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COURT OF APPEALS
STATE OF NEW YORK

ALBERT BEHLER,

Appellant,

-against-

KAI-SHING TAO,

Respondent.

NO. 4

20 Eagle Street
Albany, New York
January 7, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Next case on the calendar is
2 number 4, Behler v. Tao.

3 MR. CONAN: Good afternoon. May it please the
4 court. Jesse Conan for the Plaintiff Appellant, Albert
5 Behler. Can I reserve about two minutes?

6 CHIEF JUDGE WILSON: Yes.

7 MR. CONAN: This case arises out of a promise Tao
8 made to induce Behler to invest in one of Tao's companies.

9 The majority below held that Tao unilaterally
10 terminated his obligation to Behler, and he did so after
11 Tao had gained the benefit of Behler's performance.

12 As the dissent explained, that outcome violated
13 basic and fundamental principles of fairness. Now, this
14 essential question of authority in this case, did Tao have
15 the power to unilaterally terminate his obligation to
16 Behler?

17 JUDGE SINGAS: And what does Delaware law say
18 about that?

19 MR. CONAN: Well, Delaware law says that Tao does
20 not have the power to unilaterally terminate a private
21 transaction like the exit guarantee agreement. That was -
22 - -

23 JUDGE SINGAS: I think Delaware might be a little
24 surprised by that interpretation.

25 MR. CONAN: Well, under the - - - under the - - -

1 so under the Delaware statutory exception, the Delaware
2 statutory exception applies to agreements of the members or
3 member as to the affairs of a limited liability company.
4 It's an operating agreement. That's what the Delaware law
5 says.

6 JUDGE TROUTMAN: So do you first have to
7 determine if both were members?

8 MR. CONAN: Well, I think you have to determine
9 if the - - - if the exit guarantee agreement does not fall
10 within the statutory exception, in that it is not an
11 operating agreement of the members. And I think by any
12 definition of operating agreement, it's not. It's a
13 private agreement between two people. It was entered
14 before - - -

15 JUDGE TROUTMAN: Isn't that a question of fact?

16 MR. CONAN: Well, to the extent it is a question
17 of fact, I think it would be grounds for a reversal here,
18 because questions of fact are not supposed to be resolved
19 on a motion to dismiss. But in terms of the - - - the
20 statute says that a member of an LLC is bound by an LLC's
21 operating agreement. But the exit guarantee agreement is
22 not an operating agreement, and it doesn't fall within the
23 ambit of the statute.

24 You couldn't create the exit guarantee agreement
25 unilaterally. There would be no way for Tao - - -

1 JUDGE CANNATARO: But don't the covenants, the -
2 - - the promises made in the exit agreement, relate
3 directly to the core functions of the LLC, such that you
4 really can't parse them out the way you would apparently
5 have us do?

6 MR. CONAN: Well, I think that the promise,
7 specifically, that we're dealing with here is the promise
8 to make an exit offer. And that's really a private
9 transaction.

10 JUDGE CANNATARO: But the substance of the exit -
11 - - of the exit offer would require a distribution from the
12 LLC, and that's the core function of the LLC that I'm
13 talking about.

14 MR. CONAN: I don't think it - - - it would have
15 required distribution, because Tao is obligated to make
16 that exit offer, but he can - - - he doesn't have to
17 liquidate Behler's. He doesn't have to - - - he doesn't
18 have to have the LLC purchase the shares back. That wasn't
19 the promise. The promise was that he was going to - - -

20 CHIEF JUDGE WILSON: It does - - - it does
21 require a transfer of the shares, right? Even if you pay -
22 - - even if Tao pays for it out of his pocket, it requires
23 a transfer of the shares?

24 MR. CONAN: A hundred percent it requires some
25 sort of transfer of the shares for Tao - - -



1 CHIEF JUDGE WILSON: And the amended - - - the
2 amended agreement gives the managing member the right to
3 disapprove transfers.

4 MR. CONAN: It does. It provides discretion for
5 the managing - - -

6 CHIEF JUDGE WILSON: So how does that bite on the
7 private agreement? If it's a private agreement.

8 MR. CONAN: Well, it - - - it's a constraint on
9 whether Tao is going to be able to perform. Tao has an
10 obligation to either make the offer himself or find a buyer
11 for Behler's shares. And there might be an independent
12 manager of the LLC. Now, in this case, it was Tao at the
13 time he was supposed to perform, but it doesn't have to be,
14 who would have to approve that transaction. And if Tao was
15 unable to get that approval, Tao would be in breach of the
16 agreement.

