IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MILTON INVESTMENTS, LLC, a Delaware Limited Liability Company,	)	
Plaintiff,	)	
v.	)	Civil Action No. 4909-VCP
LOCKWOOD BROTHERS, II, LLC, a Delaware Limited Liability Company,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: April 13, 2010
Decided: July 20, 2010

Jeffrey M. Weiner, Esquire, LAW OFFICES OF JEFFREY M. WEINER PA, Wilmington, Delaware; *Attorney for Plaintiff*

John W. Paradee, Esquire, D. Benjamin Snyder, Esquire, Stephen E. Smith, Esquire, PRICKETT, JONES & ELLIOTT, P.A., Dover, Delaware; *Attorneys for Defendant*

PARSONS, Vice Chancellor.

In this action, Milton Investments, LLC ("Milton Investments") and Lockwood Brothers, II, LLC ("Lockwood Brothers"), together the sole members of North Milton Development Group, LLC ("North Milton" or the "Company"), ask the Court to determine whether certain disputes between them properly fit within the scope of an arbitration clause in North Milton's LLC agreement. Additionally, the parties ask the Court to determine whether the sole arbitrator designated in the arbitration clause, Eugene Bayard, properly may serve as arbitrator despite statements he made regarding the members and their disputes.

As addressed below, I hold that the arbitration clause at issue is narrow in scope, but that each of the issues identified by the parties fit within the expansive categories of arbitrable disputes listed in that clause and, therefore, must be arbitrated. Furthermore, because the parties selected Bayard as sole arbitrator despite known conflicts of interest and because I find Bayard's prior comments regarding the members and their disputes harmless, I hold that Bayard may properly serve as the arbitrator under the procedures specified in the arbitration clause as to all the disputes in issue.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, Milton Investments, is a Delaware limited liability company whose sole members are Louis J. Capano, Jr. Investments L.P., III ("LJC") and Louis J. Capano, III ("Louis III"). Defendant, Lockwood Brothers, is a Delaware limited liability company whose sole members are Darin A. Lockwood ("Darin") and Don Lockwood ("Don").

Milton Investments and Lockwood Brothers are the sole members of North Milton (together, the "Members").[1]

B. The Formation of North Milton

In 2003, Darin commenced a real estate development project known as The Villages of Elizabethtown (the "Project").[2] In pursuit of that Project, Darin, Don, and another individual, Wayne Hudson, through an entity named Rust Farm, LLC, entered into an agreement with Darlene Rust and Aileen Tobin on March 25, 2004 to purchase a 50% interest in two adjacent parcels of property (the "Rust Farm Property").[3] Shortly thereafter, on May 18, 2004, Darin, Don, and Hudson entered into a contract to purchase the other 50% interest in the Rust Farm Property from the Salvation Army.[4] After Hudson and another potential partner dropped out of the Project, the rights to purchase the Rust Farm Property were assigned to Lockwood Brothers.[5]

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1 These facts are drawn largely from documents that make up the stipulated record. The documents are located at Docket Item ("D.I.") 8 and divided into five exhibits (A-E). Additionally, after stipulating to these documents, the parties agreed to supplement the record with affidavits from Darin, Louis III, and Robert J. Krapf, an attorney who represented Milton during the negotiations leading up to the formation of North Milton. *See* Pl.'s Opening Br. ("POB") Ex. B; Def.'s Ans. Br. ("DAB") Ex. A.

2 Darin Aff. ¶ 6.

3 Ex. A at 1-10 ("Rust Farm Agreement"); Darin Aff. ¶ 6.

4 Ex. A at 11-18 ("Salvation Army Agreement").

5 Ex. A at 119 ("[Don, Darin, and Hudson] and Rust Farm subsequently assigned their interest in the Salvation Army Agreement and the Rust Agreement, respectively, to [Lockwood Brothers].").

Because the purchase rights under both the Rust Farm and Salvation Army Agreements expired in December 2004, Darin sought a new partner to help fund the purchase of the Rust Farm Property.[6] Eugene Bayard, one of Darin's attorneys, suggested he contact Louis III, another of Bayard's clients. Through their respective legal representatives, Darin and Louis III agreed to form North Milton to purchase the Property and began discussing how to memorialize the terms of that business deal.

C. Pertinent Agreements

Darin formed North Milton on November 30, 2004 to manage the parties' investment in the Project,[7] and, on December 17 and 18, 2004, the parties entered several agreements governing the purchase of the Rust Farm Property and the formation and governance of North Milton. Pertinent portions of these agreements are summarized below.

1. Rust Farm Property Deeds and Acquisition Loan

On December 17, North Milton executed a $7,130,000 Note and Mortgage to Wilmington Trust Company (the "Acquisition Loan").[8] North Milton used this loan to purchase the Rust Farm Property in fee simple, as reflected in the deeds it obtained.[9]

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6 Louis III Aff. ¶¶ 2-3.

7 Ex. A at 83.

8 Ex. A at 111-18, Acquisition Loan. Section 2.1 of the LLC agreement governing the operation of North Milton specifies that each Member would enter into the Acquisition Loan and serve as guarantors, along with their respective principals.

9 Ex. A at 89-103.

2. Contribution Agreement

Also on December 17, Darin, Don, LJC, and Louis III entered into a contribution agreement that referenced the relationship of the parties to North Milton under the LLC Agreement and established certain rights of contribution "in the event [any party was] required to pay [the Bank] in excess of his respective interest" (the "Contribution Agreement").[10] In general, the Agreement provided that if any party paid in excess of their liability share, that party could seek contribution against the others.

3. LLC Agreement[11]

On December 18, 2004, the day after North Milton acquired the Rust Farm Property and entered the Contribution Agreement, Lockwood Brothers and Milton Investments entered into an LLC agreement governing the operation of North Milton (the "LLC Agreement" or "Agreement").[12] Pursuant to the Agreement, Lockwood Brothers and Milton Investments are the sole Members of North Milton, each holding a 50% ownership interest in the Company.[13]

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10 Ex. A at 85-88, Contribution Agreement. Specifically, Darin, Don, LJC, and Louis III agreed that their obligations under the Acquisition Loan "[s]hould be limited to their respective interests in [North Milton] through Lockwood [Brothers] and [Milton], respectively, and that each should have a right of contribution in the event any one or more of them are required to pay [the] Bank in excess of his respective interest." *Id*.

11 Undefined capitalized terms come from the LLC Agreement and have the same meaning specified in that document.

12 Ex. A at 19-84, LLC Agreement.

13 LLC Agreement Ex. C.

Delaware law governs the LLC Agreement and the "rights, powers, duties, liabilities and remedies of the [Members]."[14] The Agreement contains an integration clause explicitly providing that it is "the entire agreement" among the parties, superseding "all prior and contemporaneous agreements and understandings relating thereto."[15] Importantly, the LLC Agreement also provides for arbitration of certain disputes among the Members in Section 14.1 (the "Arbitration Clause"):

> All disputes among or between the Members involving or relating to [1] the interpretation of this Agreement, [2] the breach of any Member of the terms hereof, [3] the duties, rights or obligations of the Members or Manager hereunder, [4] the deadlock between Managers or Members or enforcement of any of the provisions hereof (including, without limitation, any disputed termination of an Affiliate under contraction to the Company), shall be settled and finally determined by arbitration in accordance with the rules and other provisions of Delaware law.[16]

This provision further dictates that "[a]ny arbitration pursuant to this Agreement shall be conducted by Eugene H. Bayard, Esquire, in Georgetown, Delaware" and outlines specific procedures for arbitration.[17]

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14 *Id*. § 15.3.

15 *Id*. § 15.5.

16 *Id*. § 14.1.

