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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JILL F. BRANDIN and the JILL F. BRANDIN REVOCABLE TRUST, Plaintiffs, v. STEPHEN P. GOTTLIEB, Defendant, ARGENT MARINE SERVICES, INC., a Delaware corporation, ARGENT CHARTERING I, INC., a Delaware corporation, and ARGENT CHARTERING II, INC., a Delaware corporation, Nominal Defendants.	)	Civil Action No. 14819

MEMORANDUM OPINION

Date Submitted: June 6, 2000
Date Decided: July 13, 2000

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STRINE, Vice Chancellor

This post-trial opinion addresses a number of claims brought by plaintiff Jill F. Brandin (“Jill”) against her former business partner, defendant Stephen P. Gottlieb (“Stephen”)[1] regarding his management of Argert Marine Services, Inc. (“AMS”). Stephen owns two thirds of AMS’s stock Jill owns the remainder.

In 1995, Stephen effectively ousted Jill from her management positions at AMS and essentially replaced her with his brother, Jay Gottlieb (“Jay”). The ensuing litigation pursuant to 8 <u>Del. C</u>. § 225 resulted in a settlement agreement under which Jill gave up her role in AMS’s management in exchange for substantial contractual protections against self-dealing and nepotism on Stephen’s part.

Before the ink was dry on the peace treaty, Stephen and Jill were at legal war again over alleged violations of the Settlement Agreement and breaches of fiduciary duty by Stephen. In particular, Jill alleged that Stephen had violated the agreement by entering into sweetheart contracts with his brother Jay and by shifting onto the books of AMS certain expenditures that Stephen himself was required to pay.

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[1] I use first names for the reason that there are at least three Gottliebs mentioned in this opinion and because the parties used first names in their trial testimony. Moreover, the use of first names captures the once close — but now quite damaged -relationships at issue in the case.

In this opinion, I, in major part, grant Jill the relief she requests by setting aside a major contract between AMS and Jay Gottlieb, and by ordering a restoration to AMS of other contractually improper expenditures. Because Jill has prevailed on her contractual claims, I need not reach her claims that Stephen's conduct also breached his fiduciary duties. As a consequence of her status as the prevailing party, I also award Jill reasonable attorneys' fees and expenses pursuant to the Settlement Agreement's fee-shifting provision.

I. General Factual Background

A. Jill And Stephen Form A Business To Own And Operate Two Liquid Natural Gas Tankers

During the late 1980s, Stephen and Jill were principals in Argent Group, a financial advisory firm they had both helped form that specialized in leveraged lease and project financing with a focus on maritime projects.

During the late 1980s, Shell Bermuda (Overseas) Ltd. ("Shell") wanted to purchase two liquefied natural gas ("LNG") ships, the ARZEW and the SOUTHERN. Then as now., Shell was the dominant player in the international LNG market. But Shell faced an obstacle to purchasing the vessels: they had been built with federal maritime subsidies. Under then-existing law, it was required that American taxpayer-subsidized vessels be owned by an American entity and operated under a U.S. flag. Shell did not fit that bill.

Stephen came up with a solution to the problem. He and Jill would form an American entity, Argent Marine Services, Inc. ("AMS"), that would "own" and "operate" the ships under lengthy time charters with Shell that gave Shell substantial control over the use and disposition of the ships (the "Time Charters" or "'Charters"). In accordance with their function as a proxy for a direct purchase of the ships by Shell, the Time Charters required Shell to pay "hire," which included not only fees to AMS and its affiliates but enough to cover the debt incurred by AMS in purchasing the ships.

Using this structure, Gottlieb negotiated and drafted the Time Charters with Shell. As Gottlieb -- who had been head of Cadwalader, Wickersham & 'Taft's 'Leveraged leasing and project finance group before forming Argent Group -– stated at trial:

> . . . 1 had practiced for close to sixteen years, drafting time charters and doing these types of transactions. . . . You can assume that I was an expert, and am an expert, in drafting leveraged lease charters, and that these charters are such charters.'

The original Charters ran for twenty years commencing from November 1990. the date of the vessels' delivery. At the end of the 20-year

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Tr. at 346-47

Charter –– or sooner if the ships *were "MO longer required by applicable law to be documented under the laws of the United States"*[3] --- Shell could purchase the ships for their fair market value plus the cost of paying off any outstanding debt still owed on the ships. The parties refer to this option as the "Fair Market Value Option." At trial, Stephen Gottlieb explained why Shell wanted the Fair Market Value Option:

> Because Shell on day one wanted these ships and couldn't have them, they wanted an option in the original charter so that when -- if and when you could get reflagging, they would have a window in which they could exercise the option.[4]

Shell had another option under the Charters that allowed it to declare the ships obsolete ten years into the Charters. In that event, Shell would pay off the debt on the ships, and AMS would be entitled to the present value of a portion of the hire due it for the remaining ten years of the Charters plus the ships' scrap value. The parties call this the "Economic Obsolescence Clause."

Stephen and Jill stood to gain from this arrangement in two primary ways. First, the Charters provided for the payment of substantial "hire" to AMS as owner and operator in exchange for Shell's use of the ships. This hire included sums that AMS would turn over to its affiliate, Argent Marine

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[3] JE 4, § 14; JE 9, § 14 (emphasis added).

Tr. at 720.

Operations ("AMO"), which had the direct responsibility for maintaining, refurbishing, and operating the ships. Second, AMS would the benefit if Shell exercised the Fair Market Value Option at a favorable price. And even uncle-r the Economic Obsolescence Clause, AMS would receive the present value of a lucrative stream of hire payments that far exceeded AMS's investment in the ships plus their scrap value, which in itself would be in excess of several million dollars.

To consummate the Charters, Stephen and Jill formed AMS and AMO. As to AMS, Stephen Gottlieb owned two thirds of the stock, and Jill owned the rest. As to AMO, the record is unclear but suggests that they controlled that company, that Stephen owned a majority 01' shares, that Jill had a minority block., and that some of the company's employees were also cut in on the equity.

Stephen and Jill shared management responsibilities at AMS. Stephei was the Chief Executive Officer and President. Jill held the title of Vice President and Treasurer. For most of its early history, Stephen and Jill comprised the entire board of AMS.

B. Shell And AMS Negotiate A Fixed Price Purchase Option On The Ships

After the Time Charters were executed, AMS --- through AMO began performing the extensive work necessary to put the SOUTHERN and the ARZEW into service in. the LNG trade. But that work was halted in July 1993 when Shell instructed AMS to place the ships in deep lay-up.

Despite this adverse development regarding the likelihood that the ship would sail in the near future, Shell had not lost interest in the ships. Even though Shell had no current use for the ships, it approached AMS in the spring of 1994 in order to negotiate an option to purchase the ships at a fixed price. According to Stephen, the ships were then "dirt cheap versus a new build, which would have been $250 million . . ."[5]

With Jill's help, Stephen negotiated an amendment to each of the charters. The amendment gave Shell an option to buy each ship for $96.4 million between January 'I 0 and December 3 1, 200 1 (the "Fixed Price Purchase Option"). If Shell exercised this Option, the Charters would terminate and Shell would have no further commitment to AMS or AMO. After accounting for debt, AMS would yi eld net profits of approximately $70 million if Shell used the Option to buy each ship.

In exchange for granting the Fixed Price Purchase Option, AMS obtained a four-year 'extension of the Economic Obsolescence Clause, which prevented Shell from declaring the ships obsolete until August 2004.

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[5] Tr. at 733-34.

C. Stephen And Jill Have A Falling Out

In April 1995, Stephen took action that effectively ended his alliance with Jill. That month he elected his own brother, Jay Ciottlieb, to AMS's board of directors, an action that clearly signaled his intent to control AMS in the future.

This move and other actions impelled Jill to bring suit against Stephen in this court (the "19'95 Litigation"). After trial, Vice Chancellor Balick ruled against Jill on her claim regarding the appropriate composition of the AMS board. Shortly thereafter, Stephen and Jill began negotiating a settlement agreement. On August 15, 1995, those negotiations culminated in the execution of a final settlement agreement ("the Settlement Agreement" or "Agreement"), the: terms of which are critical to the resolution of the current dispute between Stephen and Jill.

D. The Terms Of The Settlement Agreement

The basic concept behind the Settlement Agreement is deceptively simple. For his part, Stephen got Jill's resignation as an officer, director, and employee of AMS and its affiliate companies. He also got Jill's agreement not to participate in the management of those companies as well as her relinquishment of her shares in AMO and another AMS affiliate, Argent Marine Management, Inc, ("AMM").[6] For her part, Jill got the right to continue to share in the value of the hire generated by the Charters, including a share of the hire due to AMO. Jill also obtained significant restrictions on Stephen's discretion to manage AMS.

E. The "Hire" Due To Jill Under The Settlement Agreement

Under the Settlement Agreement, Jill was to receive one third of the cash flow of AMS after the payment of its permissible expenses, which were strictly defined by the Agreement.

Moreover, in exchange for giving up her interest in AMO, Jill obtained a provision in the Settlement Agreement requiring that a contract between AMS and AMO be amended so as to ensure that AMS would receive so-called "interim hire" within the meaning of § 8(a)(iii) of the Charters. According to the agreement of the parties, this interim hire was to be transferred to AMS from AMO on a monthly basis. Through this transfer, Jill would benefit because of her right to one third of AMS's net cash flows.

F. The Managerial And Expense Restrictions
Jill Negotiated To Protect Her Cash Flow From AMS

Jill sought to protect her distribution stream from AMS by negotiating strict lirn: ts on AMS's scope of business and its ability to incur expenses.

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[6] AMM at that time had a different name.

Because these limits are critical to resolving this case, I will now describe them in some detail.

1. AMS Was Required To Focus Its Business Solely On The ARZEW And The SOUTHERN

Jill negotiated a strict limitation on the permissible activities of AMS. Under § 8.1 (c) of the Settlement Agreement, AMS was prohibited from "the conduct of any significant business activity . . outside the business of owning, chartering, refurbishing, laying up, improving, maintaining or operating the vessels now owned by AMS . . . ." As Stephen put it, the Agreement "made [AMS] a special purpose corporation, so that this corporation basically could do business only with these two ships. If I wanted to do anything else., I had to go do it with another vehicle."[7]

2. The Expense Limitations Imposed On AMS By The Settlement Agreement

Under the Settlement Agreement, Jill negotiated to limit AMS's expenses to only three categories. The permissible expenses consisted of: (1) the payments on existing loans made to AMS by Jill and Stephen; (2) the payment of a "management fee" to AMM for the management of AMS; and (3) "necessary expenses" as defined in the Agreement. The second and third of these limitations are at issue in this case.

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[7] Tr. at 599

At trial, Jill explained that she war ted these limitations in order to protect her cash flow. As she put it at trial, “the income was relatively certain from Shell. The only way that Steve could get money out to disadvantage me was, through the payment of these kinds of expenses. I wanted to be sure there was a cap on these expenses. I wanted to be sure there was a cap on these expenses and they were very clear as to what could or could not be spent out of the company.“”

The key expense limitations are contained in § 8.4 of the Settlement Agreement. That section caps the amount of rnoney AMS will pay to Stephen to manage the business. It does so by providing for the payment of a variable management fee to AMM (the “Management Fee”), out of which AMM must cover the overhead costs necessary for AMS to function. AMM may keep any excess not necessary for that purpose but is responsible for paying those costs even if the Management Fee is less than is required. Thus § 8.4.2(iv) of the Agreement expressly prohibits AMS from paying its own “general overhead costs” other than “as expressly contemplated” in the Agreement.

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[x] Tr. at 17. *See also* tr. at 699 (Stephen testifying regarding his understanding that the agreement limited his ability “to go out and through expenses run out the income”).

