IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRITZ R. KUNDRUN,	:	
	:	
Plaintiff,	:	
	:	
v	:	C. A. No.
	:	2025-0570-LM
AMCI GROUP, LLC,	:	
	:	
Defendant.	:	

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Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, October 22, 2025
9:15 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

ORAL ARGUMENT ON EXCEPTIONS TO MAGISTRATE'S REPORT

APPEARANCES:

FRANCIS G. X. PILEGGI, ESQ.
RAE RA, ESQ.
Lewis Brisbois Bisgaard & Smith LLP
-and-
JONATHAN T. BLANK, ESQ.
of the Virginia Bar
McGuireWoods LLP
-and-
CHAUNA A. ABNER, ESQ.
of the Maryland Bar
McGuireWoods LLP
for Plaintiff

GARRETT B. MORITZ, ESQ.
S. REIKO ROGOZEN, ESQ.
ANTHONY CALVANO, ESQ.
Ross Aronstam & Moritz LLP
-and-
EDWARD C. BARNIDGE, ESQ.
MATTHEW D. HEINS, ESQ.
of the District of Columbia Bar
Williams & Connolly LLP
for Defendant

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THE COURT: All right. Good morning, everyone. So, Mr. Pileggi, how are you?

ATTORNEY PILEGGI: Good morning, Your Honor. May it please the Court. Francis Pileggi, Lewis Brisbois for the plaintiff. And if Your Honor would prefer, I can introduce counsel now.

THE COURT: Please do.

ATTORNEY PILEGGI: Okay. So now I have the pleasure of introducing Jonathan Blank, who has been admitted *pro hac*.

THE COURT: Stand up. There you go. Thank you.

ATTORNEY PILEGGI: All right. If Your Honor allows, he will present the argument today.

THE COURT: Of course.

ATTORNEY PILEGGI: And also Shana Abner also of McGuireWoods and my colleague Rae Ra is also on our team. Thank you, Your Honor.

THE COURT: Thank you all for being here.

Good morning, Mr. Moritz.

ATTORNEY MORITZ: Good morning, Your Honor. Garrett Moritz from Ross Aronstam on behalf of AMCI Group, LLC. First I'm joined by my colleagues

Reiko Rogozen and Mr. Calvano, who needs no introduction. I'm pleased to introduce from Williams & Connolly Edward Barnidge and Matthew Heins. And Mr. Barnidge has been admitted *pro hac vice* and will be taking the lead on argument today.

THE COURT: All right.

ATTORNEY MORITZ: Thank you, Your Honor.

ATTORNEY BLANK: May it please the Court. Your Honor, Jonathan Blank again for the plaintiff Fritz Kundrun.

I start with unique and extraordinary facts call for uniquely crafted remedies. I think that's where we will quickly end up with today.

We would be remiss if we left this hearing, and Mr. Kundrun would be remiss, if we did not explain to you the extraordinary facts that Mr. Kundrun is facing. We would be remiss if we left this hearing without explaining how opposing counsel's actions are prejudicing the administration of justice, which I think again would be one of the standards here today. And we would be remiss if we did not discuss a remedy that we've proposed in this case.

Our road map for this argument is a

little bit lengthy, Your Honor, but I'd like to set it out for you. I'd like to give a high-level explanation of the facts and the issues before Mr. Kundrun. We'll go into the weeds of the facts. We'll start with the creation of this company, the current LLC, the start of the issues in 2021/2022; what I think is a damning email from Mr. Ray Parker, we'll explain, that in 2022 in an effort to freeze out Mr. Kundrun. We'll go to the first books and records request litigation in this case and move on to the settlement in this case and then back to the litigation, current opposing counsel's engagement, and current opposing counsel's adverse actions to Mr. Kundrun, and then finally Mr. Mendez's, I would say, continued assault on Mr. Kundrun in his role. And then we'll move back to the suggested remedy.

THE COURT: So I don't mean to preempt that wonderful anticipated exegesis of the facts. I'm not sure -- I mean, it does seem to me -- can we crank down the volume on this? I'm getting a lot of echo. I used to have power on this. But can we reduce my echo so I don't sound like I'm trying to speak from Olympus?

All right. It doesn't seem to me like

a fact-heavy scenario. It feels to me like a question of what the provision of the LLC agreement requires and whether the delegation of authority over day-to-day management, how that is interpreted with the second sentence of the managerial provision.

And then it seems to me to be a question of what falls, assuming you're right, what falls within the scope of day-to-day managerial authority.

And once we get past that, in a world where you lose on those types of things, then I understand you have an equitable argument. But the equitable argument ought to be based on what's happening, or at least I would think, in terms of the current books and records action, which is all we're here on.

So, it's not clear to me how and why giving me the post-trial-level detail about the potentially difficult relations between these two gentlemen going back to the original founding of the company and the joining, et cetera, really advances the ball. So help me understand why we're going to spend so much time on that.

ATTORNEY BLANK: Yes, Your Honor. I

think it's a good juxtaposition between two questions.

I think the first question is did Mr. Mende have the authority? And I think that's what you just raised. To me, that is just one piece. I think opposing counsel would like us just to stop there. I don't think that's the stop of the inquiry under the Delaware case law. I think -- in fact, I think the Magistrate Judge pointed out the Dunlap standard. And I think that's really where the second part goes. I think there has to be clear and convincing evidence of some professional conduct that has been violated, and then it has to prejudice the administration of justice.

In order to get there, you have to get into the litany of the facts. The litany of the facts really drives that. And it really will drive a discussion back to your decision in *Hyde Park* and who is the joint client versus who's the corporate entity. I think that's the problem in this case for opposing counsel.

We've got a very unique situation, and that's why the facts really do matter. It's a 50/50 LLC, 50 percent owned by Mr. Mende, 50 percent owned by Mr. Kundrun. It's a two-member board. That's the

unique facts in this case. We have seen no case law that deals with the issues in this case. You get there in the context of *Hyde Park* in the sense of this joint client discussion that you talked about.

THE COURT: No, no, look, I'm with you on all that. But if you ask me what the salient facts were. The salient facts would be that it's a 50/50 entity, that they're both the board. That there's been a delegation to the executive chairman and there's a dispute about the scope of the delegation, that there have been a series of books and records requests made by one of the two directors who jointly constitutes the manager of a manager-managed entity; and the ultimate question is going to be whether he can access those books and records and what happens in terms of the company's representation during this case.

Again, I don't want to spend so much time debating whether you're going to spend a lot of time telling me things. If you really want to spend the next, you know, half hour giving me the factual exegesis from the beginning of the entity, why don't we get to it and I'll bear along with you.

I can just tell you that it seems to

me that there is a -- that this is a narrower question than the big picture issue of who is right on the ultimate dispute and that this is a question of who was right on the hiring of counsel and whether there's a meaningful objection to these two law firms such that even in an abstract world where you are right on everything, I'm curious as to like what goes differently? I mean, somebody's got to implement whatever ruling ultimately the Magistrate makes and if you all take exceptions or somebody takes exceptions to what this court adopts.

Why isn't Ross Aronstam and Williams & Connolly as good as anybody to do that? And why, if they know the parameters within which they have to act, and why aren't they completely capable of complying with this court's rulings?

So to the extent we get -- there's a lot of steps to go through, right. And there's an ultimate step of remedy. So one of my final questions is going to be, it's not like they hired a bunch of schmoes. They didn't hire some one-person firm that's going to knock a lender because it's their only client and they want to do what the guy wants.

In other words, I think we have got a

lot of legal issues to talk about. Again, why don't you use your time how you want to use your time. I feel like it's not going to be as good a use of your time to start from creation and take me forward and go through a lot of the back-and-forth between these gentlemen.

But if you want to do that, it's your license to do that.

ATTORNEY BLANK: No, Judge, I've never taken a path that a judge told me not to take. I'm not going to take that today. So I'm going to skip.

THE COURT: Well, people will do that if they want to preserve something for appeal, they do it all the time.

ATTORNEY BLANK: I've got a lot in it for appeal.

But I do want to dissuade the Court and maybe persuade the Court that that's not the ultimate question here. And it gets to your question here, why does it matter? It matters a lot. Because it's, again, we're not just fighting the books and records case, we've got a lot of other cases going on. So this is a big deal in terms of those other cases.

THE COURT: Let me ask you something

about that.

Do you believe that the same analysis applies necessarily in a director books and records action as it does in a -- equivalent to a 225? Or in a dissolution proceeding?

It's not clear to me why those aren't potentially different contexts such that the type of law that you're citing could very well require counsel to stand neutral in some of the other proceedings.

But we're here in the books and records version, so you can either get to that now or later; but it's not clear to me that this is necessarily one and done. Because this is -- I don't mean to insult anyone -- this is the least of the fights. This is the informational fight. I agree that if you win here, it probably carries through to all the others. But if you -- imagine a world where you lose here because there's a finding that responding to a books and records action is really ordinary business. It doesn't mean you lose the same motion when it comes to the 2525 analog.

ATTORNEY BLANK: I agree with you. I think this is we're going to get multiple shots at this apple. This just happens to be the first shot in

front of you. So, again, it's important for Mr. Kundrun that you start getting, this court starts getting educated on the whole.

I would like to go back. Why does it matter? They're not schmoes. I frankly don't want them to be disqualified. I actually want the other remedy. I want you to say that they have to be neutral and keep them in this case. The two gentlemen have great counsel. We've been litigating and working through this for three years. Mr. Mende can use his own counsel. He should come in like *Engstrum* and get in this case. He shouldn't use 50 percent of my client's money to be fighting against my client. That's the problem here. That's one of the problems.

The second problem is, again, if they declared neutrality, they can provide a constructive resource to these two gentlemen. They can't do it when they're acting at the behest of Mr. Mende. It matters a ton. I'll show you a perfect example where it matters. They have -- and, again, if they don't choose neutrality, then I believe that they are going to be violative of the professional conduct rules, and I do think it's prejudicing administrative justice.

Getting directly to your point, why

does it matter? The Magistrate Judge entered an order on May 27, 2025. It ordered them -- and, again, I know it's a form order, but it says "Identify defenses you intend to assert to the category of documents. If the documents don't exist, tell us. If the definitive objection inspection on grounds of volume of burden, the defendant shall provide evidence of the volume of burden sought."

Not only did they not answer it, they didn't comply with that order. They didn't respond at all to that order. We then followed up with discovery requests. I made it really nice and neat. I got an Excel spreadsheet that puts every single request and makes a little column. Does it exist? Are you going to say that there's an objection? Is it a burden of volume? They won't even respond to that.

It matters. If they're neutral, they have to respond. They have to be constructive. If they're not neutral, then they are taking a position for one person over the other, and that's not what this operating agreement -- I agree with you, one of the first questions is: Is it day-to-day business as to who gets to select?

But that's not where this inquiry

stops. There's a huge other question that's going on here. The huge other question is: Should my client be treated like a joint client?

You've done it through a bunch of cases. *Kalisman* through *Hyde Park* talking about in the discovery context. What's unique about this, it's not in the discovery context. What's unique about this is it's at the beginning of the case. Why does it matter? They're putting imperator of the company on the pleadings. They're putting the imperator on the actions of opposing counsel that it's right, and it's not right. It's wrong. It absolutely prejudices the administrative justice. I'm just giving you one reason why in this order.