17 *Id*. For instance, Members may present witnesses, documents, and other evidence at arbitration without concern for the strict rules of evidence, and the arbitrator must issue a written opinion and award within thirty days of the close of the hearing.

The LLC Agreement also contains several sections pertinent to the present dispute dealing with (1) the purpose and business of North Milton,[18] (2) Capital Contributions,[19] (3) the management powers and duties of the Members,[20] (4) a mechanism for resolving disputes with Affiliates,[21] (5) Additional Capital Contributions,[22] (6) a mechanism for

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[18] *Id*. Art. 2.

[19] *Id*. Art. 4.

[20] *Id*. §§ 7.1-7.6.

[21] *Id*. § 7.17. The LLC Agreement defines Affiliate as

> any . . . Person controlling, controlled by or under common control with such Person or the parents, spouse, siblings and lineal descendants of such Person, and their respective spouses so long as they remain spouses, and any trust for the benefit of any of the foregoing and any beneficiaries of such Person.

Id. § 16.1(6); *see also id*. § 16.1(62) (defining Person as "any natural person or any corporation, general partnership, limited partnership, limited liability company, joint venture, association, firm, joint stock company, trust, business trust, unincorporated association or other entity.").

Section 7.17 provides that, if North Milton enters an agreement with an Affiliate of a Member to provide goods or services to or on behalf of North Milton, any disputes arising with respect to performance of that agreement must be resolved using the specific procedures outlined in that Section.

[22] *Id*. § 9.1 ("[T]he Members agree to make additional Capital Contributions . . . from time to time in accordance with the provisions herein and in proportion to their respective LLC Interests . . . and in such amounts as are sufficient to enable [North Milton] to carry out the purposes of this Agreement.").

resolving disputes between Members regarding the necessity of Additional Capital Contributions,[23] (7) Contribution Loans,[24] and (8) Events of Default.[25]

4. Assumption Agreement

Also on December 18, 2004, Lockwood Brothers entered into an Assignment and Assumption of Agreement of Sale with North Milton (the "Assumption Agreement").[26] Through this Agreement, Lockwood Brothers assigned and transferred to North Milton all of its right, title, and interest in and under the Rust Farm and Salvation Army Agreements. In exchange, North Milton agreed to pay $2,000,000 to Meridian Enterprises, LLC ("Meridian"),[27] on behalf of Lockwood Brothers, which sum included

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[23] *Id*. ("[I]f a Member believes that Additional Capital Contributions are required to be made by the Members, notwithstanding the absence of Approval of the Managers . . . such Member . . . may request that the Manager retain independent accountants . . . to make the determination whether Additional Capital Contributions are required . . . .").

[24] *Id*. § 9.3. Section 9.4 of the LLC Agreement details the process for repayment of Contribution Loans and Section 9.5 outlines remedies available to Members in the event that a Contribution Loan is not repaid in full within ninety days.

[25] *Id*. § 11.1. Relevantly, Events of Default include failure to make Additional Capital Contributions or repay a Contribution Loan.

[26] Ex. A at 119-22, Assumption Agreement.

[27] Darin is the sole principal of Meridian, which allegedly performed "all engineering services required for advancement of the Project." Darin Aff. ¶ 8. Although the parties at various times refer to Meridian Enterprises, LLC, Meridian Engineers and Architects, Meridian Architects, Meridian Engineers, and, simply, Meridian, they do not consistently differentiate between those entities. Therefore, even though the parties may be referring to two or more separate entities, I have referred to all of them herein as "Meridian" and find that they all should be treated the same way for purposes of this analysis.

$1,000,000 due and payable within ten days of "Final Approval."[28] The LLC Agreement also expressly requires this $2,000,000 payment.[29]

D. Procedural History

In recent years, the Members of North Milton began to disagree about several issues regarding the operation of the Company and "the liability of Members for, and an accounting of, Capital Contributions to" it.[30] As a result of these disputes, on September 3, 2009 Lockwood Brothers submitted an arbitration demand to Bayard (the "Arbitration Demand").[31]

On September 18, 2009, Milton Investments filed a Verified Complaint and motion for a temporary restraining order in this action seeking to enjoin Lockwood Brothers from arbitrating any of the issues set forth in the Arbitration Demand. On September 24, Lockwood Brothers filed an Answer to the Complaint and, on November 5, the parties stipulated to present certain specified issues to the Court on cross motions for summary judgment.

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28 "Final Approval" is defined in the Assumption Agreement as the annexation of the Rust Farm Property into the Town of Milton and expiration of all related appeal periods. *Id*. at 120.

29 LLC Agreement §§ 2.1, 16.1(10).

30 D.I. 6.

31 Milton submitted a counter-demand for arbitration on September 15, 2009 "requesting that Bayard arbitrate questions arising from a purported Contribution Loan made by [Milton] to Lockwood Brothers pursuant to Section 9.3(a) of the LLC Agreement." DAB 2.

The stipulated issues are:[32]

- Whether any of the following issues (the "Stipulated Arbitrability Issues") are subject to binding arbitration under Section 7.17, Article 14, or any other provision of the LLC Agreement:
  - Disputes regarding obligations of North Milton or its Members under the Assumption Agreement;
  - Disputes concerning sums North Milton allegedly owes to Meridian;
  - Whether payments made by a Member on behalf of North Milton should be considered a capital contribution under the LLC Agreement;
  - Disputes concerning cash distributions made in purported repayment of capital contributions; and
  - Disputes over a Member's failure to make purportedly necessary capital contributions and the remedies available to North Milton for such failure under Section 9.3(a) or any other provision of the LLC Agreement.
- Assuming one or more of those issues are subject to arbitration, whether Bayard is disqualified from serving as arbitrator.
- If Bayard is disqualified, whether the procedures set forth in 10 *Del C.* § 5704 will provide the standard for selecting an alternative arbitrator.[33]

On November 25, I approved a further stipulation by the parties that certain documents would constitute the record for the Court's determination of the identified issues.[34] The parties then fully briefed and presented oral argument on those issues.

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[32] D.I. 6.

[33] Regarding this last issue, the parties agreed in their opening briefs that "in the event Mr. Bayard is for any reason unable to serve, then 10 *Del. C.* § 5704 should govern and the Court should appoint a new arbitrator." POB 31-32; DAB 36. As discussed *infra* Part II.E, however, I hold that Bayard is not disqualified from serving as arbitrator.

E. Parties' Contentions

Resolution of the Stipulated Arbitrability Issues depends on the Court's interpretation of the language of the Arbitration Clause. Milton Investments argues that the Arbitration Clause is narrow in scope and requires only specific, limited types of disputes to be resolved in arbitration. It also contends that none of the issues Lockwood Brothers seeks to arbitrate fit within those specified categories and that, based on Section 15.5 of the LLC Agreement, disputes arising from any prior or contemporaneous agreements are not subject to arbitration under the Arbitration Clause. In the alternative, Milton Investments contends that the disputed issues are not subject to arbitration because it possesses "exclusive management authority on behalf of [North Milton] for accounting, budgets, leases, contracts, and other financial matters."[35] Predictably, Lockwood Brothers disagrees, contending that, even though the Arbitration Clause does not use the exact language that previous decisions by Delaware courts have characterized as broad, the Clause effectively allows for arbitration of all disputes between the parties and is, thus, broad in scope. In the alternative, Lockwood Brothers argues that, even if the Arbitration Clause is narrow, each of the disputed issues fall within the ambit of the disputes the LLC Agreement makes subject to arbitration.

As to whether conflicts of interest and statements made by Bayard disqualify him from serving as sole arbitrator, Milton Investments claims that, even if some or all of the

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[34] *See supra* note 1.

[35] LLC Agreement § 7.2.

