COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
2084CV00735-BLS2

DR. ROBERT ADELMAN

v.

PROSKAUER ROSE LLP

DECISION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Dr. Robert Adelman helped found a life sciences investment firm that operated as a venture capital fund and as a hedge fund. The company later spun off the hedge fund. Adelman contends that when his law firm, Proskauer Rose LLP, prepared the contract documents, it negligently included a provision that allowed the new hedge fund manager to redeem Adelman's interests in the fund and its profits if the manager carried out certain permitted transactions. Adelman claims that this negligence caused him harm because the hedge fund manager took advantage of this provision, engaged in permitted "strategic transactions," and then stripped Adelman of his economic interests. Adelman is suing Proskauer for legal malpractice. He seeks $636 million in damages.

Proskauer argues that it is entitled to summary judgment in its favor. Though the firm concedes there is a triable issue as to whether it breached the standard of care by adding the "Strategic Transactions" provision, Proskauer contends that the hedge fund manager breached other contract provisions and his fiduciary duty to Adelman, and that each of these breaches "severs the chain of causation between Proskauer's alleged conduct and Adelman's injury." Proskauer also argues that Adelman lacks standing to sue for losing his interest in the hedge fund's profits, because Adelman transferred that interest to a trust.

The Court disagrees and will **deny** Proskauer's motion for summary judgment. Two of the contract provisions that Proskauer invokes are irrelevant, because the contracts expressly gave the hedge fund manager the right to engage in the transactions notwithstanding those provisions. The fiduciary duty argument similarly fails because the contracting parties agreed that the hedge fund manager did not owe Adelman any fiduciary duty. Other arguments by Proskauer suggest at most that the hedge fund manager may also be liable to Adelman; Proskauer has not shown that the manager's alleged malfeasance was an unforeseeable superseding cause that absolves Proskauer of potential

liability. The summary judgment record supports a finding that Proskauer's alleged negligence caused the loss of Adelman's share of future hedge fund profits. Finally, Adelman has standing to sue Proskauer for the loss of his right to share in those profits. For these reasons, and as further explained below, Proskauer is not entitled to summary judgment in its favor as a matter of law.

1. **Factual Background and Summary of Claims**. Dr. Robert Adelman, Dr. Corey Goodman, and two others co-founded a life sciences investment firm that they called venBio. The two other founders later retired, leaving Adelman and Goodman as the sole owners. The firm invested in private companies through venture capital funds and in public companies through its hedge funds. Over time, Dr. Berhzad Aghazadeh became the hedge funds' principal portfolio manager.

1.1. **The Spinoff**. Adelman and Goodman decided to spin off the hedge fund operation as a separate entity and let Aghazadeh become its majority owner and sole manager.

Attorneys at Proskauer Rose LLP represented Adelman and Goodman in preparing the contract documents needed to carry out this transaction.

Adelman told Proskauer that he wanted to give Aghazadeh operational control over and a majority ownership interest in the hedge fund, so long as his economic interests in the hedge fund and in its future profits were protected, including in the event of a sale or transfer of the hedge fund business. As a co-owner of the hedge fund, Adelman had—and after the spin-off would continue to have—the right to share in profits earned by the hedge fund manager, including fees based on the amount of assets under management and other fees based on the fund's performance; in the hedge-fund world the performance-based fees as known as "carried interest" or "carry."

After the spin-off transaction, the venBio hedge fund business was structured as follows:

- The individual hedge funds were managed by a "Service Company" called venBio Select Advisor LLC.
- The Service Company was wholly owned by a "Partnership" called venBio Select Advisor L.P. (a Delaware limited partnership), which was the sole member of the Service Company. The Partnership's original limited partners were Aghazadeh, Adelman, and Goodman. Later on, Goodman chose to wind down his interest in the hedge

fund business. After he did so, Aghazadeh and his spouse owned 72.5 percent of the Partnership, and Adelman owned the remaining 27.5 percent.

- The Partnership was controlled and run by its General Partner, an entity called venBio Select Advisor Management Holdings GP, LLC (a Delaware limited liability company). Aghazadeh was the majority owner and sole Manager of the General Partner; he therefore controlled and ran the hedge fund business. Adelman was a minority member of the General Partner.
- The carry earned by the Service Company was paid to a "Carry Vehicle" called venBio, LLC. Aghazadeh, Adelman, and Goodman were the Carry Vehicle's original members; this is how they were to receive their share of the carry. However, Adelman's interest in future carry belonged to him personally, and he evidently was free to assign it to a different carry vehicle.

