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Case No. 4067-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE NEXTMEDIA INVESTORS, LLC,	)	
	)	C.A. No. 4067-VCS
a Delaware limited liability company.	)	
	)	

MEMORANDUM OPINION

Date Submitted: March 30, 2009
Date Decided: May 6, 2009

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STRINE, Vice Chancellor.

I. Introduction

Certain members of respondent NextMedia Investors, LLC ("NextMedia") are seeking summary judgment on their petition for judicial dissolution of NextMedia and for the court to appoint a liquidating trustee.

The core dispute between the petitioners and the members of NextMedia who oppose the dissolution is whether, under the terms of NextMedia's Third Amended and Restated Limited Liability Company Agreement (the "LLC Agreement"), the petitioners' consent was needed to amend the LLC Agreement to extend NextMedia's dissolution date from April 17, 2008 to April 17, 2012. Under the LLC Agreement, the consent of all members "to be adversely affected" was needed to change the dissolution date.[1] The petitioners argue that their consent was needed because an extension of their investment horizon was an adverse effect. NextMedia responds that summary judgment is not appropriate at this stage because the LLC Agreement is ambiguous as to when the consent of adversely affected members is required and that there is a factual issue as to whether the petitioners were adversely affected.

In this opinion, I grant the petitioners' motion for summary judgment as to their request for an order of dissolution. A contract provision is ambiguous only where it is reasonably susceptible to multiple meanings. Here, the plain language of the relevant terms of the LLC Agreement gives rise to only one reasonable meaning, which is that the petitioners' consent was required before NextMedia's dissolution date could be changed. And, the factual issue raised by NextMedia is not relevant because the petitioners' right

[1] Petitioners' Joint Aff., Ex. B ("LLC Agreement") § 17.5(a).

to consent turned on whether they could have reasonably been expected to be adversely affected before the amendment was adopted in the sense that the proposed change would alter a materially important economic term of the LLC Agreement, not on whether, as an after-the-fact matter for judicial determination, they were actually adversely affected by the amendment. Thus, the petitioners are entitled to summary judgment on their request for an order of dissolution.

But, I deny the petitioners' motion for summary judgment as to their request for the court to appoint a liquidating trustee. Under the LLC Agreement, the NextMedia board of managers is responsible for liquidating NextMedia in the event of dissolution, and it cannot be removed from that role without cause. Although there is color to the petitioners' argument that the NextMedia board is not fit to serve as the liquidator, the factual record is not so uncontroverted as to allow for the strong remedy of removal on a motion for summary judgment. Rather, the petitioners should present their case for removal after full discovery and a trial.

II. Factual Background[2]

NextMedia was formed in February 2000. NextMedia's sole asset is stock in NextMedia Group, Inc. ("NM Group"), which in turn invests in radio and outdoor advertising assets through its subsidiaries. Next Media has four classes of membership interests: Class A, Class B, Class C, and Class D.

[2] I draw these facts from the Petition for Dissolution and from the affidavits submitted by each side, viewing the record in the light most favorable to NextMedia, the nonmoving party. *See* Ct. Ch. R. 56(c); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

In October 2000, the petitioners, James H. Hooker and Richard F. Rambaldo, collectively invested $6 million in NextMedia in exchange for Class C membership interests.[3] When the petitioners invested in NextMedia, the company had a clear, eight-year investment horizon. Specifically, § 13.1 of the LLC Agreement stated that "[t]he Company shall dissolve upon the first to occur of any of the following events . . . (a) eight years after the Original Effective Date."[4] The Original Effective Date was defined in the LLC Agreement as April 17, 2000,[5] so NextMedia's dissolution date was April 17, 2008. Once NextMedia dissolved, NextMedia's board of managers was to serve as the liquidator.[6]

Accordingly, in early 2008, with the dissolution date looming, NextMedia retained two experts in the radio and outdoor advertising industries to help market NextMedia's assets.[7] Unfortunately, the sales process was begun in the midst of a worldwide credit crisis. Recognizing that market conditions were not favorable, NextMedia's board of managers and members representing a majority of the NextMedia membership interests sought to extend the duration of NextMedia in anticipation that the radio and outdoor advertising assets would be priced higher when the economic environment improved. In March 2008, the board proposed an amendment to § 13.1(a) of the LLC Agreement that