Stipulated Arbitrability Issues are subject to arbitration, Bayard must be disqualified because he already has expressed thoughts and comments germane to some of those issues. Lockwood Brothers counters that the Arbitration Clause neither requires a neutral arbitrator nor references any set of rules requiring such neutrality and that, in any event, Milton Investments has not provided sufficient evidence to show that Bayard is anything other than neutral and impartial.

Against this backdrop, I first address the relevant legal standards for cross motions for summary judgment and substantive arbitrability and then examine the arbitrability of each of the five Stipulated Arbitrability Issues and the ability of Bayard to serve as arbitrator.

II. ANALYSIS

A. Standard for Cross Summary Judgment Motions

"Under Court of Chancery Rule 56, summary judgment will be granted where the record shows that (1) there is no genuine issue as to any material fact and (2) the moving party is entitled to judgment as a matter of law."[36] When considering a motion for summary judgment, evidence and inferences drawn from the evidence are to be viewed in

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[36] *Zurich Am. Ins. Co. v. St. Paul Surplus Lines, Inc.*, 2009 WL 4895120, at *4 (Del. Ch. Dec. 10, 2009); *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) ("Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show 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.")).

the light most favorable to the nonmoving party.[37] Additionally, where "the dispute centers on the proper interpretation of an unambiguous contract, summary judgment is appropriate because such interpretation is a question of law."[38]

In this case, the parties stipulated to present the specified issues on "cross motions for summary judgment and do not argue that there is 'any issue of fact material to the disposition of either motion.'"[39] In such instances, "the court 'shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.'"[40] Where material factual disputes exist, however, a court must deny summary judgment.[41]

The parties stipulated both to the issues presented and the evidentiary record on which I must make my decision. As resolution of those issues largely turns on interpretation of several unambiguous terms in the various agreements submitted by the

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37 *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

38 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007) (citing *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007)); *see also AHS N.M. Hldgs., Inc. v. Healthsource, Inc.*, 2007 WL 431051, at *3 (Del. Ch. Feb. 2, 2007).

39 D.I. 6; *Zurich*, 2009 WL 4895120, at *4 (quoting Ct. Ch. R. 56(h)); *see also In re Last Will and Testament of Daland*, 2010 WL 716160, at *2 (Del. Ch. Feb. 15, 2010) (citing *Bank of N.Y. Mellon v. Realogy Corp.*, 979 A.2d 1113, 1118-19 (Del. Ch. Dec.18, 2008)).

40 *Zurich*, 2009 WL 4895120, at *4.

41 *See Bank of NY Mellon*, 979 A.2d 1113, 1118-19 (citing *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 166-67 (Del. Ch. 2003); *Empire of Am. Relocation Servs., Inc. v. Commercial Credit Co.*, 551 A.2d 433, 435 (Del. 1988)).

parties, I have based my decision regarding the merits of this case on the stipulated record submitted by the parties.

B. Arbitrability

The parties implicitly recognize that the Delaware Uniform Arbitration Act ("DUAA") applies to my determination of arbitrability under the Arbitration Clause.[42] I agree because, among other things, the Arbitration Clause explicitly requires that any arbitration under the LLC Agreement must take place "in accordance with the rules and other provisions of Delaware law."[43] In any case, the resolution of the issues raised by the parties likely would be the same whether this Court applied the FAA or the DUAA.[44]

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[42] 10 *Del. C.* §§ 5701-5715. For instance, the parties agree that Section 5704 of the DUAA will control selection of an arbitrator if Bayard is disqualified. *See* POB 31; DAB 25. I further note that there is no reason to believe the Federal Arbitration Act ("FAA") would apply because the LLC Agreement appears to contemplate only business transactions in Delaware and the FAA presumptively applies only to transactions involving interstate commerce. *See* 9 U.S.C. §§ 1, 2.

[43] *See* LLC Agreement § 14.1. Federal courts have held that "a generic choice-of-law provision, standing alone . . . is insufficient to support a finding that the parties intended to opt out of the FAA's default standards." *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *7 (Del. Ch. Dec. 4, 2007) (citing *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293-300 (3d. Cir. 2000); *Jacada, Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710-12 (6th Cir. 2005)). The operative agreement in this case, however, not only contains a generic choice-of-law provision invoking application of Delaware law, but the Arbitration Clause itself also specifically provides that *the arbitration* will proceed "in accordance with the rules and other provisions of Delaware law." *See* LLC Agreement §§ 14.1, 15.3. Thus, even if the LLC Agreement had contemplated business transactions in interstate commerce, the parties have demonstrated their intent that Delaware law, including the DUAA, should govern the arbitration.

[44] *See T-Ink*, 2007 WL 4302594, at *7 ("While federal law applies, the application of either federal or Delaware law likely would produce the same outcome in the

The parties also agree that this Court, and not the arbitrator, has jurisdiction to determine the arbitrability of the five Stipulated Arbitrability Issues. In the circumstances of this case, I concur. Because I find that the Arbitration Clause does not "constitute[] 'clear and convincing evidence' of the parties' intent to arbitrate arbitrability,"[45] the Court properly may determine the scope of the Arbitration Clause and the arbitrability of the Stipulated Arbitrability Issues.[46] Consequently, for purposes of this case, I need not delve into the sometimes fine distinctions between substantive and procedural arbitrability[47] or address the even more nuanced question of whether the

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> pending dispute. . . . As the [Supreme] Court noted in *Willie Gary*, Delaware law mirrors federal law on the issue of substantive arbitrability.") (citing *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79-80 (Del. 2006)).

45 *Julian v. Julian*, 2009 WL 2937121, at *5 (Del. Ch. Sept. 9, 2009) (citing *Willie Gary*, 906 A.2d at 80); *see also infra* note 48.

46 *See DMS Properties-First, Inc. v. P.W. Scott Assoc., Inc.*, 748 A.2d 389, 391-93 (Del. 2000) ("The law presumes that parties who agreed to arbitrate the merits of some disputes also agreed to arbitrate the merits of issues on which their agreement is either silent or ambiguous. Nevertheless, the United States Supreme Court held that courts should not presume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable evidence that they did so.'") (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995)).

47 In *Carder v. Carl M. Freeman Cmtys.*, this Court discussed certain differences between questions of "procedural arbitrability" and "substantive arbitrability":

> Questions of procedural arbitrability deal with whether the parties have complied with the terms of the arbitration clause. For example, a contract might provide that to arbitrate a dispute a party must provide notice to another party within ten days of some event. Whether a party satisfied that requirement would pose a question of procedural arbitrability. There is a presumption that questions of procedural arbitrability will be handled by arbitrators and not by courts.

parties intended to arbitrate arbitrability.[48] I, therefore, next examine the arbitrability of the five Stipulated Arbitrability Issues.

> "Substantive arbitrability" is more complicated. Substantive arbitrability concerns the applicability of an arbitration clause, and includes determining the scope of an arbitration provision, as well as broader issues, such as whether a contract or an arbitration clause is valid and enforceable. The underlying question is "whether the parties decided in the contract to submit a particular dispute to arbitration." Where the parties bargained for an arbitration provision in a contract, Delaware courts generally favor arbitration of particular disputes and "ordinarily resolve any doubts in favor of arbitration."

2009 WL 106510, at *3 (Del. Ch. Jan. 5, 2009) (citations omitted). Neither party claims that any of the Stipulated Arbitrability Issues implicates questions of procedural arbitrability. Thus, because the parties only raise questions of substantive arbitrability, this Court presumptively may determine whether the parties agreed to arbitrate the five Stipulated Arbitrability Issues. *See DMS Properties*, 748 A.2d at 391-93.