The Settlement Agreement otherwise limits AMS to paying for "necessary expenses.," which include "any reasonable fees and expenses incurred by AMS in connection with the conduct of the business of owning, chartering, refurbishing, laying up, improving, maintaining, operating or selling the Vessels . . ."[9]

But even as to "necessary expenses," the Agreement has further limitations. In addition to the prohibition on general overhead costs, two other limitations are important here. First, § 8.4.2 of the Agreement provides that necessary expenses cannot be "paid to or on behalf of' Stephen. Second, the "Related Persons Provision" of that section of the Agreement prohibits the payment of expenses to Stephen's brother Jay and other identified persons related to Stephen unless the following conditions are satisfied:

> (a) said payments are made only pursuant to a written contract, entered into prior to the performance of services, that is fully disclosed to JFB [Jill] by the earlier of 30 days after execution of the contract or the date services are to commence under the contract and that is certified by SPG [Stephen] in writing as being in compliance with this subsection 8.4.2., (b) the Related Person providing such services is objectively qualified to provide the services described in the written contract, (c) the fee compensation (other than the reimbursement of reasonable, documented out-of-pocket expenses incurred after the execution of the contract providing for the provision of services which relate to the provision of such services and are not

[9] JE 1, § 8.4.2

> disproportionate to the goals sought to be achieved by the contract) is on a contingent basis so that after payment of the contingent fee, the stockholders of AMS, in their capacity as such, shall be no worse off than had such contingent fee and cost reimbursement not been paid, i.e., that either the income of AMS shall increase and the residual value of the Vessels shall not be adversely affected by an amount greater than the present value of such increase or that the value of their investment in AMS, taken as a whole, shall have increased, *and (d) the total compensation paid to such Related Person represents fair value for the services rendered (with fair value meaning value within the range of what would be paid to an independent third party, negotiating at arms' length, providing equivalent services).*[10]

G. Peace Breaks Down Immediately

By February of 1996, Jill and Stephen were back in this court. Jill brought suit alleging, among other things, that Stephen had breached the Settlement Agreement by causing AMS to make improper payments to himself or entities he controlled and by causing AMS to enter into improper contracts with U.S. Capital, a one-man investment banking firm operated by Jay Gottlieb, and with Argent Group, Stephen's former firm at which his brother Marty Gottlieb was a partner.

Those claims were either resolved by Vice Chancellor Balick in a summary judgment decision or have been mooted by subsequent events. Later in this opinion, I address the parties' arguments regarding what, if any, attorneys' fees are payable as a result of these claims. For now I mention

[10] JE 1, § 8.4.2 (emphasis added).

them only to make clear that Jill and Stephen have been in litigation against each other continuously since February of 1996.

II. Jill's Current Claims And Stephen's Counterclaims

Given the unwieldy number and nature of the claims currently at issue, I intend to set forth my findings of fact and conclusions of law as to each claim sequentially. For her part, Jill has presses the following claims:

- Stephen improperly caused AMS to enter into a 1997 contract with Jay Gottlieb's firm U.S. Capital (the "1997 U.S. Capital Agreement"). According to Jill, the 1997 U.S. Capital Agreement violates the Settlement Agreement's limitation on expenses paid to persons related to Stephen (the "U.S. Capital Claim") and constitutes, a breach of fiduciary duty.

- Stephen refused to provide Jill with copies of documents due her under the terms of the Settlement Agreement (the "Document Access Claim"). Jill contends that Stephen's refusal to give her copies of the documents was not excused by any prior breach on her part of the confidentiality provisions of the Settlement Agreement.

- Stephen caused AMS to make certain modest payments that fall within the Settlement A.greement's definition of prohibited general (overhead expenses or related party payments (the "General Overhead Claims").

- Stephen failed to ensure that AMS received the proper amount of interim hire from AMO (the "Interim Hire Claim").

- Stephen caused AMS to pay for all his legal expenses in defending this action (the "Legal Fees Claim"'). Jill contends that this constitutes an improper expense "on behalf of' Stephen and is therefore prohibited by the Settlement Agreement.

For his part, Stephen has asserted by way of affirmative defense that Jill violated the confidentiality provisions of the Settlement Agreement by discussing aspects of the 1995 Litigation with Stephen's e-x-wife, Shannon Such. According to Stephen, Jill provided Such with information that caused her to come to Delaware to look at the file in the 1995 Litigation and to later sue Stephen for fraud in connection with their divorce settlement. Stephen claims that he was subsequently justified in limiting Jill's access to information about AMS because of the seriousness of this prior breach. I will address Stephen's affirmative defense at the same time I address Jill's Document Access Claim.

Finally, both Jill and Stephen make claims based on a provision of the Settlement Agreement that provides for the prevailing party in litigation between them to recover his or her attorneys' fees and litigation expenses. I will resolve this issue after addressing all of the other issues in the case.

III. Legal Analysis

A. Jill's Challenge To The 1997 U.S. Capital Agreement

Jill's U.S. Capital Claim is the most substantial of her claims from a monetary standpoint. Under the 1997 U.S. Capital Agreernent, U.S. Capital and its sole owner, Jay Gottlieb, stand to receive $3.8 million when Shell buys the SOUTHERN and the ARZEW in 2001, as AMS now has the right to make Shell do.

As noted earlier, Shell had approached AMS in the Spring of 1994 seeking an option to buy the vessels at fixed price because they were ‘“dirt cheap.“’[11] In exchange for certain concessions, Shell obtained the Fixed Price Purchase Option, which gave it the right to buy each vessel for $94.4 million in 2001.

After Jill’s and Stephen’s falling out, Stephen brought his brother Jay into the business as a virtual partner. Stephen had Jay elected to the AMS Board. In that capacity, two of Jay’s initial acts were to vote in favor of substantial bonuses for Stephen without conferring with Jill, who was at that time the third director of the company. When Jill left AMS as an officer, Jay Gottlieb stepped in as interim Treasurer but did not receive compensation due to the Related Persons Provision of the Settlement Agreement.

When Jill left AMS, Jay was seeking work and needed income. His previous managerial role at a metal can manufacturing firm had ended and there is no evidence in the -record that he (or his business, U.S. Capital) had other Immediate prospects.

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[11] Tr. at 733-34.

In 1996, Stephen brought Jay on board at AMM and AMO for remuneration of $200,000 that year. By the end of 1996, Jay had become President of AMO, and his salary was increased. In years 1997-l 999, Jay’s annual compensation frorn AMM and AMO averaged well over $250,000. In his capacity as President of AMO, Jay was responsible for running the entity charged with rnaintaining and refurbishing the vessels. But according to Stephen, Jay’s work was “nowhere near full time.”[12]

When Stephen. brought Jay into AMS, AMM, and AMO, Jay had virtually no maritime experience, and in particular, no experience in the LNG ‘shipping market. Before coming to AMS, Jay’s most substantial experience had been as a manager of a manufacturer of metal cans, although he did get some limited maritime experience dealing with that company’s barge operations. His firm, U.S. Capital, was basically a one-man show formed to make equity investments in companies that Jay would help operate. 13efore its to-be-detailed involvement with AMS, U.S. Capital had only performed investment advisory services for one client looking to make an acquisition in the gaming industry.

[12] Tr. at 416-17.

Had Stephen merely hired Jay for a substantial salary at AMM and AMO. Jill would have no legal basis to complain. But Stephen did not stop there.

1. Stephen Hires U.S. Cauital To Find Other Uses For The Vessels Even Though They Were Already Obligated To Shell Under Long-Term Time Charters

In January 1996, Stephen retained U.S. Capital to find "alternative ernployment" for the vessels ("the 1'996 U.S. Capital Contract" or the "Contract").[13]

According to the Contract, Shell was giving less attention to shipping activities, and Stephen had been contacted by Shell about scrapping the vessels if employment for them was not found by the end of 1998.'" Stephen therefore wanted to explore other options for the vessels. Under the Contract, Jay was to (devote: a substantial portion of his time to identifying a transaction to supplant the Time Charters with Shell. His compensation was to be five percent of the net consideration paid to AMS in any alternative

[13] JE 102, at JB001585.

[14] I note, however. that Shell could not scrap the vessels until 2004 and that it would have been irrational for Shell to scrap vessels it could control until 2010 if a viable economic use could bc found for them. I also note that just a year or so before this, Shell secured the Fixed Price Purchase Option because the vessels were, according to Stephen, a bargain.

transaction and was to be wholly contingent on the consummation of such an alternative transaction.[15]

It is quite obvious that no other LNG firm in the world would have retained Jay for this assignment. He was a total unknown in the maritime industry, and there are investment banks and ship brokerage firms that have expertise in the LNG sector of that industry. Rather, Jay was hired because he was Stephen's brother, because Stephen was already paying him a full-time salary for work at AMM and AMO, and because Stephen trusted him. Absent the first of these factors --- Jay's status as Stephen's brother -- it is unlikely that the other two would have existed.

U.S. Capital was not selected through any process resembling a true market search for the best firm to do the job. Stephen's testimony on this subject is confusing and ultimately unpersuasive. While he essentially admitted at trial that there were firms with more experience than Jay in the maritime industry, Stephen basically conceded that he made little effort to inquire into their potential interest in the assignment or the terms on which they would undertake it. In this regard, Stephen claims to have contacted Lazard Freres and Merrill Lynch and come away convinced that they did not

[15] JE 102, at JB001587 (stating that compensation for Jay's services would equal "five percent of rhe compensation paid (net of related expenses)" and "five percent of any charter hire or other revenues payable .," both of which fees were subject to certain conditions).

have a strong capability in the shipping arena and that they would not do the work on a purely contingent basis. Likewise, although Stephen admitted that there are firms that specialize in finding employment for vessels, he testified that he did not hire any of them because he needed “an investment banking capability.“‘”

For several reasons, I conclude that Stephen’s testimony that he actual y considered other firms cannot be credited.

First, had he been seriously interested in getting the best deal, Stephen had the maritime contacts to do a survey of the relevant firms and make a meaningful inquiry into their capacity and willingness to perform the assignment. His contention that he made calls to Lazard and Merrill and became convinced that they did not have the necessary horse power might be more persuasive if Jay had better credentials. But given Jay’s overall lack of experience, it is hard to imagine that Lazard and Merrill — or other firms — were not worth a closer look.

Second, even though Stephen could have hired any non-Related Person on a non-contingent basis, Stephen eschewed any consideration of that option. As will become even clearer later, Stephen uses the Related Person Provision as a, justification for his actions by applying the following

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[16] Tr. at 821.

circular logic, which I paraphrase as follows: "Because qualified, experienced firms would not work for a contingency and would want some guaranteed compensation if no deal panned out, I ruled them out. Because U.S. Capital was a Related Person, I could not pay it a fixed fee or a reasonable hourly rate. Therefore, I hired U.S. Capital on a pure five percent contingency."

Third, Stephen's rationale for hiring Jay was also premised on an advantage he had already bestowed upon Jay. That is, Stephen had already commanded Jay's tirne by 'hiring hirn at AMM and AMO. Because Jay was already a director of AMS, it was consistent with Stephen's obvious goal of making Jay a junior partner in the business to bring him in with an upside on the AMS end of things.

Fourth, Stephen's failure to consider ship brokers because they were not investment bankers is also less than compelling, given that Jay's firm did not do classic investment banking work and because, as is discussed below, Jay farmed out all the serious financial analysis required by his contractual responsibilities. Basically, what Jay did was look for opportunities to employ the vessels, a task a full-time ship brokerage firm was far better equipped to do than Jay. And insofar as Stephen was relying upon Jay's ability to "structure deals,"[17] the evidence supports a finding that Stephen himself was far better equipped to structure a deal involving these vessels than Jay.[18]

Finally, my perception of Stephen is that he is a sophisticated, careful businessman. He would not have engaged a non-family member with so little relevant experience without conducting a more aggressive and thorough market check.

As to the fees due Jay under the 1996 U.S. Capital Contract, there similarly do not appear to have been any hard-fought fee negotiations between Jay and Stephen. It is not quite clear how the five percent figure was reached, but it was, and the AMS board — consisting of Stephen, Jay, and *Stephen's son David Gottlieb* — approved the contract.

Jay then went off to earn his contingent payment, which was an improbable assignment at best. Under the Time Charters, Shell had the absolute right to control the destiny of the vessels and could preclude them from being used by anyone else. Stephen knew that Shell had a policy against allowing its own vessels to participate in non-Shell projects.

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[17] Tr. at 822.

[18] At trial, Stephen gave a very cogent and lengthy narrative presentation regarding the Time Charters, the economic rationale for them, and how they worked. Moreover, his confident demeanor, relevant experience, and obvious knowledge of the relevant issues belies his claim that he was less suited to do these tasks than Jay.

Because Shell is probably the '"most savvy" player in the world LNG market'" as well as one of the largest, it was also quite doubtful that Jay would stumble upon a use for the ships that Shell did not already have wind of, and even if he did, Shell. had the contractual ability to extract most, if not all, the added value from AMS if such an opportunity came to pass. Nonetheless, Stephen was apparently unnerved by Shell's references to scrapping the vessels and by their lay-up status, and he evidently believed it important to keep AMS's options open.

A-t the same time Stephen had Jay pursuing the alternative use strategy, Stephen himself e-mbarked on a more important and logical task: seeking legislation that would allow AMS to reflag the vessels.

I briefly discuss what each did next.

2. Jay Comes Up Empty

After the 1996 U.S. Capital Contract was executed, Jay set about doing a market survey of the LNG industry. He then made contacts with a number of industry players who had possible uses for the vessels. Building upon these leads. Jay pitched various ideas, usually centering upon the idea of a joint venture between an industry player and his and his brother's

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[19] Tr. at 8 16 (Stephen's explanation of Shell's position in the industry)

companies. Jay appears to have relied upon Argent Group to perform the financial analyses that supported his proposals.