Proskauer drafted and negotiated the Partnership's amended and restated limited partnership agreement (the "LPA") and the General Partner's amended and restated general partnership agreement (the "GPA"). The spin-off of venBio's hedge fund business was accomplished when Aghazadeh, Adelman, and Goodman executed the LPA and GPA together, as part of the same transaction, in September 2017. The LPA and GPA both state that they are governed by Delaware law.

1.2. **Strategic Transaction Provisions**. In its initial draft of the LPA, Proskauer included a "Strategic Transactions" provision as § 3.2.5. Adelman contends that Aghazadeh never asked for this provision, it was of no benefit and great detriment to Adelman, and Proskauer was negligent by adding it. Adelman contends that Proskauer mistakenly copied and pasted this provision from a prior contract it had worked on, even though it did not belong in the Partnership's amended LPA. The provision remained in the final, executed version of the amended LPA.

This provision authorizes the General Partner to cause the Partnership to engage in a "Strategic Transaction"—which is defined as "A Financing, Acquisition or Asset Sale"—without the consent of the limited partners. It also authorizes the General Partner "to determine whether this Section 3.2.5 is applicable to any transaction or series of transactions," and states that any such

determination by the General Partner "shall be binding on all Partners." And § 3.2.5 provides that the limited partners, including Adelman, "shall not have any appraisal rights in connection with any Strategic Transaction."

In addition, LPA § 11.1 states that, "Subject to 4.1.1(g) of the GP Agreement, nothing herein or in any other agreement shall prevent the General Partner from entering into a Strategic Transaction."

Adelman contends that Proskauer's inclusion of § 3.2.5 allowed Aghadazeh to redeem Adelman's hedge fund interests merely by causing a Strategic Transaction to take place, even if the qualifying transaction had no economic substance.

Section 3.2.5 of the LPA provides that, "In connection with any Strategic Transaction, the Partnership shall have the right to redeem and an assignable right to purchase any Partner's interest in the Partnership (other than such Partner's Transaction Percentage)." And § 4.1.1(i) of the GPA provides that, "Notwithstanding any provision contained herein to the contrary, Aghazadeh shall be permitted to cause the redemption of each of Adelman and Goodman from any venBio Carry Vehicle in the event of a third party Acquisition with respect to 100% of the limited partner interests in the Partnership or Asset Sale of the Partnership (each as defined in the Partnership Agreement)."

1.3. **Dr. Aghazadeh's Transactions and Redemptions**.

1.3.1. **The Acuta Financing**. In June 2018, Aghazadeh caused the Partnership to enter into a transaction with Acuta Capital Partners, LLC. The transaction involved a $1.5 million loan by Acuta to the Partnership that was evidenced by a promissory note, and the purchase by Acuta of $500,000 preferred limited partner interest in the Partnership.

1.3.2. **The Opal Transaction**. In December 2018, Aghazadeh caused the Partnership to enter into a transaction that was structured as a business combination of the venBio hedge fund business owned by the Partnership and the venture fund business of HealthQuest Capital Management L.P., which was owned by Dr. Garheng Kong. The deal was structured to include a sale of the Partnership's assets, so that it would constitute a Strategic Transaction within the meaning of LPA § 3.2.5. The transaction was essentially as follows:

- Kong formed a limited partnership called Opal Parent, LP ("Opal Parent"). Its general partner was a limited liability company called

Opal Parent GP, LLC. Kong was the sole member and manager of Opal Parent's general partner.

- Kong and his spouse contributed their interests in HealthQuest to Opal Parent. In exchange, they received all of the Class A limited partnership interests in Opal Parent, which allowed Kong to continue to manage and exercise complete control over HealthQuest.
- Opal Parent bought the Partnership's assets, including the Service Company. In exchange, the Partnership received all of the Class B limited partnership interests in Opal Parent. Since Aghazadeh simultaneously redeemed Adelman's ownership interest in the Partnership, as discussed below, Aghazadeh caused the General Partner to distribute these Class B interests to himself and offered to pay Adelman 27.5 percent of an alleged present cash value of those interests. These interests permit Aghazadeh to continue to manage and exercise complete control over the Service Company, and thus over its hedge funds.
- In addition, Aghazadeh received a 50 percent ownership interest in Opal Parent's general partner.
- Ten percent of HealthQuest's gross revenues were allocated to "Pooled Revenue," and all other proceeds distributed by HealthQuest were allocated to Kong and his spouse.
- Similarly, ten percent of the Service Company's gross revenues were allocated to "Pooled Revenue," and all other proceeds distributed by the Service Company were allocated to Aghazadeh.
- To the extent that Pooled Revenue is not spent or reserved for future expenditure, it is to be distributed equally to Kong and Aghazadeh.