[48] *Carder*, 2009 WL 106510, at *4. Generally, before determining issues of substantive arbitrability, the Court must address the threshold question of "who should decide 'whether the parties decided in the contract to submit a particular dispute to arbitration.'" *Id*. at 3-4 (citing *Kaplan*, 514 U.S. at 945). In *DMS Properties*, the Supreme Court held that the duty to determine whether the parties agreed to arbitrate certain claims, *i.e.*, questions of substantive arbitrability, generally falls to the courts unless there is "clear and unmistakable evidence" that the parties also intended to arbitrate arbitrability. 748 A.2d at 391-93. In *Willie Gary*, the Supreme Court held that an arbitration clause constitutes "clear and unmistakable evidence" of such intent if it (1) generally refers all disputes to arbitration and (2) references a set of rules that would empower arbitrators to decide arbitrability, such as the rules of the American Arbitration Association. *Willie Gary*, 906 A.2d at 79-80. Section 14.1 of the LLC Agreement provides that certain types of disputes "shall be settled and finally determined by arbitration in accordance with the rules and other provisions of Delaware law," *see supra* note 16, and does not reference a set of rules empowering the arbitrator to decide arbitrability. Additionally, as discussed in more detail below, Section 14.1 refers some, but not all, disputes to arbitration. Thus, it does not provide the "clear and

Delaware public policy favors arbitration and courts will resolve doubts in favor of arbitration where "a reasonable interpretation in that direction exists."[49] Nevertheless, arbitration "is a consensual proceeding, and the court may not require arbitration unless the parties have a contract to arbitrate."[50] Thus, the Court must dismiss all issues the parties have agreed to commit to arbitration for lack of subject matter jurisdiction.[51]

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unmistakable evidence" of the parties' intent to arbitrate arbitrability necessary to overcome the presumption that questions of substantive arbitrability should be decided by the courts.

Though it does not affect my analysis in this action, I note that the United States Supreme Court recently addressed a particularly nuanced question regarding "who arbitrates arbitrability." *See Rent-A-Center, West, Inc. v. Jackson*, 78 U.S.L.W. 4643, 2010 WL 2471058 (2010). In that case, the Supreme Court examined whether the court or an arbitrator should examine, in the first instance, a party's challenge to the enforceability of an agreement as a whole based on unconscionability when that agreement includes an arbitration clause granting the arbitrator "exclusive authority to resolve any dispute relating to the . . . enforceability . . . of th[e] [a]greement." *Id.* at *4-5. Essentially, the Court held that if a party specifically challenges the enforceability of *an agreement to arbitrate*, the court should consider the challenge, but if the party challenged the enforceability of *the agreement as a whole*, the arbitrator should consider it. *Id*. at *1, 5-8.

[49] *Wilcox & Fetzer, Ltd. v. Corbett & Wilcox*, 2006 WL 2473665, at *3 (Del. Ch. Aug. 22, 2006) (citing *Willie Gary*, 906 A.2d at 79; *Ishimaru v. Fung*, 2005 WL 2899680, at *13 (Del. Ch. Oct. 26, 2005) ("In interpreting the Arbitration Clause, Delaware public policy comes into play and requires that doubts should be resolved in favor of arbitrability when a reasonable interpretation in that direction exists.")).

[50] *T-Ink*, 2007 WL 4302594, at *10 (quoting *Yuen v. Gemstar-TV Guide Int'l, Inc.*, 2004 WL 1517133, at *2 (Del. Ch. June 30, 2004)).

[51] *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001) ("This court 'will not accept jurisdiction over claims that are properly committed to arbitration since in such circumstances arbitration is an adequate legal remedy.'") (quoting *Dresser Indus., Inc. v. Global Indus. Tech., Inc.*, 1999

In *Parfi Holding v. Mirror Image Internet, Inc.*, the Supreme Court established a two-part procedure for determining whether a claim is arbitrable under an arbitration clause:[52] "First, the Court must determine whether the arbitration clause is broad or narrow in scope. Second, the court must apply the relevant scope of the provision to the asserted legal claim to determine whether the claim falls within the scope of the contractual provisions requiring arbitration."[53] If the clause is narrow, the Court must determine whether a particular claim "directly relates to a right in the contract."[54] If the clause is broad, the Court generally defers to arbitration on all claims touching on

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WL 413401, at *11 (Del. Ch. June 9, 1999)); *Willie Gary*, 906 A.2d at 78 (noting that a litigant "cannot be required to submit to arbitration any dispute which [it] has not agreed to so submit.") (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

52 817 A.2d 149, 155 (Del. 2002).

53 *Id*.

54 *Id*.; *see also HDS Inv. Hldg. Inc. v. Home Depot, Inc.*, 2008 WL 4606262, at *5 (Del. Ch. Oct. 17, 2008) ("When construing narrow arbitration clauses, courts must carefully determine which disputes the parties intended to be decided by arbitration and only send to arbitration those disputes that the parties expressly agreed should be arbitrated. The presumption in favor of arbitration applies to narrow arbitration clauses; however, the Court must still consider the boundaries of the arbitration provision and not require a party to arbitrate an issue they did not agree to arbitrate.") (citing *Camferdam v. Ernst & Young Int'l, Inc.*, 2004 WL 1124649, at *1 (S.D.N.Y. May 19, 2004) ("[W]hen dealing with a narrow arbitration clause, the court must consider whether the disputed issue is, on its face, within the purview of the clause, and the court 'must be careful to carry out the specific and limited intent of the parties.'") (internal citations omitted); *Chevron U.S.A. Inc. v. Consol. Edison Co.*, 872 F.2d 534, 537-38 (2d Cir.1989)).

contract rights and performance.[55] Thus, I begin by examining the language of Section 14.1 of the LLC Agreement to determine the scope of the Arbitration Clause.

C. Is the Arbitration Clause Broad or Narrow?

The Arbitration Clause does not include the characteristic catch-all language of other clauses courts have found to be broad, such as language explicitly referring to arbitration all controversies arising from or in connection with an agreement. Yet, the expansive nature of the categories listed in the Clause initially suggests the parties might have intended such a broad scope of referral under the LLC Agreement. This possibility is undercut, however, by other sections of the Agreement that provide specific, nonarbitration dispute resolution mechanisms for two categories of disputes that arguably would fit within the Arbitration Clause. These carve-outs limit the scope of the otherwise broad Arbitration Clause and indicate that the parties did not intend to refer all disputes under the LLC Agreement to arbitration. Therefore, I hold that the Arbitration Clause is narrow in scope. At the same time, however, I find that each of the specific categories of arbitrable disputes identified in the Clause captures a wide swath of issues.

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[55] *Parfi*, 817 A.2d at 155. Though determining whether an arbitration clause is broad or narrow will aid the Court in finding an appropriate level of arbitral deference, such an analysis seeks primarily to discover what issues the parties agreed to arbitrate. Indeed, "[a]n arbitration clause, no matter how broadly construed, can extend only so far as the series of obligations set forth in the underlying agreement." *Id*. at 156. Thus, while "Delaware courts strive to honor the reasonable expectations of the parties and ordinarily resolve any doubt in favor of arbitration" when the parties agreed to submit all claims under a contract to arbitration, *id*. at 155-56, they will not manufacture such doubt, nor will they send to arbitration claims that fall outside the scope of an arbitral clause (whether broad or narrow).

Generally, "[a]n arbitration clause is broad if it refers all disputes under the agreement to arbitration."[56] Our courts have held the following language to be indicative of a broad arbitration clause:[57] (1) "all disputes arising in any way under the Agreement,"[58] (2) "any controversy . . . aris[ing] out of this contract or out of the refusal to perform the whole or any part thereof,"[59] (3) "any controversy or claim arising out of or relating to this Agreement or the breach of this Agreement,"[60] (4) "[a]ny Claim arising

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[56] *HDS Inv. Hldg.*, 2008 WL 4606262, at *5 (citing *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F. 2d 825, 832 (2d Cir. 1988)); *see also Parfi*, 817 A.2d at 155 ("By agreeing to submit to arbitration 'any dispute, controversy, or claim arising out of or in connection with' the . . . Agreement, [the parties] have signaled an intent to arbitrate all possible claims that touch on the rights set forth in their contract.").