Undoubtedly, Jay became more knowledgeable in the LNG industry during this period. This is not surprising, because Jay is an intelligent and experienced businessman (even though he did not have extensive knowledge of the maritime industry) and his brother Stephen had allowed him to invest all of his professional time working in the LNG industry on behalf of AMS, AMM, and AMO.

Despite all of Jay's efforts, however, none of the deals he proposed came off. One obvious reason for this is the fact that Shell controlled the ships under the Charters and soon reiterated to the Gottliebs that it had no interest in having other companies use them. Shell bluntly told AMS to take the "for sale" sign off the ships.

Significantly, many of the transactions that Jay pitched went beyond the permissible limits of AMS's business under the Settlement Agreement. Rather than being limited to the ARZEW and the SOUTHERN, the transactions Jay proposed were designed to enable AMM and AMO to expand their operations in the LNG sector. Thus Jay's proposals were presented on behalf of "At-gent Marine Companies", a set of companies comprised of Stephen's LNG entities, rather than AMS. Although under the

1996 U.S. Capital Contract, AMS was to foot the bill for Jay's success, Jay admitted at trial that:

Q. Did you know that the business of AMS was, by contract limited to owning and operating the Arzew and Southern?

A. . [N]one of the kinds of transactions that I've talked about here today in ary way, shape or form required to be successful the involvement of AMS as a corporation, or the use of AMS as a corporation . . . .

Q. Well, when you were meeting with these people, did you have an understanding as to what the settlement agreement meant, whether it limited itself or limited the business of AMS to owning and operating the Arzew and Southern?

A. I'm sure I did.

Q. But you were also talking joint ventures and acquisitions with these entities. Were you not?

A. But that had no relation to AMS.[20]

Although Jay and Stephen had a rather awkward disagreement about this issue at the time of trial, both apparently now agree that the 1996 U.S. Capital Contract is dead. As I will soon discuss, however, this contract is Stephen's primary justification for his decision to sign the 1997 U.S. Capital Agreement.

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[20] Tr. at 1044-45; see *also* tr. at 840 (Stephen':; acknowledgement that Jay was also pitching the services of' AMO).

3. With Shell's Help, Stephen Succeeds In His Reflagging Initiative

During this same period, Stephen sought -- with Shell's assistance and support --- congressional permission to reflag the vessels at a date earlier than the law would otherwise permit.

This effort made perfect economic sense for AMS -- and Shell.[21] After all, the only reason for AMS's existence was Shell's legal inability to own and operate vessels that had been built with subsidies from U.S. taxpayers. If Congress would allow the vessels to be reflagged, then the vessels would become much more viable to operate. Under a foreign flag, the costs of operating the vessels would decrease by roughly $3 million per year per vessel.

In 1996, Stephen and Shell succeeded in having Congress add to the Coast Guard's annual authorization bill a rider enabling AMS to reflag the ARZEW and the SOUTHERN. This eventuality greatly increased the chances that Shell would exercise its Fixed Price Purchase Option and buy the vessels outright in 2001.[22] As Stephen's own expert testified, the best

[21] Whether it made sense for American taxpayers is a question for others to consider.

[22] Although Stephen testified that the vessels could have been reflagged by 1998-1999, see tr. at 684 ("In '98-'99. basically you would have the first opportunity under U.S. law to attempt to reflag them."), Stephen mentioned that other "interests sometimes prevent that." *Id.* Given the substantial effort Stephen devoted to getting the ability to reflag earlier and Shell's involvement in that effort, I consider it a significant achievement and motivating factor. Moreover, Stephen gave little explanation of the precise nature of the "other interests" that potentially hindered

way for Shell to take full advantage of the cost savings that could be achieved by reflagging was to control the ownership and operation of the vessels. Of course, this had been Shell's goal from the beginning.

The success of the reflagging initiative was followed by a renewed interest by Shell in activating the vessels. By July 1997, Stephen had become aware that Shell had signed a long-term sub-time charter for the use of the SOUTHERN. Stephen also believed that Shell would soon reactivate the ARZEW as well. That same month, the AMS board formally voted to reflag the vessels in the Marshall Islands. and the vessels were officially reflagged on August 1, 1997.

The record is clear that neither AMS nor U.S. Capital had any role in finding a use for the SOUTHERN. Shell itself found that use.

4. Stephen Bootstraps The 1996 U.S. Capital Contract Into The 1997 U.S. Capital Agreement

Stephen's next move is the most controversial one. Having reflagged the vessels, knowing that Shell had identified specific uses for them, and having realized that Shell had wanted to buy the vessels for itself all along, Stephen sensed the opportunity to extend the Time Charters or improve their terms. Even better, Stephen wanted to convert the Fixed Price Purchase

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reflagging, and no doubt specific congressional approval cut through many possible administrative obstacles.

Option into an obligation on the part of Shell to purchase the vessels. That is, Stephen wanted to turn Shell's "option" into AMS's "put" by renegotiating the Time Charters

Of course, the negotiation of time charters is Stephen's stock-in-trade. He had structured the original Time Charters with Shell and had also negotiated the Fixed Price Purchase Option.

Despite this, Stephen undertook to hire Jay to spearhead this effort under a contract that provided for Jay to receive two percent of the total value of any resulting transaction, "i.e., total purchase price of the vessels upon any sale or total present value of charter hire or equivalent payments under any charter."[23] In simpler terms, because this 2% figure equals 5% of AMS's net, the Agreement gave Jay approximately 5% of the profits to AMS in the event that the Fixed Price Purchase Option became a put -- or $3.8 million. In this regard., the 1997 U.S. Capital Agreement essentially mirrors the earlier 1996 U.S. Capita-l Contract.[24]

Under the 1997 U.S. Capital Agreement, Jay was to:

> 1. negotiate and have documented with SBOL [Shell] or one or more of its affiliates or subcharters, new bareboat or time charter parties with respect to each of the SOUTHERN and

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[23] JE 129, at 2.

[24] *See* note 15, *supra*, showing that Jay was to receive 5% of the consideration "net of related expenses" received by AMS under the 1998 U.S. Capital Contract. In any event, this case does not turn on this issue.

> ARZEW such that (A) the cash flow to AMS is significantly increased over what it is on the date hereof and/or (B) the duration of the charter parties is extended beyond 20 10, thereby enabling the Company to qualify and realize upon the residual values of the vessels; and/or
>
> 2. negotiate and have documented with SBOL [Shell] or one or more of its affiliates an early buy-out of one or both vessels so that SBOL's [Shell's] current *options* to purchase are converted to *obligations* on the part of SBOL [Shell], an affiliate or a subcharter to do so.[25]

The 1997 U.S. Capital Agreement itself acknowledges that Shell had a strong interest in using the vessels on a long-term basis:

> . . . SBOL [Shell] and its affiliates have endeavored to find long-term employment for the Vessels within one or another of the Shell LNG projects. These efforts on the part of SBOL [Shell] have resulted in the fixing of a *long-term* sub-time charter on the SOUTHERN which will bring it into service sometime in calendar year 2000, should the project for which the vessel is intended proceed. We also understand that SBOL [Shell] is currently in negotiations to fix a second *long-term* sub-time charter with respect to the ARZEW. Service under that sub-time charter would commence sometime between 2000 and 2003.[26]

At trial, Stephen gave two explanations for his decision to hire Jay to do a task that Stephen himself was better equipped to do.

The first reason was that Stephen was too busy himself. This explanation was not terribly credible, however, given that Stephen was

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[25] JE 129, at 2 (emphasis in original)

[26] JE 129, at 1 (emphasis added).

unable to persuasively explain what else he was doing at the time. By July 1997, he no longer had to spend substantial time on the reflagging initiative. Given Stephen's expertise in time charter negotiations and his long-standing relationship with Shell, it is difficult to see why his involvement in this critical task did not rank high on his managerial priority list. Indeed, as things turn out, he attended most of the key meetings with Shell regarding the renegotiation of the charters. By contrast, Stephen contended, it took far less than Jay's full energies to manage AMO, even though managing AMO is more time-consuming than managing AMS. Yet Stephen (a self-proclaimed expert in this area who had once managed a major law firm's leveraged leasing and project finance department) was somehow too busy to attend to the key issue confronting AMS and had to rely on Jay, who, one would have thought, had even less time.

Stephen's second reason is the plausible and convincing one; namely, that he hired Jay because he felt responsible to Jay because Jay received no compensation under the 1996 U.S. Capital Contract. As Stephen testified when asked why he did not consider other sources of expertise:

THE COURT: In '97, when that came around, you never — you just had already mentally X'd out Argent Group as a possibility?

THE WITNESS: 'No, I felt Jay had done a lot of work in '96. He surfaced three or four deals which he will tell you

> about when he arrives. Those deals were the things that gave us a seat at the table with Shell, because for the first time we could say, "It isn't true that there isn't business for these ships. There is a lot of business out there for these ships, we think, in the right set of circumstances."
>
> And it was under those circumstances that in 1997, when this turned to a negotiation with Shell, I felt that I couldn't, with Jay or any other party, say, "Well, thank you very much for what you have done up to this point, Jay. I'm now going to bring somebody else in to do this."
>
> * * *
>
> But in any event, the real answer to your question is I wouldn't have done that to U.S. Capital. . .[27]

It bears pausing upon this explanation for several reasons. As an initial and critical matter, it is important to note how Stephen has converted the supposedly "contingent" 1996 U.S. Capital Contract into an entitlement on U.S. Capital's part to another contract. If the 1996 U.S. Capital Contract was truly contingent, then U.S. Capital took the risk that no transaction would occur. Had U.S. Capital not been owned by Jay, I strongly doubt that Stephen would have felt the same moral obligation toward that firm.[28]

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[27] Tr. at 437-38; *see also* tr. at 825-26 (acknowledging having felt a moral obligation to Jay).

[28] In fairness, Stephen also claims that Jay's work under the 1996 U.S. Capital Contract made Jay "uniquely qualified" to renegotiate the Time Charter. Defs.' Post-Trial Reply Br. at 13. But Stephen also argues that it is "irrelevant" that Jay had no relevant experience before the 1996 U.S. Capital Contract was signed. *Id.* at 13 n.6. By this reasoning, Stephen's (now unchallengeable as moot) initial decision to hire his inexperienced brother becomes his justification for considering only his brother to handle the 1997 work. This argument is an inventive, if ultimately unpersuasive, attempt to justify nepotistic behavior.

This consideration is especially relevant in light of the absence of any connection between the work U.S. Capital had done under the 1996 U.S. Capital Contract and the favorable prospects for turning the Fixed Price Purchase Option into a put. The key factors in that regard appear to have been the reflagging and the fact that Shell had found long-terms uses for the vessels on its own. Although Stephen contends that Jay's attempt to find other ruses for the ships shook things; up and got Shell focused on the vessels, that contention has little fo-rce in view of the strong evidence that Shell wanted to control the vessels all along, never had any genuine intention of allowing any other company to use them, knew more about potential uses for the vessels than Jay could ever hope to discover, and acted promptly to deploy and gain more control over them once the reflagging initiative succeeded.

Similarly, the method by which Stephen set the fee lacks any indicia of a genuine arms-length approach. According to Stephen, he based the two percent fee on two factors. First, he considered Stephen's previous market survey in connection with the 1996 U.S. Capital Contract. But, as I concluded earlier, Stephen did not perform a genuine market search before signing the 1996 U.S. Capital Contract. Moreover, the tasks to be accomplished in 1997 were quite di-Fferent, consisting entirely of renegotiating the Charters with Shell. This, however, was an area in which Jay had no previous experience.[29] One might think that AIMS's change in focus — from investigating the possibility of deploying the vessels with otlher companies to hammering out a better deal with Shell — would open the door to consideration of other professionals for a set fee or on an hourly rate basis. There is no evidence that Stephen explored these options

The second factor Stephen relied on was the advice of the mergers and acquisitions partner at Fried, Frank, Harris, Shriver & Jacobsen who had negotiated the Settlement Agreement. That lawyer opined that the two percent was a figure in line with what "major investment banks" or "boutique firms" would charge"' and that the fee was fair because it was entirely contingent.[31] This attorney based his advice on the assumption that U.S. Capital would be providing financial advice rather than just renegotiating the Time Charters with Shell.

Furthermore, while this advice provided Stephen with some basis for setting the compensation, the Fried, Frank lawyer appears to have treated U.S. Capital as if it were a full-fledged investment bank that would bring a

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[29] *See* tr. at 9X8-89 (Jay conceding that U.S. Capital had never previously earned a fee for negotiating a charter and had never been retained to negotiate a charter other than in connection with Argent Group or AMS).

[30] Tr. at 850.