17 CHIEF JUDGE WILSON: From himself, you mean?

18 MR. CONAN: In this particular case, it would be
19 himself. It would be - - -

20 CHIEF JUDGE WILSON: Well, we are - - - the case
21 in front of us is this particular case.

22 MR. CONAN: Well, right, but we're - - - we're
23 trying to - - - trying to disentangle these two agreements.
24 And one agreement - - -

25 CHIEF JUDGE WILSON: Well, you're trying to



1 disentangle them.

2 MR. CONAN: I would like to disentangle the two
3 agreements. One of the agreements instill certain powers
4 in the manager and that manager was Tao in 2014, but it
5 doesn't have to be. And Tao's obligation to perform would
6 exist whether he's the manager or not.

7 JUDGE TROUTMAN: In 2014, were there any other
8 members besides Tao?

9 MR. CONAN: I believe there were, but that's
10 really outside the - - - the scope of this motion. I think
11 there were something like twenty to twenty-five members
12 eventually. I think they might have all been members in
13 2014, but I don't - - - I don't know for sure.

14 JUDGE SINGAS: Can we go back to the personal
15 versus the managerial authority? In your complaint, you
16 say that "Tao agreed that if the price of Remark were to
17 hit fifty dollars a share, he would cause Digipak to sell
18 its shares of Remark and distribute the proceeds." He does
19 that as a manager, not in his personal capacity, correct?

20 MR. CONAN: Well, in terms of him being able to
21 perform, I think the manager would have to make that
22 happen. But in terms of what the promise was, I think that
23 - - - that it seems to me it was a personal guarantee that
24 he made.

25 JUDGE SINGAS: Yeah. But Behler - - - Behler

1 initially, unless I'm mistaken, didn't even want to invest
2 because his concern was that he couldn't get his money out
3 of a limited liability company. And that's not a personal
4 decision. Like, he's investing as a member of this
5 corporation. He's saying, look, I'm wary of it for a
6 corporate reason, not for a personal reason.

7 I'm just having trouble separating out or saying
8 that this was done in their personal capacity. I agree, if
9 they said, look, I'll give you a loan of three million
10 dollars, and then the terms. But this is not what's going
11 on here.

12 MR. CONAN: Well, I think there's two - - - I - -
13 - I think that the - - - certainly the first - - - the
14 first component of the promise that Tao made, I think has a
15 lot more connection to the operation and affairs of the LLC
16 than the second.

17 The second promise was unequivocal. Tao
18 guaranteed to make an exit offer at the five-year mark.
19 There was no capacity in which he was making that promise.
20 The complaint says that it was Tao's obligation. And he
21 could choose - - -

22 JUDGE HALLIGAN: What - - -

23 MR. CONAN: - - - how he wanted - - -

24 JUDGE HALLIGAN: - - - what do you mean - - -

25 sorry. What do you mean by "no capacity"? Why was it not

1 either in his individual or managerial capacity? I'm not
2 sure I follow.

3 MR. CONAN: I think - - - I think it was - - -
4 the complaint doesn't allege it was in his managerial
5 capacity. It alleges a personal obligation. The claims
6 are asserted against Tao personally, not in his capacity as
7 manager. And Tao is the individual that's obligated to
8 perform.

9 And all we have is the complaint, and that's what
10 the complaint alleges.

11 CHIEF JUDGE WILSON: So it - - - so focusing just
12 on whether Tao signed the - - - what you want to call
13 private agreement, repurchase agreement, however you want
14 to call it, as an individual or as the managing member of
15 the LLC. Right? Which - - - what are the facts - - - what
16 are the kinds of facts you would rely on to show that he
17 did so in his personal capacity?

18 MR. CONAN: Well, they were - - - they were
19 interacting as friends. This was a deal that Tao and
20 Behler entered before Behler was even a member of the LLC,
21 and - - -

22 CHIEF JUDGE WILSON: That goes to - - - that goes
23 to Behler's status. I'm asking about Tao's. I'm asking
24 about the - - - so you've - - - let's say you've
25 sufficiently pleaded that Tao entered into this in his

1 personal capacity. What are the kind of facts that, if you
2 could prove them, would let us conclude that you are right?

3 MR. CONAN: Well, that the - - - the facts are
4 that the obligation to perform was Tao's. Tao made the
5 promise that - - -

6 CHIEF JUDGE WILSON: Yes. Although, the first
7 part that Judge Singas read you sounds like Tao making a
8 promise about what he would do as managing member, whereas
9 the second part doesn't read that way. So again, I mean,
10 I'm not sure you can answer right now, but what kinds of
11 facts - - - I mean, are the - - - and the fact you're
12 pointing to is actually a fact that's in the record in
13 front of us. It's - - - it's how the document reads.

14 So are there facts extraneous to the complaint
15 and the agreements which we can refer to that you would
16 rely on in - - - if we were to remit this?