[57] These courts considered many of these clauses in the *Willie Gary* context, *i.e.*, determining whether an arbitration clause "generally refers all controversies to arbitration." While an "arbitration clause . . . [that] refers all disputes under the agreement to arbitration" (the standard for a broad clause laid out in *HDS Investments*) may not necessarily be one that "generally refers all controversies to arbitration," (the *Willie Gary* standard), it is highly likely that an arbitration clause that meets the *Willie Gary* standard would, as a practical matter, also be characterized as broad under the definition in *HDS Investments*.

[58] *Carder*, 2009 WL 106510, at *5; *see also Caproc Manager, Inc. v. Policemen's & Firemen's Ret. Sys. of the City of Pontiac*, 2005 WL 937613, at *2 (Del. Ch. Apr. 18, 2005) ("[a]ny dispute or controversy arising under this Agreement.").

[59] *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 1987 WL 16508, at *2 (Del. Ch. Sept. 8, 1987), *aff'd*, 545 A.2d 1171 (Del. 1988).

[60] *Willie Gary*, 906 A.2d at 79.

out of or related to the Contract,"[61] and (5) "all disputes arising out of or in connection with the agreement."[62]

But, while language like "arising out of," "in connection with," and "relating to," which is characteristic of arbitration clauses traditionally recognized as broad in scope, clearly signals a party's intent to refer all disputes under an agreement to arbitration, an arbitration clause need not invoke any specific catch phrase or special words to be considered broad. Rather, it must evidence the parties' general intent to refer all disputes under their agreement to arbitration.[63]

In contrast, "an arbitration clause is narrow if arbitration is limited to specific types of disputes."[64] For instance, courts have held to be narrow an arbitration clause that refers to arbitration only issues regarding an "Applicable Amount" that remained in

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61 *Id*. (citing *Cong. Const. Co. v. Geer Woods, Inc.*, 2005 WL 3657933, at *3 (D. Conn. Dec. 29, 2005) (citing *Terminix Int'l Co. v. Palmer Ranch L.P.*, 432 F.3d 1327, 1329 (11th Cir. 2005) ("any controversy or claim . . . arising out of or relating to [the agreement]")); *see also McLaughlin v. McCann*, 942 A.2d 616, 623 (Del. Ch. 2008) (finding broad an arbitration clause that referred "any controversy arising out of or relating to the LLC Agreement" to arbitration).

62 *Id*. (citing *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 470 (1st Cir. 1989)); *see also Parfi*, 817 A.2d at 156 ("any dispute, controversy, or claim arising out of or in connection with" an agreement).

63 *See HDS Inv. Hldg.*, 2008 WL 4606262, at *5; *Carder*, 2009 WL 106510, at *5; *McLaughlin*, 942 A.2d at 625-26.

64 *HDS Inv. Hldg.*, 2008 WL 4606262, at *5 (citing *McDonnell Douglas*, 858 F. 2d at 832)).

dispute after a contractual "Resolution Period."[65] Similarly, an arbitration clause that required arbitration only for disputes concerning the "interpretation or performance" of an LLC Agreement has been deemed narrow,[66] as has a clause that mandated arbitration only if the pertinent section of the contract expressly required arbitration.[67]

Here, the Arbitration Clause refers to arbitration "[a]ll disputes among or between the Members involving or relating to" (1) interpretation of the LLC Agreement, (2) a Member's breach of the terms of the Agreement, (3) the duties, rights, and obligations of Members and Managers under the Agreement, and (4) any deadlock between Managers or Members or the enforcement of any provisions of the Agreement (including any

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65 *Id*. (citing *Blue Tee Corp. v. Koehring Co.*, 999 F.2d 633, 634-35 (2d. Cir. 1993) (describing as a "narrow arbitration clause" a provision "requiring disputes regarding the computation of the final statement to be resolved by accountants"); *CAE Indus. Ltd. v. Aerospace Hldgs. Co.*, 741 F. Supp. 388, 392 (S.D.N.Y. 1989) (finding an arbitration provision narrow in scope where it only required that objections by a buyer to matters in the closing balance sheet be submitted to an independent accounting firm for arbitration)).

Although the Court examined the arbitration clause at issue in *HDS Investments* under the FAA, the result would be the same under the DUAA. *See supra* note 44.

66 *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *7 (Del. Ch. Dec. 4, 2007). As the Court later noted in *Carder*, "[a] key fact supporting the conclusion [that the arbitration clause at issue in *T-Ink* was narrow] was the parties' use of broader 'arising out of or relating to this agreement' language in the immediately preceding paragraph regarding waiver of the right to a jury trial. The use of that broad language suggested that the later use in the same agreement of the arguably narrower . . . language was intentional." 2009 WL 106510, at *5.

67 *NAMA Hldgs., LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 432 (Del. Ch. 2007).

termination of an Affiliate under contract to North Milton).[68] The "involving or relating to" language expands the reach of each of the four enumerated categories to such an extent that it is difficult to envision any dispute arising under the LLC Agreement that would not fit within one of these broad categories. Indeed, the Agreement may even require arbitration of claims that a Member breached its fiduciary duties, claims that did not fit under the broad arbitral language in *Parfi*.[69]

Despite this seemingly broad language, however, the LLC Agreement contains two provisions that appear to limit somewhat the scope of arbitration. In Sections 7.17 and 9.1, the LLC Agreement outlines specific resolution mechanisms for (1) "disputes

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[68] *See supra* note 16.

[69] In *Parfi*, the Supreme Court declared broad a clause that submitted to arbitration "any dispute, controversy, or claim arising out of or in connection with th[e] Agreement, or the breach, termination, or invalidity thereof." 817 A.2d at 151. But despite this broad language, the Court stated that the parties to that agreement did not, by using such language, "commit to bring into arbitration every possible breach of duty that could occur between the parties" and held that fiduciary duty claims need not be arbitrated because such claims were "independently and separately assertable" and, thus, would not arise "'in connection with' the Agreement." *Id*. at 156.

Here, however, Lockwood Brothers suggests that the Arbitration Clause, though lacking "catch-phrase" language described by the Court as broad, may be even broader than the clause at issue in *Parfi* because, unlike the broad arbitration clause at issue in that case, Section 14.1 of the LLC Agreement explicitly refers to arbitration "[a]ll disputes . . . involving or relating to . . . the duties, rights or obligations of the Members or Manager hereunder." For purposes of this case, I need not decide whether this language encompasses claims for breach of fiduciary duties, because no such claims are included among the Stipulated Arbitrability Issues. Still, the possibility that such claims may be included in the Arbitration Clause illustrates the expansive nature of the categories referred to arbitration in that Clause.

aris[ing] with respect to" performance of an agreement between North Milton and a Member's Affiliate "to provide goods or services to or on behalf of [North Milton]" and (2) disputes regarding the necessity of Additional Capital Contributions.[70] Both of these categories of disputes likely would fit within the ambit of the Arbitration Clause if the LLC Agreement did not contain Sections 7.17 and 9.1. The inclusion of these Sections, however, limits the reach of the Arbitration Clause at least to the extent of excluding from arbitration the categories of disputes explicitly referenced in those Sections.

Yet, despite these exceptions, the categories of arbitrable disputes in the LLC Agreement are expansive enough to encompass the vast majority of disputes arising under that Agreement. Thus, I hold that the LLC Agreement contains a narrow Arbitration Clause, which is, nevertheless, expansive, referring a wide swath of claims arising under that Agreement to arbitration.[71]

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[70] *See supra* notes 21 and 23.