Kong and Aghazadeh later changed the brand name of the Opal entities, including the former venBio hedge fund entities, to Avoro.

1.3.3. **Redemption of Dr. Adelman's Interests**. On the same day that Aghazadeh caused the Partnership to transfer its assets to Opal Parent, Aghazadeh also sent a notice of redemption to Adelman. In that letter, Aghadazeh declared that the Acuta Transaction constituted a Financing and the Opal Transaction constituted an Asset Sale, as those terms are defined within the LPA, and that LPA § 3.2.5 therefore applied to both of those

transactions. Aghazadeh told Adelman that the Partnership was exercising its right under § 3.2.5 to redeem Adelman's ownership interest in the Partnership.

In June 2019, an attorney representing Aghazadeh wrote an attorney representing Adelman, stating that Adelman's interest in the Carry Vehicle had been redeemed as of May 3, 2019, when the Opal Transaction closed. After this redemption, Aghazadeh and a trust created by him become the owner of 100 percent of the Carry Vehicle.

1.4. **Dr. Adelman's Claims**. Adelman contends, among other things, that Proskauer breached the applicable standard of care by drafting the LPA and the GPA in a way that failed to adequately protect Adelman's economic interests in the hedge fund and its carry, and by failing to adequately advise Adelman on the terms of the LPA and GPA or the risks created by the inclusion of the Strategic Transaction provisions.

Adelman says that, after he and Goodman learned about the Acuta Transaction, they spoke with their main contacts at Proskauer, asked why Proskauer had included the § 3.2.5 Strategic Transaction provision in its first draft of the LPA, and Proskauer had no answer. Documents produced in discovery suggest that Proskauer then realized that its inclusion of § 3.2.5 had been a mistake. For example, the Proskauer partner with lead responsibility for drafting the amended LPA and GPA for the hedge fund spin-off circled the provision in § 3.2.5 that allows the Partnership to redeem Adelman's interests in the event of a Strategic Transaction, and wrote "fuck" (underlined twice) next to it. Adelman is prepared to offer expert testimony that Proskauer breached the applicable standard of care by including this provision without adequately protecting Adelman's interests, and by not telling Adelman about the risk he could lose his interests in the hedge fund because of this provision.

Adelman further contends that Proskauer's alleged negligence caused Adelman to lose his interest in the Partnership, the Carry Vehicle, and all future carry to be generated by the hedge fund, because Aghazadeh used the Strategic Transaction provision to strip Adelman of those valuable interests by arranging the Acuta Financing and the Opal Transaction.

2. **Legal Background**. The following legal principles are relevant to Proskauer's summary judgment motion and inform the Court's decision.

2.1. **Causation in Legal Malpractice Cases**. To prevail on a legal malpractice claim against their former lawyers, the plaintiff client must demonstrate that

its attorneys "failed to exercise reasonable care and skill in handling the matter for which the attorney was retained," "the client has incurred a loss," and "the attorney's negligence is the proximate cause of the loss." *Jenkins* v. *Blast*, 95 Mass. App. Ct. 654, 658 (2019), quoting *Kiribati Seafood Company, LLC* v. *Deschert LLP*, 478 Mass. 111, 117 (2017).

"The causation element requires a plaintiff to prove that he 'probably would have obtained a better result had the attorney exercised adequate skill and care.' " *Greenspun* v. *Boghossian*, 95 Mass. App. Ct. 335, 339 (2019), quoting *Kiribati Seafood*, *supra*. To do so, the plaintiff must show that their attorneys' negligence was both a "factual cause" and a "legal cause" of the harm that he suffered. See *Doull* v. *Foster*, 487 Mass. 1, 7–8 (2021). "Generally, a defendant is a factual cause of a harm if the harm would not have occurred 'but for' the defendant's negligent conduct." *Id*. at 7. And the defendant's negligence is a legal cause of the harm if the injury suffered by the plaintiff was also "within the scope of the foreseeable risk arising from the negligent conduct." *Id*. at 8, quoting *Leavitt* v. *Brockton Hosp., Inc.*, 454 Mass. 37, 45 (2009). "[T]here is no requirement that a defendant must be the sole factual cause of a harm;" to the contrary, in many cases there is more than one but-for cause of an injury. See *Doull v. Foster*, 487 Mass. 1, 16–17 (2021).

