

1 reasonable.

2 So on what -- what is it that you have
3 given Ms. Simone and her colleagues? I feel like you
4 sent me a supplemental submission, which I can't put
5 my hands on up here, that had additional information
6 about what you had sent over.

7 MR. DUPRE: I could hand you up my
8 copy of it.

9 THE COURT: Just tell me what it is.
10 What have you sent them?

11 MR. DUPRE: There are three categories
12 of fees that we asked for. So we asked for all the
13 fees while it was an expedited case until we did the
14 stipulation that put Feeley back in.

15 THE COURT: So presumably for that
16 period -- let's call that the expedited control phase.
17 For the expedited control phase, have you sent them
18 your invoices with some type of minimal redactions?
19 And I'll be honest with you. I'm always deeply
20 skeptical of "Oh, my golly, we can't send over
21 unredacted billing statements because we will waive
22 the attorney-client privilege." I don't think anybody
23 who has ever written time sheets, certainly no one who
24 is a billing partner who has ever reviewed time sheets

1 legitimately thinks that there's enough detail there
2 to waive anything, particularly not in hindsight.

3 But needless to say, have you sent
4 over to the other side -- so I'm sure that Mr. Feeley
5 has received, probably to his great dismay, 10- and
6 20-page invoices from you-all, or some 10-, 12-pagers,
7 something like that, that have detailed items. Have
8 you sent those to Ms. Simone and her friends?

9 MR. DUPRE: No, Your Honor. I ran a
10 report out of McCarter's billing system. So it says
11 "Mr. Kelly, equity partner/chairman, 25 hours" -- you
12 know, it's in the right time period. So it goes on
13 each category "25 hours, \$600 an hour, total hours,
14 total billed," blah, blah, blah.

15 THE COURT: Is that report comparable
16 to this that I have on page 2 of your August 30 letter
17 where --

18 MR. DUPRE: That's correct, Your
19 Honor. It's functionally the same info. I ran a
20 report out of the billing system with all the people,
21 all the hours, all the money; and then, you know, I --
22 those are fees. They're not costs; but, you know,
23 fees are 2,000 bucks or whatever for Lexis File &
24 Serve. They're de minimis compared to the attorneys'

1 fees.

2 THE COURT: All right.

3 MR. DUPRE: I did that in response to
4 Danenberg II, which is these are the items that are
5 listed in Danenberg II. So I tried to follow -- what
6 I -- frankly, Your Honor, there's just so much
7 acrimony in this case that I'm reluctant to send over
8 a hundred-page bill, because I know we're going to be
9 right back here --

10 THE COURT: Well, you are.

11 MR. DUPRE: -- "Mr. Dupre spent too
12 many" -- I mean, we already are arguing that I
13 overbilled this case, and --

14 THE COURT: No; we already are. But
15 -- so -- but here's -- here's the thing. I do
16 think -- and perhaps if I wasn't clear enough in my
17 decisions on this, perhaps I'll need to make it
18 clearer. I think that you have to provide them with
19 those types of statements. Again, if they're going to
20 say "We want to challenge this on a detailed basis," I
21 think under goose and gander, you then get similar
22 information from them. Once you-all have done that,
23 you then are in a position to, you know, think about
24 these things, decide whether, really, it's contested,

1 et cetera.

2 I am happy to not require you to brief
3 these things again. You've given me lots of good
4 briefing on it. What I think you should do is provide
5 that information to Ms. Simone, get from Ms. Simone --
6 and, to the extent you also need it from
7 Mr. McDermott -- Mr. McDermott, I don't know to what
8 degree --

9 MR. DUPRE: We don't have any fees
10 against Mrs. Akel.

11 THE COURT: If they don't have any dog
12 in the fight on this --

13 MR. DUPRE: No.

14 THE COURT: -- then submit it to Ms.
15 Simone. All right. Then get from Ms. Simone and her
16 firm their comparable information, have that little
17 exchange. Then you can put in to me a supplemental
18 Dupre affidavit that will attach those statements.
19 Because what I do is I do spot checks. So even though
20 in Danenberg, I said "Look, I'm not going to get into
21 the weeds and argue about these little things," I did
22 look through them. And I did get a sense that it was
23 a normal case. It wasn't a craziness case.

24 That's the other factor. I have the

1 joy of being with you all for the past -- it started
2 10 months ago. This started in December, didn't it?
3 No?

4 MR. DUPRE: February, Your Honor.

5 THE COURT: February? Oh, okay. It
6 must have been something else started in December.

7 Anyway, either way, I've been with you
8 all for seven months. So it's not like I'm coming to
9 this fee petition cold. I've gotten to see you guys.
10 So I have a real sense of the level of work that has
11 gone into this. And that's going to inform my
12 reasonableness determination a lot more than me
13 sitting down and looking at invoices and quibbling
14 over each one. But I am going to look at them. But I
15 don't think, as I say, unless -- I'm not going to
16 worry about is it nine hours or 10 hours; but until
17 you've done that, I don't think this is right.