[31] Golden Dep. at 177-80.

wealth of expertise and talent to bear on the deal. Without belittling Jay's skills, U.S. Capital is not one of the premier investment banks in the United States. It is a one-man operation that had performed financial advisory services for only one previous client. Nor does it appear that Stephen's Fried, Frank advisor was aware of the precise nature of the work to be done, whether U.S. Capital would do all of that work itself, or the extent of the risk that a transaction would not be consummated with Shell.

Yet relying upon these two factors., Stephen supposedly negotiated the two percent fee at arms-length with Jay.

5. <u>Jay and Stephen Negotiate With Shell</u>

Jay soon got to work on the effort to convert the Fixed Price Purchase Option to a put. But he was not on a solo mission.

On September 1, 1997, Jay wrote to Shell with a "proposal to replace the current time charter arrangements, including the single fixed price purchase option . . for the ARZEW and SOUTHERN."" Jay enclosed cash flow analyses with the proposal, which also included the possible option of a so-called "'U.K.' tax lease."' The financial analyses and U.K. tax lease portions of the proposal, however, were rot prepared by Jay, the investment banker whose fee was pegged to that of Wall Street firms. Rather, those

'JE 130, at 00007.

analyses were prepared by Argent Group, Stephen's former maritime investment advisory firm, which appears to have been serving at that time on an informal basis as supplemental financial advisors to AMS. Jay also got advice on strategic issues from Argent Group.

In November of 199'7, Jay met with Shell. He was accompanied by Stephen and their brother, Marty Gottlieb, of Argent Group. Shell later rejected the specific proposals advanced at that meeting but appears to have been willing to consider modifying the Charters.

On March 3, 1998, Shell sent Stephen formal notice that it was reactivating the SOUTHERN, having orally advised AMS of that fact much earlier. Stephen and Jay met with Shell representatives a rnonth later. At or around that time, Stephen and Jay must have gotten a strong sense that Shell was interested in restructuring the Charters, given that Shell agreed to pay for additional advisors to help AMS in the process of that effort.

On June 1, 1998, Stephen formally retained Argent Group "as financial advisor" to AMS "in connection with efforts by [U.S. Capital] to effect a restructuring . . ."[33] The agreement between the two firms set forth the responsibilities of Argent Group, in its capacity as financial advisor, as follows:

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[33] JE 140.

- conduct quantitative analyses of various Restructuring options;

- assist in structuring, analyzing and/or implementing a cross-border financing and/or a foreign sales corporation structure;

- analyze various bareboat and time charter alternatives with the objective of maximizing the net economic benefit to AMS;

- analyze and prepare formal presentations relating to the economic benefits to AM S and Shell of various alternatives as compared to current time charter arrangements;

- identify and quantify the tax characteristics of various alternatives together with the impact thereof to AMS and Shell;

- identify and recommend approaches to compensate/eliminate/minimize adverse tax consequences from various alternatives;

- evaluate and identify financing requirements and preferred financing structures for various alternatives; and

- prepare risk profiles and supporting defenses for achieving acceptable tax treatment for each of AMS and Shell.[34]

Under its agreernent with AMS, Argent Group was to receive $300 an hour plus expenses. Shell agreed to reimburse AMS for all of these costs.

Aside from help from Argent Group, Jay had assistance from two respected law firms. The first, Gilmartin, Poster & Shafto, a firm

[34] *Id.*

specializing in maritime law, handled all the key drafting on AMS's behalf. The second, the Fried, Frank firm, provided tax advice. As it did with Argent Group, Shell reimbursed the costs for these advisors.[35]

In addition to this substantial assistance, Jay was supervised by Stephen, an expert in time charter negotiations who attended and participated in the key meetings with Shell.

Alrnost two months after Argent Croup's formal retention, Shell and AMS struck a deal on a Restated Charter for the SOUTHERN. The Restated Charter ir. effect ends the Charter in 200 1 . At that time, Shell must exercise the Fixed Price Purchase Option or, failing that, will be deemed to have terminated the Charter and must pay the same amount as i-fit exercised the option , approximately $96.4 million. In (exchange for this agreement, Shell obtained concessions8 from AMO that increased Shell's ab-ility to control the reactivation and operation of the vessel before 2001.

In May 1999, Shell notified A.MS in writing that the ARZEW should be reactivated. Jay followed up with Shell as "Vice Chairman" of AMS and asked that Shell consider renegotiating the ARZEW's Charter.[36] On October 5, 1999, that charter renegotiation was accomplished on terms essentially

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[35] Ultimately, Jay was the only AMS advisor whose fee Shell refused to pay. Tr. at 434

[36] JE 102.

identical to those in the SOUTHERN's Charter, except for the provision of higher payments to AMO, the firm of which Jay is President."

The record regarding what Jay in fact did in connection with the renegotiation of the Charters is not voluminous. Aside from one '"Powerpoint" presentation, substantial portions of which were prepared by Argent Group, there is little in the way ol'written analysis prepared by Jay. Although Jay contends that he performed such analyses, the fairer reading of the record is that whenever there was any number-crunching or sophisticated analysis to be performed, it was done by someone else at Argent Group, AMO, or at the law firms advising AMS.

In essence, Jay appears to have operated solely as a negotiator who jawboned Shell as a method of encouraging them to renegotiate the Charters. These efforts appear to have involved some correspondence, a number of phone calls, and some face-to-face meetings at which Stephen played an important role. Malting it all the more difficult to sort out are the facts that Jay had other important reasons to speak with Shell on a regular basis on account of his work at AMO and that Jay kept no records of the time he spent working under the contract.

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[37] JE 14

The crucial factor that Jay brought to the table, in his own estimation, was his ability to grasp the ineffable "strategic" reasons Shell had to convert the Fixed Price Purchase Option to a put.[38] If the strategic reasons were the obvious ones -- that Shell wanted the ships all along, that the Fixed Price Purchase Option price was substantially less than the price of building comparable vessels, that Shell could operate the vessels more cheaply once reflagged, and that Shell was willing to agree to buy them so long as Shell could exert more control over their operations until the purchase date — then he "strategic" reasons were certainly known to Stephen, and he did not have to pay Jay handsomely to identify them. After all, Stephen was the one who came up with the complicated charter arrangement that enabled Shell to effectively control the vessels in the first place.

At trial, Jay could not identify any other non-obvious rationale for Shell's decision. Jay simply could not verbalize a less evident strategic motivation of Shell's that he had discerned and used as a lever to get the deal.

Furthermore, it is implausible that Shell did what it did because Jay's efforts led it to believe that there were uses for the vessels. As Stephen admitted, Shell knew more about the LNG market than anyone and had

[38] Tr. at 963-64; *id.* at 1070 (Jay referring to himself as the "strategic analyst" and "deal guy")

found uses for the vessels without AMS's assistance. And although no one should underestimate the significance of persistence, Shell's contractual and market power gave it no incentive to do a deal with AMS simply because Jay and Stephen were yammering at it. Stephen's expert witness conceded as much, testifying that there would have to be an explicable, rational economic reason for Shell to do the deal.

6. Conclusions Of Law Regarding The 1997 U.S. Capital Agreement

Jill claims that the 1997 U.S. Capital Agreement is invalid because it fails to comply with the Related Persons Provision of the Settlement Agreement and because it was a self-interested transaction. Thus she contends that Stephen has failed to satisfy his burden of demonstrating that the Agreement was entirely fair to AMS.

Jill's contract claim centers on the fact that the Settlement Agreement generally forbids AMS from entering into a contract with Jay or any entity he controls. Under § 8.4.2(d) of the Settlement Agreement, AMS may only make payments to Jay if:

> (d) the total compensation paid to such Related Person [i.e., Jay] represents fair value for the services rendered (with fair value meaning value within the range of what would be paid to an independent third party, negotiating at arms' length, providing equivalent services).[39]

[39] JE 1, § 8.4.2

Although the parties joust about whether Jill relies upon other subsections of the Related Persons Provision, they do agree that Jill has focused her aim largely on subsection (d).[40] In that regard, Jill contends that no rational businessman who was himself an expert in time charter negotiations would have offered U.S. Capital two percent of the total transaction value of converting the Fixed Price Purchase Option into a put in exchange for U.S. Capital's willingness to negotiate with Shell, particularly when that businessman had the expert assistance of an investment advisor and two law firms to supplement his own expertise.

For his part, Stephen contends that he made a good faith business judgment to hire Jay., that Jay obtained a beneficial outcome, and that there is no evidence that the contract rate was out of line with what other firms would have charged for equivalent services.

For several reasons, 1 conclude that Jill has proven that the 1997 U.S. Capital Agreement does not comply with subsection (d) of the Settlement Agreement's Related Person Provision. In so concluding, I begin with my understanding of the central purpose of the Related Person Provision: namely, that Related Persons would only be retained by AMS when their

[40] I do not reach any of Jill's arguments regarding the other subsections

retention was on terms that would have made economic sense to a neutral businessperson uninfluenced by family bias.

In my view, Stephen's approach to the retention of U.S. Capital subverted that purpose. Indeed, he turned the restrictions in the Related Persons Provision into a justification for violating the Provision. For example, he essentially failed to consider hiring other more qualified firms on the basis that they would not work on a purely contingent basis. As a result, he disabled AMS from using far more experienced and expert advisors who might have provided services for an hourly rate that would not, in the end, have cost AMS nearly as much.

Of course, Stephen justifies his decision on the basis that he did not want AMS to pay fees in the event that no transaction came to pass. But he never treated the 1996 U.S. Capital Contract as the pure contingency contract it supposedly was. If business reasons motivated him to use a contingency approach in that contract, why did business reasons not lead him to seal-ch for the most effective, least expensive way to achieve the much narrower and less risky task ofrenegotiating the Time Charters in 1997 after it was clear that Shell had a long-term interest in the vessels? The reason is obvious. Jay was Stephen's brother, and Stephen did not treat Jay like an arms-length contractor. Stephen therefore turned the contingent 1996

Contract ---- under which Jay performed services for Stephen's other companies as well as AMS — into a moral entitlement and an excuse for Stephen's failure to consider more qualified contractors in 1997.

It is inconceivable that a disinterested businessperson would have proceeded as Stephen did. No other LNG firm would have engaged Jay in the first instance. Certainly, no other LNG firm would have engaged Jay at the rate Stephen did with the understanding that Jay would rely on another financial advisory firm to provide the necessary financial analyses."

Unlike Jill, I do not take the view that Stephen was required to do all the negotiating with Shell himself. Nonetheless, it is a factor in my determination that Stephen holds himself out as an expert in time charter negotiations and that Stephen was the person with the preexisting relationship with Shell and the more sophisticated understanding of the LNG market. Though Stephen attempts to downplay his financial expertise, he was the one who structured the original deal, negotiated the Fixed Price Purchase Option, and founded Argent Group. Given that these vessels were

[41] At trial, Jill did not press a claim that Jay was not objectively qualified as defined in subsection (b) of the Related Persons Provision. Nonetheless, it bears noting that Jay was only objectively qualified in the most literal sense. It is true that he was a businessperson with financial experience. But to the extent that we are in an age in which somewhat greater specialization is typical of professionals, the decision to retain Jay appears to have been decidedly old-fashioned. A disinterested decisionmaker would have hired a competent professional with some actual experience in the maritime industry, particularly the LNG market.

the only aspect of AMS's business, that the reflagging initiative was complete, that Stephen had the relevant expertise and contacts, and that Stephen had other qualified advisors to assist him, why did he need to bring Jay into the picture to renegotiate the Time Charters? Again, the reason seems to be that Jay was his brother and Stephen did not want to cut him out.[42]

It is true, as Stephen contends, that the record is sparse regarding what market rates were for services "equivalent" to what Jay provided. This sparseness does not disentitle Jill to a judgment in her favor. One of the major reasons for the lack of evidence of market comparables is that Stephen did not seriously consider other professionals to perform the "services" Jay "rendered." Another reason is that it is difficult to value the price one would pay for the inexperienced owner of a one-man firm (who was already being paid over $250,000 a year by related entities) to negotiate with Shell -- with the assistance and supervision of a boss who is an expert in such negotiations — with the aid of a much more experienced Financial advisory Gnn performing all needed. analytical work — and with the support of two law firms performing the key drafting and legal analysis.

[42] The reason cannot bc that Jay brought financial expertise Stephen did not possess. For one thing, Stephen was fully competent to grasp the financial issues at stake. Most important, Argcnt Group was doing the key financial analyses. not Jay.

What evidence exists suggests that there would have been a substantial discount in any fee that Jay could command as a result of such heavy reliance on others. Stephen's contention (through his own testimony and that of his expert) that Jay should receive a fee comparable to an investment bank is undercut by the fact that investment banks would be expected to do the work that Argent Group and AMO employees did for Jay. Moreover, the testimony of Stephen's expert, who is an officer at a leading ship brokerage firm, supports the conclusion that expert brokers knowledgeable about the shipping industry could be engaged at a rate less than what Jay received under the 1997 U.S. Capital Agreement. Finally, the fact that Argent Group was retained for a $300 hourly rate suggests that AMS could have obtained services equivalent (more likely, superior) to what Jay provided on a far more economical basis.[43] Although such an arrangement may have required AMS to pay out of pocket,[44] Stephen's failure to give any consideration to this option is baffling, as I mentioned earlier, in view of the relatively narrow task at hand and Shell's demonstrated and long-standing interest in owning the vessels outright.

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[43] According to Stephen, he pays Jay a salary at AMM and AMO based on a hourly rate of $250 to $300. Two thirds of S3.8 million would give Jay a contingency "premium" far in excess of that rate. Indeed, as the plaintiff points out. the Argent Group worked at $300 an hour and therefore would have had to put in over 12,000 hour< to earn a $3.8 million fee.

[44] Or perhaps not. given that Shell appeared to be so Interested in doing the deal as to pay reasonable hourly rates for experienced advisors retained by AMS.

For all of these reasons, I conclude that the 1997 U.S. Capital Agreement does not comply with subsection (d) and therefore violates the Related Persons Provision of the Settlement Agreement. In addition, I reject Stephen's request that I modify that Agreement to set a rate of compensation that would be fair. There is nothing in the record that would enable me to tailor such a fee, in view of the unusual nature of Jay's arrangement, Jay's inability to keep time records, and the fact that he failed to keep his work for AMO and AMS distinct. In that regard, however, I note that if Stephen merely pays his attributed two-thirds responsibility under the Agreement, he will more than adequately compensate Jay for Jay's time and effort.[45]

On the other hand, the remedy for this breach should be set after further input from the parries. Given Jay's absence as a formal party, it may be that the proper remedy is to require Stephen to indemnify AMS for one third of the amount due Jay rather than to void the 1997 U.S. Capital Agreement.

[45] *See* note 4.1, *supra*. That would provide Jay with more than Stephen's alternative suggestion that I reduce the Agreement rate from 2% to 1%, an amount paid to Stephen's expert for services in an analogous context.

7. Because Jill Has Prevailed On Her Contract Claim, I Do Not Reach Her Breach Of Fiduciary Duty Claim

Jill also claims that the 1997 U.S. Capital Agreement is a self-dealing contract and that Stephen has not met his burden of showing that the contract is fair. Stephen claims that Jill is estopped from raising this claim because the Settlement Agreement states that Jill may not bring a claim for mismanagement unless that claim rests on a violation of the specific terms of the Settlement Agreement,[46] in this instance, the Related Persons Provision.

The parties' competing positions raise a nice question of Delaware law, namely, whether a stockholder in a closely-held corporation that is not designated as such under the Delaware General Corporation Law can agree to limit her ability to press a breach of fiduciary duty claim against the directors of the corporation? Stephen says yes, emphasizing that Delaware corporation law favors uncoerced, private ordering, which is what occurred here. Jill says no, arguing that a stockholder may never waive her right to assert a claim for breach of the fiduciary duty of loyalty.

I leave that question for another case, however. With respect to Jill's fiduciary duty claim, I note merely that if it is later found upon appeal that Jill did not prove a breach of the Settlement Agreement and that Jill does

[46] JE 1, § 8.5

have the right to challenge the 1997 U.S. Capital Agreement as a fiduciary duty breach, it is clear to me that Stephen has not met his burden of showing that the Agreement was fair to AMS.

B. Did Jill's Material Breach of § 7.3 of the Settlement Agreement Excuse Stephen's Failure To Comply With The Literal Terms of § 8.3 of the Agreement?

The next issue in the case is unusual in the sense that it involves an admitted breach of the literal terms of the Settlement Agreement by Stephen. In the late summer of 1998, Stephen stopped delivering to Jill information she was due under § 8.3 of the Agreement. In lieu of delivering her the information, he made the information available for Jill to inspect, but not copy, at a location near Jill's home in Incline Village, Nevada. Stephen also provided copies of the information to Jill's litigation attorneys, under the condition that they not give Jill copies. Stephen's conduct in this regard forms the basis of Jill's Document Access Claim

Stephen contends that his refusal to deliver the required documents was a legitimate exercise in self-protection justified by Jill's breach of § 7(c) of the Settlement Agreement. Section § 7(c) states in relevant part:

> Each of SPG [Stephen] and JFB [Jill] shall hold in confidence and not 'directly *or indirectly* disclose any of the documents filed with the court or otherwise produced (including any memoranda sent to SPG [Stephen], JFB [Jill], or their attorneys) in connection with the Action [i.e., 1995 Litigation] between Stephen and Jill], except that either rnay provide

> information or documents in response to a valid subpoena or a request from a. governmental agency, including a taxing authority.[47]

In blatant violation of this provision, Stephen claims, Jill informed Stephen's ex-wife Shannon Such that Such's name was "written all over" the record in the 1995 Litigation.@ Jill told this to Such in September 1997 during a phone call that Such initiated for reasons having nothing to do with the 1995 Litigation.

Although Jill's attorneys have mounted a valiant defense of her conduct, the record is clear that Jill breached § 7(c) in a material way. In the 1995 Litigation, Jill asserted that Stephen tried to hide from Such facts concerning the value of the Time Charters to AMS and AMO in 1992, which was the period during which Stephen and Such were negotiating a divorce agreement."'

By informing Such that her name was "'all over the record" of the 1995 Litigation, Jill had to know that Such would likely be impelled to go to Delaware and to review the record. That is in fact what happened. Acting on this tip, Such went to Delaware and spent a good deal of time reviewing

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[47] JE 1. § i'(c) (emphasis added).

[48] Tr. at 512-13.

[49] Given the timing of Jill's September 1997 discussion with Such in relation to the divorce settlement and Jill's written agreement not to disclose the 1995 Litigation, it is obvious that Jill cannot be regarded as a selfless whistleblower.

the record.. As a result of information she learned from doing so, Such fonned the view that Stephen duped her into agreeing to the economic terms of their divorce agreement and commenced litigation against him in July 1998 to reopen it.

Not only did Jill obviously direct Such to Delaware, Jill also had lengthy phone conversations with Such shortly before and after Such's visit this court. Jill's discussions with Such continued afterward. Although Such and Jill had been friends before they began discussing the record in the 1995 Litigation, their contact had been quite sporadic and, indeed, neither had spoken with the other for a long time before their September 1997 conversation.

While I generally credit Such's testimony, including her assertion that Jill was careful to limit her comments regarding the record in the 1995 Litigation, I find it implausible that Jill — having given Such the match, the lighter fluid, and pointed her toward the charcoal briquettes — was able to fend off Such and provide no useful information. Put simply, I find that Jill either (1) affirmatively provided Such with information giving her reason to suspect that Stephen had not treated her fairly in the divorce; or (2) reacted to Such's questions in such a manner as to assure Such that Jill's testimony would buttress any claim by Such that Stephen had low-balled his financial worth in the divorce discussions.

Obviously, I am no clairvoyant, and the only parties to these conversations (Jill and Such) deny that this inference is justified. Nonetheless, the pattern of phone calls, a lengthy memorandum Such wrote in January of 1998 in which she repeatedly states the issues on which "Jill will testify,"[50] and a rudimentary understanding of human nature buttress my conclusion. This is not to say that I believe that Jill acted as the litigation consul tan.: Stephen portrays her to be. It is my sense that Jill tried to be quite careful in what she said; nonetheless, the fact that Jill — who by her own admission "blurted . . . out"" the fact that Such might find the record of the 1995 Litigation useful — unleashed a chain of events that compromised her ability to remain entirely silent as to the "documents filed with the court or otherwise produced" in connection with the 1995 Litigation. Without belaboring the matter further, it is clear that Jill "indirectly disclosed" these documents to Such and thus violated § 7(c) of the Settlement Agreement.

This violation has caused injury to Stephen. The lawsuit Such filed in New York contains very serious and painful allegations. Regrettably, the

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[50] JE 135, at 2-3.

` Tr. it 238.

suit. was commenced at a time when the relations between Such and Stephen had reached a less contentious stage, a benefit not only to them but, perhaps more importantly, to their daughter. It cannot be that the resumption of hostility between their daughter's parents has aided her, or her relationship with Stephen. It is equally clear that Jill's violation of § 7(c) was a "but for" cause of Such's suit against Stephen. Such as much as conceded that at trial.

The question that arises from these findings is whether Jill's material violation of § 7(c) of the Settlement Agreement precludes Jill from pressing her claim regarding Stephen's breach of § 8.3.

For her part, Jill asserts that her violation of § 7(c) was more technical than substantive and that it cannot excuse Stephen's disregard for her rights under § 8.3. Jill also argues that, to the extent that Stephen was attempting to use § 7(c) of the Settlement Agreement to conceal evidence that he committed fraud agamst Such, his affirmative defense is barred as a matter of public policy.

By contrast, Stephen claims that his modest response of requiring Jill to inspect but not receive or make copies of the information to which she was entitled was a legitimate resort to "self-help"[52] justified by Jill's

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[52] Defs. Post-trial Br. at 8. *See* RESTATEMENT OF THE LAW (SECOND) CONTRACTS, *Rules And Principles*, Ch. 10 – Performance and Non-Performance (198 1) ("[C]ontracting parties ordinarily bargain for performance rather than for a lawsuit. It is therefore generally fairer to give the injured party. to the extent it is possible, the right to suspend his own performance and

material violation of his contractual rights under §7(c). He further contends that her breach precludes her from going after him for a breach of a closely related provision of the Settlement Agreement and that she dirtied her hands in a manner that disentitles her to relief from this court of equity.

There is no elegant way to clean up this food-fight. But the just result seems relatively clear. Jill materially breached § 7(c). Her breach was no minor slip-up, but a major breach that subjected Stephen to harm.

Because Jill committed a prior material breach, she is in no position to argue thar Stephen's refusal to perform his obligations under § 8.3 in a literal manner should be condemned by th-is court. "As a general rule the party first guilty of a material breach of contract cannot complain if the other party subsequently refuses to perform."[53] Given the narrowly tailored response of

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ultimately to refuse it and, if the other party's non-performance is not justified, to claim damages for total breach of contract.").

[53] *Hudson v D & V. Mason Contractors*, *Del.* Super., 252 A.2d 166, 170 (1969); see *also Chamison v. Healthtrust, Inc.-Hospital Co.*, Del. Ch.. 735 A.2d 912, 923 n.38 (1999), *aff'd*, *748* A.2d 407 (2000): *cf. Eastern Elec. & Heating, Inc. v. Pike Creek Professional* **Center,** Del. Super., C.A. Nos. 85L-AP-21, 85L-MY-1, 85C-MR-79, lctt. op., 1987 WL 9610, at "4, O'Hara, J. (Apr 7. 1987) ("If the plaintiff has committed a material breach he cannot complain in the non-breaching party subsequently refuses to perform. The converse of this principal is that a slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligat ons of the injured party to perform under the contract.") (*citing Hudson*, 252 A.2d at 170); RESTATEMENT (SECOND) OF CONTRACTS § 240. at 22 1 (198 1) ("1 f the performances to be exchanged under an exchange of promises can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents, a party's performance of his part of such a pair has the same effect on the other's duties to render performance of the agreed equivalent as it would have if only that pair of performances had been promised.").

Stephen to Jill's breach, this doctrine supports a refusal to accord Jill any retroactive relief or a declaration that Stephen's response was unjustifiable.[54]

Although contractual non-performance is usually not favored, I see no basis to condemn Stephen for his reaction, especially because he shaped an approach to disclosure that gave Jill sufficient access to the information to which she was entitled in order to protect her substantive rights. Having

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[54] I also reject Jill's argument that her breach of § 7(c) of the Agreement was excused because Stephen allegedly disparaged her to Such and thus breached §7(c) himself and that her victory on certain contract claims earlier in this litigation disqualifies Stephen from "complain[ing] that *any* of Jill's actions after October 1995 constitute a violation of any provision of the Settlement Agreement." Pl.'s Reply Br. at 36 (emphasis in original).

As to the first issue, while Stephen's remarks to Such may have been inappropriate, they were made in a personal setting and were of a personal nature. They hardly caused material harm: and I have little doubt that Jill made similar remarks about Stephen to her personal friends.

With respect to the larger argument, Jill concedes that the question of whether a prior breach is sufficiently Important to excuse non-performance by the other party is "one of degree and is determined by 'weighing the consequences'" of court-sanctioned non-performance. *Eastern Elec. & Heating, Inc. v. Pike Creek Professional Center*, Del. Super., C.A. Nos. 85L-AP-21, 85L-MY-1, 85C-MR-79, 1987 WL 9610, at *4, O'Hara, J. (Apr. 7, 1987) (*quoting* 4 CORBIN ON CONTRACTS § 946, at 809 (1967)), *aff'd*, Del. Supr., 540 A.2d 1088 (1988). Whereas Stephen's modified method of complying with § 8.3 was tailored precisely to Jill's breach of § 7(c), Jill argues that Stephen's prior breach of a Settlement Agreement — one she Jill seeks to enforce in a scrupulously literal manner — excuses her non-performance of the Settlement Agreement as a whole. Jill's argument in this regard rests on the notion that in the commercial context a shove in the chest may Justifiably be answered by deadly force, which is a proposition I do not accept. Nor is it equitable for Jill to receive, as she will, monetary compensation for Stephen's breaches at the same time she claims for herself the right to violate the Agreement with impunity. *Cf. Merck & Co. v. Smithkline Beecham Pharmaceuticals Co.*, Del. Ch , C.A. No. 15443-NC, 1999 WL 669354. at *5 1, Chandler, C. (Aug. 5, 1999) ("Ifevery breach of contract automatically invoked the unclean hands doctrme, then any non-breaching party to a breached contract would have the effective ability to act inequitably against the breaching party with impunity (even as late as 20 years after the breach). Any future complaint by the breaching party would be barred by the doctrme of unclean hands. 'This is not a sound rule of law, and [the court] refuses to recognize such a policy.").

For similar reasons, I reject Stephen's mirror argument that Jill's breach of § 7(c) disables her from asserting *any* of her contract claims.

reached this conclusion through the application of contract law principles, I will not address Stephen's unclean hands defense.

While I find that Stephen's method of complying with § 8.3 was permissible in view of Jill's behavior, I agree with Jill that her time in the informational penalty box must at some point come to an end.[55] That time is now, and Stephen should resume compliance with § 8.3 upon the entry of the order implementing this opinion. Ralher than continued non-performance, Stephen should seek relief for any future violation of § 7(c) from this court, which traditionally makes itself available to decide such matters promptly.

In coming to this conclusion, I rely upon my (perhaps optimistic) perception from trial that Jill generally recognizes the importance of compliance with the Settlernent Agreement, the reality that her economic interests mostly coincide with Stephen's, and the consequent irrationality of her doing anything to harm AMS as an entity, if not Stephen as a person.

Jill's public policy argument, like the larger question of what monetary damages Jill may owe to Stephen, can be left for another time and to another proceeding in which Stephen has sought affirmative relief. If Such is unsuccessful in her action to reopen her divorce settlement and her

[55] *Cf. Merck*, 1999 WL 669354, at *51.

claim:; are found to lack merit, it is possible that Jill could be responsible for substantial damages (e.g., Stephen's litigation fees and expenses in that proceeding). On the other hand, if Stephen is founded to have engaged in fraud against Such, the law may well bar him from receiving any indemnification or other damages from Jill.'"

But for now, Stephen is only entitled to a finding that Jill's material breach of § 7(c) of Settlernent Agreement rendered precludes her from insisting on strict enforcement of the letter of § 8.3 of the Settlement Agreement.

C. Did Stephen Violate The Settlement Agreement By AMS To Pay For General Overhead?

As noted previously, the Settlement Agreement prohibits AMS from spending money to cover its "genera.1 overhead costs . . . ."[57] Rather, Stephen was responsible for paying for overhead out of the Management Fee AMh4 receives under the Settlement Agreement. This arrangement puts the burden on Stephen to decide whether expenditures were sufficiently worthwhile to justify cutting into his profits from the Management Fee.

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[56] 17A AM. JUR.2D *Contracts* § 292, at 290-91 (1991) ("A contract will generally be held void and unenforceable where the object of the parties is to perpetrate a fraud upon a third person or upon the public.")

[57] JE 1, § 8.4.2(iv).

Jill contends that Stephen has caused AMS to pay the following costs, which in her view constitute general overhead costs: (1) corporate franchise taxes for AMS; (2) business license fees: (3) fees paid to AMS's registered agent; and (4) bank fees in connection with a cash management account ("CMA"). She admits that these claims amount to chump change but asserts them, she says, out of fear that if she does not draw the line when Stephen has taken the metaphorical inch, he will soon take a mile. Thus 1 undertake to answer questions better raised in an accounting course.

I start with the pertinent contractual language, which is "general overhead costs." While the Settlement Agreement does not define "overhead" further, the term is commonly defined as "[b]usiness expenses (such as rent, utilities, or support-staff salaries) that cannot be allocated to a particular product or service; fixed or ordinary operating costs."[58] Although the application of the term "overhead" to specific categories is an exercise of some difficulty for a non-accountant, the term is an ordinary one, and resort to extrinsic evidence to determine its meaning is unnecessary.[59]

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[58] BRYAN A. GARNER, ED.. A HANDBOOK OF BUSINESS TERMS 434 (1999).

[59] *E g., Citadel Holding Corp. v. Roven,* Del. Supr., 603 A.2d 818, 824 (I 992). But to the extent that suc h evidence could be considered appropriate in this Instance, the lawyer who assisted Stephen in crafting the Settlement Agreement testified in his deposition that the term means "the cost of running AMS, whether it's office space, utilities, secretaries." Golden Dep. at 77. Thus Stephen's contention that the broad term used in tht contract was intended to mean the specific expenses listed on a particular document prepared by Jill listing "Key Real Expenses" is not only advanced through an Improper (and unconvincing) affirmative use of Stephen's own deposition

Turning to the application of that definition, I have little difficulty in concluding that the franchise taxes, business license fees, and registered agent fees constitute general overhead that should have been paid by AMM, not AMS. These expenses fit within the category of administrative expenses of doing business that are not attributable to the production of particular services or products and thus fall within the commonly understood meaning of overhead.[60] This conclusion is buttressed by case law applying statutory definitions of the term overhead to taxes and business licenses as well as by the classic dictionary definition.[61]

I arrive at the same conclusion with respect to the CMA fees, but with more uncertainty. In one sense it is obvious that bank account fees are

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testimony, it is also undercut by the fact that Stephen's own counsel believed that the Agreement should be construed in keeping with the common understanding of overhead. Had the parties wished to limit that term to cover only the "Key Real Expenses," they knew how to do so. And had the parties implicitly intended the term's meaning to be limited in this manner, one would expect Stephen's lawyer to have remembered it.

[60] BLACK'S LAW DICTIONARY 1129 (7th ed. 1999) (defining overhead costs as "overhead" as "[b]usiness (expenses (such as rent, utilities, or support-staff salaries) that cannot be allocated to a particular product or service; fixed or ordinary operating costs").

[61] 18 Del. C. § 702(c)(5)(b) (defining "general overhead expenses" of insurers as including "all taxes of this State and of the United States . . ."). *See* also *Western Union Fin. Servs., Inc. v. Data Corp.*, 25 Cal. Rptr. 2d 341, 345 n.6 (Cal. App. 1993) (applying state statutory definition of "overhead expense" Including "all types of licenses. taxes . . ."); MERRIAM-WEBSTER COLLEGIATE DICTIONARY ONLINE (2000) (defining "overhead" as "business expense (as rent, insurance, or heating) not chargeable to particular part of the work product"); C. P. STICKNEY & R. L. WEIL. FINANCIAL ACCOUNTING: AN INTRODUCTION TO CONCEPTS, METHODS, AND USES G-66 (8th ed. 1997) (defining "overhead costs" as "[a]ny cost not directly associated with the production or sale of identifiable goods and services: sometimes called 'burden' or 'indirect costs' . . . frequently limited to manufacturing overhead") (emphases omitted); WEBSTER'S NEW WORLD DICTIONARY (1976) (overhead defined as "the general, continuing costs of running a business, as of rent, maintenance, taxes. . .").

general overhead; it is unthinkable that a business of any size can operate without such an account, and in this case the account is as necessary to the overall operation of AMS as an office. On the other hand, the bank fees charged on the CMA account can in many ways be seen as a cost directly attributable to producing a particular benefit — higher interest payments for AMS — much like the standard fees charged on a mutual Fund account. Indeed, AMS cannot receive the higher interest proceeds it has earned from the CMA account without paying the increased fees that go with it. As a result, one can sympathize with Stephen when he argues that it is unfair that he (through AMM) should pay all of the fees yet only get two thirds of the benefit generated thereby. If forced to do so, Stephen might well be incentivized to simply scrap the CMA account and let AMS's money languish in a fee- and interest-free account.

Rut this qualm aside., it is clear that the maintenance of a bank account is necessary for the overall functioning of AMS as a business (like the maintenance of a mailing address or office) and that the CMA fees fit within the standard definition of overhead.

Stephen agreed to cover overhead costs and thus put. himself in the posit-ion of choosing which overhead costs to avoid (thereby increasing his yield, if any, from the Management Fee) and which overhead expenses it made business sense to incur (recognizing that he would bear the entire cost). As a result, I find for Jill on this issue.“”

C. Did Stephen Violate-. Settlement Agreement By Refusing To Adjust The Interim Hire Due AMS For Inflation?

Given the degree of animus between Stephen and Jill, it is perhaps unsurprising that they would both argue that an issue was decided by Vice Chancellor Balick earlier in the litigation and is therefore law of the case but disagree about how the issue was decided. The issue they both believe was decided was whether the interim hire that. was required to be paid to AMS under § 8.1 (b) of the Agreement had to be adjusted for inflation on an annual basis.

The reader need not be bothered with the precise definition of interim hire; suffice to say that it is a payment that Shell would make to AMO unless it or another affiliate of AMS was managing the vessels. As an economic

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[62] Jill and Stephen also do battle over his decision to have AMS pay certain interest payments to AMO. Before Jill left AMS, she had arranged with Shell for it to pay certain amounts of charter hire directly to AMO, even though AMO was AMS's subcontractor. After she left, Stephen changed this practice. apparently for personal tax “planning” reasons. See JE 108. Although Jill no longer challenges this change in payment practice, she does assert that AMS is forbidden under § X.4.2 of the Settlement Agreement to pay interest to AMO and should be declared to have no future right to do so. In the absence of any showing by Stephen that AMS has some legal obligation to pay Interest to AMO, I conclude that Jill is correct. To the extent that AMO is a mere subcontractor and that Stephen has (as he argues) simply reformed AMS's practices to conform to the Tune Charters, there is no legitimate business reason for AMS's management to pay interest to AMO when it has no obligation to do so. Most profit-maximizing busmesses would take any interest on the float for themselves. Under the Settlement Agreement, Stephen does not have the flexibility to be beneficent to AMO with AMS's money.

arrangement, AMO had paid an amount "in lieu of' interirn hire to AMS durir g several of the years before the Settlement Agreement. Under the Settlement Agreement, Stephen agreed to ensure that AMO would amend its management agreement with AMS so that AMS would continue to receive payments equal to interim hire as calculated in the Time Charters, regardless of whether Shell was paying it or not. The Time Charters provided that interim hire "shall be adjusted on each anniversary of the Date of Delivery [of the vessels] by the percentage increase in that year's Consumer Price Index . . . ."[63]

The dispute at this stage is over whether the interim hire was to be adjusted for inflation annually. Stephen argues that an inflation adjustment was to be made only during the years in which such interim hire was actually paid by Shell in connection with the Charters. Contrarily, Jill claims that the rate of interim hire was to be adjusted for inflation regardless of whether Shell was in fact paying such hire. The purpose of including the interim hire provision in the Settlement Agreement was, according to Jill, to compensate her for relinquishing her interest in AMO and losing her control over whether AMO paid interim hire to AMS. Thus she claims that she bargained for an inflation-adjusted stream of payments.

[63] JE 3. § 8(a)(iii); JE 9, § 8(a)(iii)

Earlier in the litigation, Jill won a summary judgment motion before Vice Chancellor Balick on the issue of interim hire. At that time, she claimed that Stephen was paying her an amount of interim hire that did not comply with the contract. Stephen countered that what he was paying — an amount pegged to what AMO had been paying AMS "in lieu of' interim hire –– was actually higher than the amount of interim hire as calculated under the Time Charters. Vice Chancellor Balick held as follows: "Be that as it may, [Jill] is entitled to have the Management Agreement comply with the terms of the Settlement Agreement."[64] He then entered summary judgment for Jill on this claim.

The prior briefing makes clear that Jill sought a declaration that the Settlement Agreement required Stephen to amend the AMO-AMS management agreement "in a manner that contemplates annual inflation of the payment from AMO."[65] Moreover, Jill presented evidence that Shell, the other party to the Time Charters, provided an annual notice indicating what interim hire would be if it 'were payable, an amount that reflected an annual inflation adjustment. She also pointed out that § 8.4.1 of the Settlement Agreement recognizes that interim hire payments would be adjusted for

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[64] *Brandin v. Gottlieb*, Del. Ch., C.A. No. 141119, mem. op. at 12, Balick, V.C. (Sept. 18, 1998)

[65] Dkt. 54. at 47; *see also* Dkt. 7 1. at 42-45.

inflation. Stephen countered with his "I'm paying more, no harm, no foul" argument.

After examining the briefs submitted to Vice Chancellor Balick, I am convinced that he resolved the inflation issue in favor of Jill and ordered that she was entitled to interim hire payments in accordance with the Settlement Agreement, regardless of whether such payments were lower than those that Stephen actually paid. The inflation issue was at the center of the summary judgment dispute, and Vice Chancellor Balick resolved that dispute in favor of Jill. His ruling is therefore law of the case. Moreover, it comports with the most reasonable reading of the contract, because Stephen's argument that the interim hire payments would not be adjusted during periods when such payments were not made makes no economic sense, derives no support from the language of the Time Charters, and is at odds with the only relevant extrinsic evidence on the subject.

Thus I uphold Jill's view of what interim hire is due. The parties shall collaborate and agree: on the adjustments necessary to ensure that interim hire was paid in accordance with the Settlement Agreement from its inception. This means that any overpayments made by AMO must be credited to it, in accordance with the intent behind Vice Chancellor Balick's prior ruling.

D. Did 'Stephen Violate-: Settlement Agreement
By Having AMS Pay All His Legal Expenses?

Under § 8.4.2 of the Settlement Agreement, AMS is forbidden to incur expenses "paid to or on behalf of' Stephen. Yet AMS has borne virtually all of Stephen's litigation expenses in this case,[66] even though the amended complaint seeks no damages from AMS as an entity and is entirely premised on Stephen's alleged failure to abide by his contractual and fiduciary duties.

Stephen's main defense to this claim was premised on his assertion that he was representing himselfpro se and merely coordinating his efforts with the two major law firms representing AMS as an entity. It is difficult to capture the right word to ascribe to this defense; silly is the charitable one I choose.

A review of the docket reveals that the Richards, Layton and Fried, Frank firms were clearly representing Stephen personally earlier in the litigation. Since his claimed pro se status, they have continued to do the same but under the implausible guise that they are not in fact his personal counsel. At no point has Stephen filed a separate brief on an issue[67] or taken

[66] The only exception is that Stephen, perhaps sensing the weakness of his entitlement, has recently begun bearing his own expenses.

[67] Shortly before issuance of this opinion, Stephen filed a letter separate from his counsel, who had already filed one on his behalf regarding the issue at stake.

a divergent viewpoint from "company counsel." That is because it is wholly evident that "company counsel" have been acting as his personal counsel all along.

At trial, this defense fell apart as a result of Stephen's admirable candor regarding the fact that the Richards, Layton and Fried, Frank law firms were in indeed representing him as to all the claims against him concerning actions he took in his capacity as an officer and director of AMS. In other words, they were representing him as to all claims asserted in this case. Stephen also admitted that if he breached his contractual or fiduciary duties then AMS could not pay his fees:

> I'm not trying to be — I'm not trying to be cagey. The concept is a difficult concept to grasp. If you look at this agreement, I've signed it in my individual capacity. To the extent that there is a breach of the agreement by me as an individual, I'm certainly not entitled to have legal fees paid. To the extent that the — there is a breach by the company, and that breach occurred because of my behavior, I think that I would have to say, in those circumstances, that I would be responsible and the company shouldn't — shouldn't reimburse me.
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> We haven't sought indemnification here, because [the Settlement Agreement] says that a necessary expense — which is what that indemnification payment would have to be — cannot be paid me or on my behalf. So it's my view that I cannot be indemnified by the companies.[68]

[68] Tr. at 340-41

As a result of these admissions, Stephen's post-trial brief concedes that a great deal of the expenses AM'S has incurred on his -behalf should be repaid but contends that "AMS has properly paid some of defendants' legal fees."[69] Stephen bases this contention on his view that some of Jill's claims implicate AMS's corporate policies or practices or its relationships with third parties. As a result, Stephen contends, AMS as an entity has a legitimate: interest in defending the claims.

I reject this argument. Initially, it is clear that Jill seeks relief for misconduct by Stephen and seeks damages only from him and not from AMS as an entity. While it is true that some of her claims implicate the way AMS does business, they do so only insofar as is necessary to ensure that Stephen does not shift unnecessary expenses onto AMS or force it to bear the costs of contracts, between itself and Stephen's relatives (these being the "third party contracts" at stake). Jill's characterization of AMS as a nominal defendant in the complaint is apt, and it is clear that almost all the legal work done in this case by Richards, Layton and Fried, Frank was devoted to convincing the court that Stephen had not violated his contractual or fiduciary duties.

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[69] Defs.' Post-Trial Br. at 43.

Relatedly, to the extent that AMS needed representation, it was entitled to independent representation. It was of no value to the entity to be represented in the litigation. by counsel who were representing Stephen and therefore unable to advance arguments contrary to his personal interests. While Stephen argues that -this case is not a formally derivative suit, it has many of the attributes of one (and indeed, several of the claims raised by Jill in fact seek to redress injury to AMS and are thus derivative in nature). In derivative suits brought in this court, the corporation typically has separate counsel who plays a far less active and expensive role than counsel for the defendant-directors. What Stephen has done is to conflate the role of company and personal counsel and then use his pretextual *pro* se status as an excuse not to pay his own way. That course of conduct is prohibited by the Settlement Agreement.

Moreover. 1 decline to grant Stephen's request that I allow AMS to bear some of the freight because it was entitled to have counsel to represent it as an entity. If independent counsel had been retained for AMS in the first place, that retention might not have violated the Settlement Agreement. But I see no basis to pay Stephen's lawyers on the fictive premise that they acted as independent advisors to the company when they in fact represented

Stephen personally and pursued his litigation agenda without a single instance of deviation.

Finally, my reading of the Settlement Agreement is bolstered by § 11.8 of that Agreernent, which provides for the payment of litigation expenses to the prevailing party in any litigation concerning compliance with the Agreement. That provision indicates how the parties wished to deal with the issue of litigation expenses over disputes like this and supports the conclusion that the payment of Stephen's litigation expenses breached § 8.4.2.[70]

El. Is Jill Entitled To All Or Some Of Her Litigation Expenses As The Prevailing, Party?

Section 11 .8 of the Settlement Agreement states in relevant part that "[t]he party prevailing in any action., suit or proceeding shall be entitled to receive from the losing party prompt reimbursement of all reasonable legal fees and disbursements incurred by the prevailing party in connection with

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[70] Because 1 reach this conclusion on contractual grounds, I do not address Jill's argument that AMS's interested board of directors improperly advanced litigation expenses to Stephen without complying in any manner nith 8 Del. C. § 145 and that Stephen has been unable to demonstrate that the hoard's decision to advance such expenses was fair. *Havens v. Attar*, Del. Ch., C.A. No. 15134. mem. op. 1997 WL 55957, Chandler, V.C. (Jan. 30, 1997) (granting preliminary injunction against advancement where Interested board advanced fees to itself and could not prove that its actions in *so* domg were fair); *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Services, Inc.*, Del. Ch., C.A. No. 15478, 1999 WL 743479, Strine, V.C. (Sept. 10, 1999) (where corporate general partner paid its own litigation expenses out of limited partnership funds, failed to employ procedures akin to those under 8 Del. C. § 145, and could not prove its decision was fair, court ordered repayment of the expenses).

such action, suit or proceeding." In this case, it is clear that if there can only be one prevailing party, then Jill is i-t.

In the present litigation, Jill has succeeded on a variety of important claims, having prevailed in her previous summary judgment motion before Vice Chancellor Balick and having won most of the claims she pressed at trial. Moreover, while Jill has raised some claims that did not reach a final determination on the merits, most of those claims were mooted by Stephen's own conduct and, at least with respect to one claim (Jill's challenge of a contract with Argent Group), might not have been pressed had Stephen been timely in explaining that Shell was to pay for the contract.[71] And though some of the claims were for miniscule dollar amounts, Stephen's failure to gain Jill's trust makes her desire for "to the letter" compliance by Stephen more understandable.

As a result, the only difficult issue I confront now is whether the parties intended § 11.8 to be an all or nothing clause or to be susceptible to a more balanced, claim-by-claim application. As noted earlier, Jill's breach of § 7(c) was a material one, and Stephen prevailed on that aspect of this dispute, which involved a good deal of litigation effort on both sides.

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[71] In this regard, Jill appears to be correct that before the Fixed Price Purchase Option became a put, AMS could have been adversely affected by this contract because it could have affected what AMS would receive as fair market value after Shell paid off the debt on the ships (which was to Include :he payments to hrgent Group).

Stephen therefore argues that § 11.8 should be equitably applied and that any fee award to Jill should be adjusted to account for her loss on a major issue. By contrast, Jill argues that the court must select a "prevailing party" and that once it does so, it is clear that that party, per § 11.8, is entitled to "all of its reasonable legal fees and disbursements incurred in . . . connection with such action, suit or proceeding."

The parties do not support their arguments with parol evidence that provicies any sense of what the parties to the Settlement Agreement actually intended. Rather, both parties rely on case law that is not directly on point. For his part, Stephen cites cases from this court emphasizing the court's broad flexibility in shaping an appropriate fee award where a benefit has been achieved in corporate litigation. Such case law, of course, does little to help me interpret how § 11.8 of the Agreement should be interpreted and applied.

Jill gets closer to the mark by citing cases addressing who is a prevailing party under the procedural rules commonly used in American courts, including this one. Under this case law, a party like Jill, who has prevailed on most of her claims, is appropriately deemed a prevailing party, and the court may award costs to her." Yet under such rules of procedure, such as Court of Chancery Rule 54, the court typically retains the discretion not to shift costs or to split costs in an equitable fashion.[73] Furthermore, the determination to shift costs is far less significant than a decision to shift fees.

In view of the traditional discretion conferred upon &his court and a court of equity's natural tendency to avoid stark rulings where justice seems to require more nuance, one hesitates to take the approach that § 11.8 requires the payment of all of the fees to a party that has prevailed on most of its claims but who has also committed a serious breach of contract herself.

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[72] *Graham v. Keene Corp.*, Del. Supr., 616 A.2d 827, 829 (1992); WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § *266'7.* at 212 (1998) (hereinafter "WRIGHT & MILLER") ("A party who is only partially successful also can be deemed a prevailing party. Consequently, a claimant who has obtamed some relief usually will be regarded as the prevailing party even though he has not sustained all his claims."); *Devex Corp. v. General Motors Corp.* 494 F.Supp. 1369, 1390 (D.Del. 1980) ("A prevailmg party is the party which, although it might not sustain all of its claims, receives a favorable judgment."), *aff'd*, 667 F.2d 347 (3d Cir. 1981), *cert. granted*, 456 U.S. 988 (1982) *and cert. denied*, 456 U.S. 990 (1982); *reh'g denied*, *474* U.S. *890* (1985); *Sir Speedy, Inc. v. L & P Graphics, Inc.* 957 F.2d 1033, 1040-41 (2d Cir. 1992) (declaring party who recovered greater relief on the contract as prevailmg party); *Wise v. DeWerd*, 373 F.2d 306, 307 (3d Cir. 1967) (plaintiffs secured a net recovery, therefore it was "perfectly clear that the plaintiffs are the prevailing parties in this litigation ."); **Wayne** *Point Co. v. Gulfview Apartments of Marco Island, Inc.*, 7.39 So.2d 1259, 1260 (Fla. Dist. Ct. App. 1999) (prevailmg party is "the party prevailing on the significant issues in this litigation"); *Roberts v. Madigan*, 92 1 F.2d 104'7, 1058 (10"' Cir. 1990) (district court's decision "to award costs to the party that prevailed on the vast majority of issues and on the issues truly contested at trial was not an abuse ofdiscretion"). cert. *denied*, 505 U.S. 1218 (1992).

[73] Ct. Ch. R. 54(d); WRIGHT & MILLER § 2667, at 212-19; *id* § *2668.* at 228-30.

Rut that hesitation must give way to the court's duty to give effect to the most reasonable reading of the Settlement Agreement.[74] And given the sophistication of the attorneys and clients who were involved in drafting the Settlemert Agreement, it is difficult to see the inequity in giving the words of the contract their ordinary meaning.[75] When that approach to § 11.8 is taken, Jill's reading of the contract emerges as the preferable one. Having chosen the common term "prevailing party," the parties can be presumed to have intended that that term would be applied by the court as it has traditionally done so, And under any traditional application of the term, Jill's predominance in the litigation entitles her to that appellation. Similarly., the parties chose in § 1 1.8 to grant the prevailing party "in any *action, suit, or-proceeding* relating to this Agreement . . *all* of its reasonable legal fees and disbursements incurred in . . connection with such *action, suit or proceeding*." That is., the parties eschewed a claim-by-claim approach by failing to insert any language in the contract that would authorize the court to exercise discretion to award less than "all" the

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[74] *See, e.g., Neary v. Philadelphia*, Del. Ct. Err. & App., 9 A. 405, 407 (1 887) ("One leading principle of construction is to carry out the intention of the authors of or parties to the instrument or agreement, so far as it can be done without infringing on any law of superior binding force."): *Phillips Home Builders, Inc. v. Travelers Insurance Co., Del.* Supr., 700 A.2d 127, 129 ("if the relevant contract language is clear and unambiguous, courts must give the language its plain meaning").