17 MR. CONAN: Sure. So I think that the - - -
18 there's - - - first of all, the complaint alleges that Tao
19 understood that it was - - - it was his obligation. I
20 think if you look at paragraph 9, he actually makes a - - -
21 a settlement offer that never really amounted to anything.
22 But he said that he would buy Behler's shares back. So
23 there was an understanding between the parties that it was
24 Tao's obligation.

25 And again, this is a motion to dismiss. And I

1 think Behler's understanding was that it was a personal
2 obligation on the part of Tao.

3 JUDGE TROUTMAN: So when Behler invests, does his
4 status change? Does he then become a member?

5 MR. CONAN: Well, Behler - - - Behler invested,
6 and at the point of his investment, I think Behler's
7 understanding was that he was now a member of the LLC. But
8 the investment was made without any paperwork. There were
9 two buyers - - -

10 JUDGE GARCIA: There's paperwork, though. Isn't
11 there the governing agreement over Digipak? I mean, that's
12 in paperwork.

13 MR. CONAN: Well, sure. There was - - - there
14 was a - - - there was an initial barebones operating
15 agreement that - - -

16 JUDGE GARCIA: Which also says it can be changed.
17 Right? The Digipak - - -

18 MR. CONAN: Sure.

19 JUDGE GARCIA: - - - agreement itself?

20 JUDGE SINGAS: Right.

21 MR. CONAN: Yes. But - - -

22 JUDGE SINGAS: So isn't this more a due
23 diligence? Your client failed to really read and
24 understand and appreciate Delaware law and the agreement
25 that he entered into when he invested, which gave expansive

1 authority to Tao to change the terms of that agreement?

2 MR. CONAN: Look, I think that there's certainly
3 a due diligence component. He would have been better off
4 had he - - - had he looked at that. But I don't think that
5 changes the fact that Tao made a personal promise to
6 Behler, and Tao didn't have the power or authority to
7 unilaterally invade that promise.

8 He could change the operating agreement in his
9 capacity as manager. But what he can't do is he can't
10 unilaterally terminate this private transaction that he
11 agreed to with Behler. The Delaware - - -

12 JUDGE HALLIGAN: But isn't - - - isn't the
13 personal characterization critical? I guess what I'm - - -
14 I'm trying to sort through is, I would guess - - - and
15 perhaps, these agreements are more often reduced to
16 writing. But I would guess that it's not unheard of for
17 there to be some sort of an oral agreement like this. And
18 when someone on behalf of an LLC or some other entity calls
19 up someone else who is also in the same line of - - - of
20 investing and says, do you want to do a deal? Put money
21 into the vehicle? Doesn't it - - - it sort of create an
22 opportunity to then walk away from whatever the written
23 agreement says? Because you can say, well, you weren't
24 proceeding on behalf of the entity, you are proceeding in a
25 separate personal capacity. Why shouldn't we be concerned

1 about that?

2 MR. CONAN: Well, because I - - - I think in this
3 particular case, there were personal promises.

4 JUDGE HALLIGAN: But why - - - why personal? As
5 opposed to promises that were made on behalf of the LLC?
6 That's what I'm trying to understand.

7 MR. CONAN: Because the - - - if the promises
8 were made on behalf of the LLC, they would have been made
9 on behalf of the LLC. And that they would have then said
10 the LLC will buy the shares back. But that's not what the
11 promise is.

12 JUDGE HALLIGAN: So - - - so because - - - oh,
13 okay.

14 JUDGE RIVERA: So at - - - at - - - just to be
15 clear about something Judge Troutman asked you before. At
16 the time of the agreements and perhaps at the time that the
17 money was actually sent, right? At the time Behler cuts
18 the checks or however he pays - - -

19 MR. CONAN: Sure.

20 JUDGE RIVERA: - - - pays the millions, Tao had
21 sole control over this LLC. Is that not correct? Whatever
22 titles he may have held.

23 MR. CONAN: Yes. Tao had - - -

24 JUDGE RIVERA: So it is - - - it is possible that
25 it is a personal agreement, but that Behler is depending on

1 the fact that Tao can - - - can actually make this happen
2 because they have control over the LLC? That is, they can
3 actualize the agreement; they can comply with the
4 agreement. Because they - - - it's their company and they
5 have control over it?

6 MR. CONAN: Well, look, I - - - I think - - -

7 JUDGE RIVERA: Absent that, I assume Mr. Behler
8 wouldn't have entered this agreement with Tao.

9 MR. CONAN: I think that that's - - - that's
10 likely - - - it's a factor. If you - - - if you had
11 someone promising that he can make something happen, but
12 you didn't think he would be able to make that happen, then
13 you probably wouldn't.