[3] Petitioners' Joint Aff. ¶¶ 8-9. Rambaldo took out 10% of his original investment in 2005 through an agreement with NextMedia, but the petitioners have not otherwise received any distributions from NextMedia.
[4] LLC Agreement § 13.1. When the petitioners joined NextMedia, the then-operative version of the LLC Agreement was the First Amended and Restated Limited Liability Company Agreement. But, the relevant provisions are the same in both versions of the LLC Agreement.
[5] LLC Agreement at 15.
[6] LLC Agreement § 13.2.
[7] Neumann Aff. ¶ 4; Dinetz Aff. ¶ 3; Pryor Aff. ¶ 2; Tolliver Aff. ¶ 3.

would push the dissolution date to twelve years after the Original Effective Date, or April 17, 2012 (the "Extension Amendment").

In order to amend § 13.1(a), the members and managers seeking to extend the duration of NextMedia had to obtain the consent of the other members of NextMedia as set forth in § 17.5(a) of the LLC Agreement:

> Consent Requirements. Without the consent of *each Member* to be adversely affected, the Agreement shall not be amended so as to:
> . . .
> (v) amend Articles 12, 13, 14, 15 or 16 (or any defined term used in such sections) to affect adversely any Member . . . .[8]

The NextMedia board sought consent for the Extension Amendment from all members, and approximately 97% of Class A and Class C holders approved the Amendment.[9] The petitioners, however, did not consent to the Extension Amendment.

In an attempt to persuade the petitioners to provide their consent to the Extension Amendment, NextMedia's Chief Financial Officer, Eric W. Neumann, sent the petitioners a letter dated April 15, 2008 (the "Neumann Letter") stating NextMedia's position.[10] The Neumann Letter argues that dissolution would not be in the petitioners' interest because, given the market conditions, NextMedia may choose to liquidate by distributing its illiquid stock in NM Group to the NextMedia members, rather than by selling the radio and outdoor advertising assets, as NextMedia planned to do if the dissolution date was moved to 2012. The petitioners reasonably took this as a threat that

[8] LLC Agreement § 17.5(a) (second emphasis added).
[9] The parties have not indicated how the Class B and D members voted. But, Class B and D interests are held by NextMedia managers and employees, suggesting they aligned with the board and the rest of the NextMedia management.
[10] Petitioners' Joint Aff. Ex. F ("Neumann Letter").

if the petitioners did not consent to the Extension Amendment, NextMedia's management would retaliate by distributing illiquid stock instead of liquidating the assets of the operating companies. The Neumann Letter also suggests, in passing, that NextMedia might take the position that the petitioners' consent was not needed to adopt the Extension Amendment because they were not adversely affected by the Amendment.

Despite the Neumann Letter, the petitioners refused to consent to the Extension Amendment, and they requested that the board dissolve NextMedia on April 17, 2008. According to the petitioners, § 17.5(a) of the LLC Agreement required that all members consent to an amendment of § 13.1(a). Because the petitioners did not consent to the Extension Amendment, the Amendment was not adopted, and the arrival of April 17, 2008 was still an event of dissolution under the LLC Agreement.

In July 2008, NextMedia informed the petitioners that NextMedia viewed the Extension Amendment as properly adopted under § 17.5(a), and that NextMedia, while still exploring asset sales, would not be dissolving immediately.[11]

This Petition for Dissolution followed. The petitioners bring two counts: Count I seeks an order of dissolution; and Count II seeks appointment of a liquidating agent. The petitioners have moved for summary judgment on both counts.[12]

[11] In October and November 2008, NextMedia sold some of its radio and outdoor advertising assets for a total of $90 million. Pryor Aff. ¶ 2; Tolliver Aff. ¶ 3. These sales were necessary under the operating subsidiaries' credit agreements. Neumann Letter at 2.

[12] As explained by the petitioners, this has been styled as a motion for partial summary judgment because the petitioners are not asking the court to select a liquidating trustee, but instead to allow the parties to agree on one if the court finds the petitioners are entitled to have one appointed. But, all of the petitioners' claims are part of this motion. Petitioners' Op. Br. at 1.

III. Legal Analysis

A. Standard Of Review

The petitioners' motion for summary judgment is governed by Court of Chancery Rule 56. Under that familiar standard, the petitioners are entitled to summary judgment if the record indicates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[13] As the moving party, the petitioners bear the burden of demonstrating that no genuine issues of material fact exist.[14] And, in determining whether the petitioners are entitled to summary judgment, I must view the facts in the light most favorable to the nonmoving party, NextMedia.[15]

B. Count I: Order Of Dissolution

The petitioners contend that they are entitled to summary judgment on Count I because an event of dissolution under the LLC Agreement occurred, namely the passing of April 17, 2008. This contention is based on the petitioners' argument that the Extension Amendment was not adopted in accordance with § 17.5(a) of the LLC Agreement because the petitioners did not consent to the Amendment, so NextMedia's dissolution date was not extended to April 17, 2012. NextMedia responds that the petitioners are not entitled to summary judgment because another reasonable interpretation of § 17.5(a) exists under which the petitioners' approval of the Extension Amendment was not required.

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[13] Ct. Ch. R. 56(c).
[14] *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 829-30 (Del. Ch. 2007).
[15] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

Thus, to resolve this matter, the court must determine whether the petitioners' consent was required under § 17.5(a) of the LLC Agreement in order to amend § 13.1(a) of that Agreement. In a dispute requiring interpretation of a contract, summary judgment is appropriate only where the contract is unambiguous.[16] Ambiguity exists "when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[17] In other words, to succeed on their motion for summary judgment, the petitioners must demonstrate that their interpretation of the LLC Agreement is the only reasonable one.[18]

NextMedia argues both that the petitioners' interpretation of the LLC Agreement is not reasonable, and that another reasonable interpretation of the contract exists. NextMedia further argues that a question of fact exists as to whether the petitioners were adversely affected by the Extension Amendment, precluding summary judgment. None of these arguments is persuasive.

1. The Petitioners' Interpretation Of The LLC Agreement Is Reasonable

The petitioners contend that § 17.5(a) of the LLC Agreement required the consent of all members of NextMedia to the Extension Amendment because all members were adversely affected by the extension of the company's duration. This is a reasonable interpretation of the Agreement. The ability to withdraw from an investment and take

[16] *United Rentals*, 937 A.2d at 830.
[17] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).
[18] *United Rentals*, 937 A.2d at 830.

one's capital elsewhere is an important one.[19] It is not uncommon for organizational documents to require a unanimous vote to avoid dissolution, in recognition of the importance investors place on the ability to withdraw.[20]

Moreover, NextMedia's actions suggest that the company's representatives originally thought it was necessary to seek unanimous consent for the Extension Amendment. The resolution adopted by the board authorizes the company's officers to execute the Extension Amendment upon "execution of the [Extension Amendment] by the Members (as defined in the LLC Agreement) . . . ."[21] The LLC Agreement defines Members to include all members of all classes.[22] Thus, the NextMedia board initially sought unanimous consent for the Extension Amendment. Also, the heavy-handed tactics employed in the Neumann Letter to persuade the petitioners to consent to the Extension Amendment when the Amendment had already received the approval of an overwhelming portion of NextMedia's members belies the board's current argument that it believes that the petitioners' consent was not required.

The convoluted argument that NextMedia now puts forth about the meaning of §17.5(a) does not alter the reasonability of the petitioners' unanimous consent interpretation. NextMedia suggests that whether an amendment has an adverse effect

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[19] *See Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1229 (Del. Ch. 2000) ("Suspending the limited partners' power to withdraw from the limited partnership does adversely affect the limited partners.").

[20] *See, e.g.*, *Star Cellular Tel. Co. v. Baton Rouge CSGA, Inc.*, 647 A.2d 382 (Table), 1994 WL 267285, at *2 (Del. June 9, 1994) (withdrawal of general partner caused dissolution unless remaining partners unanimously agreed to continue); *R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P.*, 790 A.2d 478, 488 (Del. Ch. 2001) (partnership agreement required unanimous vote of unitholders to avoid dissolution if one of the listed events of dissolution occurred).

[21] Petitioners' Joint Aff. Ex. G.

[22] LLC Agreement at 13.

should be judged by whether a majority of similarly situated members approve it. Because a majority of Class C holders approved the Extension Amendment, NextMedia concludes that the Amendment did not have an objectively adverse effect on the class. Therefore, if the petitioners' consent is required, it is because the petitioners are subjectively adversely affected. But, according to NextMedia, it would be unreasonably burdensome to require the board to explore the subjective circumstances of each member when seeking consents, so it is unreasonable to interpret the LLC Agreement to allow the petitioners to defeat an amendment when the majority of their fellow Class C holders approved it.

This argument fails for a number of reasons. For starters, NextMedia's interpretation would convert § 17.5(a) into a class voting provision — something the drafters of the LLC Agreement could have elected to do,[23] but instead gave individual investors greater protection by requiring the consent of "each Member"[24] on an individual basis. And, nothing about the petitioners' position suggests they are seeking a subjective standard for determining when an amendment has an adverse effect. Section 13.1(a)

[23] *See* 6 *Del. C.* § 18-302(b) ("A limited liability company agreement may grant to all or certain identified members or a specified class or group of the members the right to vote separately or with all or any class or group of the members or managers, on any matter."); *see also, e.g.*, *Elliot Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 845 (Del. 1998) (considering a certificate of incorporation that required approval of preferred stockholders voting as a class to amend the certificate in a way that adversely affected the preferred stockholders); *Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. Ch. 1989) (same); *Watchmark Corp. v. ArgoGlobal Capital, LLC*, 2004 WL 2694894, at *2 (Del. Ch. Nov. 4, 2004) (same); *Benchmark Capital Partners IV, L.P. v. Vague*, 2002 WL 1732423, at *1 (Del. Ch. July 15, 2002) (same); *Solomon v. Armstrong*, 747 A.2d 1098, 1121 (Del. Ch. 1999) (considering a certificate of incorporation that granted each class of common stock class voting rights with regard to any amendment to the certificate adversely affecting the rights, powers, or privileges of the class).

[24] LLC Agreement § 17.5(a).

embodied a promise to all of NextMedia's investors when they put their capital at risk that they would be able to exit their investment no later than April 17, 2008. A reasonable investor would regard this guaranteed investment end point that could not be changed without her consent to be a material economic provision of the LLC Agreement. NextMedia has made no credible argument that §13.1(a), which creates a terminal point for the continuation of NextMedia in the absence of unanimous consent to extend the company's life, does not have substantive economic impact.

In sum, the petitioners have put forth a reasonable interpretation to the LLC Agreement, namely that unanimous consent of all NextMedia members was required to adopt the Extension Amendment.

2. NextMedia Has Not Offered A Reasonable Alternative Interpretation

NextMedia argues that the LLC Agreement is ambiguous because, aside from the interpretation offered from by the petitioners, the Agreement can be reasonably interpreted to require consent only from those members that the board *intended* to adversely affect. In other words, NextMedia's interpretation of § 17.5(a) is that a member's consent is only required of if the board subjectively intended to harm that member. This interpretation is not reasonable because it is at odds with the plain meaning of § 17.5(a).

As our Supreme Court has noted, "[c]ourts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in

the position of the parties would have thought it meant."[25] NextMedia's proffered interpretation of § 17.5(a), which rests on the grammatical functions of the infinitive phrase, requires the type of awkward linguistic leap that this court will not make in giving a practical reading to a contract.

NextMedia points to the LLC Agreement's use of the phrase "to affect adversely" in § 17.5(a) — "the Agreement shall not be amended so as to . . .amend Articles 12, 13, 14, 15 or 16 . . . *to affect adversely* any Member"[26] — and argues that "to affect" can be interpreted to require a purpose or intent.[27] In making this argument, NextMedia relies on dictionaries and two out-of-state cases involving entirely different interpretive problems. But, although these sources support the principle that words and phrases may have multiple meanings that vary with context, NextMedia does not explain why the meaning of "to affect" that implies purpose or intention is a reasonable one to choose here.

Under NextMedia's chosen meaning of the phrase "to affect," a NextMedia member only has the right to object to an amendment when the board of managers subjectively intends to harm that member. Section 17.5(a) is written very obliquely if that is its meaning, a meaning that could have been written very directly if the drafters intended to embrace such an unusual provision, whereby an investor only has an

[25] *Rhone-Poulenc*, 616 A.2d at 1196 (citations omitted); *see also Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006) (quoting *Rhone-Poulenc*).
[26] LLC Agreement § 17.5(a) (second emphasis added).
[27] This meaning comes from the use of the infinitive phrase "to affect." *See, e.g.*, Respondent's Ans. Br. at 15 n.6 (citing Wikipedia, http://en.wikipedia.org/wiki/Infinitive (last visited May 6, 2009). for the proposition that "[t]he full infinitive (or to-infinitive) is used in a great many different contexts: . . . It can be used like an adjective or adverb, expressing purpose or intent . . . .").

individual veto if fiduciaries intend to do the electorate harm. Indeed, it is hard to imagine fiduciaries making the necessary confession to trigger this voting right.

This odd construction has no reasonable basis in the text of § 17.5(a), which was clearly meant to provide a broader protection to NextMedia investors. As NextMedia itself points out, the non-Class A members have very few voting rights under the LLC Agreement, and thus little control over NextMedia.[28] This suggests that the matters over which the non-Class A members do have voting rights are of particular importance, a suggestion that is borne out by the type of rights covered by § 17.5(a), which largely govern the members' ability to exit their investment or their relationship with management.[29]

The obvious point of § 17.5(a) was to induce investment in the LLC by giving investors assurance that certain rights they held — including the right to exit their investment on a specific date — could not be altered without their approval on an individual basis, regardless of whether the board of managers sought to change them in good faith. It would be little inducement for this protection to be available only when NextMedia's board of managers purposely took action that the board knew would harm certain NextMedia members because the consequences of an amendment that the board adopted in good faith could also be harmful to particular investors.

[28] Respondent's Ans. Br. at 13-14.

[29] The rights covered by § 17.5(a) are: transfer of membership interests (Article 12); dissolution and winding up (Article 13); the Class A members' option to purchase the membership interests surrendered by departing employees (Article 14); the power of attorney granted by the members to the board of managers (Article 15); and the terms of the managers' engagement (Article 16).

Nor would a reasonable investor read § 17.5(a) as offering such a narrow and exceedingly strange protection. The plain meaning of a contract, as it would be understood by a reasonable person reading the contract, is controlling in disputes over contract interpretation.[30] Here, in the absence of clarifying words like "purpose" or "intent," the plain meaning of "to adversely affect" encompasses a situation where an investor will be adversely affected in the sense that a material economic term of the LLC Agreement is subject to alteration, regardless of whether an adverse outcome is intended by the board.[31] In other words, the obvious purpose of § 17.5(a) was to allow individual investors to veto changes to specific, economically substantive terms of the LLC Agreement if they deem those changes inadvisable, regardless of whether the board proposed them in good faith.

Thus, the interpretation of § 17.5(a) offered by NextMedia is at odds with that provision's plain meaning, so it is not a reasonable interpretation and does not indicate that the LLC Agreement is ambiguous.[32]

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[30] *See U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *9 (Del. Ch. June 6, 1996) ("The primary rule of construction is this: where the parties have created an unambiguous integrated written statement of their contract, the language of that contract (not as subjectively understood by either party but) as understood by a hypothetical reasonable third party will control.").

[31] For example, the dictionary entries cited by NextMedia include the following definitions: Merriam-Webster, http://www.merriamwebster.com/dictionary/to (last visited May 6, 2009) ("2a —used as a function word to indicate purpose, intention, *tendency, result, or end*" (emphasis added)); Dictionary.com, http://dictionary.reference.com/browse/to (last visited May 6, 2009) ("8. (used for expressing agency, result, or consequence)"); The Free Dictionary, http://www.thefreedictionary.com/to (last visited May 6, 2009) ("3. Toward a given state").

[32] Because I find that the LLC Agreement is unambiguous, I need not, and therefore do not, address the petitioners' argument that ambiguities in the LLC Agreement should be construed against NextMedia as the drafter of the document. *See Levitt Corp. v. Office Depot, Inc.*, 2008 WL 1724244, at *6 n.37 (Del. Ch. Apr. 14, 2008) (declining to apply this principle of contract construction to corporate bylaws because the bylaws were unambiguous).

3. Factual Arguments About Whether The Petitioners Are Correct That Postponement Of Dissolution Is Bad For Them Are Irrelevant To The Question Of Whether The Petitioners Had A Veto Right Under § 17.5(a)

Finally, NextMedia argues that the petitioners are not entitled to summary judgment because they have "not provided the Court with a factual basis to conclude that they were adversely affected by the Section 13.1(a) Amendment."[33] In other words, NextMedia argues that the petitioners must prove to the court, as an issue of fact, that they were adversely affected by the Extension Amendment in order to demonstrate that their consent was required to adopt the Extension Amendment.

NextMedia, for its part, has offered affidavits from its officers indicating that, in their opinion, a liquidation of NextMedia's radio and outdoor advertising assets at the time of the Extension Amendment would not have resulted in distributions to NextMedia's equity holders because the market prices of those assets were less than NextMedia's debts.[34] According to NextMedia, these affidavits create a material factual issue as to whether dissolution would have led to distributions to the petitioners, because if the petitioners would not have received anything whether or not NextMedia dissolved in April 2008, they were not adversely affected by the Extension Amendment.

This argument misconstrues the nature of the petitioners' burden. The petitioners must show only that their consent was needed to approve the Extension Amendment. Whether they were to be adversely affected for purposes of § 17.5(a) is necessarily a before-the-fact question — a company cannot determine who is entitled to vote on an

[33] Respondent's Ans. Br. at 23.
[34] Neumann Aff. ¶ 4; Dinetz Aff. ¶ 3.

action by first carrying out the action and then seeing who is adversely affected. And, the petitioners should not be required to show they were entitled to vote on the Extension Amendment through factual evidence — that is not a reasonable way for a company to determine whose consent is required, as NextMedia itself argued in its opposition to the petitioners' reading of § 17.5(a).[35] Such a method would leave investors subject to ad hoc decisions about their substantive rights, whereas the purpose of an LLC agreement, like all agreements, is to define the rules of the game so that all parties know what to expect.[36]

Thus, the question of who is entitled to vote is best judged by who can be reasonably expected to be adversely affected. Likewise, the question of whether a change triggers the individual approval right in § 17.5(a) depends not on an empirical, factual assessment of whether a member is correct about the effect of a change in the contract, but on whether the proposed contractual amendment would alter an economically meaningful term. If it does, the individual approval right of § 17.5(a) is implicated. A change to the lifespan of the entity like the one proposed in the Extension Amendment is clearly such a triggering amendment.[37]

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[35] *See* Respondent's Ans. Br. at 12-13 ("[I]t would be necessary for the Board to contact each of the non-consenting members to ascertain their unique circumstances before the Board would be in a position to determine whether the consent of any non-consenting Members was required pursuant to Section 17.5(a). That could not have been the intent of the drafters." (footnote omitted)).

[36] *See* 1 WILLISTON ON CONTRACTS § 1:1 (4th ed. 2008) ("Contract law is designed to protect the expectations of the contracting parties. . . . The goal of contract law is to hold parties to their agreements so that they receive the benefits of their bargains.").

[37] Moreover, NextMedia's argument that NextMedia's equity holders would receive nothing in a contractually timely dissolution is factually controverted and incomplete because it ignores, among other things, the fact that the Extension Amendment deprived the petitioners of the ability

* * *

In sum, the petitioners have demonstrated that that there is no genuine issue of material fact in the record regarding the interpretation of the LLC Agreement and that they are entitled to dissolution based on the only reasonable interpretation of the LLC Agreement. The petitioners are therefore entitled to summary judgment on Count I.

I now turn to the petitioners' request that this court appoint a liquidating trustee to oversee this dissolution.

C. Count II: Appointment Of A Liquidating Trustee

The default rule for liquidating trustees is contained in § 18-803 of the Delaware LLC Act:

> Unless otherwise provided . . . a manager . . . may wind up the limited liability company's affairs; but the Court of Chancery, upon cause shown, may wind up the limited liability company's affairs . . . and in connection therewith, may appoint a liquidating trustee.[38]

NextMedia's LLC Agreement alters this default rule in § 13.2:

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to exit their investment in NextMedia any sooner than 2012, even if money was available to distribute to them sooner. The affidavits submitted by NextMedia suggest there may be money available for distribution if Nextmedia dissolved now. *See* Neumann Aff. ¶ 4 (NextMedia officer opining that the prices of NextMedia's assets were likely to go up in the second half of 2008 and 2009); Dinetz Aff. ¶ 3 (same); Mimms Aff. ¶ 14 (accounting expert opining that, as of February 2009, the petitioners might receive up to $260,000 if NextMedia dissolved.) The Extension Amendment, however, would prevent the petitioners from cashing in on these gains now, as they expected they could. The liquidator could have taken advantage of the improving market because the LLC Agreement grants the liquidator one year after dissolution to dispose of NextMedia's assets, or longer where "necessary to realize upon any material amount of property that may be illiquid." LLC Agreement § 13.3. Instead, the petitioners would have to wait until 2012, forcing them to leave their capital at risk for far longer than they agreed. In other words, the Extension Amendment would materially alter the petitioners' economic position even if NextMedia's equity was valueless in April 2008.

[38] 6 *Del. C.* § 18-803(a).

> Subject to any rights of a Member or a creditor to apply to a court of competent jurisdiction in respect of the dissolution of the Company under the Act, the Board shall serve as the liquidator of the Company unless it fails or refuses to serve . . . . If the Board does not serve as the liquidator, one or more other persons may, to the extent permitted by law, be elected to serve by consent or vote of Class A Members then representing a Majority in Interest of the Class A Members.[39]

Read together, these provisions require the court to decide whether the petitioners have shown that there is no genuine issue of material fact regarding the NextMedia board's ability to carry out the duties of a liquidator in a loyal and careful manner. In my view, the strong medicine of removal is not appropriate on this thin, paper record.

Although the board has so far refused to liquidate the company, that is because the board currently does not consider NextMedia to be dissolved.[40] The petitioners also take issue with the board's attempt to bully the petitioners into consenting to the Extension Amendment, as evidenced by the Neumann Letter, by threatening to liquidate NextMedia by distributing illiquid stock in NM Group rather than liquidating NextMedia's operating assets. But, the fact that the board took one stance while it was possible that dissolution could be avoided does not necessarily mean that the board will not act as a capable and fair liquidator once dissolution is made inevitable by this court's order.

Without a trial, I feel inhibited from declaring the Neumann Letter a definitive indication of fiduciary impropriety. Although the Letter's tone obviously adds vibrant color to the petitioners' request for the board's ouster from the role of liquidator, an assessment about the board's good faith is better made after full discovery and an

[39] LLC Agreement § 13.2.
[40] Neumann Aff. ¶ 3; Dinetz Aff. ¶ 2; McNeill Aff. ¶ 2.

evidentiary hearing. That is especially the case because the board is likely in the best position to liquidate NextMedia, having already hired brokers and considered strategies for liquidation. Under the scrutiny that will attend its actual role as liquidator, the board may well reorient its initial perspective, and it will be expected to faithfully and selflessly perform its contractual and fiduciary duties. For now, though, the key point is that these issues of fitness and motive are not clearly resolved by this paper record.

Moreover, even if the board was not capable of serving as the liquidator, the petitioners would not be entitled to a liquidating trustee appointed by the court. Rather, the second part of § 13.2 quoted above, entitling the Class A members to appoint the liquidator if the board does not serve that role, would be applicable. This language, read together with the statute, requires the petitioners to at the very least show cause as to why the Class A members should be denied their right to appoint the liquidating trustee, which the petitioners have not done.

For these reasons, I deny the petitioners' motion for summary judgment on Count II.

IV. Conclusion

For the foregoing reasons, I grant the petitioners' motion for summary judgment with respect to Count I of the Petition for Dissolution and order the dissolution of NextMedia Investors, LLC. But, I deny the petitioners' motion for summary judgment with respect to Count II. IT IS SO ORDERED.