But, again, they don't have to be there, and this court doesn't have to disqualify them. What this court needs to do is follow up on what the Magistrate Judge said. And the Magistrate Judge said, in the ruling, "I'm willing to presume counsel for defendant, especially local counsel, are familiar with the rules of professional conduct; and although the plaintiff did argue the representation would violate those rules to date -- there is to date, to evidence of the actual violation of the rules, areas presented

by the plaintiff serve as mere speculation." That was then. A lot of water has gone under the dam since then, including the fact that it's not speculation. Why does it matter? Because they're taking actions against Mr. Kundrun. That's why it matters.

And I can go through the litany of arguments on it. Again, I think it's important. And I'm not going to spend 30 minutes. But I want to tick off that, again, I think the modus operandi of Mr. Mende is important. And from the beginning, I think the Ray Parker email is important.

THE COURT: Instead of talking about it, let's do it.

ATTORNEY BLANK: Again, I'm not going to go down a road that you told me not to do. But I do think it's important.

Mr. Mende, for whatever reason, 2021/2022, he decides that he wants to take shots at Mr. Kundrun. He's after him. How do we know that? Because Ray Parker, the lawyer for Mende Kundrun and AMCI writes an email that says it. It's in the record. It's Exhibit 3. He's freezing Kundrun out. He's doing those things.

And that is carried all the way

through. Why does that matter? Back to this joint client. Because this client, unlike *Hyde Park* and *Kalisman* where you don't have 50/50 and you don't have -- you have more than two board members, they are representing who? Who is AMCI Group? That's the question. That's why it matters. AMCI Group is not just Mr. Mende. It's Mende and Kundrun.

They cannot take an action without -- and this is not day-to-day. This is just general. This is not the -- back to your first question, this is second question. This is: Can a lawyer, can opposing counsel take actions when there's a 50/50 LLC, 50/50 directors, and just take advice from one? It's not day-to-day management; it's who is the client?

They can put in their self-serving engagement letter that it's AMCI Group, but that ignores the structure of this company, the history of the company, and the actual two members that own this company. And it ignores the fact that it's, again, slightly offensive, it's 50 percent of my client's money that's paying them to attack my client. And it may seem silly in a books and records case that it's administerial day-to-day, but it's not. It's not if

they're going to take a position that's adverse to my client.

That's why the second question, to me, is almost more important than the first.

THE COURT: Well, I certainly didn't mean to think, didn't mean to suggest to you that I thought that this was a trivial case or wasn't important to your client or wasn't worthy of consideration. I spent a lot of time going through the materials. I tried to make an effort to cut to the merits. I understand you have a presentation you want to make. I'd like you to make it. Please proceed.

ATTORNEY BLANK: I wasn't saying that you were saying it was trivial at all.

THE COURT: That's fine.

ATTORNEY BLANK: I wasn't making a denigration of that at all.

THE COURT: It's all right.

ATTORNEY BLANK: So, again, Your Honor, to me at the high point -- and, again, going through the weeds -- the high points of it is the predecessor company was my client. And then my client added Mr. Mende. And then they became 50/50. We get

to the current LLC creation -- and I'm going to go fast because I'm not going to spend 30 minutes -- we end up at this May of 2022 email from the lawyer for all of them and he's saying "you're being frozen out." My client doesn't want to believe it because it's his long-time friend, his best friend, his partner. And so he does these books and records.

And we get to the next point in the timeline which is our books and records request for Mr. Kundrun, the litigation, and the settlement agreement. Why do I want to go fast through the settlement agreement? I'm shortcutting this. The settlement agreement, again, goes back to why, again, opposing counsel's position is against my client's interests.

If you go to the settlement agreement, it talks about the whereas clause, that whereas, AMCI Group, Kundrun is entitled to access the documents, books and records. AMCI agreed to produce or make available to Kundrun responsive documents. AMCI further agreed to produce to Kundrun any and all such other documents Kundrun reasonably requests in the capacity as director. AMCI will respond to all future demands for books and records from Kundrun by

producing all readily accessible and electronically available books and records within five days.

It then goes on to say, number 9, "AMCI will direct its employees to promptly respond to the requests for information in connection with producing the documents responsive to the books and records." They'll confirm with whether they exist after a good faith search is conducted.

That right there, Your Honor, comes all the way back to that second point, and specifically *Dunlap*, specifically *Infotechnology* and what we need to prove with clear and convincing evidence.

Why it's so important in this case is when they take a position that they don't have to respond to the court order, they don't have to respond to the settlement agreement, then they are violating the rules of professional conduct to the extent that it has an effect on the administration of justice, the efficiency and fairness of this proceeding.

To me, that's where you have to go through this road map and see what are they doing? They say, no, the inquiry just stops with the contract. It's the four corners. You have to look at

the contract. Nobody, Your Honor, nobody in the third-party objective state, which is, again, what *Weinberg v. Waystar* says -- we cited to it -- nobody in their right mind would enter into a contract that says that you can choose counsel and use my money to work against my interests. Nobody would do that. That's not what this contract could possibly mean.

So back to your question. Could the day-to-day administration, did Mr. Mende have day-to-day responsibility? He did. But that day-to-day responsibility can't possibly extend to using corporate resources to utilize against Mr. Kundrun. That is not the intent of this. That is not possibly what this contract could mean.

So when they get up here again and say no, no, no, no, this is what the contract says, the contract stops there, we have a disagreement about what that clause, the first sentence, says or the second sentence and whether -- but that, to me, is secondary to what the intent of this contract was. The intent of this contract could not possibly be that in a books and records case, counsel for the company could take opposing positions to Mr. Kundrun's interests because Mr. Kundrun and Mr. Mende are the

company. They are AMCI Group. They are the joint clients. And so to me that's super important for you to know.

THE COURT: So how would you feel if it was a situation where let's assume that there were two 40 percent interest holders and then the other 20 percent was divided among a bunch of other smaller holders. I know it's not our facts. Imagine a world where one of the smaller holders sent a books-and-records demand. Would you view that as within the day-to-day business of the company to retain counsel to respond to that demand?

ATTORNEY BLANK: You said it, Your Honor. I'll answer the question. It depends on whether or not they're going to use the resources against that owner. I think that really is what it -- but I think that's what makes this case so unique. This case is so unique because that's not the fact pattern. I do think --

THE COURT: Now let's take the next sort of escalation in the hypothetical.

ATTORNEY BLANK: Yep.

THE COURT: Assume that the board instead of just being your two folks, the board is

actually five or six members or something like that. And one of them files a director request for information. In that situation, would hiring counsel to oppose that request fall within the day-to-day business of the company?

ATTORNEY BLANK: Again, getting farther from the facts, it depends whether or not the purpose and the reason and the modus operandi I think would come into effect there. I think you're going further away from the facts here. So I would say it's less likely, but it could be. And it may be.

It gets also back to, again, I think the writing in *Hyde Park* where -- and this gets to your question, I think, in this way, I'll bring it back to this case. In *Hyde Park* -- and, again, I hate doing the citing to a judge that wrote the decision, but I think it's important. "The fact that the board of directors governs the corporation and comprises multiple individuals means that to the extent there is a corporation that can be a client ... the board ... is the decisionmaker for the client."

And then you go on to say, "Most importantly, the joint client approach prevents lawyers from claiming the authority to tell directors

what to do .... Lawyers can and should give advice .... and lawyers could "explain the potential consequences to the [company], but lawyers should not be giving orders to directors...."

So in your hypotheticals, you have the check. So you have the check there because the directors, 80 percent, check. That's the problem with this one. They are de facto becoming your third board member. They are de facto becoming the 20 percent or the extra five board members. That's not acceptable in a 50/50 LLC. That's where I think this case, if I could be so bold for the Court, that's why this case is so unique. And this is where the jumping off point from *Hyde* is because *Hyde* is, again, as you know, is producing documents and dealing with that issue. But here this isn't dealing with -- yet. Because we're going to come back. We'll have the next bite of the apple, I think, in subpoenas and document production.

This is at the beginning. This is can opposing counsel make decisions for the board? And they can't. And that's why it's not day-to-day. The day-to-day is -- the day-to-day is handing over the documents. The day-to-day is something that's -- that is truly ministerial. This is much more. This is

control. This is who gets to decide what the benefit is.

And back to if they were neutral and they just said, well, Kundrun says this, we go and ask Mende this and Mende says that, then we have a fair fight. Then we have the *Engstrum* where directors are actually fighting, the owners are actually fighting. That's all we have here. That is, to me, what gets back to the super problem here in this case. And, again, I think that's why *Hyde* is so important.

I'm going to get back to my road map, and then I'm going to come through.

Again, the current opposing counsel's engagement, there's a lot of hype, when we got it -- and, again, important/not important. More important is getting back to why it matters even in the who's, how they operate. Their engagement letter itself talks about transactions in dealing with resolving this. How in the world -- why does it matter now? How in the world could you resolve the case with our side with them being counsel for the corporation dealing with transactions? That's not what they were supposed to be hired to do or even what the court talked about. That's put them in a direct conflict

with one member of the board versus the other member of the board.

Again, if they're going to work to be working through transactions to resolve this, they have to be in a neutral position. They cannot take sides between one or the other.

And why is it so important? Why can't they take sides? And, again, I'm going to go through the couple more litanies of what Mr. Mende's doing to Mr. Kundrun, just, again, the last two weeks. This issue in Australia, different. We're all the way across the other side of the world. One of the more unique experiences of my life because the judge allowed me to call -- listen in from 8 p.m. to 2:30 in the morning. Again, we think this court is fast. This suit was filed, Mr. Mende, using his executive chairman title, tries to terminate a guy on August the 6th. We file on August the 8th and we have a trial on September 2nd. We have a 21-page decision on September the 5th. That's crazy.

THE COURT: Great.

ATTORNEY BLANK: Even for this.

But what is -- why is that so important? They are taking orders from somebody who

is abusing the power. Again, it's not to make a decision here whether I'm right or wrong on that. It's that the allegations exist such that they can't do it without being nonneutral.

We saw the same thing with their interjection in. They were not hired, again, to respond to the books and records requests that are ongoing. And, again, we're at a board meeting on July the 28th and Mr. Mende makes all these statements about a very important Series 20 operating company Inerca, which has $100 million in cash and $100 million in inventory and $25 million of accounts receivable, and we've been trying to get the money out forever on behalf of Mr. Kundrun. And Mr. Mende says there's environmental liabilities, there's corporate governance issues.

And we send a letter to Mr. Mende's counsel and say, what environmental liabilities? What corporate governance issue? And instead of Mr. Mende's counsel responding, they jump in and take a position that, again just regurgitates what Mr. Mende says. Is that day-to-day operations? No, that's board of directors trying to get to the reasons why you're making decisions or not. That's not

day-to-day decisions. And if they take that position, again, who are they representing there? They're not representing AMCI Group.

And, again, it puts us in an unenviable position about having to take actions to get there.

So we move to the remedy. I got through 30 minutes in 10 minutes. Hopefully I didn't belabor the point too much.

We get to this remedy. And the remedy is: Get a neutral counsel in. And the neutral counsel -- and they can do it. Again, I have the utmost respect for Williams & Connolly. I am co-counsel with them on other cases. Again, if they choose it, they're choosing their own path. But I'm giving them a path. I tried to give the path the day we filed the suit. I reached out. I tried to meet and confer. I didn't get a meet-and-confer. I got Williams & Connolly again forced down Mr. Kundrun's throat. I said that can't be possible. I tried to get it back to a meet-and-confer to say look, just be neutral. And they have not taken neutrality.

This court can order, can craft a neutrality order that says, look, you cannot take a

side. You have to share information. Before you do a pleading -- in fact, we could do our pleadings; and if they want to come in and say there's something that's missing, they can do it. Or they can do a pleading and come to say, are you missing something or am I missing something here? They can simply say we can't admit or deny.

What they should do is ask Mr. Mende to intervene in this case like Inerca. They should say, and this court should say, look, you have to be neutral. Mr. Mende, jump in. He's got able counsel. We are fighting in other cases directly. He is the one that's taking the position, which shouldn't continue to happen, is they shouldn't take the position that they represent AMCI Group and AMCI Group can be delegated the responsibilities of day-to-day to Mr. Mende.

That just will abridge the fairness and efficiency of the administration of justice and puts them in a difficult position because they would then be violative of 1.4 and 1.7 and 1.13. That's not for this court to decide. I understand that's for the Delaware Supreme Court to decide. But this court has to get to a threshold issue, and the way that you get

to that threshold issue is: Is AMCI Group a joint client? And if you do, then the first part of the day-to-day management, it matters, but it matters less because if you can declare that they're neutral, à la *In re Aerojet* or *Longoria* or *Jazinski* (ph.) where they actually put in a limited receiver, then you can get to the right place. And we're not going to be running here -- we're going to be here a lot, I think. But we're not going to be running here every time there's a dispute. How do I know that? How do I know that this can work? And then I will yield the floor.

I know this can work because there in the last week we did it. Didn't do it in AMCI Group. It's not part of the record. But I will suggest that this did take place on October the 15th. We have AMCI Holdings Inc., another 50/50 company we're fighting before, we'll be before the court on this. And AMCI Holdings Inc. got a subpoena. And the question was: Well, they wanted -- AMCI Holdings Inc. wanted to hire Williams & Connolly. We said no, you can't hire Williams & Connolly because they're adverse in all these positions, we're not going to allow them to do that.

So we worked out that we would get a

third party, another counsel. And we hired, the two parties hired a local Delaware lawyer. And the question was: Well, what happens if there's a dispute? And the answer was: Well, the lawyer would then go to the two counsel for Mende and Kundrun and see if they could work it out. And then there's nothing beyond that. That's where it stops.

And if they can't work it out, what would they do? They would come back to this court and ask for aid and guidance. The lawyer would say this party takes this position, this lawyer takes that position and, Judge, we need some help. It happens all the time in trust disputes. It happens all the time in courts here and all across America. Trustees come in and say I've got two beneficiaries and I've got these disputes. You could do that here.

That's the crafting of the appropriate remedy in this case. The appropriate remedy is not to say disqualify these guys. The appropriate remedy is, guys and gals, be neutral. Work with Kundrun's counsel, work with Mende's counsel. Do the books and records actually exist? Is there some defense that you think that you can take? And then get on with it. And then I'll yield the floor after I address one

other issue.

The other issue that I think they're going to stand up and say when they sued, they became adverse. And, therefore, the company needs corporate counsel.

That's not the case. Again, back to *Engstrum*. We may have to sue AMCI Group because that's the way the statute says. This fight is not between Kundrun and AMCI Group. Kundrun loves AMCI Group. He founded it. It's been incredibly important to him and his family. It's been probably incredibly important to Mr. Mende.

We are not adverse to AMCI Group. We are adverse to Mr. Mende. Mr. Mende is taking these actions. Mr. Mende is adverse to Mr. Kundrun. It's no question these guys have a huge disagreement that this court hopefully is going to help us figure out how to resolve.

But to say that just because we're on the opposite side of the V in these cases means that we have taken some adverse condition ignores the fact that it's a two-member LLC. It's two owners. The two owners equally share in the responsibilities. The two owners and directors should have equal access to

information. One member should not be able to trump the decision of the other member. And I get the day-to-day management. I get what they're saying. I think it's shortsighted that the belief that the day-to-day management gets to be everything but those six enumerated items because there's lots of other things that are taking place that the board has to do other than those six enumerated items.

So, Judge, I think I got through all of what I wanted to say in a short amount of time. I'll be glad to answer any other questions that the Court may have. But I would like the opportunity to reply.

THE COURT: Of course. That's helpful. Thank you so much.

ATTORNEY BLANK: Thank you, Judge. Your Honor, excuse me.

ATTORNEY BARNIDGE: Good morning, Your Honor. Ed Barnidge from Williams & Connolly on behalf of AMCI Group.

Your Honor, we submit that this is ultimately a contract question: Operating agreement controls. There was not much discussion of the terms. And I would like to discuss those terms.

We think the question presented is: Can Mr. Kundrun attain through judicial relief a blocking right that he bargained away in the operating agreement? When he was in his 60s, 25 years ago, he decided to step away from the business. He and Mr. Mende subsequently memorialized a governance structure that delegated full power and authority to the executive chairman subject to certain express carve-outs. The authority is that counsel was never one of those reserved powers. And it was never added, even despite the litigation three years ago.

Magistrate Mitchell, we submit, correctly addressed the two questions. First, that Mr. Kundrun did not have authority -- excuse me. That Mr. Mende did have authority to appoint Williams & Connolly and Ross Aronstam & Moritz. And she correctly concluded, in our estimation, that they lacked clear and convincing evidence that there was any conflict that would affect the fairness of the proceedings.

Start with the thrust of their argument, they rely heavily on the law of corporation, but Mr. Kundrun decided on the alternative entity arrangement that would be governed, of course, by

contract. And the public policy, of course, in Delaware is the freedom of contract. The LLC Act, of course, makes some things unwaivable: Implied covenant of good faith and fair dealing, for example; but it does not make the power to appoint counsel to an executive chairman something that is a sacred cow that's forbidden.

THE COURT: You all alluded to this. You cited it in passing, but I've been a fan of looking at the LLC Act as essentially a form of moldable clay that people can then use to make entities structured as they wish. And so my position has been that if something looks like a corporation, you analogize to corporate law. If something looks like a flat entity, like a partnership, you analogize to partnership law. If people come up with some other structure in the world, you try to think about what that might be like, like a limited partnership or something like that. Tell me how you think that applies, if at all, to this case.

ATTORNEY BARNIDGE: Well, I do think that what the parties set up was a management structure where the board would be the manager. And so that has certain analogs to a corporate structure,

of course.

But what's clear is that they then have the ability, as the moldable clay, to delegate the board's powers to an executive chairman. So that takes you to the question Your Honor flagged at the very beginning, did that happen?

And so here the analogy only goes so far to the corporate structure because the parties had -- took that extra step.

THE COURT: Well, does the analogy go far -- are you familiar with the one-man board committees?

ATTORNEY BARNIDGE: I'm somewhat familiar, Your Honor.

THE COURT: Isn't a delegation of board authority to an executive chairman roughly comparable to a delegation of authority to, for example, a chairman as a one-man board committee that you might use, for example, to grant option rights or to do other things that the DGCL would permit?

ATTORNEY BARNIDGE: Well, I think I do agree with that, Your Honor. In the *Aerojet* case, it was interesting, the footnote in *Aerojet* dealt with the question of the power to appoint counsel there.

THE COURT: I'm following up on a point that you made, which was that the idea of delegation somehow takes this out of the corporate context and makes this not a corporate analog.

And I'm pushing back on that to say: Is that really true? And so I'd like to know whether you think that that's really true. So, I mean, we can shift to counsel later, but right now, I'm pushing back on your idea that the fact that they could delegate to an executive chairman means that this isn't really a corporate analog case.

ATTORNEY BARNIDGE: Correct, Your Honor. I do agree there is analogy there. Where I was going to go with the *Aerojet*, it talked about the *Rainbow Mountain* case. It said actually the bylaws there did specify that the president could appoint counsel even though it was a corporate structure.

So I agree even in the corporate structure there are mechanisms to delegate certain powers to the executive chairman or to a president or to an officer. So I do agree.

And what I would submit that's exactly what happened here with the language. I mean, the word "delegate" is huge I think in the operating

agreement because first and foremost the power of the board to delegate all of its powers is recognized and agreed to. I will get the cite to Your Honor.

THE COURT: I'm looking at it. It's page 4.

ATTORNEY BARNIDGE: Yes, page 3 and page 4. They say it twice. And it uses the word delegate. And then that second sentence that you flagged in the officer section uses the word delegate. "Delegated the full powers and authorities of the board with respect to the company and each company-managed series." What they want to read into that sentence is they want to say full power and authorities with respect to day-to-day matters.

THE COURT: But they're not making it up, are they? It actually says "over the day-to-day operations," right?

ATTORNEY BARNIDGE: The prior sentence.

THE COURT: Yeah, the prior sentence.

ATTORNEY BARNIDGE: The prior sentence. What I would understand this structure to be that was set up, there are certain powers that are typically associated with an officer managing the

day-to-day. There are certain powers that might be, to use your question before, might be analogized in the corporate setting as board duties. And that second sentence is saying as to those powers that might be typically construed to be board powers, those have been delegated here to the executive chairman, as well.

THE COURT: So in your view of the world, what is the first sentence doing, then?

ATTORNEY BARNIDGE: The first sentence is identifying that it will be the executive chairman who holds the officer powers to conduct the day-to-day affairs.

THE COURT: Let's think of three concentric circles, okay. Let's think of the outer circle as the full powers that the entity can wield. So, again, it's easier to use a corporate analogy. But that would be all of the 121 and 122 powers. And sometimes that requires both board action and stockholder action. But it's like everything the corporate entity can do, all right. Are you with me so far?

ATTORNEY BARNIDGE: Yes.

THE COURT: Outside circle.

ATTORNEY BARNIDGE: Yes.

THE COURT: Now let's move in just a little bit from the outside, right, and you have what the governing body, the board can do, that's full board member. Are you with me so far?

ATTORNEY BARNIDGE: Yes.

THE COURT: Okay. Then you move in from that and you get officer power. Less than, generally less than board power. Are you with me so far?

ATTORNEY BARNIDGE: Yes.

THE COURT: Okay. So if we think about what it means to color in some of those circles, if I color in the second circle, what is the first circle doing?

ATTORNEY BARNIDGE: The only -- when I say I'm with you, the only part I'm struggling with is I think under this structure, it seems to me the first and the second circles are -- overlap.

THE COURT: Yeah.

ATTORNEY BARNIDGE: Because the full power to manage the affairs was placed on the board.

THE COURT: Right, right. So if we are delegating the second circle to the executive

chairman, what is the first circle doing?

Because we've got two sentences here, right. And in your world, the first sentence is the inner circle. The second sentence is the second circle.

And so what you like to say is you like to say well, if the first circle enlarges, it writes out the second sentence. So that can't be right. Fair argument. I understand where you're coming from.

It also seems to me that if the second circle trumps and you color in the whole second circle, you have colored in the middle circle, as well. And in this case, what is the first sentence doing?

ATTORNEY BARNIDGE: The first sentence is identifying that it is the executive chairman who's going to play the officer roles. And the day-to-day matters will be performed by the executive chairman.

And then you can construe the second sentence to be about, okay, well, what about those powers that are normally customarily associated with the board? Those powers will also be delegated.

THE COURT: Delegated for what? For

day-to-day or for everything?

ATTORNEY BARNIDGE: For everything.

THE COURT: For everything, right. And so do you agree that everything includes day-to-day?

ATTORNEY BARNIDGE: I do.

THE COURT: So if we're giving through the second sentence the "everything," --

ATTORNEY BLANK: Yep.

THE COURT: -- what is the point of the first sentence?

ATTORNEY BARNIDGE: The second sentence is rescindable, first of all. And the first sentence is subject to the authority of the board. So obviously --

THE COURT: They're both limitable. That's right. No, I agree with you. But both could be carved back. The board could come back later, carve it back. But under the structure that's initially created here, it seems to me that if you have your reading of the second sentence, then the first sentence isn't an anomaly.

So I don't get why the same logic that you used to try to defeat their reading isn't all the

more compelling to defeat your reading.

ATTORNEY BARNIDGE: Well, that's where I think that it's important to go to the board reserve matters language.

THE COURT: We'll get there.

ATTORNEY BARNIDGE: Okay.

THE COURT: If we just focus on these two interactions, right, I mean, do you see the circle problem? Or is there some way the circles are side-by-side?

ATTORNEY BARNIDGE: The way they could be side-by-side is that the first sentence is talking about day-to-day matters. The second sentence is talking about board powers that are not typically understood to be day-to-day.

THE COURT: Yes. So it's bigger. It includes, it's bigger, right?

ATTORNEY BARNIDGE: Or it can be said to exclude the day-to-day.

THE COURT: You think it excludes the day-to-day.

ATTORNEY BARNIDGE: I'm saying that is one reading. That it can be talking about -- day-to-day is talking about the powers that are

normally --

THE COURT: Let's look at it, all right.

ATTORNEY BARNIDGE: Sure.

THE COURT: So the second sentence says executive chairman has full power and authority of the board with respect to what? The company and each company-managed series. So there's no limitation to day-to-day in that; right?

ATTORNEY BARNIDGE: There is not.

THE COURT: So, again, that just seems broader to me than the first sentence. It seems to me that the second one under your reading is that's everything unless we get to the board reserve matters, right?

ATTORNEY BARNIDGE: And the second one is the one that uses the word delegate. So it is the one that is --

THE COURT: Is that meaningful? Is there meaning between "delegate" versus saying "will have?"

ATTORNEY BARNIDGE: Well, I think there's two ways to think about it. One, I've already talked about the first sentence is about day-to-day

matters. The second is about more traditional board matters. And you can think of both of them as delegations.

But you can also think of the second sentence is the, what you said, the comprehensive delegation. And the first sentence, then, is describing, specifically as to the day-to-day matters, to clarify, the executive chairman has unqualified powers to exercise those. And he's the one -- and, of course, he, then, it goes on to say, can designate other officers to perform certain roles.

THE COURT: So I'd like to bring in, think back to the sort of the delegation concept of the committee resolution.

So, a lot of times boards will form committees to, for example, look at conflict of interest transactions. Or to conduct special litigation committee investigations.

And usually there's two resolutions there. There's a scope resolution, which says this committee is being appointed to do something. This committee is being appointed, for example, to conduct a special litigation committee, investigation into the following issues. Or this committee is being

appointed to look at a challenged transaction or look at a conflict of interest transaction.

And then usually after that, there's a powers provision that says in conducting its charge or fulfilling its charge, the committee will have the following powers. And it will list things. Sometimes it will say all the powers of the board. Sometimes it will call out specific things. It will say power to appoint counsel, power to hire other advisors, power to give instructions to management, et cetera.

This looks to me like that structure. This looks to me like a scope structure followed by a power structure in which the first sentence is the scope structure and the second sentence is the power structure.

Now, I will concede to you that both use the word "authority," which makes it less clean than the fine lawyers from your firm or Mr. Moritz's firm were drafting something.

But why isn't this a standard delegation setup in which you have two clauses, the first one identifies the scope and the second one confirms the powers that one can exercise when acting within the scope of that charge?

ATTORNEY BARNIDGE: And I think there the answer lies in the board reserve matters language because that makes clear that -- if their distinction is day-to-day and like important, major, vital, critical; and that day-to-day has been delegated, but none of the other important, critical measures have been, then this entire board reserve matters definition, intricate, is meaningless.

THE COURT: Why do you think that's meaningless?

Because one of the things that I looked for in here was some type of signal as to whether it was illustrative or exclusive. Because sometimes people will say here's a big grant of authority, and it includes the following things. And sometimes people will say -- or it excludes the following things.

And some people will say, "for example." I didn't see in here an "only." I didn't see here an "including but otherwise." It just says that these are board reserve matters. So how do I know whether these are the only board reserve matters or whether these are examples of board reserve matters?

ATTORNEY BARNIDGE: A few comments on that. First, it starts with, of course, a recognition there's been a broad delegation. So the parties agree that the delegation that has occurred has been broad.

There's then a list of six items. The sixth item is critical. Because the sixth item isn't actually -- unlike the others, which is investments, compensation of the executive chairman's specific examples or specific items.

The sixth one, taking any other action that the board specifically designates as a board reserve matter. So of course you have *expressio unius*. I would say that's one point in response to your question, Your Honor. But it's more explicit here. We don't even have to rely on that because the parties agreed that the mechanism to add additional board reserve matters is for the board to come together and expressly designate it or specifically designate it.

So I think that is -- you could have used only, but I think that gets to the same point, Your Honor. And so in this context, there has been a broad delegation. There has been specific reservations.

The board members on occasion, including in this operating agreement, have specified certain things beyond the five that would also be subject to affirmative vote by the board, such as dissolution. So they've used six, the carve-out in six, and actually designated things to be subject to the board. They've never done that with respect to appointing counsel.

And that's important because there is a history here. There's a reference to this Ray Parker email in early 2022. What came after the Ray Parker email? What came after is a letter by Mr. Kundrun where he himself, this is attached to the settlement agreement as Appendix A, designated what he characterized to be the board reserved matters, and it's this same six.

THE COURT: Point me to that because I will be the first to admit that I don't know the record as exhaustively as you and your friend do.

ATTORNEY BARNIDGE: Yes. That is Exhibit 10. The settlement agreement has as Exhibit A, a June 3rd, 2022, letter from Mr. Kundrun.

And it says there at the bottom of the first page, the last sentence, "Although, as Executive

Chairman, you manage AMCI's day-to-day operations ... the Company Agreement requires you to obtain Board Approval, which is to say, my approval, to take certain actions." And he cites to the board reserve matters provision and then continues on the next page to specify those provisions that you are prohibited from taking without first obtaining board approval.

THE COURT: And this is the same list as we've got in the agreement, yes?

ATTORNEY BARNIDGE: Correct.

THE COURT: All right. Help me out. Why is selling or transferring a material investment something that a CEO wouldn't otherwise have the ability to do in the ordinary course of business?

ATTORNEY BARNIDGE: Well, I think in the context of this, it's because the parties agreed to it.

THE COURT: Oh no, I hear you. I hear you. So in a world, though, where Jamie Dimon decides that he wants to sell a material asset of Bank of America. I'm sorry. He'll be furious. Don't tell him. Do you think that would be a day-to-day matter, or do you think that that would be a board matter?

ATTORNEY BARNIDGE: I think a material

transaction that affects obviously the company materially by definition is -- can be and often is a board-level decision.

THE COURT: Can be. Depends on sort of the range of where we are, right? If we're using a threshold of materiality of like 3 percent, maybe. If we're using a materiality of like 25 percent, I'm with you.

ATTORNEY BARNIDGE: Right.

THE COURT: Issuing any equity interest. Now DGCL, that would say that that is a board matter.

Making a new investment. That one seems to me that Mr. Dimon wouldn't have to go to the board to just make a new investment. Agree or disagree?

ATTORNEY BARNIDGE: I think what's interesting there is that it also has this materiality component because it then says "other than in ordinary course, contributions of capital consistent with the budget" that -- and they set it up that the board would approve a budget so I think --

THE COURT: There's preapproval for those right there. There's essentially already

approval for the board for budgeting stuff.

ATTORNEY BARNIDGE: That structure, right. That was the structure.

THE COURT: But ordinarily starting a new, making a new investment, CEO thing or board thing?

ATTORNEY BARNIDGE: I think it certainly can be a board thing. I mean, these are huge enterprises, often, these coal processing facilities that they are investing in, these are major decisions. And so I think in many corporations, those would also be board-level decisions.

The compensation of the executive chairman also is consistent with a board-level decision.

And so I think -- I don't want to, I didn't know if you had a question about any of those others.

But obviously there's a dilution, as you said. It's not a normal function day-to-day for an executive chairman to be able to dilute ownership shares. Certainly that's a board-level.

THE COURT: It can be, though, if you're doing like employee options or things like

that. Again, that's where you get back to the one-person committee or I think even after our latest rounds of amendments, you can even have an officer do it.

So but I hear you. Some of these are otherwise board-ish. Some of these strike me as things that are perhaps more executive-ish. But I understand where you're coming from.

ATTORNEY BLANK: And I will note, Your Honor, to correct my prior answer, while these are essentially the list, I do realize these are truncated a little bit. And back on the board reserve matters definition, it says issuing any equity interest other than pursuant to a management equity incentive plan.

So, again, I think it's carving out not something that would be more day-to-day and something that is a board-level action. And it's making clear that as to that board-level dilution event, that that needs approval of both.

And so the structure, read as a whole, provides a mechanism for him to add more in agreement, Kundrun and Mende could agree to add more things to the board reserves pile. But it specifies a mechanism for doing that, and that has not been done here.

I did want to, being cognizant of the time, briefly address the, kind of the back-and-forth.

And I did want to say the final thing is -- actually, I think I've already covered that.

The course of performance briefly, we think the plain language clear here. I showed the letter there that was from June 2022. There was then a lawsuit. Mr. Mende caused counsel to be appointed on behalf of the company, Ropes & Gray. There was no objection. No claim that anything was *ultra vires*. There was then a settlement agreement. Mr. Mende signed the agreement on behalf of the company. Mr. Kundrun was the opposing party to that. There was no objection that Mr. Mende didn't have authority to sign. There was then a subsequent counsel engaged by the company. Mr. Mende didn't object to that as it was with respect to tax matters.

So they've acted consistently with the reading that I've set forth of these provisions.

The deadlocked cases, I think *Maitland* is an important case. It does deal in the LLC context, of course. And it says you have to start with the contract, which as Your Honor already noted, is the starting place. And that what makes it a

deadlock is if there's no power structure that delegates something -- someone as the decision-maker here. We submit the agreement does set that forth.

The Australia event, case recently, the court there said that the AMCI Group agreement has nothing to do with the analysis there. It was an entity outside of the AMC group, AMCI Group structure.

But the court in Australia then, what did it do? It went to the constitution, which as I understand it in Australia is similar to operating agreement here; and there, there had been no delegation by the board of powers to the executive chairman to hire and fire the executive. So the analysis actually is consistent with what our position is here.

Now, we heard a lot about --

THE COURT: The title of CEO instead of executive chairman, right, how would your analysis change?

ATTORNEY BARNIDGE: I don't think it would change in this context because clearly Mr. Mende would have been designated as the CEO. And the board would have been conferring the powers of the board to manage on the CEO. So I think the title is not what

is the critical factor here.

THE COURT: I agree.

Doesn't that, though, set up a situation where, contrary to information management systems or things I've said elsewhere, you would get a setup where by virtue of deadlock, our CEO in that setting would be in the happy position of managing the company without any board-level oversight because he could hold the deadlock at the board level while continuing to rely on the managerial-level authority, including whatever delegation he had to essentially operate free from board involvement. Why isn't that the same problem that we have here?

ATTORNEY BARNIDGE: Well, and if it's set up that way, that -- it's set up to avoid deadlock. If you set up a structure where you empower an executive chairman or a CEO, whatever title, to make decisions except for in certain circumstances and they then are making the decisions in those circumstances, that was the structure you set up to avoid a deadlock.

THE COURT: It doesn't avoid deadlock. It avoids deadlock on whatever is in the delegation of authority and maintains deadlock as to everything

else, including the ability to modify the delegation of authority.

And so what you have is a board-governed entity where by virtue of a deadlock, locked-in delegation, the individual, whatever we want to call them, gets to manage the entity free of the oversight of the senior governance agent in the entity.

Now, why is that solving a deadlock as opposed to -- it avoids the crisis that usually causes a deadlock to be a problem. But why does it avoid the deadlock?

ATTORNEY BARNIDGE: Clearly, I mean, you have a two-person board, 50/50. As to the matters that the board controls, there is always still the potential for deadlock, but it avoids it as to the matters that are delegated.

THE COURT: Right. But one of the things that you made a point of stressing earlier was that the delegation could be changed; right?

ATTORNEY BARNIDGE: Correct.

THE COURT: So it also deadlocks over the ability to change the delegation; doesn't it?

ATTORNEY BARNIDGE: It potentially

can. But the parties, for example, had a settlement agreement at the end of the last litigation. Their circumstances can produce parties to recut their deal.

THE COURT: No question. No question.

I'm focused on the extant governance arrangement where you have a locked-in board that can't act and, hence, somebody that is able to exercise power under a pre-existing and now nonamendable delegation of authority.

Again, I think I'm having trouble with your assertion that that solves the deadlock as opposed to simply shifting focus of the deadlock.

ATTORNEY BARNIDGE: Right. It doesn't -- the deadlock can only exist as to the matters that are reserved to the board. Of course, it doesn't solve --

THE COURT: Including matters that they themselves could take back.

ATTORNEY BARNIDGE: But it, in the meantime, the structure allows an agile executive chairman to run the matters that are within his or her purview. And that keeps potentially the business running and avoids just pure gridlock.

THE COURT: I agree with you that it

avoids the operational crises that normally bring a deadlock to a head. I do agree with you on that.

What else do you want to tell me?

ATTORNEY BARNIDGE: Just briefly on the fairness points. I mean, obviously our position is to have a remedy, you need a right that's been violated. You need some wrong that's occurred. And that it wouldn't be appropriate to fashion a remedy without such a violation.

But I did want to -- and the Court's more familiar with the *Moore Business Forms* and your Honor's decision in *Kalisman* that a director is outside the company's privilege when the director is sufficiently adverse to the company.

Here, we have Mr. Kundrun did not just sue Mr. Mende. He sued AMCI Group. He's seeking coercive relief against the company. Damages, cash distributions, monies based on share differences, disgorgement, accountings. And so there's no question that as to those matters, not as to all matters, but as to those litigation matters, there is adversity.

Williams & Connolly is not the roving counsel that's been designated for all matters. We've been designated to handle the matters in which

Mr. Kundrun is adverse. And the same with Ross Aronstam.

And specifically today we're here for the books and records. We've been designated as to that matter.

THE COURT: And when you take instruction internally in your role as client to the -- counsel to the company, who do you take instruction from?

ATTORNEY BARNIDGE: We take it from the company's officers.

THE COURT: Which is who?

ATTORNEY BARNIDGE: Mr. Mende, of course, is the ultimate executive chairman. There is Ms. Ornella, who is the CFO. And there's others at the company who --

THE COURT: The structure reports up to Mende.

ATTORNEY BLANK: Correct. Absolutely.

But, of course, we have to advise them properly as to the duties of the company. And there's a notion that we've just been standoffish. I don't know where that comes from. They say that they wanted a copy of the engagement agreement. We gave it to

them voluntarily. We didn't wait for discovery. They asked questions about it; we answered those questions. They said they want an investigation into the operating agreement, which ones are the right version? We said sure. We pledge to do so. They say that they want transparency, they want simultaneously reporting the results of that; we agreed to that.

THE COURT: Let me interrupt you a second. Humor me, notwithstanding your view that I don't have to think about this, indulge me. And assume that I have to think about what falls within day-to-day business.

Does a dispute with a director over the director's informational rights constitute day-to-day business? And does it matter if it's a, you know, multiple-director board à la *Kalisman* where there's one director sort of on the outs who's asking for stuff versus a two-member board like here where one of the directors is raising the issues?

ATTORNEY BARNIDGE: Well, I do think that when you're starting, like you say, taking one case at a time, this case, a books and records request for information, I would consider that to be a part of the day-to-day functioning of a company in Delaware.

THE COURT: Let's think about that. Because you're -- and this is where I want to run through the sort of the hierarchy or the escalation of what books and records can entail.

So you write in your engagement letter, "Williams & Connolly will provide legal services to AMCI Group LLC in connection with, one, representation and civil litigation including a shareholder dispute including books and records requests." Then you go on from there.

So, I think I would agree with you that if -- again, to get back to J.P. Morgan and Mr. Dimon, if they get a stockholder books and records request, I bet general counsel hires lawyers. I think that's a day-to-day business matter.

So if we had a situation where this was -- and my example to your friend -- a 40/40 entity that is what gave rise to our deadlock, a two-directors setup but there was a public float, and if somebody in the public float came in and asked for the books and records, I'd be there with you. I'd agree that that is day-to-day and that somebody ought to be able to hire Williams & Connolly, be it Mende or his general counsel, whoever.

But then I at least personally view a director request for information as a more serious thing because it involves board-level issues. It is almost like by definition a board-level problem. And that's where I start to have trouble with that being a day-to-day concept. And I really have trouble with the idea the 50/50 board-level information request being day-to-day because, look, that just doesn't happen that often; right? The structure is not that common. Does it happen? Yeah, but, ooh, that's different.

So why am I not thinking about it in the right way and saying like you can't just stop by labeling it a books and records action. You have to think about what's going on in the books and records action. And not all books and records actions are the same. So tell me how you think about them.

ATTORNEY BARNIDGE: So of course a manager can make a books and records, but the manager is the board. And so Mr. Kundrun, in and of himself, is not that. He is making a request that we construe as a member. And he has rights as a member to make that request. That's how we understand his request.

THE COURT: So you think that there's

a deadlock over the request. Because only the board can make the request as manager.

ATTORNEY BARNIDGE: Well, no. I think he certainly has -- I'm saying in the context of where does this fit in the books and records --

THE COURT: You're telling me it's now a director-level request; it's not a manager-level request.

ATTORNEY BARNIDGE: It's a manager level -- it's a member-level request.

THE COURT: It's a member-level request.

ATTORNEY BLANK: Yes.

THE COURT: And why is it a member-level request?

ATTORNEY BARNIDGE: And it's where Your Honor was alluding. I mean, we --

THE COURT: Which is what?

ATTORNEY BARNIDGE: That the board is two people.

THE COURT: Yes.

ATTORNEY BARNIDGE: Yes. And the board is the manager.

THE COURT: And the board can't act to

request the information. Why?

ATTORNEY BLANK: Well, no, I understand. I mean, they would have to have approval of both to --

THE COURT: You just don't want to say the D word, huh?

ATTORNEY BARNIDGE: No. I understand. Oh, a deadlock, yeah. No, that's fine. I understand that to make that board-level request would require them not to be deadlocked.

But he has the rights as a member to make the request. He has done so before. There was a settlement. It offered him, in his capacity as a member, rights to make requests in the future.

THE COURT: But in your world, in your world, yeah, this isn't -- really, the delegation doesn't even solve the deadlock problem as to something as basic as whether one of the directors of the entity can get information because there is even a deadlock over that.

ATTORNEY BARNIDGE: No, because he is a member.

THE COURT: Member rights and manager rights are different, right?

ATTORNEY BARNIDGE: But he has broad -- but the parties set it up in the operating agreement to give him specific rights as a member.

THE COURT: Have contractual rights, yes.

ATTORNEY BARNIDGE: Right.

THE COURT: You have officer, I mean capacity-based rights, yes?

ATTORNEY BARNIDGE: Correct.

THE COURT: Yes.

ATTORNEY BARNIDGE: And it's set up that he's empowered to make the requests. And we've hired an expert. We're working diligently to get him --

THE COURT: Expert for what?

ATTORNEY BARNIDGE: They have -- this spreadsheet that they sent us, thousands and thousands of requests that they want. They had an expert analyze whether these requests are material to the stockholder, to Mr. Kundrun valuing his interest. And they had an expert specify which of those categories were relevant to that.

We have retained our own expert on behalf of the company because we're trying to

facilitate this request.

THE COURT: Are you guys still requiring him to show up personally at the company to conduct an individual inspection?

ATTORNEY BARNIDGE: No, no.

THE COURT: When did you all back off that demand?

ATTORNEY BARNIDGE: I don't -- it happened before our time on the case, Your Honor.

THE COURT: It doesn't suggest the receptivity. It doesn't suggest a receptivity towards providing information.

ATTORNEY BARNIDGE: I would disagree in this sense, Your Honor. That Bailey Glasser was previously handling on behalf of the company. They've produced thousands of documents, 300,000 pages of documents. They've gone back and forth letter after letter. Every time they produce something, it yields five more requests. And they worked diligently.

There may have been a time, prior to the 2022 lawsuit, where things were different. In 2023 and 2024, there were extraordinary efforts by company. The company hired a new employee just to deal with this. So that is old vestige to the extent

that was the case. It's certainly not the attitude now. It's not. It's a far-flung enterprise. And the effort to compile the information has been a moving target, to some extent, is difficult. But we've got an expert involved. We now are in a stay because of the proceeding here today. But we're taking that very seriously and very diligently. And it's, frankly, been difficult because my friend has not wanted to engage with us because he doesn't recognize us as proper counsel.

And so the deadlock is really being caused by that rather than the parties trying to work through these issues to get whatever information is appropriate, necessary --

THE COURT: There's a deadlock at multiple levels. But at a minimum we now know that there's even a deadlock, in your view, as to the ability of the board to exercise its information requests. Fair?

ATTORNEY BARNIDGE: Under the statutory term. Not under the -- we have acknowledged that he has the ability to propound requests for us.

THE COURT: I don't distinguish between manager rights and member rights, which is

where you start. Let's focus on manager rights.

ATTORNEY BARNIDGE: Right.

THE COURT: Do you agree that the ability of the board qua manager to exercise its information rights is currently ineffective or blocked because there's a deadlock as to whether those rights should be exercised?

ATTORNEY BARNIDGE: Your Honor, I do think that that is the proper analysis given the way, by contract, the parties set up the rights and responsibilities.

THE COURT: Look, it seems to me like you can't take the one position without acknowledging the other, right. I mean, once you've said, hey, only the board's the manager, only the manager has the rights. And it takes unanimity for the board to act, and our guy's going to act -- I don't see how you incredibly say that at the manager level he's got --

ATTORNEY BARNIDGE: I get -- I guess -- I'm sorry to speak over Your Honor.

THE COURT: That's fine.

ATTORNEY BARNIDGE: The only thing I would say is that de facto, Mr. Mende has -- the company has made extraordinary efforts under his

management to comply, to provide information. And so we're not standing on a formality in that respect.

THE COURT: But there's different rules that apply to a director/manager-level request and a member-level request.

And so what your position does is it channels him into the, again, from your standpoint, into the member-level angle, the member-level channel, where there's just a lot more stuff that you got to deal with; right?

ATTORNEY BARNIDGE: Well, yes. I mean, it does channel him there. It also channels him into a settlement agreement where he has rights, as well. In addition to the operating agreement has a whole provision on access to books and records for him as a member.

So, Your Honor, finally, in conclusion, the implied covenant of good faith and fair dealing, I know they made a brief reference to that. I don't know if you'd like for me to briefly address it. That was brand new in the reply brief. I'd never seen that before in the arguments below and in their opening motion. We submit it's -- there's no gap to fill here, for all the reasons we've said.