18 So I think you-all should get
19 together, have those exchanges, give me the
20 supplemental Dupre affidavit. If there's some
21 category-specific items that, you know, they feel the
22 need to address, having seen your detail, maybe some
23 little supplemental briefing on that. And then I'll
24 get together with you. And who knows. Maybe people

1 will figure out a way to resolve at least the fee
2 motion part and there can be a little give and a
3 little take.

4 MR. DUPRE: Could we drill down just a
5 little bit on what Your Honor wants?

6 THE COURT: Sure.

7 MR. DUPRE: The invoices that go to
8 Mr. Feeley have everything, and we're not trying to
9 charge NHA for everything. We're trying to charge
10 them for this bad faith/not-available argument on the
11 JOT fee, and we're trying to charge them for the
12 control proceeding. So no matter what I give, it's
13 going to be different than the invoices that I give to
14 Mr. Feeley.

15 THE COURT: Yes. So here's what you
16 need to do. So let's say your invoice for February --
17 you're going to take your February invoice. You are
18 going to go through it and, for the entries that you
19 are not seeking, you can put a piece of redacting tape
20 over them and stamp "Redacted." Then you're going to
21 get to the end, and there's going to be a total there.
22 And you're going to either write on it or have a cover
23 memo or something that says "Of this total, the
24 amounts for which we're seeking reimbursement

1 represented by the nonredacted entries set forth
2 above, is" bam. And that's the amount.

3 Then Ms. Simone can look down and she
4 can say "Okay" or "No way" or "Well, all right.
5 That's about what we were doing" or "Wow. That was
6 really nutty. I don't think that that should be
7 covered."

8 You'll do the same thing for March.
9 You'll do the same thing for April.

10 Now, in the -- the entries that you do
11 not redact -- in other words, the items for which you
12 are seeking information -- I mean, seeking recovery --
13 that's where I want you to be relatively restrained in
14 your redactions, because -- twofold: First of all, I
15 really don't think you're wavering anything. I'm not
16 going to view it as a waiver. The -- the -- it would
17 be a really odd time entry that said -- you know, I'll
18 pick on Mr. McDermott, since he almost stood up back
19 there. You know, imagine a time entry by
20 Mr. McDermott that says "February 7, 2012, advised
21 Ms. Akel to give up case. Claims were meritless, .1
22 hours." That would be a problem.

23 Now, what I bet Mr. -- first of all,
24 I'm sure Mr. McDermott didn't say that. But, second

1 of all, I'm sure what Mr. McDermott's time entry in
2 fact says is same date, same hours of time,
3 "teleconference with Ms. Akel re litigation matter."
4 That's not a waiver. That's not even a problem.

5 So judge that type of stuff. But
6 that's what I think you have to give them.

7 MR. DUPRE: I don't think we need to
8 redact anything on that. So if it's okay with Your
9 Honor, I'll just run the report out of the billing
10 system that is the source of these numbers and give
11 them the time entries that, you know -- instead of the
12 summary report that I've already given them, it will
13 be a hundred-page report of --

14 THE COURT: Yeah. They get the
15 detail. Now, where it becomes difficult -- and we've
16 got to either wrap this up or take a break soon
17 because poor Neith has been going for an hour and a
18 half. Where it gets difficult is expenses, because
19 most of the time there's not a breakout on expenses
20 and it's really hard to go back and figure out
21 expenses. So that's where I would encourage you-all
22 to be good to one another. If, for example, there's a
23 bill for 50,000 and you believe that 30,000 -- 30,000
24 of it is reimbursable, recoverable, take three-fifths

1 of the expenses and call it a day.

2 MR. DUPRE: There's no travel or
3 anything like that, Your Honor. I mean, we're talking
4 about de minimis amounts, anyway.

5 THE COURT: I'm just saying. Because
6 that's -- that's one of the place where if you go back
7 and try to say "Oh, well, this meal was for this," it
8 gets to be a little crazy.

9 But -- but you need to have that type
10 of exchange. And if Ms. Simone really wants to
11 challenge the reasonableness of your fees for all of
12 these periods, then you get back from them what they
13 got so that I can have a good market reflection of
14 what another firm was doing during the same time. And
15 the same redaction things apply to you folks.

16 MR. DUPRE: Okay.

17 THE COURT: All right?

18 MR. DUPRE: Then we're not ripe, Your
19 Honor.

20 THE COURT: So you're not yet ripe.

21 MR. DUPRE: Yes.

22 THE COURT: You're unripe.

23 MR. DUPRE: Thank you, Your Honor.

24 THE COURT: With that, in lieu of a

1 break, we will simply recess. I will take under
2 advisement the motion to dismiss the counterclaims,
3 the motion to dismiss by AK-Feel, the motion to
4 dismiss by Feeley; and I still have the motion to
5 dismiss of Andrea Akel. I will give you-all something
6 in writing.

7 (Court adjourned at 3:38 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 80 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 at pages 69 through 80, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 28th day of September 2012.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent