STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 4473
TRAIL CREEK INVESTMENTS LLC and WARREN OIL COMPANY, LLC, Plaintiffs, v. WARREN OIL HOLDING COMPANY, LLC, et al.; Defendants.	**ORDER AND OPINION ON WARREN OIL HOLDING COMPANY, LLC'S MOTION TO AMEND COUNTERCLAIMS [PUBLIC][1]**

THIS MATTER is before the Court on Defendant Warren Oil Holding Company, LLC's ("the Minority Member") Motion to Amend Counterclaims ("Motion to Amend," ECF No. 212).

THE COURT, having considered the Motion to Amend, the briefs of the parties, the arguments of counsel, the applicable law, and all appropriate matters of record, **CONCLUDES**, in its discretion, that the Motion to Amend should be **GRANTED**.

Tuggle Duggins P.A., by Denis E. Jacobson, Jeffrey S. Southerland, Brandy L. Mansouraty, Daniel D. Stratton, Shauna L. Baker-Karl and Claire E. Thompson, for Plaintiffs.

Robinson, Bradshaw & Hinson, P.A. by David C. Wright, Stephen D. Feldman, Melissa A. Romanzo, Andrew R. Wagner, Emma W. Perry, Matthew B. Wright, and Nathan C. Chase, for Defendants.

Davis, Judge.

[1] The Court elected to file this Opinion under seal on 11 September 2024. The Court then permitted the parties an opportunity to propose redactions to the public version of this document. The parties proposed the redactions contained herein, and the Court finds that those redactions are narrowly and appropriately tailored. Accordingly, the Court now files the redacted, public version of this Opinion.

INTRODUCTION

1. As this Court has summarized on several prior occasions, the claims asserted by Plaintiffs in this lawsuit concern allegations that " 'Defendants fraudulently failed to disclose substantial existing environmental liabilities in connection with the sale of Warren Oil Company, Inc.[2] and its affiliated companies to Trail Creek Investments LLC' " ("Trail Creek," and together with Warren Oil, "Plaintiffs"). *Trail Creek Invs. LLC v. Warren Oil Holding Co.*, 2024 NCBC LEXIS 96, at *1 (N.C. Super. Ct. July 11, 2024) (ECF No. 238 (Sealed); ECF No. 244 (Public)) (quoting *Trail Creek Invs. LLC v. Warren Oil Holding Co.*, 2023 NCBC LEXIS 128, at **2 (N.C. Super. Ct. Oct. 13, 2023) ("13 October Opinion," ECF No. 114)).

2. The present Motion to Amend, however, solely relates to the Minority Member's counterclaims, which are factually dissimilar to Plaintiffs' claims. The Minority Member has previously asserted several existing counterclaims alleging, in part, both that Warren Oil substantially overpaid management fees to its majority owner, Trail Creek (and to affiliates of Trail Creek), and that the Minority Member has not been paid its full pro rata share of those management fees as required by a contract that was previously executed between the parties. In its Motion to Amend, the Minority Member now—for the first time—seeks to add a new derivative counterclaim regarding this alleged overpayment of management fees.

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[2] As a consequence of the sale, Warren Oil Company, Inc. was restructured as Warren Oil Company, LLC ("Warren Oil"). (*See* Sec. Am. Compl. ("SAC") ¶ 7(m), Ex. A, at 1, ECF No. 125.)

FACTUAL AND PROCEDURAL BACKGROUND

3. This lawsuit was originally filed on 26 April 2022. (ECF No. 3.)

4. A more complete summary of the factual and procedural background of this lawsuit—as alleged in Plaintiffs' currently operative SAC—can be found in the Court's 13 October Opinion. In the interest of brevity, the Court will limit its recitation of the factual background below to only those events relevant to the Minority Member's Counterclaims (ECF No. 173).

5. Warren Oil is a company that produces lubricants and chemical products, primarily for use in the automotive industry. (SAC ¶¶ 27–28.) In 2016, Trail Creek acquired all issued and outstanding equity interests in Warren Oil (the "Transaction"). (SAC ¶ 131.) As a consequence of the Transaction, several of the entities involved in this case underwent a complicated restructuring process. This process culminated in the Minority Member assuming a roughly fifteen percent ownership interest in Warren Oil (which it maintains to date). Meanwhile, Trail Creek became—and continues to serve as—Warren Oil's controlling majority member. *See Trail Creek Invs.*, 2024 NCBC LEXIS 96, at *2–3, 28.

6. In a nutshell, the Minority Member's existing counterclaims—along with the proposed derivative counterclaim that is the primary subject of the current Motion to Amend—stem from two separate contracts.

7. The first contract was executed on 7 October 2016, at which time Trail Creek and the Minority Member entered into an Option and Management Fee Sharing Agreement (the "Management Fee Agreement," ECF No. 59.6, Ex. G). The

Management Fee Agreement memorialized a fee-sharing arrangement between the two parties in connection with Trail Creek's intention to charge certain management fees for its provision of management services to Warren Oil. (Mgmt. Fee Agrmt., at 1; Countercls. ¶ 7–10.)

8. The Management Fee Agreement contains two provisions that are particularly relevant to the issues raised in the Minority Member's Counterclaims: Sections 1.01 and 3.01.

9. Section 1.01 of the Management Fee Agreement defines a "management fee" as follows:

> "Management Fee" shall mean the management fee, if any, accrued or received by [Trail Creek] or any Affiliate thereof from [Warren Oil] in exchange for management services rendered to [Warren Oil] by [Trail Creek], *not to exceed four and one-half percent (4.5%) of [Warren Oil's] operating income*.

(Mgmt. Fee Agrmt. § 1.01 (emphasis added).)

10. Section 3.01 of the Management Fee Agreement states, in relevant part:

> 3.01 Sharing of Management Fee. [Trail Creek] agrees to pay over to the Minority Member *the Minority Member's pro rata share of any Management Fee payable by [Warren Oil] to [Trail Creek]* or any Affiliate thereof . . . promptly following the receipt of such Management Fee by [Trail Creek] or any Affiliate thereof[.] . . . The Minority Member's pro rata share of such Management Fee shall equal the amount of such Management Fee multiplied by a percentage determined by dividing the number of Units in the Company held by the Minority Member on the date such Management Fees were payable by the Company over the sum of the number of Units in the Company held by the Minority Member and the number of Units in the Company held by [Trail Creek] on such date.

(Mgmt. Fee Agrmt. § 3.01 (emphasis added).)

11. The Minority Member alleges that from 2017 to 2021, Trail Creek paid it an annual sum of [redacted] as its pro rata share of management fees previously paid by Warren Oil to Trail Creek and its affiliates pursuant to the Management Fee Agreement. (Countercls. ¶¶ 14–15.) Until 2020, [redacted] equaled roughly 15% of the approximately [redacted] in total annual management fees that were being paid by Warren Oil to Trail Creek. (Countercls. ¶¶ 13–15.)

12. Then, in or around 2020—and unbeknownst to the Minority Member—Warren Oil allegedly began substantially increasing its annual payments to Trail Creek (and its affiliates) with regard to management fees. (Countercls. ¶¶ 16–17.) However, Trail Creek did not correspondingly increase the pro rata share of fees that it was paying to the Minority Member under the Management Fee Agreement. (Countercls. ¶ 18.) Eventually, in May 2022, Trail Creek allegedly ceased paying any management fees at all to the Minority Member. (Countercls. ¶ 19.)

13. The second contract was a "Services Agreement" executed on 1 January 2017 between Warren Oil and one of Trail Creek's affiliates, Falls of Neuse Management, LLC ("FNM"). (Countercls. ¶¶ 2, 5, 11.)

14. The Minority Member alleges that pursuant to the Services Agreement, Warren Oil has paid annual fees to FNM since 2017—an assertion that does not appear to be contested. (Countercls. ¶ 12.) However, the parties do dispute whether these payments to FNM qualified as "management fees" for purposes of the Management Fee Agreement.

15. According to Plaintiffs, these annual fees paid to FNM were merely "service fees" (as opposed to "management fees") and account for "services related to banking and financing, human resources, payroll, benefits, information technology, legal, real estate, and risk management matters (including insurance), as well as accounting services." (Pls.' Resp. Br., at 4, 19.)

16. The Minority Member, conversely, contends that those fees do, in fact, qualify as management fees, and that it should have received a pro rata share of the fees under the Management Fee Agreement. (Countercls. ¶¶ 12, 34, 38.) Moreover, based on this same logic, the Minority Member asserts that when the payments to FNM over the last few years under the Services Agreement are added to the fees paid to Trail Creek (and its affiliates) under the Management Fee Agreement, the total for each year since 2017 exceeded 4.5% of Warren Oil's operating income, in violation of Section 1.01 of the Management Fee Agreement. (Countercls. ¶¶ 22, 32–33.)

17. In or around January 2024, H. Lawrence Sanderson—a representative of the Minority Member and a member of Warren Oil's Board of Representatives (the "Board")—formally requested the right to inspect information related to Warren Oil's finances in order to investigate any possible improprieties regarding the above-referenced payments. (Countercls. ¶ 23–27.)

18. On 19 January 2024, the Minority Member filed its existing Counterclaims, which stated causes of action for declaratory judgment and breach of contract against Trail Creek for breach of the Management Fee Agreement. (Countercls ¶¶ 28–40.) The breach of contract counterclaim sought payment of the

Minority Member's full pro rata share of the management fees paid by Warren Oil for the prior years in which the Minority Member alleged that it had only received a partial share. (Countercls. ¶ 35–40.)

19. That same day, counsel for the Minority Member sent Warren Oil's registered agent a letter (the "Derivative Demand Letter," ECF No. 212.4, Ex. A). The Derivative Demand Letter stated the Minority Member's intention to file a derivative claim if the demands listed therein were not met within ninety days pursuant to N.C.G.S. § 57D-8-01(a)(2). (Derivative Demand Letter, at 3.) Specifically, the Derivative Demand Letter stated, in pertinent part, as follows:

> 1. We demand that the Company investigate the management fees paid to [Trail Creek] and its affiliates, including FNM—and appoint a non-conflicted and independent third party to conduct the investigation.
>
> 2. We demand that the Company seek recoupment of all fees, payments or distributions—no matter how categorized—to [Trail Creek] and its affiliates that exceed the limit of 4.5% of the Company's operating income that is established in section 1.01 of the Management Fee Agreement.
>
> 3. We demand that the Company—again, through the appointment of a non-conflicted, independent third party—investigate and take suitable corrective action regarding legal-duty and contractual-duty violations by [Trail Creek] and its affiliates, and each of their respective representatives on the Board, related to the Company's payment of management fees to [Trail Creek] and its affiliates. Such action must include investigation into all services allegedly provided for any and all fees charged to the Company by [Trail Creek] or its affiliates and all disclosures made by Company officials to its auditors regarding such fees.
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> 4. We demand that the Company investigate and take suitable corrective action regarding legal and contractual duty violations by [Trail Creek], affiliates of [Trail Creek], and their respective representatives on the Board, related to abuse of the Minority

> Member and Minority Member Representative, including due to denial of information rights. Such action shall include immediately complying with the January 5, 2023 information request by Mr. Sanderson.

(Derivative Demand Letter, at 3.)

20. On 18 April 2024, counsel for Warren Oil responded to the Minority Member in a letter declining to take the actions set forth in the Derivative Demand Letter. ("18 April Response Letter," ECF No. 212.4, Ex. B.)

21. The Minority Member filed the present Motion to Amend on 21 May 2024, seeking to add a derivative counterclaim against Trail Creek for causing Warren Oil (in Trail Creek's capacity as the company's controlling member) to breach the Management Fee Agreement. Additionally, the Motion to Amend seeks to add several additional factual allegations in connection with its existing counterclaim for breach of contract. ("Amended Counterclaims" ¶¶ 5, 17, 25, 26–28, 31–39, 49–51, 53–64, ECF No. 212.2.)

22. The initial round of briefing on the Motion to Amend was completed on 27 June 2024. (*See* ECF No. 233.)

23. On 11 July 2024, shortly before a hearing on the Motion to Amend was scheduled to take place, Plaintiffs filed a document captioned "Warren Oil Company, LLC's Notice of Filing of Report by Special Committee of the Board" ("Notice") along with an attached "Report by Special Committee of the Board" ("Special Committee's Report"). (ECF Nos. 241, 241.1.) The Notice stated that on 14 May 2024 Warren Oil held a special meeting of its Board for the purposes of appointing a three-member

committee (the "Special Committee") to review and investigate the claims alleged in the Derivative Demand Letter. (Not., at 1–2.)

24. The Special Committee's Report summarized the review, analysis, and conclusions of the Special Committee with respect to "the various management and services' [sic] fees between [Warren Oil] and [Trail Creek/FNM]." (Spec. Comm.'s Rep., at 1.) Specifically, the Special Committee's Report concluded, in relevant part, that

> [t]he [Management Fee Agreement] between [Trail Creek] and [the Minority Member] dated October 7, 2016 explicitly states that it is for 'governance and management' and we do not find it logical to assume this governance and management encompasses any of the services defined in the Services Agreement dated January 1, 2017 which was between FNM and [Warren Oil].

(Spec. Comm.'s Rep., at 3.)

25. Following a round of supplemental briefing ordered by the Court regarding the effect of the Special Committee's Report on the Motion to Amend, Plaintiffs filed a separate Notice of Filing of Unanimous Resolution, attaching a document captioned "Unanimous Resolution of Independent Special Committee of Board of Representatives of Warren Oil Company, LLC" ("Unanimous Resolution," ECF No. 263). The Unanimous Resolution stated, in relevant part:

> NOW, THEREFORE, IT IS RESOLVED, that the Special Committee has fully investigated the derivative claims asserted by the Minority Member and has unanimously concluded that it is not in the best interest of the Company to bring a derivative proceeding based on the derivative claims made by the Minority Member.

(Unanimous Resolution, at 1.)

26. The Court conducted a hearing on the Motion to Amend via Webex on 26 August 2024 at which all parties were represented by counsel.

27. The Motion to Amend has now been fully briefed and is ripe for resolution.

LEGAL STANDARD

28. Motions to amend are governed by Rule 15 of the North Carolina Rules of Civil Procedure. Rule 15(a) provides, in relevant part, as follows:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C. R. Civ. P. 15(a).

29. Although Rule 15 states that leave shall be freely given, "the rules still provide some protection for parties who may be prejudiced by liberal amendment." *Vitaform, Inc. v. Aeroflow, Inc.*, 2021 NCBC LEXIS 79, at **11 (N.C. Super. Ct. Sept. 16, 2021) (quoting *Henry v. Deen*, 310 N.C. 75, 82 (1984)). As a result, an "amendment may be denied for reasons of 'undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice, and futility of amendment.' " *Id.* (quoting *Bartlett Milling Co. v. Walnut Grove Auction and Realty Co.*, 192 N.C. App. 74, 89 (2008)). "The burden is upon the opposing party to establish that [it] would be prejudiced by the amendment." *Id.* (quoting *Mauney v. Morris*, 316 N.C. 67, 72 (1986)).

30. The decision whether to grant or deny a motion to amend is within the discretion of the trial court, and its decision will not be reversed except in case of manifest abuse. *Id.* (citing *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 603 (2018)).

ANALYSIS

31. As an initial matter, the Court notes that Plaintiffs do not oppose the Minority Member's Motion to Amend to the extent that it seeks to add additional allegations to the Minority Member's *existing* counterclaims. Plaintiffs do, however, oppose the Motion to Amend to the extent that it seeks to add the new derivative counterclaim. Plaintiffs' opposition is based on the grounds of undue delay, prejudice, and futility.

A. Undue Delay

32. Plaintiffs argue that the Motion to Amend should be denied on the ground of undue delay because the proposed derivative counterclaim is based upon information to which the Minority Member has allegedly had access for several years. (Pls.' Resp. Br., at 9–15.) Specifically, Plaintiffs contend that Sanderson, a member of the company's Audit Committee and its Board, received Warren Oil's 2019 and 2020 Financial Statements (which purportedly reflected payments of "service fees" by Warren Oil to FNM) in May of 2020 and 2021, respectively. (Pls.' Resp. Br., at 11–13.) Plaintiffs assert that Sanderson's receipt of these documents (especially in light of the fact that he is an accountant) should have been sufficient to put him—and, by extension, the Minority Member—on notice of the facts giving rise to the proposed derivative counterclaim several years ago. (Pls.' Resp. Br, at 14.)

33. The Minority Member makes two arguments in response to Plaintiff's undue delay contentions. First, it contends that the financial documents received by Sanderson in past years did not make clear the fact that certain additional sums being paid by Warren Oil qualified as management fees under the Management Fee Agreement and that Sanderson did not become aware of the proper characterization of these fees until shortly before the present Motion to Amend was filed. (*See* Warren Oil Holding Co., LLC's Br. Supp. Mot. Am. Countercls. ("Defs.' Br. Supp.") at 10, ECF No. 213; Defs.' Reply Br., at 2–3.)

34. Second, the Minority Member contends that the timeliness of its Motion to Amend should be assessed in relation to the progression of this lawsuit. (Defs.' Reply Br., at 2.) In support of this argument, the Minority Member asserts that at the time it filed its existing counterclaims it was statutorily precluded from simultaneously asserting a derivative counterclaim because N.C.G.S. § 57D-8-01(a)(2) required it to send the Derivative Demand Letter and then wait ninety days (or until it received a rejection of its demand from Warren Oil) before seeking leave to file any such derivative counterclaim. (Defs.' Reply Br., at 2.)

35. After a thorough review of the record, the Court is unable to conclude that the Motion to Amend should be denied on the basis of undue delay. With regard to Plaintiffs' argument that Sanderson was (or should have been) aware years earlier of Warren Oil's alleged violation of the Management Fee Agreement, the Court cannot say as a matter of law that any such violation was readily apparent based solely on Sanderson's receipt of the documents relied upon by Plaintiffs for this

argument. Based on this uncertainty, the Court's liberal standard of review at the Rule 15(a) stage requires it to resolve this issue in favor of the Minority Member as the moving party. *See Vaughan v. Mashburn*, 371 N.C. 428, 434 (2018) ("There is no more liberal canon in the rules than that leave to amend shall be freely given when justice so requires.") (cleaned up).

36. Moreover, as the Minority Member asserts, our Court of Appeals has held that when assessing undue delay under Rule 15(a), it is proper for courts to consider the progress of the lawsuit when assessing the timing of the proposed amendment. *See Strickland v. Lawrence*, 176 N.C. App. 656, 667 ("In deciding if there was undue delay, the trial court may consider the relative timing of the proposed amendment in relation to the progress of the lawsuit.") (cleaned up).

37. Here, for reasons unrelated to the present Motion to Amend, the Minority Member did not file an Answer in this case until 20 December 2023. (ECF No. 171.) On 19 January 2024—thirty days after filing its Answer—the Minority Member timely filed an Amended Answer containing its existing Counterclaims. (ECF No. 173.) At the same time the Counterclaims were filed, the Minority Member sent its Derivative Demand Letter to Warren Oil, thereby triggering the mandatory ninety-day waiting period for a response as required by N.C.G.S. § 57D-8-01(a)(2). Upon receiving the 18 April Response Letter in which Warren Oil declined to take the actions requested in the Derivative Demand Letter, the Minority Member filed the current Motion to Amend on 21 May 2024. Thus, when viewed through this lens, there was no undue delay.

38. For all of these reasons, the Court rejects Plaintiffs' argument that the Motion to Amend should be denied on the ground of undue delay.

B. Prejudice

39. Nor have Plaintiffs shown any material prejudice that would result from granting the Minority Member's Motion to Amend. *See Martin v. Hare*, 78 N.C. 358, 360 (1985) ("Under Rule 15(a) of the North Carolina Rules of Civil Procedure, leave to amend a pleading shall be freely given except where the party objecting can show material prejudice by the granting of a motion to amend."); *Howard v. IOMAXIS, LLC*, 2023 NCBC LEXIS 159, at **14 (N.C. Super. Ct. Nov. 29, 2023) ("As for undue prejudice, it is not uncommon for a proposed amendment to impact the status quo in a way that the nonmovant opposes. But not every impact constitutes undue prejudice. Further, undue prejudice is not presumed, even when the proposed amendments are extensive.").

40. Here, the Court observes that the Minority Member's existing counterclaims contain the same basic allegation that forms the basis of the proposed derivative claim—that is, the assertion that Trail Creek caused Warren Oil to pay fees to Trail Creek and its affiliates in an amount substantially in excess of the 4.5% cap provided for in the Management Fee Agreement. (Countercls. ¶¶ 22, 28–34.)

41. Plaintiffs also argue that allowing the derivative claim will result in the need for additional discovery in this case. However, given the fact that the Minority Member's existing counterclaims likewise allege that Trail Creek wrongfully caused Warren Oil to exceed the 4.5% cap contained in the Management Fee Agreement, the

parties have presumably been conducting discovery on this issue for the past nine months.

42. Moreover, with regard to Plaintiffs' suggestion that the Minority Member should be required to file a new lawsuit if it seeks to pursue a derivative claim, (Pls.' Resp. Br., at 16–17), such a proposal would be inconsistent with notions of judicial economy given that similar (if not identical) issues would continue to be litigated in the present case based on the Minority Member's existing counterclaims even if such a new lawsuit was filed.

43. Therefore, the Court declines to deny the Motion to Amend on the ground of prejudice. *See Hopkins v. MWR Mgmt. Co.*, 2015 NCBC LEXIS 104, at **21 (N.C. Super. Ct. Nov. 5, 2015) ("The Court . . . concludes that MWR will not be unfairly prejudiced by the addition of these claims because Hopkins put MWR on notice of these potential claims [earlier on]."); *Sampson-Bladen Oil Co. v. Walters*, 86 N.C. App. 173, 177 (1987) (finding no prejudice where opposing counsel knew "more than a year earlier" that certain charges would be an important factor in the case).

C. Futility

44. Plaintiffs further assert that denial of the Motion to Amend is proper on futility grounds. (Pls.' Resp. Br., at 17–20.)

45. With regard to the substance of the proposed derivative claim, Plaintiffs contend that allowing the Motion to Amend would be futile because (1) a comparison of the language of the two contracts shows that the fees paid to FNM under the Services Agreement should not be treated as "management fees" under the

Management Fee Agreement; (2) Warren Oil was neither a signatory to, nor a third-party beneficiary of, the Management Fee Agreement; and (3) an email exchange between representatives of Trail Creek and the Minority Member reflects their agreement on a replacement to the 4.5% cap set forth under Section 1.01 of the Management Fee Agreement. (Pls.' Resp. Br., at 18–20.)

46. However, the Minority Member has responded with facially plausible arguments rebutting each of these contentions, and the Court concludes that it would benefit from a more factually developed record in assessing the parties' competing contentions as opposed to attempting to resolve their disputes at the Rule 15 stage. (Defs.' Reply Br., at 8–12.)

47. Finally, Plaintiffs contend that the Special Committee's Report and Unanimous Resolution mandate a finding of futility because they preclude the maintenance of the Minority Member's derivative counterclaim pursuant to N.C.G.S. § 57D-8-03. ((Pls.' Suppl. Mem. Op. Warren Oil Holding Co., LLC's Mot. Am. Countercls., at 6, ECF No. 245.)

48. N.C.G.S. § 57D-8-03 states, in relevant part, as follows:

> (a) The court shall dismiss a derivative proceeding on motion of the LLC if one of the groups specified in subsection (b) . . . of this section determines after conducting an inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interest of the LLC.
>
> (b) The inquiry and determination with respect to the demanded action is to be made either (i) pursuant to subsection (f) of this section or (ii) by either of the following:
>
> (1) A majority vote or other approval of those persons who have the authority individually or collectively to cause the LLC to

> bring an action in the superior court of this State for the recovery or other remedy sought in the derivative action and are independent.
>
> (2) A majority vote of a committee composed of two or more independent persons appointed by a majority vote or other approval of those persons described in subdivision (b)(1) of this section.

N.C.G.S. §§ 57D-8-03(a)–(b).

49. As an initial matter, it is not entirely clear whether the Court can even consider the Special Committee's Report and Unanimous Resolution in ruling on the Motion to Amend given that they were not attached to an affidavit or otherwise authenticated.

50. However, even assuming the Court is able to consider them, Plaintiffs' argument is premature. Section 57D-8-03(a) contemplates the filing of a motion by the LLC to dismiss a pending derivative claim. Here, the derivative claim has not yet been filed, and there is no motion to dismiss under § 57D-8-03(a) currently before the Court.

51. As a practical matter, at the 26 August hearing, Plaintiffs' counsel made clear Plaintiffs' intent to immediately file a motion to dismiss under § 57D-8-03(a) in the event that the Court permits the Minority Member to file the proposed derivative claim, and counsel for the Minority Member, in turn, voiced his intention to seek discovery at that time on the issue of whether the members of the Special Committee were truly "independent." *See* N.C.G.S. § 57D-8-03(d)-(e) (allowing a party who has asserted a derivative claim to engage in discovery to determine, among other things,

whether a committee appointed to investigate the desirability of the company's maintenance of the derivative claim actually consisted of independent persons).

52. Thus, the legal effect of the Special Committee's findings and resolution cannot be determined at the present time.

CONCLUSION

53. For the reasons discussed herein, the Motion to Amend is **GRANTED**.

54. The Minority Member is **DIRECTED** to file its Amended Counterclaims in the form attached as Exhibit 1 to the Motion to Amend within **three (3) days** of the date of this Opinion.

SO ORDERED, this the 11th day of September, 2024.[3]

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases

[3] This Opinion was originally filed under seal on 11 September 2024. This public version of the Opinion is being filed on 16 September 2024. To avoid confusion in the event of an appeal, the Court has elected to state the filing date of the public version of the Opinion as 11 September 2024.