We submit that the way to do equity in chancery is to enforce the parties' contract when they set up their arrangement in this way.

And the notion that the parties would have come to a different conclusion had they specifically contemplated this scenario, well, we also have the evidence to the contrary in the way they've conducted themselves with respect to the prior books and records dispute.

So when you put it all together, we submit Magistrate Mitchell got it right. She identified the two key issues. She identified this as a contract question. And we submit it does authorize the executive chairman to appoint counsel so there is not a deadlock as to that.

We are -- we'll take seriously -- and do take seriously -- our obligations to represent AMCI's interests zealously. And we submit that that is what should proceed with this case with us as counsel. If they don't want us in the case, AMCI, in the various cases, of course they don't -- specifically, they've got the Series 11, the Series 33, these other cases, and obviously they don't need to keep them as a defendant.

THE COURT: I'm sorry. Say that again?

ATTORNEY BARNIDGE: I was saying that to the extent -- they say these other cases where they're seeking damages, accountings, disgorgements, where they've named AMCI as a defendant, not as a Nominal Defendant, as a defendant, and they say, well, it's really just about Mr. Mende, well, they've named AMCI as the defendant. And we have an obligation as the company to have counsel to represent itself with respect to those allegations.

THE COURT: All right. Thank you.

ATTORNEY BARNIDGE: Thank you, Your Honor.

THE COURT: Reply?

ATTORNEY BLANK: Your Honor, I want to start with a statement that was made that I just don't think is accurate. And this is this member/manager distinction.

We've made the request as a director, as a member. To say that we've just made it as a member is inaccurate. To say that we're not a director is inaccurate. To say that we're not entitled to the records as a director is inaccurate.

And the way that you know that is the settlement agreement. Because the first -- the third whereas clause says, "Whereas, as a director of AMCI Group, Kundrun is entitled to access to AMCI Group's books and records."

So you have hit on the crux. They are again taking an adverse position to Mr. Kundrun's interests. That's a violative 1.4. It prejudices the administration of justice in this case, in this hearing right now because that's not accurate.

THE COURT: The settlement agreement's, that whereas clause, good fact for you. I'm not going to argue about it. I totally get it.

But they're saying that you may have tried to make your demand as a director. But maybe you didn't learn that they were going to make this defense or whatever, but their pitch, apparently, is that the board can only act to make that demand. You can't act unilaterally. Look, there's deadlock over whether you can seek information. But that's -- you've got at least flushed out by their arguments, right?

ATTORNEY BLANK: But that argument doesn't fly for a variety of reasons. And it leads

back to the *In re Aerojet* because if that's true, then *In re Aerojet* says the Delaware corporation must remain neutral where there's a legitimate question that's entitled to speak or act on its behalf. The corporation cannot take sides where a control dispute is resolved. That's what they're doing here.

If they are going to take that position, which, again, is new in the sense that they somehow it's a member not a director, then we're right to where we need to be because this court should appoint a neutral counsel. They should not be taking this position because it's unresolved. That issue in and of itself is unresolved. I would say it's not unresolved because I've got the settlement agreement. It's a great fact. But you get to the point.

And back to is this corporate law or is this LLC law? The joint client analysis applies to LLC law. It's not in our briefs, but *Mehra v. Teller*, 2020 Delaware Chancery Lexis 305. It goes right to that issue of is the LLC, you have the same interpretation, which gets you back to, they say, this is this contract issue.

I want to take back -- before I go down there, there's another statement that Mr. Mende

has said let's be transparent, kumbaya. And we get all the documents and they've done extraordinary efforts. That's inaccurate. That's just not true.

They have actually, as of January of 2025, they haven't produced any documents. Well, that's not true. That's an overstatement. They have provided very little documents. And they have taken the position that they haven't -- they don't have to produce any documents.

How do we know that? Not because of Mr. Mende's counsel that said it over and over again to 10 letters that we added as directors saying we need to have this information to determine, to make our decisions that you're asking us to make on the fly on tens or hundreds of millions of dollars of issues. Williams & Connolly wrote on August 7th of 2025, again they're saying that they have great painstaking and it's a new regime. This is Exhibit 41. They basically say you don't have the right to do it. We're not going to do it. We're not going to respond. We have four more questions in July of 2025 that counsel to my right writes a letter saying "you're not entitled to these documents." So to stand up say it's a new regime, it's painstaking measurements, that's

not accurate at all, and it gets back to the point they're taking an adverse position against Mr. Kundrun.

Now I'll go back to my argument about the joint-client analysis and back to this reading. And I want to come back to where you were at, Your Honor. The *MALT Family trust v. 777 Parters LLC*, it says you can't read a clause in a vacuum. So that's Delaware law.

The idea that these enumerated rights are taking into consideration what we're doing here today, that's not what these parties were doing. No one in their right mind, in January of 2020, would have agreed that Mr. Mende could use company resources to hire counsel to take positions against Mr. Kundrun. That is inconsistent with anything that's part of this.

How do you know that? And back to this issue of he's reading from this letter from 2020 -- oops, I just had it. Got myself off. Again, opposing counsel reads those last two sentences, but go to the first two sentences of that paragraph. The company protects -- "The company agreement protects my rights by limiting your authorities as executive

chairman. As you know, you and I are the sole directors. That means that both you and I act as a body must manage the business and affairs of the company."

How do you know that? Because if you go back to the actual reading of this LLC agreement -- and you can't read it again, you can't just read the sentences out of context -- now, Your Honor, if you will give me a second. Because page two starts off, governance, as a general rule, "governance is a company-level responsibility and in particular the responsibility of the company's board of directors."

Then board of directors, "The board of directors, acting as a body, will manage the business and affairs of the company unless the members of any particular series agrees otherwise each series. We refer to each series as managers by the board company as company-managed series." They are ignoring the board governance Article I governance board of directors. They're ignoring that. You can't read that out of the context of this.

When you go back to where you were at, again, what they're saying is you would read everything out. Mr. Mende is authoritarian in this

context.

THE COURT: Tell me what you think about the subsection (f), "taking any other action that the board specifically designates as a board reserve matter."

You know, I can envision some formalistic reasoning that would say everything is delegated. A list is here. And the fact that they've said anything else that the board might designate does create an inference that that list is supposed to be exclusive because if there was anything else, well, you know, it's picked up by (f). What is your pushback on that line of reasoning?

ATTORNEY BLANK: First of all, there's numerous places we cited in our brief where even in this agreement they start taking actions. Why would you put that there if you have other areas that you're going to enumerate?

Again, what would -- I think Your Honor got to it. Would -- if you take their reading of that to the logical extreme, Mr. Mende's the authoritarian. It is deadlocked. It is total deadlock. That's not what these two gentlemen were agreeing to. They had mutual trust. They were going

down the path.

So, again, taking the other action that board specifically designates as a board reserve matter, it could be a number of different things, but it doesn't mean that Mr. Mende has unfair control over everything.

Again, your circles, again, makes perfect sense. I don't think that the answer got them to where they wanted to be. You have these day-to-day -- and we cite what day-to-day is. These other things, again, couldn't possibly be. Back to the *MALT* cases and the line that you can't read these contracts in a vacuum, they can't possibly mean -- and I'm channeling Mr. Kundrun here -- it can't possibly mean that Mr. Mende gets to hire counsel using 50 percent of Mr. Kundrun's money to take actions that are adverse to Mr. Kundrun. That can't possibly mean what F is limiting.

THE COURT: If you haven't seen it yet, the line you're going to see is that people can, under Delaware law, can enter into good contracts, and bad Delaware law enforces both. I don't know if they've put that in one of their briefs yet. I forget whether I saw it in here. But they are going to beat

you over the head and shoulders with that at some point.

ATTORNEY BLANK: They can, again, continue to beat you over the head with it, but, again, this idea that these four corners gets you to a bad contract? You can't ignore the intent of what these parties mean.

So I get -- that Delaware law, you can enter into bad contracts. I think both of these gentlemen think that this is bad in a lot of ways. We've talked about it a lot. Oh my God, sometimes it's my advantage, sometimes it's not. But the intent of the parties for this particular motion, for the specifics of: Can they not be neutral? Can they take the actions that they're taking? That's not what this contract was set up to do.

And I think your Honor's hit on head that it doesn't say "only." Mr. Pileggi likes to argue it and say "no dogs are allowed." Well, you don't say rhinoceros. You don't say elephants. You don't say all these other things, but everybody knows, okay, can you bring an elephant into the room? It defies logic, this argument that they're making.

Again, back to where we're at, the

two-part, this contractual analysis, you've hit the nail on the head with the two sentences. The second sentence can't -- if what they're saying is true, the first sentence would be nonexistent.

I go back to literally the first sentence in Article I of the board of directors that adds onto that concept, as well.

And then the second piece to it is: Even if, even if you read that correctly, then you're still off to the second question, which is: Can they do what they're doing? Is it -- it's not just is it fair, does it prejudice the administration of justice?

And these comments that we can't ask as a director, that's not true. The fact that they say that they're giving us documents, we wouldn't be here if that was true.

It's just -- it's not right. This court has the ability to fashion a remedy to make it right, to make this contract work for this specific issue in this books and records. And we'll be before you again on these other cases.

But for this time it's not right for us to sit here and have to fight against corporate counsel when the corporation really is Mr. Mende and

Mr. Kundrun.

Thank you, Your Honor.

THE COURT: All right. So here's what we're going to do. Let's take a break until 10 after and then we'll come back and I'll try to give you all some answers. Stand in recess until then.

(Court in recess 10:50 a.m. to 11:14 a.m.)

THE COURT: Please take our seats.

Thank you, everyone, for your presentations this morning, which were very helpful. Thank you also for your briefing, which I spent a lot of time with before coming in today. I had some thoughts. Your presentations helped crystallize them.

We're here in a case called Kundrun versus AMCI Group LLC. I'm going to give you my ruling now.

We're here on exceptions to a Final Report by the Magistrate on Plaintiff's motion to disqualify the defendant's counsel and for appointment of a limited receiver.

For the reasons that I'm going to explain in a moment, I'm denying the motion in part and granting the motion in part.

I'm denying the motion in part to the

extent it requests disqualification and a receiver. I'm granting the motion to the extent it requires company counsel to be neutral in this proceeding, which is in substance a bilateral dispute between Kundrun and Mende.

I am permitting Mende to intervene with his counsel to defend the proceeding on the company's behalf.

The role of company counsel going forward will be to take steps like identifying what documents or information exist and carrying out either joint instructions of the parties or the Court's directives, including the eventual final order.

I'll start with some factual background. This is an LLC books and records action, but it is a unique one. It involves an LLC with 50/50 ownership and a two-member board of managers. The dispute is over whether one of the individuals can access information. That individual asserts information rights as a member of the board of managers under the LLC Act, as a member of the LLC under LLC Act, as a member under the LLC agreement, and under a settlement agreement between the parties.

There does not appear to be any

meaningful precedent involving an LLC books and records action where the members each own 50 percent of the entity and are each members of a two-person board.

In other areas of entity law, we treat those types of entities as unique. In the DGCL, for example, we have a separate section to cover them. We also have different case law that has developed. That's because disputes between 50/50 owners are effectively bilateral disputes. To channel them through an entity law framework that generally applies to larger entities with more complex capital structures, such as multiple-member governing bodies and multiple-member investor profiles, risks misshapen results.

At this stage of the dispute, the case is not about whether the plaintiff gets books and records; it's solely about whether the LLC, acting at the behest of one of the involved parties, could hire the counsel it retained to represent it in this litigation.

The plaintiff is Fritz Kundrun. His long-time business partner is Hans Mende. They have co-owned and run a business together for nearly four

decades. Currently, the parent entity is AMCI Group LLC, which is the named defendant. I will call it the "Company."

Before 2000, Kundrun owned 51 percent of the interest in the company's predecessor and Mende owned 49 percent. In 2000, Kundrun decided to step away from the day-to-day management. Mende agreed to step in to run the day-to-day operations in exchange for an additional 1 percent ownership interest. That brought the parties to an even 50/50 split.

In 2019, Kundrun and Mende formed the company as a manager-managed series LLC. They engaged in a restructuring that brought the bulk of their entities under the umbrella of the company.

Kundrun and Mende each directly or indirectly own 50 percent of the member interests in the company. The company's sole manager is a board of directors. Kundrun and Mende serve as the only two directors.

The operating agreement for the company identifies Mende as the company's executive chairman, which is an officer position. It gives him authority to act as an officer and to exercise the powers of the board. There are also provisions

limiting his ability to act. I will return to those, because the parties dispute the proper interpretation of those provisions and the extent to which they delegate authority to Mende to select counsel.

After years of seemingly peaceful cooperation, Kundrun and Mende's professional relationship has soured over the past few years. Among other squabbles, Kundrun has been in an ongoing fight with Mende since 2022 about getting access to company information. Kundrun filed two lawsuits against the company and Mende in 2022. Mende acted in his capacity as executive chairman to pick counsel to defend itself in those suits. Kundrun didn't object at the time of the company's retention of counsel.

I frankly don't view that as a significant fact. Kundrun didn't waive his right to object, and he certainly didn't waive his right to object to any future counsel, whoever it might be. What Kundrun also alleges is that even though he didn't object at the time, he learned that it was a bad idea not to object. So I don't treat that as a waiver of a right, nor as a past practice establishing what the proper interpretation of the LLC agreement is.

Since 2022, Kundrun has sent multiple books and records demands to the company. In May of this year, Kundrun filed this action for inspection of books and records. He followed up the books and records complaint by filing five plenary actions against the company and Mende.

After the litigations began, Mende exercised his authority as executive chairman to select counsel for the company. The company retained Williams & Connolly and Ross Aronstam. This time Kundrun objected to Mende's selection of company counsel. Williams & Connolly and Ross Aronstam represent they have never been counsel for Mende personally. Mende, in fact, has separate counsel.

Kundrun moved to disqualify company counsel on the grounds that Mende did not have authority to hire them unilaterally to represent the company. Kundrun also sought the appointment of a receiver for the limited purpose of identifying neutral counsel to represent the company in this litigation. After argument, the Magistrate denied the motion in a bench ruling and Kundrun took exceptions.

In terms of the standard of review, I must review issues on exceptions *de novo*. That's the

DiGiacobbe v. Suslak case. Under Court of Chancery Rule 144, I hear the exceptions based on the record before the Magistrate unless there is good cause to expand the record.

Kundrun has argued that I could consider additional information not before the Magistrate. The company has asked me to reject this new evidence. I'm not going to consider the new evidence because I don't think it affects my decision. My decision turns almost exclusively on the language of the LLC agreement.

Where I come out is that Mende, in fact, lacked authority under the LLC agreement to select company counsel for purposes of this litigation because he only had authority to exercise the power of the board in connection with the company's day-to-day operations. While many books and records actions likely are within the day-to-day operations of a company, a books and records action brought by what is effectively a director on a two-member board who was also one of two 50/50 investors is not a day-to-day matter.

Nevertheless, I think that disqualification is not required as long as counsel

stands neutral. I don't think there's any conflict here as long as counsel takes a neutral position. And Kundrun's counsel commendably agreed that disqualification was not warranted if that type of stand neutral order was put in place.

I also don't think that the appointment of a receiver is warranted in light of that result.

So let's drill into the main issue, which is whether Mende had authority under the LLC agreement to select company counsel.

As a threshold matter, there appears to be an open question about which version of the LLC agreement is the current version. For this dispute, both parties rely on the January 2020 amended and restated LLC agreement. After the magistrate's ruling, Kundrun suggested that there may be a more recent version, but neither side presented a copy of this document, and I don't intend to reach that issue given that parties have both referred to the 2020 version.

As I indicated at the outset, the company is a series LLC that establishes a manager-managed structure in which a board of

directors acts as the sole manager for the LLC and its series with a delegation of authority to conduct day-to-day matters to a senior officer. That is a quintessential corporate structure.

As I have suggested elsewhere, the LLC Act is the soft clay of entity law. You can make an LLC look like pretty much anything you want, but people normally model LLCs on other types of entities and then simply tweak the governance regimes that would apply in those other entities to enhance them in some way, often to limit liability.

So when an LLC is structured to look like a corporation, it's my view that one can infer from that the parties were thinking about the backdrop of corporate law when they drafted the LLC agreement. If parties draft an LLC to agreement to create a structure that looks like a limited partnership, then I think one can infer that they were thinking about the backdrop of limited partnership law when they were drafting the LLC agreement. If parties drafted the LLC to follow the default LLC structure and create a flat member-managed entity akin to a partnership, then I think it follows that one can infer that the parties were thinking about the backdrop of general

partnership law when they drafted the LLC agreement.

Now, in all these circumstances, the actual language of the LLC agreement controls. The question is the real world context from which the Court is going to approach the parties' agreement. No agreement can cover everything. People always have implicit understandings and frameworks when they draft a contract or approach a scenario. We all have these rubrics that we use to understand the world. And so I think that one has to take into account the big picture structure that people have used when one approaches an LLC agreement.

I think that's particularly true here where the parties did not explicitly follow a legally written model for their LLC agreement. The parties made a point of trying to write their agreement in layman's language or nonlegalese. I think that's commendable. One of the things that happens when we use precedents for our next deal is we get the accumulated detritus of years of people tweaking the language.

But we also get provisions that one can look at and find readily identifiable precedents or analogs and cases interpreting them. That's one of

the reasons why legal forms persist.

Here, the parties decided to go, or attempt to go, the plain language route. And I think from my standpoint, when folks sit down and try to go a plain language route, it's all the more important to try to interpret the agreement from a realistic standpoint of what they're trying to achieve. And here I think they were trying to achieve something that was modeled on a corporate structure.

For starters, I draw that inference from the following language in the operating agreement. It states, "As a general rule, governance is a company-level responsibility and in particular is the responsibility of the company's board of directors." It further states, "The board of directors, acting as a body, will manage the business and affairs of the company, and unless the members of any particular series agree otherwise, 'the series.'" It then says, "The board collectively acts as the statutory manager of the company, and each company managed series under Delaware law, but no single director has the authority in that capacity to bind the company or any company-managed series unless the board has explicitly empowered him or her to do so."

That is a classic board-level governance structure and statement of authority. Just as in the corporate context, the board is the governing body that exercises authority on behalf of the company. So too here. No individual director in the corporate context can exercise authority unless they are duly empowered through a committee or otherwise. So too here.

And they even used the language from 141(a) to refer to the business and affairs of the company and call for the board of directors acting as a body to do that. We're starting with the concept of board-level management.

Now let's move on to the next section, which is the section on which Mende relies. This section is entitled "Officers." We don't normally afford dispositive weight to headings in an agreement, but they are signals. What we started with was board authority for the overall management of the company. Now we are getting to officers. Just as in the general corporate context, the officers are going to have a lesser and more limited scope of authority than the board, which has plenary authority over the entity.

The LLC agreement says that there's one officer position, the executive chairman, and it appoints Mende to that position. It gives him the power to appoint other officers, but this is the one officer position that's in the LLC agreement.

The argument then says the board may delegate any or all of its authority to act with respect to any matters to the officers of the company. That provision follows up a two-sentence combination which I'm going to read.

"Subject to the authority of the board, the executive chairman will have the unqualified and complete authority and responsibility over the day-to-day operation of the business of the company and each series." That's sentence one. I'm going to refer to that as the "scope provision" for reasons that I will come back to.

It then says, "Unless later rescinded by the board, the executive chairman is, by virtue of this agreement, delegated the full powers and authority of the board with respect to the company and each company-managed series." I'm going to refer to that as the "powers provision," for reasons that I will come back to later.

This, to me, is a standard delegation structure that we see all the time in the corporate world. The most common example involves delegations to special committees. Initially, a special committee that's looking at a transaction or a special committee that's empowered to investigate litigation is given a charge. The committee is told you have authority over this subject. You have authority over this conflicted transaction, like a going private merger. Or you have authority over how to deal with this litigation. That's the scope provision.

The committee is then given powers that it can exercise. Sometimes it's given the full powers of the board with respect to that charge. Sometimes it's given the full powers of the board with specific things emphasized, like the ability to hire its own counsel or the ability to hire other advisors or the ability to make outreach to third-party bidders. Sometimes there are limitations on what it can do. But this is a common structure. Scope, then powers that you can exercise in that scope.

This looks to me to be like it's using that structure. Now, I will acknowledge that the language is not as pristine as it might be because it

uses the word "authority" in two places. It first says, "The executive chairman will have the unqualified and complete authority and responsibility over the day-to-day operations of the company."

It then says, "Unless rescinded by the board, the executive chairman is, by virtue of this agreement, delegated the full powers and authority of the board."

So authority is showing up in both places. It would be cleaner if the first sentence said "authority" and the second sentence said "powers." But that's the type of small linguistic fillip that I don't think is dispositive and one would expect to see even in a heavily lawyered agreement. It's all the more expected in an agreement that's attempting to not use legalese.

What I draw from this is that the delegation to the officer is to handle the day-to-day operations of the business.

The provision is then saying that within that scope of authority, the officer can also exercise board powers, but only within the day-to-day operation of the business.

I think this reading gives effect to

both sentences. And it does so in a customary way. In their arguments, by contrast, the parties have suggested or accused each other of taking positions that overwrite one or the other of the sentences by making one of the sentences expand to the point where it prevents the other from operating.

The company, for example, says that if day-to-day operations limits the full power and authority of the board, well, then, you don't have full power and authority of the board; you just have authority over day-to-day operations.

But that's also true of the company's argument. And during my colloquy with counsel, I used the example of three concentric circles of authority. We can envision a world where the outer limit of company authority is everything the company can do. So in a corporate law scenario, we'd be talking about all the powers conferred by Section 121 and Section 122 of the DGCL. Some of those powers require stockholder approval to exercise. Most of those powers can be exercised solely by the board. But it's everything the company can do. That's a big, outermost circle.

We only have to move slightly inside

that circle to identify the scope of the board's authority, because the board has near plenary authority over the company. That's the second circle.

But then we have a third concentric circle that is smaller still that is the scope of executive authority, such as the authority that a CEO would have.

The company's argument is that the powers provision here gives all the authority of the board to the executive chairman. If that is so and we colored in that whole board circle, then we have also colored in the circle of managerial authority that is at the center of the three concentric circles that I'm positing. What that means is that the company's argument reads out of existence the first sentence.

Now, as I acknowledged to counsel, both of these delegations of authority can be changed. They can be limited by board. They can be modified, et cetera. But what we're talking about is how to read the language that is in fact here. And so I think the company's argument is actually the one that is most vulnerable to the contention that reading one of the two sentences as they wish renders the other sentence a nullity.

By contrast, if I read the first sentence to assign authority over day-to-day operations to the executive chairman and then say that within that scope of operations the executive chairman can exercise all the full powers and authority of the board, then what we have is a standard delegation setup. It looks, walks, talks, reads like the type of committee delegations that we're all familiar with.

The strongest argument against this reading is that the LLC agreement contains a section titled "Board Reserved Matters" that identifies five specific items, A through E, that require board authority and that the executive chairman cannot take unilaterally.

Then there's a final catch-all provision in F that refers to taking any other action that the board specifically designates as a board-reserved matter.

The company argues that this list is exclusive. The provision doesn't say that. It doesn't say that these items are either exclusive or nonexclusive.

I will credit, however, that F is a signal that these provisions, all else equal, could be

read as exclusive because it suggests that F is a catch-all designed to encompass the possibility of everything else.

But that line of reasoning runs into other provisions in the LLC agreement that also require board authority to exercise. So, for example, the size of the board has to be increased or decreased by the board. There are also requirements for amending the agreement that require the affirmative approval of the board followed by the approval of the members.

Now, I acknowledge that those provisions are also consistent with what you'd expect. They are ways of modifying the governance regime itself. And so you'd expect board-level involvement in those types of things. But it does cut against the argument that the company makes. And I think essentially that's a countervailing signal that negates the inference based on F.

I also have considered the nature of the items themselves. They're a mixed bag. Some could otherwise be part of the company's day-to-day operations; some almost certainly would not. So selling or otherwise transferring any material

AMCI investment, any material company investment, that's one that it depends on how material is material. If we're using a rule of thumb like a 3 percent asset is material, that might hit the threshold of materiality and yet be something that a CEO or a top executive, like an executive chairman, would have authority to do.

I agree that if you get bigger than that, certainly a sale of all or substantially all, then that would require board authority. But that's an example of a borderline call.

The same is true for making any new investment other than ordinary course contributions of capital consistent with any budget approved by the board.

Generally speaking, any new investment would be not something that would be outside a CEO or top executive's authority. Some levels of new investment would be 100 percent within the CEO's authority. Others certainly would not. A commitment, again, of all or substantially all of the company's resources would not be something that that one would expect that a CEO could do.

Something that I think falls cleanly

on the other side is changes in base compensation for the top executive. That's something that you'd expect to be a board matter. But it's also something that I could imagine people wanting to clarify as an item that certainly the executive chairman couldn't do unilaterally.

In terms of distributions from the company, again, there's something where it might be in, might be out depending on how regular the distributions were. In the corporate context, we'd expect dividends to require board approval. But in the LLC context, that would be fuzzier.

So based on the nature of these items, I can't draw the inference that these are all inherently things that would either fall within or fall without the concept of day-to-day board authority. These seem rather, to me, to be clarifications where they're saying you're generally limited to day-to-day matters. And then, so there's not any doubt, here are things that you absolutely can't do. And we may specify some other things that you absolutely can't do. But these are some things that you absolutely can't do.

I think ultimately that's the best

reading of how the board-reserved matters provisions interact with the overall deligation as a whole.

Ultimately this ends up being much like a TRO order that would limit the company to the ordinary course of business. Those orders can be structured -- and I prefer that they be structured -- to say that the company is limited to the ordinary course of business. It then says that actions outside the ordinary course of business include, but are not limited to, a list.

But oftentimes I get lists from counsel that say the company can't do the following things: Act outside the ordinary course of business. And then there's another list of things. And it's not immediately apparent why they wouldn't all ordinarily be covered as outside of the ordinary course of business. Maybe some are, maybe some aren't. But it's an effort to promote clarity rather than an effort to create an exclusive list.

The company has made some other arguments that I don't agree with. One is the emphasis on the contractarian nature of the LLCs. That's certainly true. They're primarily creatures of contract. But what that means is we look at the LLC

agreement in the first instance. And that's what I've done here. We give the LLC agreement the predominant weight in the analysis. And whenever it can be dispositive, it is dispositive. And that's what I've done.

Mende also argues that it would be inequitable or incorrect not to hold parties to their bargain. Again, I agree with that. But that's not what's at issue here. The question is: What is the bargain? And that's where the parties are fighting. Once you know what the bargain is, it's easy to say that you shouldn't allow somebody to retrade their bargain. But the issue here is a question of what is the bargain.

So ultimately I do conclude that the LLC agreement delegates day-to-day authority to the executive chairman. Within the scope of that authority, he can exercise all the power of the board.

For clarity, the LLC agreement states that some matters are absolutely outside day-to-day and require board approval. And this is an area where I regrettably disagree with the Magistrate. She viewed the agreement as giving the executive chairman full authority over everything except for the listed

matters. For the reasons that I've suggested, I think that overwrites and renders a nullity the day-to-day operations limitation, and it also departs from what I think is the standard structure of a delegation, which includes a scope provision followed by a power provision.

So now I turn to the next issue, which is whether hiring counsel for this action fell within day-to-day operations.

I think hiring counsel is often within the power of a CEO or the CEO's delegate, such as the general counsel. I don't think that using that counsel to defend a dispute between one of two directors and one of two 50 percent stockholders over information the director can obtain is an ordinary course of business matter.

The company says that it's just a books and records action, but I don't think that's dispositive. There is a range of scenarios.

As I suggested to counsel, you can imagine situations where there would be a deadlocked board but, nevertheless, it would be within the CEO's authority to retain counsel. So let's envision this company with Kundrun and Mende each holding 40 percent

and they are the sole directors, but there is a 20 percent float or 20 percent of the equity is widely held. If one assumed that one of the small holders sought books and records, I would think that the executive chairman's authority over day-to-day matters enabled the executive chairman to hire counsel for that dispute.

But that doesn't mean that all books and records actions are like that.

I think a closer call would be a situation where you had multiple members of the board, let's assume five, and one of the directors was seeking information. That would be a *Kalisman*-style situation. I think that I would view that as a scenario where the board had to hire counsel. But I could envision the executive hiring counsel subject to the board's ratification. I wouldn't think that the director seeking information in that setting would get to veto the counsel selection.

But here we've got two directors. We've got two directors where one of the directors is trying to exercise director-style, manager-level information rights. And we heard today that one of the reasons why he supposedly can't get the

information he wants is because the other director isn't joining him in exercising the manager-level information rights. So there's a deadlock over whether this director can even exercise his managerial director-style information rights.

This is really a bilateral dispute. We therefore benefit from the learning from *Engstrum v. Paul Engstrum Associates, Inc.* where then Chancellor Seitz addressed precisely that type of scenario. It wasn't a director books and records action; it was a dissolution action. But what then Chancellor Seitz understood quite clearly was that it was a bilateral dispute. And it didn't make sense in that setting to act as if the company was under the control of one of the two director/stockholders simply because the incumbent had been able to freeze in the existing power structure. I think that's exactly what we have here.

The fact that Mende has control over the day-to-day operations as executive chairman doesn't make him the company. It doesn't mean that there isn't a deadlock. It means he gets to run the day-to-day business. But there is a deadlock. There's a deadlock over whether the board can act.

And what we heard today, there's even a deadlock over whether directors can get information because Mende supposedly won't go along with his fellow director in exercising managerial information rights.

I pause to say that I'm deeply skeptical of that argument. It seems to me that just as the board acting as a whole can exercise board-level authority to tell a company or its officers to provide information to the board, so too here the manager can exercise manager-level authority to tell the entity to provide information to the board/manager. I don't think that inherently means that the director, who is one of the two human components of the manager, is frozen out of exercising a director-level information right simply because of that structure. I don't think it makes sense as a governance model, and I do think that the settlement agreement is inconsistent with that assertion.

But as I've written elsewhere, it doesn't mean there's no board-level deadlock simply because one of the two deadlocked parties is privileged to operate the day-to-day business and to use the resources of the company. It simply means that the company doesn't have day-to-day managerial

crises that otherwise would convert a deadlock into a crisis. It means the company can go on operating day-to-day, but there's still a deadlock.

You can look to the *Carlisle* case for that. There it was a four-member board. They were deadlocked 2-2. And I also address that in the *IMS* decision.

So, given all that, I think this is a setting where *Engstrum* applies. I think this is a setting where we have to view this as a bilateral dispute. We have to view this as a setting where the company counsel needs to be representing the company. And Mende isn't the company. The board is the company. And the board is deadlocked on lots of things, including whether Kundrun gets information in his capacity as a director.

Now, I don't think that means that we need to get rid of company counsel. Company counsel is needed because the company is a defendant in this lawsuit. Counsel is going to have to provide information about what information the company has. Counsel is going to have to implement whatever rulings the court makes. And so I think this is a situation where à la *Engstrum* and à la a setting like Aerojet,

company counsel needs to stand neutral. Mende can intervene and defend this action and oppose his business partner's right to information and make all the arguments that he wants to make. I personally don't see any basis to prevent him from intervening. I think the petitioner acknowledges that he should be able to do that. And I think as in *Engstrum*, that's the way this should unfold.

There's an implied covenant argument raised in the briefing. Given how I've ruled so far, I don't have to reach it.

The last issue I'm going to talk about is whether there is a separate basis to disqualify counsel notwithstanding what I've held. I don't think there is. We do our best not to grant motions to disqualify. Here, but for the structural governance problem that I've described, there wouldn't be any reason to disqualify either Williams & Connolly or Ross Aronstam.

It's the structural issue that gives rise to this situation. I don't think this is a situation where the LLC agreement conflicts of interest governs. This is a separate type of issue. But I simply don't think that there's any reason to

disqualify Williams & Connolly and Ross Aronstam as long as they operate within the neutrality concept that I've articulated. And, again, I appreciate counsel's acknowledgment of that fact.

There is also an argument about adversity. Both sides have raised the concept. It's certainly true that even with a director-level information request, once there's sufficient adversity between the director and the corporation, then the director can't have a reasonable expectation that he was the client of company counsel. I draw that from *Kalisman*.

But one can be adverse for some purposes and not others. And when you're dealing with director access rights, access to information about the day-to-day management of the business is usually not something where there's an actual issue of adversity, at least not an issue of adversity that would prevent Kundrun from accessing the information. By contrast, nothing prevents Mende from asserting privilege or invoking the work product doctrine regarding his own counsel.

That said, I would be strongly disinclined to override the work product doctrine for

purposes of the period of time when Williams & Connolly and Ross Aronstam have been operating in the belief that they could represent the company in active litigation. It seems to me that overriding work product would open an unnecessary can of worms. What we really should do is on a go-forward basis, have Williams & Connolly and Ross Aronstam act as company counsel under a principle of neutrality.

We shouldn't go back and try to scrape through all of their internal documents and communications under the theory that now Kundrun can pierce work product. I think he likely can get a lot of things. But I don't think it makes sense for him to get work product-related information that these folks were preparing at the time when they believed that they were operating as company counsel appropriately for purposes of active litigation. I think that's just going to cause things to further spin off into a bunch of unnecessary disputes.

It should follow from everything that I've said so far that I don't think a receiver is warranted.

I'm going to conclude where I started. The motion is granted in part and denied in part.

It's denied as to the request for receiver and as to disqualification. It's granted as to the requirement under *Engstrum* and *Aeroflex* that counsel stands neutral. Mende can intervene and defend.

You can now go back to the Magistrate and pick up where you left off, or seek whatever other relief you wish to pursue.

Let's go off the record.

(Off-the-record discussion held.)

THE COURT: Thank you all for your presentations today. I appreciate them. I know some of you have come in from out of town, so I hope you will have safe travels back to where you're headed. And I'll enter an order that implements the ruling. We stand in recess.

(Court adjourned at 12:04 p.m.)

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CERTIFICATE

I, KATHY CORTOPASSI, 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 112 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 24th day of October, 2025.

/s/ Kathy Cortopassi

Kathy Cortopassi
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public