14 JUDGE RIVERA: Well, not only Mr. Tao, but Mr.
15 Behler. Right? What person would enter an agreement for
16 millions of dollars who didn't think the other side could
17 actually comply with the exit - - -

18 MR. CONAN: Right.

19 JUDGE RIVERA: - - - strategy, which is the - - -
20 according to the complaint, the only reason why Mr. Behler
21 was willing to invest this much money.

22 MR. CONAN: Certainly, Behler believed that this
23 was a promise that Tao would be able to perform when he
24 entered the agreement.

25 CHIEF JUDGE WILSON: Thank you.



1 MS. KLEIN: Good afternoon. May it please the
2 court. Kerrin Klein on behalf of Defendant Respondent Tao.

3 There are at least two independent reasons why
4 this court should affirm the decision below. The first, as
5 we've been talking about today, is the LLC agreement.

6 Delaware LLCs are creatures of contract. When
7 Mr. Behler invested in Digipak, he automatically, under
8 Delaware law, became bound by the company's operating
9 agreement.

10 CHIEF JUDGE WILSON: So is there any way the two
11 of them could have written a private agreement that
12 couldn't - - - for the - - - for the repurchase, with the
13 terms that are in there, that wouldn't be extinguished no
14 matter what the LLC did to amend its charter later?

15 MS. KLEIN: With the terms that are in there, I
16 don't believe there is. Because the terms, according to
17 Mr. Behler were that, first, if digipak were to hit fifty
18 dollars per share, then Tao would cause Digipak to sell all
19 of its holdings and distribute that to the members. I
20 mean, that is the core function.

21 JUDGE HALLIGAN: But - - -

22 JUDGE RIVERA: No, no, no, no, no, not to
23 distribute to all the members. Just to deal with Mr.
24 Behler's investment.

25 MS. KLEIN: On a - - - on a pro-rata basis. But

1 - - - but he also pled that Mr. Tao would cause Digipak to
2 liquidate its holdings in Remark, period.

3 JUDGE HALLIGAN: Could they have entered into a
4 side agreement under which Tao promised and said he was
5 promising in his individual capacity, that he would buy-out
6 Behler if the share price was not at X within Y years? And
7 would that have been extinguished by the subsequent
8 agreement?

9 MS. KLEIN: He - - - he could have agreed in
10 writing to make an offer to purchase Mr. Behler's shares.
11 However, he still exercised his discretion as manager under
12 the amended LLC agreement.

13 JUDGE TROUTMAN: So a writing was - - - you - - -
14 you emphasized in a writing?

15 MS. KLEIN: Yes, Your Honor. If you look at the
16 original LLC agreement, there are multiple provisions in
17 that agreement. They afford Tao sole discretion over
18 distributions, management decisions, and the like, but they
19 also provide that the agreement can be amended in a writing
20 signed by Tao. If there's a writing signed by Tao, then
21 that can amend - - -

22 CHIEF JUDGE WILSON: So let me ask you this; vary
23 Judge Halligan's question a little bit. Suppose the
24 written agreement - - - so we - - - let's get out of the -
25 - - let's not worry about the fact that this is oral and

1 there'll be all kinds of problems around that. The written
2 agreement is that Mr. Tao will put fifteen million dollars
3 into an escrow account and when the stock price hits fifty
4 dollars, that escrow account will be delivered by the
5 escrow agent in exchange for the shares going back to Mr.
6 Tao.

7 Then the agreement - - - then the LLC agreement
8 is modified as it was. What happens?

9 MS. KLEIN: If - - - if that's - - - if there's a
10 modification of the LLC agreement that requires a writing
11 signed by Tao?

12 CHIEF JUDGE WILSON: No, no.

13 MS. KLEIN: If he signs that writing?

14 CHIEF JUDGE WILSON: No, no. There's a
15 modification of the agreement that then provides that - - -
16 that - - - that Tao has the ability to approve - - - sole
17 ability to approve or reject transfers of shares. There
18 would be a transfer of shares involved in that preexisting
19 agreement with the escrow account. What happens then?

20 MS. KLEIN: Well, then there's - - - that's a
21 difficult question because you had - - -

22 CHIEF JUDGE WILSON: That's why I asked.

23 MS. KLEIN: - - - two conflicting - - - that you
24 have two conflicting amendments in that case, right? You
25 have the amendment - - -



1 CHIEF JUDGE WILSON: No, no. The other is not an
2 amendment - - -

3 MS. KLEIN: Amendment one and amendment two.

4 CHIEF JUDGE WILSON: No. The other is not an
5 amendment. It's - - - it's a private agreement to put the
6 money into escrow. Right? And it - - - that's all it is.
7 The money is sitting there in escrow. The escrow agent
8 wants to know what to do.