[71] Of course, labeling an arbitration clause as broad or narrow does not eliminate the Court's obligation to determine whether a particular dispute must be arbitrated. This is partly because freedom of contract allows parties to create arbitration clauses that transcend typical classifications of broad and narrow, *e.g.*, by negotiating a clause that broadly refers to arbitration all issues that fit within "the [narrow] context of the limited subject matter it addresses." *See State v. Phillip Morris USA, Inc.*, 2006 WL 3690892, at *4 (Del. Ch. 2006), *aff'd*, 925 A.2d 504 (Del. 2007). As such, in this case I find that the LLC Agreement broadly refers to arbitration all issues that reasonably involve or relate to the four categories of disputes listed in Section 14.1.

The characterization of the Arbitration Clause as narrow does necessitate, however, a closer examination of each of the Stipulated Arbitrability Issues in terms of the express language of that Clause. If I had concluded the Arbitration Clause was broad within the meaning of *Parfi*, Lockwood Brothers would need to

D. Arbitrability of Stipulated Arbitrability Issues Under the Arbitration Clause

Having determined that the Arbitration Clause refers specific, though expansive, categories of disputes to arbitration, I now examine the Stipulated Arbitrability Issues to determine whether they fit within those categories.

1. Duties of North Milton or its Members under the Assumption Agreement

Lockwood Brothers seeks to submit to arbitration the question of whether or not a sum of money allegedly owed by North Milton to Meridian—which Lockwood contends is one of its Affiliates—is due and payable under the LLC and Assumption Agreements.[72] Based on a review of the relevant agreements, it appears that the LLC Agreement contemplates a payment by North Milton to Meridian of $2,000,000 on behalf of Lockwood Brothers in consideration for assigning all rights, title, and interest under the Rust Farm and Salvation Army Agreements, a requirement elaborated on in the Assumption Agreement. As such, this issue involves or relates to the interpretation of the LLC Agreement, the possible breach of that Agreement by Milton, and the duties, rights, or obligations of Members or Managers under that Agreement and, therefore, should be submitted to arbitration.

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show only that the Stipulated Arbitrability Issues touched on contract rights and performance, a less stringent standard.

[72] To the extent Milton disputes Meridian's status as an Affiliate of Lockwood Brothers, that issue requires interpretation of the LLC Agreement and, as such, should be decided in arbitration. *See* Part II.D.2.

In Section 2.1, the LLC Agreement requires that, "[c]ontemporaneously with or immediately following the execution of this Agreement, [North Milton], by way of assignment and in consideration of the Assignment Payment, . . . shall acquire from designated Affiliates of Lockwood [Brothers] all of its rights, title, interest and assume all of its obligations under" the Rust Farm and Salvation Army Agreements. The Agreement defines "Assignment Payment" as "the sum of $2,000,000, which is due and payable pursuant to the Assignment."[73] The Assumption Agreement, entered on the same day as the LLC Agreement,[74] details the conditions under which that $2,000,000 was to be

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[73] LLC Agreement § 16.1(10).

[74] Generally, agreements entered into on the same day or in close temporal proximity in connection with a single business transaction are construed together or consistently. *See Ashall Homes Ltd. v. ROK Ent. Gp. Inc.*, 992 A.2d 1239, 1250 (Del. Ch. Apr. 23, 2010) (citing 17A C.J.S. *Contracts* § 315, at 337 (1999) ("In the absence of anything to indicate a contrary intention, writings executed at the same time and relating to the same transaction are construed together as a single contract, as though they were as much one in form as they are in substance, in order to determine the intent, rights, and interests of the parties.")).

Milton claims that Section 15.5 precludes consideration of any documents in connection with the LLC Agreement. This integration clause provides that the LLC Agreement "embodies the entire agreement and understanding among the parties relating to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings relating thereto." What Milton fails to account for, however, is the limiting phrase in Section 15.5, "relating to the subject matter hereof." Essentially, this fairly boilerplate integration clause requires only that any condition imposed by the LLC Agreement not be overridden by a provision in another agreement or understanding. It does not reflect an intention to disrupt or negate the effects of the multiple agreements the parties entered into in connection with the LLC Agreement to complement and carry out its purposes. Indeed, these contemporaneous documents are often expressly referred to in and contemplated by the LLC Agreement itself.

paid—in two installments—to Meridian.[75] The obligations of North Milton and its Members under the Assumption Agreement thus mirror the obligations of North Milton under the LLC Agreement.

In this case, Milton Investments allegedly refuses to make certain payments to Meridian under the LLC Agreement and Assumption Agreement because the parties mutually agreed to annex the Rust Farm Property to Sussex County rather than into the town of Milton, the arrangement contemplated by Section 2.1 of the LLC Agreement and the Assumption Agreement.[76] As a result of the parties' agreement to annex the Property to Sussex County, the Final Approval referred to in Section 2.1 was never obtained.

Milton Investments also asserts that, in light of its exclusive financial management authority under Section 7.2 of the LLC Agreement, Lockwood Brothers has no right to second guess North Milton's refusal to make the disputed $1 million payment to Meridian in arbitration. While I make no judgments regarding the merits of these arguments, I hold that the issue of whether or not North Milton must pay money to Meridian under the LLC and Assumption Agreements involves or relates to interpretation of the LLC Agreement, a possible breach of its terms by Milton Investments, and the duties, rights, and obligations of Milton Investments and Lockwood Brothers under the

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[75] Assumption Agreement § 3. North Milton agreed to pay a certain sum to Meridian on behalf of Lockwood Brothers, which sum included $1,000,000 due and payable within ten days of "Final Approval."

[76] "[T]he [Rust Farm] Property was not annexed into the jurisdictional limits of the Town of Milton and therefore no payment is due Meridian Enterprises." Pl.'s Reply Br. ("PRB") 14.

LLC Agreement.[77] Therefore, I hold that this issue is arbitrable under the Arbitration Clause.

2. Sums allegedly due by North Milton to Meridian

Lockwood Brothers also seeks to arbitrate disputes concerning sums allegedly due by North Milton to Meridian for certain engineering services North Milton purportedly contracted with Meridian to perform. Milton Investments argues that it should not be required to submit to arbitration claims about disputed payments between the Company and an Affiliate of one of its Members and further avers that its exclusive financial management authority is not subject to arbitration simply because Lockwood Brothers disagrees with Milton Investment's financial decisions.

I address this latter contention in more detail in Part II.D.3 below. Here, however, I note that, to the extent the parties dispute the financial management authority of Milton Investments, that disagreement falls within the arbitrable dispute categories listed in the Arbitration Clause because it involves or relates to the interpretation of a provision of the LLC Agreement and the duties and rights of Members. Additionally, I find that, to the extent this dispute involves the performance of a contract to provide goods or services

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[77] Lockwood Brothers also contends that Milton Investment's decision to distribute $400,000 from North Milton to itself prior to making the Assignment Payment to Meridian breached Section 6.4 of the LLC Agreement. *See* POB 23. That Section provides that "so long as the Assignment Payments remain unpaid, the payment of the Assignment Payments . . . shall be paid prior to any payment to the Members . . . ." While I express no opinion as to whether Milton Investments, in fact, breached the LLC Agreement by this omission, I agree with Lockwood Brothers that such issues must be arbitrated because they concern interpretation of the LLC Agreement and a possible breach of that Agreement.

entered between North Milton and Meridian, it must be sent to arbitration to determine (1) whether Meridian is indeed an Affiliate of Lockwood Brothers as that term is used in the LLC Agreement and, if it is, (2) how to proceed under Section 7.17 of the Agreement.

Because Darin controls both Meridian and Lockwood Brothers and the two entities are inextricably connected through him, there is at least a reasonable argument that Meridian is an Affiliate of Lockwood Brothers.[78] Final determination of that issue, however, depends on a close reading and interpretation of the LLC Agreement. In particular, resolution of a question regarding the Affiliate status of Meridian would require interpreting Sections 2.1, 7.17, 16.1(6), and 16.1(62) of the Agreement, among others.

This question of whether Meridian is an Affiliate would have to be answered before addressing any disputes about whether and how Section 7.17 applies. Section 7.17 states that disputes between the Company and an Affiliate of a Member arising from the performance of a contract with that Affiliate "to provide goods or services to or on behalf of North Milton" should be resolved through a determination by the Disinterested Member, *i.e.*, the Member not affiliated with the third-party provider of goods or services. Thus, this Section suggests that the Disinterested Member may decide, on behalf of North Milton and without the input of other Members or Managers, whether to

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[78] *See supra* note 21.

litigate, settle, waive, or compromise a disputed matter with an Affiliate of the Company.[79] Section 7.17, however, further provides that

> each agreement [North Milton] enters into with an Affiliate of a Member will contain an arbitration provision and to the extent that any dispute is arbitrable under any such agreement, the Disinterested Member(s) will not take any action that would materially adversely affect the Affiliate party thereto unless and until the arbitrators decide the merits of the dispute in favor of [North Milton].

Although Section 7.17 appears to contemplate a dispute resolution mechanism outside of arbitration, the parties dispute its meaning within the context of the LLC Agreement. Additionally, the parties dispute whether Section 7.17 even applies or whether, as Lockwood Brothers argues, Milton Investments' failure to pay Meridian sums allegedly owed it by North Milton constitutes a disputed termination of an Affiliate under contract to North Milton that must be submitted to arbitration under Section 14.1 of the LLC Agreement. Among the ancillary questions presented by this issue are whether Section 7.17 governs disputes regarding sums allegedly due to Meridian by North Milton, whether Milton Investments complied with that provision when it refused to pay Meridian amounts allegedly owed by North Milton, and whether disputes between North Milton and Meridian must be resolved through voluntary dispute resolution or litigation. Thus, because resolution of the Stipulated Arbitrability Issue regarding "[d]isputes concerning sums North Milton allegedly owes to [Meridian]" requires interpretation of

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[79] Of course, Section 7.17 does not affect Meridian's ability to pursue a claim for monies allegedly owed to it by North Milton through litigation, settlement, waiver, or compromise.

the LLC Agreement, I hold that this issue must be submitted to arbitration in the first instance.[80]

3. Issues regarding Capital Contributions

The final three Stipulated Arbitrability Issues relate to Capital Contributions made by or required from Members. Specifically, Lockwood Brothers seeks to arbitrate disputes concerning (1) whether payments made by a Member on behalf of North Milton should be considered a Capital Contribution under the LLC Agreement, (2) cash distributions made to a Member in purported repayment of Capital Contributions made by that Member, and (3) the failure of a Member to make Additional Capital Contributions allegedly necessary under the LLC Agreement. The disputes regarding these issues also include disagreements as to the remedies available to North Milton or its Members under Section 9.3(a) or any other provision of the LLC Agreement.

Milton Investments claims, as its main argument in this regard, that none of these disputes can be arbitrated because each falls "within the exclusive management authority of [Louis III]" under Section 7.2 of the LLC Agreement.[81] As I intimated in Part II.D.2 above, however, the mere statement of that argument calls for a determination of Milton Investment's duties, rights, and obligations under the LLC Agreement and an interpretation of Section 7.2 of that Agreement. Because Section 14.1 provides for

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[80] Additionally, to the extent either party seeks to remedy a possible breach of Section 7.17 for failure to include an arbitration provision in the alleged contract between Meridian and North Milton, that issue also should be sent to arbitration.

[81] PRB 22.

arbitration of both those types of disputes, Milton Investment's arguments in this regard and the underlying disputes about Capital Contributions must be decided in arbitration.

Additionally, resolution of the three Stipulated Arbitrability Issues referenced above requires interpretation of various sections of the LLC Agreement. A Member's duties with regard to Capital Contributions, Additional Capital Contributions, and Contribution Loans, as well as remedies for failure to make required Capital Contributions or repay Contribution Loans are addressed in Articles 4, 8, 9, and 16 of the LLC Agreement. Moreover, these three disputes also involve potential breaches of the Agreement by Lockwood Brothers and Milton Investments and implicate the duties, rights, and obligations of Members and Managers under the Agreement. Therefore, I hold that these three Stipulated Arbitrability Issues also must be arbitrated.

This conclusion also comports with the principle that courts favor contractually-bargained-for arbitration and "ordinarily resolve any doubts in favor of" that dispute resolution mechanism, as opposed to litigation.[82] Thus, even if there were a basis for doubt about the above findings, which I do not perceive, I conclude that this Court should defer to arbitration on each of the five Stipulated Arbitrability Issues because they

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[82] *Parfi*, 817 A.2d at 155-56; *see also Meades v. Wilm. Hous. Auth.*, 2003 WL 939863, at *5 (Del. Ch. Mar. 6, 2003); *Ruggiero v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 499459, at *6 (Del. Ch. June 23, 1999) ("[A]rbitration practice is designed as an alternative dispute resolution mechanism and is intended to expedite, streamline, and efficiently resolve disputes in a manner which saves prospective litigants time and expense.").

reasonably appear to "involve[e] or relat[e] to" interpretation of the LLC Agreement, its breach, or the duties and rights of or disputes between the Members.[83]

E. May Bayard Serve as Arbitrator on Any of the Stipulated Arbitrability Issues?

Milton Investments seeks to disqualify Bayard from serving as arbitrator in the current dispute with Lockwood Brothers because he allegedly prematurely judged certain aspects of that dispute. In support of this contention, Milton Investments points to two statements Bayard made in a May 13, 2008 letter: First, Bayard wrote that his "initial reading of Louis' role regarding accounting, budgets, leases, contracts, & C speaks to land development, land leases and land sales, not to taking properties through land use permitting and approval process."[84] And, second, Bayard suggested that:

> When the petition for annexation into the Town of Milton was withdrawn and the project became the subject of an application to Sussex County for appropriate zoning classifications and approvals, the underlying agreements between Capano and Lockwood should have been amended to reflect that fact, since as of the date of the withdrawal of the Milton Annexation petition, the underlying agreement immediately became impossible to perform.[85]

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83 *See McLaughlin v. McCann*, 942 A.2d 616, 625 (Del. Ch. 2008). "In general, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Id.* at 621 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

84 Ex. D at 614-15.

85 *Id*. at 615.

Bayard wrote this letter in response to a request from both parties to meet and discuss various issues regarding the future of North Milton and the interpretation of certain provisions of the LLC Agreement.[86]

According to Milton Investments, Bayard's statements, though made in connection with the parties' request to examine those specific issues, disqualify him from serving as an arbitrator because such statements demonstrate that, due to some bias or conflict of interest, Bayard cannot provide a fair and neutral ruling. Lockwood Brothers counters that, even if Bayard prejudged certain of its disputes with Milton, he should not be disqualified because Section 14.1 of the LLC Agreement neither requires that the arbitrator be neutral nor references any set of rules requiring such neutrality. Instead, Lockwood Brothers contends, the parties "chose to put their faith in a man held in mutual esteem by the parties at the time," who worked with both parties on several prior projects.[87] Lockwood Brothers further argues that, because the DUAA provides that arbitration agreements are "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract"[88] and Milton Investments provided no facts that would support revoking or altering the contract, the Court should not disturb the parties' selection of Bayard as the sole arbitrator.