[75] *Rovein*, 603 A.2d at 824 ("When construing a contract, and unless a contrary intent appears. we will give words their ordinary meaning.") (citation omitted).

prevailing party's fees in a case where the prevailing party had achieved a less than full victory."

As a result, Jill is entitled to all of her reasonable attorneys' fees and expenses incurred in connection with this action.

F. Is Jill Entitled To Simple Or Compound Pre-Judgment Interest?

A financially sophisticated reader from another state might well find it amusing that Delaware, of all states, has a judicial system that devotes so much attention to an issue that the financial markets of this nation have long ago decided in favor of compound interest." Indeed, in the face of banking industry trends that judges of this state can literally see right outside the windows of their chambers, Delaware courts have "'traditionally disfavored the practice of compounding interest . . . ."[78] In accordance with that

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[76] *See Advanced Med., Inc v. Arden Medical Systems, Inc.*, C.A. No. 87-3059, 1990 WL 39261, at *4-*5 (E.D.Pa. Mar. 30, 1990) (Kelly, D.J.) (enforcing a contract provision that made clear that the party who obtained the (however modestly) greater relief was entitled to recover its fees from the other party). For this reason, I reject Stephen's argument that Jill's breach of § 7(c) permits me to invoke the unclean hands recovery of fees as to her unsuccessful Document Access Claim. Because the parties in this case negotiated a provision that contemplates the determination of the prevailing party who will receive payment for all of her reasonable litigation expenses, it would disrespect then contract to deny Jill her full fees on a theory of unclean hands. By denying Jill her expenses as to the Informational Claims due to her breach of § 7(c), I would, in effect, be ignoring the fact that the parties rejected a claim-by-claim approach to fee shifting.

[7] For an excellent discussion of a major portion of the debate. see Chancellor Chandler's well-reasoned decision in *Onti v. Integra Bank*, Del. Ch.. 751 A.2d 904, 926-29 (1999).

[78] *Summa Corp. v. Trans World Airlines,* Inc.. Del. Supr., 540 A.2d 403, 4 10 (1988), *cert. denied*, 488 U.S. 853 (1988).

distaste, Delaware's legal rate of interest statute, 6 Del. C. § 2301(a), has been interpreted as providing for simple interest only.[79]

In this case, Stephen argues that because Jill has asked for pre-judgment interest pegged to the statutory rate, albeit on a compounded basis, I have no discretion to award compound interest. Jill, by contrast, stresses this court's flexibility to set a fair rate of pre-judgment interest and the illogic of perpetuating a slavish devotion to an outmoded approach. In support of her argument, she cites the Chancellor's recent *Onti* decision, the logic of' which commends itself to me:

> The rule or practice of awarding simple interest, in this day and age, has nothing to commend it — except that is has always been done that way in the past. And on that score, I side with Holmes: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." In Delaware, no rule of simple interest (exists in the General Corporation Law and, to the extent a rule has developed in our case law, it is time to put an end to it. The grounds for the rule of simple interest are at best the inability of a prudent investor to receive compound interest and are at worst a blind adherence to the past.[80]

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[79] *Weinberger v. UOP, Inc.*, Del. Ch., 5 17 A.2d 653. 657 (1986) *(citing Papendick v. Robert Bosch GmbH*, Del. Super., C.A. No. 562-1977, slip op. at 5, Christie, J. (Aug. 4, 1981)), *aff'd*, Del. Supr., 450 A.2d 894 (1982); *Hogg v. Walker*, C.A. No. 9090, lett. op. at 5 n.1, Chandler, V.C. (June 30, 1993).

[80] *Onti v. Integra Bank*, 75 l A.2d at 929 (citation omitted).

In considering this issue, I am cognizant of the need for a consistent application of a state statute. Having for so long been construed as provic.ing for a simple interest calculation, 6 Del. C. § 2301 should not be reinterpreted by the j udiciary as calling for compound interest. Any re-interpretation of the statute at this stage should come from the legitimate authority, the General Assembly. Even less desirable would be a judicial revision of the statute that would implicitly write into the Delaware Code a judicial right to determine on a case-by-case basis whether the statute should be interpreted as calling for simple or cornpound interest. Thus if the question before me were whether § 2301 provides for compound interest, I would answer no and. rule for Stephen on this issue.

But, as I see it, that is not the relevant question. Rather, the question is whether this court has the discretion to set a fair rate of pre-judgment interest on a compound basis. As our Supreme Court has stated, “a court of equity has broad discretion., subject to principles of fairness, in fixing the rate [of pre-judgment interest] to be applied. . . . In the Court of Chancery the legal rate is a mere guide, not the inflexible rule.“”

In view of the market realities, Jill’s financial sophistication, Stephen’s multiple breaches of duty., and the probability that Stephen earned

[81] *Summa Corp.*, 540 A.2d at 409

more than the legal rate of interest on the moneys he owes to Jill, fairness dictates that the pre-judgment interest awarded to Jill be compounded. Admittedly, an award of compounded interest tied to the legal rate will quite likely be inadequate to compensate Jill for missing the opportunity to invest the funds due her in one of the nation's longest-running bull markets, but it is a fair proxy for the injury caused to her,[82] and I therefore grant Jill's request for an award of pre-judgment interest using that approach.[83]

In so ruling, I necessarily reject Stephen's argument that I do not have the discretion to determine the appropriate rate of interest in this case. He contends that this dispute is a simple breach of contract case and that equity should therefore follow the law. In support of this argument, he cites this court's decision in *American General Corp. v. Continental Airlines Corp.*[84] In that case, it was held that where a damages claim in a breach of contract

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[82] Yet an award of pre-Judgment interest at the legal rate on a compounded basis still results in far less of a return than Jill could have achieved through a relatwely conservative approach to investing the moneys. had she received them in a timely manner. According to Stephen, the five-year annualized return on a basket of 368 "balanced" or "hybrid" mutual funds was 13.68%. Jill claims that the average is even higher for this category. In either event, it is clear that an Investor would not have been required to assume extreme risk in order to obtain a rate of return higher than the legal rate, even when that rate is compounded. In this regard, I decline Stephen's attempt to have me focus upon his borrowing rate rather than the rate necessary to ensure that Jill is "fairly" compensated for her "inability to use the money [due her] during the period in question." *Universal City Studios, Inc. v. Francis I. DuPont & Co.*, Del. Supr., 334 A.2d 216, 222 (1975).

[83] Relatedly, I construe this C'ourt's discretion to select a rate of interest higher than the statutory rate as including the lesser authority to award compounding. In this case, if the award turns on the compounding issue; I alternatively award Jill the statutory rate plus one and one half percent, which is less than she would likely have eamed. *See* n. 82, *supra.*

[84] Del. Supr., 622 A.2d 1 (1 992), *aff'd,* Del. Supr., 620 A.2d 856 (1992).

action was “legal, rather than equitable, in nature,” the statutory rate should be applied.[85]

As a general matter, it makes sense for the Court of Chancery to apply the statutory rate where the damage case before it is identical to a claim that could have been brought in Superior Court were there no need for this court to decide other equitable issues. In this case, however, the rote application of the statutory rate would ignore the realities of the relationship between Stephen and Jill. In order to avoid resolving a novel question of Delaware corporate law unnecessarily, I decided this case on contractual grounds. Nonetheless, Stephen is Jill’s fiduciary and has day-to-day control over a corporation in which Jill owns a major stake. His multiple breaches of his contractual duties to Jill were undertaken in his capacity as her fiduciary, were invariably to his personal financial or familial benefit and to Jill’s detriment, and could easily be recast as breaches of his duty of loyalty.” Each element of the monetary damages 1 have awarded consists of funds that

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[85] *Id.*, 622 A.2d at 14.

[86] *Cf. RJ Associates, Inc. v. Health Payors ' Organization Limited Partnership, HPA, Inc.,* Del. Ch., C.A. No. 16873, mem. op., 1999 WL 550350, at *10, Jacobs, V.C. (July 16, 1999) (“Conduct by an entity that occupies a fiduciary position may form the basis of both a contra-t and a breach of fiduciary duty claim.”); *Universal* Studios, Inc. *v. Viacom Inc.*, Del. Ch., 705 A 2d 579, 600 (1997) (same conduct held to constitute both a breach of conduct and breach of the fiduciary duty of loyalty).

Stephen diverted to his advantage and that — but for his breach of his obligatiors to Jill -- would have been kept by AMS and paid out to Jill.[87]

As a result, I am reluctant to conclude that Jill's rights or this court's remedial powers hinge on an exercise in claim labeling. Even if Jill contracted away her right to sue Stephen except in those instances in which his actions as fiduciary breached his contractual duties to her, it is implausible that she thereby impliedly waived her right to have this court of equity exercise its historical powers to shape a fitting remedy in those instances where she had clearly bargained for the right to seek redress here.[88] Put simply, even if Stephen validly narrowed his fiduciary duties to those specified in the contract,[89] he did not thereby obtain immunity from being responsible to Jill for a complete remedy in the event that he breached those narrower duties.[90]

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[87] *Cf.* 45 AM. JUR.2D § 62, at 74 (2d ed. 1999) ("Compound interest is chargeable against fiduciaries, not for the purpose of punishing them for intentional wrongdoing, but rather to carry into effect the principle enforced by courts of equity that a fiduciary is not permitted to profit from the unauthorized use of funds in his custody or to reach the profits realized thereby.").

[88] Agreement § 11.8 ("Venue for any action to enforce the provisions of this Agreement shall be exclusive in the Court of Chancery of the State of Delaware .").

[89] This is a question I see no need to resolve

[90] *Cf. Rollins Environmental Services, Inc. v. WSMW Industries, Inc.*, Del. Supr., 426 A.2d 1363. 1367 (1980) (noting that the Superior Court had on at least one occasion awarded higher than the legal rate of interest and assuming it was because "that case involved issues of an equitable overtone") (*citing E. I. duPont de Nemours V. Delmarva Power & Light Co.,* Del. Super., 302 C.A. 1977. lett. op., O'Hara, J. (July 8, 1980)).

Likewise, post-judgment interest will be awarded to Jill on the full amount of the judgment, including that part comprised of pre-judgment interest, for the following reasons.[91] Without an award of post-judgment interest on the full award, the obvious purpose of awarding pre-judgment interest --- to ensure that Jill is fully compensated for the loss of the time value of her money --- would be undercut.[92] Simply by delaying the payment of the final judgment, Stephen could chip away at the real value of Jill's recovery and diminish his obligation to her. It is difficult, as a matter of economics or fairness, to conceive oft he utility of an approach that would do other than attempt to guarantee that Jill will, at the time of payment, receive from Stephen the real economic value of the final judgment on the date it is first entered.[93]

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[91] *Stone & Co., Inc. v. Silverstein*, Del. Supr., No. 298, 1998, order at 15, Walsh, J. (Apr. 1, 1999) (requiring the articulation of "explicit grounds," for awarding interest on the entirety of a judgment)

[92] Of course. the purpose of awarding post-judgment interest would also not be fully served

[93] I recognize that there are cases in which the Court of Chancery's refusal to award post-judgment interest on the full amount of a judgment has been upheld as within its discretion. Moreover, the practice of awarding post-Judgment Interest on a full award that is partially comprised of pre-judgment Interest has been seen as "interest" on "interest" akin to compound interest E.g., *Summa Corp.*, 540 A.2d at 410: *Weinberger*, 517 A.2d at 657. Yet no case has squarely held that this court may not award post-judgment interest on the full award. And none of the cases touching on this issue have focused on the considerations that the failure to apply post-Judgment interest to the full award creates a disincentive for prompt payment ofjudgments, defeats the purpose ofthc pre-judgment interest award, and results in an erosion of the real economic value of the judgment.

IV. Conclusion

In view of the number of claims, ii is imprudent at this time to make any attempt at a precise calculation of the amount of the judgment. Rather, it seems preferable for the parties to meet and to try to reach accord on the form of a final order. To that end, the parties shall confer and attempt to negotiate an agreed-upon final order and report back to me within fourteen days of the date of this opinion. In the absence of precise agreement, the parties shall present their positions on the outstanding issues that still divide them, their view of the appropriate language to deal with those issues, and agreed-upon text addressing the issues on which they have come to a meeting of the minds.