9 MS. KLEIN: Well, I believe there's still
10 potentially a conflict even with the initial agreement.
11 Because the initial agreement has the requirement that Tao
12 has sole discretion over everything. That includes
13 transfers. That includes distributions. And so if there's
14 this discretion - - -

15 CHIEF JUDGE WILSON: And so your view is that Tao
16 could sign a - - - a personal agreement. And then decide,
17 as the managing member, not to honor the personal
18 agreement?

19 MS. KLEIN: I think that would present a lot
20 closer case. I think in this case it's not a close case
21 whatsoever. There is no personal agreement, and I think
22 that that's clear.

23 CHIEF JUDGE WILSON: Well, that's to Judge
24 Halligan's point. That this - - - isn't that what this
25 turns on, then, really?

1 MS. KLEIN: Whether it's a personal - - -

2 CHIEF JUDGE WILSON: Yeah.

3 MS. KLEIN: - - - agreement or not?

4 CHIEF JUDGE WILSON: Yeah.

5 MS. KLEIN: I mean, I think that is one key
6 factor. I think that there's a number of responses - - -

7 JUDGE RIVERA: Do you agree that's a factual
8 question, though?

9 MS. KLEIN: Excuse me?

10 JUDGE RIVERA: Do you agree that's a factual
11 question? He asserts it's a personal agreement.

12 MS. KLEIN: No. I believe it's - - - I believe
13 it's - - - from the face of the pleading, it is not a
14 personal agreement. I don't think there's a factual - - -
15 a question of fact.

16 JUDGE TROUTMAN: Well, what about the standard of
17 review that's required on a motion to dismiss?

18 MS. KLEIN: If accepting all of the allegations
19 of the complaint is true, it is not a personal agreement.

20 JUDGE HALLIGAN: Why - - - why is that?

21 MS. KLEIN: That is - - - well, for two factors.
22 Number one, he could not have affected the agreement
23 without undertake - - - without exercising his powers as
24 manager of Digipak. So it was not - - -

25 JUDGE HALLIGAN: And that's because it involves a

1 transfer of shares at it - - - its crux, I take it; is that
2 right?

3 MS. KLEIN: Well, I think it's for two reasons.
4 So with respect to the amended LLC agreement, that's
5 correct. However, what Mr. Behler is trying to do is
6 divide the alleged promise in half and only focus on the
7 second half as opposed to the promise as a whole.

8 So the alleged promise as a whole had two prongs,
9 right? The first prong is if the shares hit fifty - - - if
10 the price of Remark hits fifty dollars a share, then he's
11 going to liquidate Digipak's holdings of Remark and
12 distribute it - - - distribute those holdings, including
13 Mr. Behler's pro rata share.

14 There's no way conceivable that that could be
15 done in his - - - Mr. Tao - - - in Mr. Tao's personal
16 capacity.

17 JUDGE HALLIGAN: So you're saying, "the promise
18 as a whole", the first component is something that could
19 only have been done in his managerial capacity; is that
20 right?

21 MS. KLEIN: Absolutely, Your Honor.

22 JUDGE HALLIGAN: Okay.

23 JUDGE RIVERA: But - - - but why isn't it
24 different to make a personal promise that I'm going to
25 exercise my managerial authority a particular way versus

1 the LLC guaranteeing a particular exercise of authority?

2 MS. KLEIN: Because - - -

3 JUDGE RIVERA: Why - - - why aren't those
4 different things? Because I understood that their argument
5 is our complaint is the former, not the latter.

6 MS. KLEIN: So are you asking why he could not
7 have personally - - -

8 JUDGE RIVERA: I'm a shareholder of a company.
9 Can I make a side agreement with someone saying, look, if
10 it hits whatever, I'm going to sell it, I'll give you the
11 money? Or whichever way you want to see that. That's just
12 an individual saying that's what I'm going to do, assuming
13 the agreement - - - the operating agreement allows me to
14 share my - - - sell my shares at any time. Right?

15 MS. KLEIN: That's the problem, Your Honor. Is
16 that you have to look to the operating agreement first, and
17 if the operating agreement does not permit that without the
18 exercise of a - - -

19 JUDGE RIVERA: But the operating agreement - - -
20 when he - - - when he gave the money, when he entered this
21 agreement, allowed for that. And he's saying, I'm going to
22 exercise my authority in a particular way to make sure that
23 your concerns are addressed, so that you will invest - - -

24 MS. KLEIN: So I disagree - - -

25 JUDGE RIVERA: - - - a certain amount of money.

1 MS. KLEIN: - - - I disagree, Your Honor, that
2 the operating agreement, when he invested, allowed for - -
3 - allowed for this. The operating - - -

4 JUDGE CANNATARO: Isn't that what the personal
5 power, the individual power that Tao had under the original
6 operating agreement would do? He could unilaterally make
7 these kinds of corporate moves.

8 MS. KLEIN: In his sole discretion for any
9 reason. He exercised sole discretion over the company - -
10 -

11 CHIEF JUDGE WILSON: And does - - -

12 JUDGE GARCIA: Would that - - - would that - - -

13 JUDGE CANNATARO: What more do you need? I'm
14 sorry.

15 MS. KLEIN: He had sole authority to amend in
16 writing. He had sole authority to decide distributions.
17 And he could - - - that could only be changed - - -

18 CHIEF JUDGE WILSON: And could he do that in bad
19 faith? Is it - - - does Delaware law imply any sort of
20 good faith or fiduciary duty in his exercise of those
21 rights?

22 MS. KLEIN: There was no allegation of bad faith.

23 CHIEF JUDGE WILSON: No. I - - - I'm asking you
24 about a legal question. Right?

25 MS. KLEIN: Yes. And - - - and we believe Mr. -



1 - - Mr. Tao did act in good faith.

2 CHIEF JUDGE WILSON: No, no. That's not what I'm
3 asking. Right? Under Delaware law, if a LLC agreement
4 gives the managing member the absolute discretion to
5 approve or deny transactions for any reason and the
6 managing member acts in bad faith in doing so, does
7 Delaware law have anything to say about that?

8 MS. KLEIN: That's a good question, Your Honor.
9 I'm not - - - I'm not sure the answer to that. I suspect
10 it would.

11 CHIEF JUDGE WILSON: It would probably frown on
12 that, right?

13 MS. KLEIN: I suspect it would, yes.

14 JUDGE RIVERA: But then - - - but then, wouldn't
15 that just be a defense to the breach of contract action?

16 MS. KLEIN: Would the - - -

17 JUDGE RIVERA: As opposed to saying you have no
18 breach of contract action?

19 MS. KLEIN: Would what be a fair defense, Your
20 Honor?

21 JUDGE RIVERA: We're at - - - we're at a very
22 early stage in the litigation. We don't know where that
23 would go, if - - - if indeed, we - - - we agreed that he
24 could pursue these claims. But that might very well be a
25 defense.

1 MS. KLEIN: What would be a defense, Your Honor?
2 That he acted in good faith?

3 JUDGE RIVERA: Or didn't act in good faith?

4 MS. KLEIN: Well, but he - - - he - - -

5 JUDGE RIVERA: Or that he couldn't act in a way
6 that was bad faith? Perhaps, that's the best way of
7 thinking about it.

8 MS. KLEIN: Our argument is that there was no
9 promise to begin with. Right? There was no argument - - -
10 to promise - - -

11 JUDGE RIVERA: I understand.

12 MS. KLEIN: - - - to begin with.

13 JUDGE RIVERA: But that's - - - the complaint
14 alleges something else. So we're just trying to deal with
15 the allegations in the complaint.

16 MS. KLEIN: I understand that Your Honor. But
17 our position is that there was - - -

18 JUDGE RIVERA: I mean, your client could take the
19 position: I never made that promise.

20 MS. KLEIN: Well, Your Honor, I mean - - - first,
21 I mean, we also made the argument and the trial court
22 dismissed on the ground that the alleged promise was
23 indefinite and vague and didn't form an enforceable
24 agreement in the first place. And we believe that alone is
25 sufficient grounds to affirm dismissal.



1 JUDGE CANNATARO: Would - - - would part of the
2 answer to Judge Rivera's question lie in the underlying
3 issue of whether or not Behler bound himself to the amended
4 LLC agreement? In other words, if, as I'm sure you argue,
5 that he, you know, he was aware of the amended LLC
6 agreement and he acted in conformity with the amended LLC
7 agreement, et cetera, et cetera. He - - - he - - - you
8 know, he cannot now claim that he - - - he was taken by
9 surprise or that this was a promise that he thought was
10 still enforceable.

11 MS. KLEIN: That's correct, Your Honor. And you
12 know, the Delaware law, it's a creature of - - - Delaware
13 LLCs are a creature of contract. The LLC agreement was
14 amended in accordance with the original agreement as it was
15 required to, to happen. So that happened in 2014. Mr.
16 Behler complains that was unfair. But the question isn't
17 fairness. It's whether it's happened in accordance with
18 the initial agreement, which it did.

19 However, even if Mr. Behler was not initially
20 bound by that amendment, which he was, years later - - -
21 five years later, he sent a letter to Mr. Tao saying as a
22 member under section 7.2 and 7.3 of the amended LLC
23 agreement, I'm invoking my right for documents and I want
24 to inspect X, Y, Z documents. And so he himself has said
25 he is bound by that agreement, and he's bound by its terms.

1 And those terms include the merger clause, which prohibits
2 all prior agreements.

3 JUDGE RIVERA: He's saying he's a member. He's
4 just saying that the amended agreement is not what he's
5 relying on for the money he claims is owed him.

6 MS. KLEIN: That's correct.

7 JUDGE RIVERA: If he doesn't have shares or
8 whatever investment he has, of course, he - - - he has no
9 argument. Right?

10 MS. KLEIN: He's saying that the amended
11 agreement is not what he is relying on. But however, the
12 amended agreement governs his membership interest in
13 Digipack. And as a member, it bars his claims because
14 there is a merger clause which prohibits other agreements.
15 Other agreements between Behler and Tao - - -

16 JUDGE TROUTMAN: But was he a member when he - -
17 - prior to his investment?

18 MS. KLEIN: He became a member upon his
19 investment. So under Delaware law - - -

20 JUDGE TROUTMAN: So even though he may have made
21 an - - - so he made an agreement with respect to turning
22 over his monies to receive an interest, he was not a member
23 at that point. Do you agree?

24 MS. KLEIN: When he turned over the money, he
25 became - - -

1 JUDGE TROUTMAN: Before he turned it over. He
2 made an agreement. If what he says is true, we had this
3 agreement, and I will give an investment subject to certain
4 conditions. So before he turns over the money, he's not a
5 member, is he?

6 MS. KLEIN: I would say those happened at the
7 same time. So before he turns over the money, he's not a
8 member.

9 JUDGE TROUTMAN: No, he does - - -

10 MS. KLEIN: I agree with that.

11 JUDGE TROUTMAN: - - - he is - - -

12 MS. KLEIN: But - - - but - - -

13 JUDGE TROUTMAN: - - - has - - -

14 MS. KLEIN: - - - the agreement is not - - -

15 JUDGE TROUTMAN: You - - - do you agree that he
16 hesitated? He was reluctant at first to invest. He says,
17 I'll invest subject to certain conditions, correct?

18 MS. KLEIN: That's what he pled.

19 JUDGE TROUTMAN: Yeah.

20 MS. KLEIN: That's what he pled. But he became a
21 member upon - - - upon giving the money. Delaware law is
22 clear that when you give money, whether you sign the LLC
23 agreement or not - - -

24 JUDGE TROUTMAN: Right.

25 MS. KLEIN: - - - you automatically become a



1 member. You're automatically bound by that agreement.

2 JUDGE TROUTMAN: And you're saying he could not
3 have had another agreement prior to that time, though?

4 MS. KLEIN: He - - - the agreement he claims he
5 had prior to that time is inconsistent with the LLC
6 agreement and is not valid based on the terms of the LLC.

7 JUDGE RIVERA: Yeah, well, he could sue. He
8 could sue based on - - - right? We could look at it this
9 way. He could sue based on what he alleges is a separate
10 agreement. He'd have to establish that. It's not an easy
11 task to establish this oral agreement and the terms
12 thereof. But he's made an allegation about that. And
13 then, if he's successful - - - of course, I don't remember
14 if the LLC still exists. But those who suffer the
15 consequences of Tao's agreement could then sue Tao - - -

16 MS. KLEIN: So - - - so - - -

17 JUDGE RIVERA: - - - for either bad faith conduct
18 or something else.

19 MS. KLEIN: Your Honor, if I may? I would just
20 like to - - - to point the court to - - -

21 JUDGE RIVERA: All I'm saying is the LLC has
22 recourse. But you've got an individual that controls the
23 LLC, who enters this agreement saying I'm going to do the
24 following. Give me your money, and I'm going to do the
25 following. And then he claims that they - - - they

1 breached it - - - he breached that agreement.

2 MS. KLEIN: But there's no conceivable way, Your
3 Honor, under what Mr. Behler has pled, that this agreement
4 was with Tao solely in his individual capacity.

5 JUDGE RIVERA: Okay. But that - - -

6 MS. KLEIN: It's - - - it's - - -

7 JUDGE RIVERA: I'm not - - - I'm not clear how
8 you read the complaint and can say that, given - - - given
9 the stage of the litigation.

10 MS. KLEIN: If Your Honor reads paragraph 5 of
11 the complaint, it says there were two components to the
12 agreement. First, Shing and Behler agreed that if the
13 price of Remark were to hit fifty dollars a share - - -

14 JUDGE RIVERA: Yeah.

15 MS. KLEIN: - - - he would cause Digipak to sell
16 its shares of Remark and distribute the proceeds.

17 JUDGE RIVERA: Again, but that - - - what I'm
18 saying to you is, is it not possible to make a distinction
19 between a personal promise to exercise your authority in a
20 particular way, versus the LLC entering an agreement to say
21 authority will be exercised in a particular way?

22 MS. KLEIN: I - - - I don't believe - - -

23 JUDGE RIVERA: And when you - - - and if he
24 breaches the personal promise, he can sue and see if he can
25 get some money from him?