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86 Ex. C at 594-96, 600, 605-08, 612-15.

87 DAB 34.

88 10 *Del. C.* § 5701.

Considering the arguments of both parties and all the relevant circumstances, I hold that Bayard is qualified to serve as arbitrator notwithstanding his professional relationship with both parties and the initial statements he made regarding issues in dispute between the parties.

Elementary fairness dictates that arbitrators generally should be neutral and impartial, and, consequently, parties to an arbitration agreement normally require such attributes in their arbitrators.[89] The DUAA recognizes and upholds a party's right to appoint a neutral arbitrator by allowing courts to vacate an arbitral award when "[t]here [is] evident partiality by an arbitrator appointed as a neutral."[90] Evident partiality on the

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89 *Speidel v. St. Francis Hosp., Inc.*, 2002 WL 1477828 (Del. Super. July 11, 2002) (citing *Federico v. Frick*, 84 Cal. Rptr. 74 (Cal. Ct. App. 1970)).

90 10 *Del. C.* § 5714(a)(2). While "[t]here is a dearth of case law in Delaware interpreting the evident partiality standard," that DUAA standard "derives from language in both the [FAA] and the Uniform Arbitration Act ("UAA")." *Beebe Med. Ctr., Inc. v. Insight Health Servs. Corp.*, 751 A.2d 426, 432 (Del. Ch. 1999). As the Court opined in *Beebe*,

> the statutory phrase "evident partiality" has not been interpreted literally as requiring a showing of obvious bias for one party. Rather, the phrase has been read as reflecting a more general requirement that neutral arbitrators be impartial and unbiased. Thus the United States Supreme Court has stated that the evident partiality standard "show[s] a desire of Congress to provide not merely for any arbitration but for an impartial one." The Wisconsin Supreme Court has interpreted identical language in its state's version of the UAA as reflecting a "clear legislative intent to require disinterested arbitration. . . ."

part of an arbitrator will justify vacation of an arbitral award, however, only when the parties appoint that arbitrator "as a neutral."[91] Parties to an arbitral agreement are free to structure arbitration in any way they see fit.[92] Such autonomy extends to selection of arbitrators, and parties to an arbitral agreement presumably may choose to have arbitration conducted by any arbitrators they can agree on, even those with known conflicts of interest.[93]

> There is no reason to believe that the General Assembly, in adopting the evident partiality rule as the public policy of Delaware, had any different conception of its purpose.

Id. at 433 (citing *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147 (1968), *reh'g denied*, 393 U.S. 1112 (1969); *Richco Structures v. Parkside Vill., Inc.*, 263 N.W.2d 204, 210 (1978)). In light of these considerations, the Court in *Beebe* held that the arbitrator, who was required to be neutral under the AAA rules that governed the arbitral agreement, exhibited "evident partiality" by failing to disclose "a substantial relationship" with one of the parties' attorneys. *Id*. at 434-35.

91 10 *Del. C.* § 5714(a)(2).

92 *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *7 (Del. Ch. Dec. 4, 2007); *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 n.19 (Del. Ch. May 5, 2008), *aff'd*, 970 A.2d 256 (2009).

93 *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) ("[S]hort of authorizing trial by battle or ordeal or . . . by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."), *cited with approval in Lefkowitz v. HWF Hldgs., LLC*, 2009 WL 3806299, at *4 (Del. Ch. Nov. 13, 2009).

I do note, however, that while parties are free to select an arbitrator with a known, disclosed conflict of interest under traditional standards, such arrangements are often less than ideal. The current action is a case in point and illustrates the kinds

Here, the parties presumably picked Bayard as the sole arbitrator precisely for the reasons that Milton Investments now claims he is conflicted, *i.e.*, close familiarity with the Project and the parties. Regardless of their reasons for selecting him, however, Bayard's conflicts of interest were well known to Milton Investments and Lockwood Brothers before they executed the LLC Agreement.[94] Before entering into the LLC Agreement, Bayard had worked on several projects with both Milton Investments and Lockwood Brothers.[95] Additionally, both Louis III and Darin continued to engage Bayard for work on several projects after December 2004.[96] Having selected an arbitrator with a known conflict of interest, Milton Investments cannot now seek his disqualification based on two innocuous statements and veiled suggestions that Bayard may suffer from a conflict of interest.[97] Essentially, by contracting to have an arbitrator

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of problems one can expect to encounter and the attendant wasteful litigation about the arbitrator's ability to remain impartial.

94 Ex. D. at 638-41.

95 *Id.* at 637-39. Bayard worked on roughly the same number of projects with Darin and Louis III before December 18, 2004, although some projects may have been larger or smaller than others. *Id.* Bayard's prior work with both parties led him to suggest Milton to Darin as a possible partner for the Project after other potential partners dropped out. Ex. B at 495.

96 After the parties entered the LLC Agreement on December 18, 2004, Bayard recalls being involved with two subdivisions for Louis III and helping Darin obtain approval for three subdivisions. Ex. D at 640-41.

97 In a letter to Darin's counsel written on February 8, 2008, Louis III's counsel wrote that "our client objects to Mr. Bayard serving as arbitrator on the basis of the conflicts of interests presented by Mr. Bayard given his professional relationship with our client and with your client." Ex. C. at 592-93. In the briefs in support of their pending motion for summary judgment, Milton Investments

with known conflicts of interest, the parties waived any argument they might have raised that Bayard should be disqualified by virtue of the fact that he represented either of them previously or that he continued to do so in the same general vein after the parties entered into the LLC Agreement.[98]

Additionally, the two statements in Bayard's May 13, 2008 letter neither exhibit evident partiality for one party nor show that Bayard would be unable to fairly and impartially judge each issue submitted to him by the parties for arbitration. Indeed, these statements reflect little more than Bayard's initial thoughts and observations based on limited facts presented to him by the parties outside of his capacity as an arbitrator.[99] Similarly, there is no evidence suggesting that Bayard would be incapable of carefully and evenhandedly considering the parties' respective legal arguments on the various Stipulated Arbitrability Issues and altering his 'initial reading,' if appropriate. As such, I

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again points to Bayard's work with both Milton Investments and Lockwood Brothers, presumably to suggest that he should be disqualified based on a conflict of interest. *See* POB 30; PRB 22.

98 In its reply brief, Milton Investments raises the specter of bias by noting that Robert Gibbs, one of Bayard's partners, entered his appearance in an unrelated matter on behalf of a company in which Darin is a principal. *See* PRB 22. Milton Investments did not, however, explain why or how that fact would influence Bayard's ability to remain impartial and neutral in arbitration between the parties. Additionally, Milton Investments did not adduce evidence suggesting any actions taken by Bayard or any current relationship between Lockwood Brothers and Bayard that is materially different from the actions taken and relationships that existed at the time the parties entered the LLC Agreement. Finally, Bayard explicitly expressed his belief that he can be impartial and unbiased in any arbitration proceeding between the parties. Ex. D 643.

99 *See* Ex. D at 614-15.

hold that Bayard properly may serve as arbitrator in any proceeding under Section 14.1 of the LLC Agreement.

III. CONCLUSION

For the foregoing reasons, I grant Lockwood Brothers' motion for summary judgment and hold that the Arbitration Clause requires that the parties submit each of the five Stipulated Arbitrability Issues to arbitration in accordance with the procedures established in that Clause. Additionally, I hold that Bayard is not disqualified from serving as sole arbitrator under the terms of the LLC Agreement. Thus, I also deny Milton Investments' motion for summary judgment.

Counsel for Lockwood Brothers shall submit, on notice, a proposed form of final judgment implementing the rulings set forth in this Memorandum Opinion within ten days.