1 MS. KLEIN: I don't believe in this context there
2 is, Your Honor, because this is clearly implicating his
3 duties as a manager, which under Delaware law is governed
4 by the LLC agreement.

5 JUDGE HALLIGAN: I assume part of why you're
6 arguing in response to Judge Troutman the Delaware law says
7 that he's bound by the LLC agreement is that I assume that
8 that incentivizes someone who's engaging in such a
9 sophisticated investment as this to actually do the due
10 diligence before signing, agreeing, sending the money,
11 whatever the - - - you know, point of consummating the deal
12 is?

13 MS. KLEIN: Absolutely, Your Honor. And it
14 creates certainty for LLCs. They're not being embroiled in
15 these types of litigations where, oh, there was this
16 outside deal or this other deal or side deal - - -

17 JUDGE GARCIA: Isn't that really the point to - -
18 - to Judge Halligan's - - - its certainty? You have a
19 governing agreement.

20 MS. KLEIN: Yes, Your Honor.

21 JUDGE GARCIA: You can rephrase that I invested
22 based on a personal agreement, seems to avoid Delaware's
23 emphasis on the lettering of the LLC.

24 MS. KLEIN: That's correct, Your Honor.
25 Particularly where that alleged side agreement is with the



1 manager and implicates his duties as manager of - - - of
2 the LLC.

3 CHIEF JUDGE WILSON: Thank you.

4 MS. KLEIN: Thank you, Your Honors.

5 JUDGE GARCIA: Could we pick up on that last
6 point? It - - - it seems to me, in looking at the Delaware
7 cases and the Delaware law, that what that aims for is
8 certainty in the agreement. And wouldn't this idea that,
9 no, this was a personal transaction, and I invested
10 pursuant to a personal agreement in an LLC, undermine
11 Delaware's focus on the letter of the agreement?

12 MR. CONAN: I don't think so. Because obviously
13 private transactions, purchases of shares, transfers of
14 share - - - of shares, occur outside of the auspices of an
15 LLC agreement. These are private transactions. Now, the
16 LLC agreement might impose - - -

17 JUDGE GARCIA: But it's clear he's investing
18 through Digipak, right? I mean, that's clear in your
19 pleading.

20 MR. CONAN: Well, sure. He's making an
21 investment in Digipak, and Tao is making certain guarantees
22 with respect to five-year - - - five-year exit.

23 JUDGE GARCIA: But why aren't those governed by
24 the Digipak agreement because he's making those
25 representations, I will do X, cause Digipak to do - - - you

1 know, the language we heard? Why isn't that governed by
2 the Digipak agreement?

3 MR. CONAN: Because as alleged and with the
4 inferences to which - - - what Behler is entitled to on a
5 motion to dismiss, it's alleged to be a personal
6 obligation. It's not alleged to be an obligation on the
7 part of Digipack right now at this - - -

8 JUDGE CANNATARO: And if - - - and if the - - -

9 MR. CONAN: - - - stage.

10 JUDGE CANNATARO: -- - if the promises are to,
11 you know, in some places to cause Digipack to do X, Y, Z,
12 which seems to implicate the governance and operation of
13 digipack, and there's the merger agreement that your
14 adversary referred to at least in the amended LLC
15 agreement, is that of no moment at all?

16 MR. CONAN: Well, I think that that's a - - -
17 that's a good point. And that I think that the scope of
18 the merger clause is the second part of the inquiry that we
19 haven't really talked about.

20 There's one question about whether Tao had the
21 authority to terminate this exit guarantee agreement, and
22 the other question is whether he actually exercised that
23 right through the merger clause. And this is a boilerplate
24 merger clause. And it - - - you know, they - - - the
25 majority and Tao have argued that it's unambiguous.

1 But it doesn't follow from that, that it's
2 unambiguous in its intent to terminate the exit guarantee
3 agreement. It's only ambiguous - - - unambiguous in two
4 ways. It's unambiguous in its intent to replace the
5 original operating agreement. And we know that because it
6 says that. And it's also unambiguous in its intent to
7 preclude parole evidence because that's what these types of
8 clauses are talking about, which are promises that are made
9 in the lead in to the final agreement.

10 But that's not what you have here. You have a
11 2012 agreement and a 2014 agreement, and they have
12 different parties. There's a different focus between the
13 two agreements. And what the case law says is that when
14 you have that kind of mismatch between the two agreements
15 and a boilerplate merger clause, you can't conclude that
16 the subsequent agreement was unambiguous in its intent to
17 terminate the earlier agreement. At the very least, the
18 clause is ambiguous, and at this stage of the proceeding,
19 an ambiguity has to be resolved. It can't be resolved on a
20 motion to dismiss.

21 CHIEF JUDGE WILSON: Thank you.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Albert Behler v. Kai-Shing Tao, No. 4 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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