An unforeseeable, superseding cause will relieve the defendant of liability for its negligence by "extinguish[ing]" any prior proximate cause. *Kent* v. *Commonwealth*, 437 Mass. 312, 321 (2002). If intervening events or conduct by a third party occur "between the negligent conduct and ultimate harm," the intervening events were not the result of the defendant's negligence, the plaintiff would not have been harmed but for the intervening cause, and those intervening events were not a foreseeable risk of the defendant's negligence, then the intervening events "become a superseding cause of the harm" and the defendant is not liable for its negligence. *Id*.; accord, e.g., *Jesionek* v. *Massachusetts Port Auth.*, 376 Mass. 101, 105 (1978).

"A superseding cause in legal malpractice '(1) must have occurred after the original negligence; (2) cannot [be] the consequence of the attorney's negligence; (3) created a result that would not otherwise have followed from the original negligence; and (4) was not reasonably foreseeable.' " *Kiribati Seafood*, 478 Mass. at 120, quoting 1 R.E. Mallen, Legal Malpractice § 8:25, at 1049 (2017 ed). "Where the intervening cause meets all four criteria, the intervening cause is a new and independent cause that breaks the chain of

causation, becoming a superseding causes the relieves the defendant of liability for the original negligence." *Id*.

"But where the intervening cause … is reasonably foreseeable and the attorney could have taken reasonable steps to prevent or mitigate the anticipated harm, the intervening cause is a 'concurring cause' that leaves the causal link between the defendant's negligence and the plaintiff's harm unbroken." *Kiribati Seafood*, 478 Mass. at 121.

"The issue whether an attorney's negligence was a proximate cause of a client's loss may be resolved at the summary judgment stage." *Global NAPs, Inc.* v. *Awiszus*, 457 Mass. 489, 500 (2010). If the undisputed facts were to show that Adelman cannot establish that negligence by Proskauer was the proximate cause of his loss, then Proskauer would be entitled to summary judgment in its favor. See *Coastal Orthopaedic Institute, P.C.* v. *Bongiorno*, 61 Mass. App. Ct. 55, 63–64 (2004); *Fiduciary Trust Co.* v. *Bingham, Dana & Gould*, 58 Mass. App. Ct. 245, 251–254 (2003).

2.2. **Interpreting Business Contracts**. The Court must apply Delaware law when construing the LPA and the GPA in this case, because the contracting parties agreed that both contracts are governed by Delaware law. Where parties to a contract "have expressed a specific intent as to the governing law, Massachusetts courts will uphold the parties' choice as long as the result is not contrary to public policy.'" *Oxford Global Resources, LLC* v. *Hernandez*, 480 Mass. 462, 468 (2018), quoting *Hodas* v. *Morin*, 442 Mass. 544, 549–550 (2004).

The proper interpretation of an unambiguous written contract is a question of law that may be resolved on a motion for summary judgment. See, e.g., *Milton Investments, LLC* v. *Lockwood Bros., II, LLC*, civil action no. 4909-VCP, 2010 WL 2836404, at *4 (Del. Ch. July 20, 2010).

"[W]hether a contract is unambiguous is [also] a question of law." *Sunline Commercial Carriers, Inc.* v. *CITGO Petroleum Corp.*, 206 A.3d 836, 847 n.68 (Del. 2019). "Contract language is not ambiguous merely because the parties dispute what it means." *Alta Berkeley VI C.V*. v. *Omneon, Inc*., 41 A.3d 381, 385 (Del. 2012). Instead, Delaware follows "an objective theory of contracts, meaning that a contract's construction should be that which would be understood by an objective, reasonable third party." *Stream TV Networks, Inc.* v. *SeeCubic, Inc.*, 279 A.3d 323, 338 (Del. 2022), quoting *Cox Communications, Inc.* v. *T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022).

Since the limited partnership and general partnership agreements were executed together as part of a single transaction involving the same parties, the Court must read them together and consider that circumstance in construing any part of either document. See *E.I. du Pont de Nemours and Co., Inc.* v. *Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985); *Florida Chemical Company, LLC* v. *Flotek Industries, Inc.*, 262 A.3d 1066, 1081 (Del. Ch. 2021).

Furthermore, when construing business contracts like these, a court must not "be blind to the general business context in which a given contract was negotiated." *Pharmaceutical Prod. Dev., Inc.* v. *TVM Life Sci. Ventures VI, L.P.*, 2011 WL 549163, at *4 n.24 (Del. Ch. 2011). "Business contracts must be construed with business sense as they naturally would be understood by intelligent persons of affairs, … and not according to forced and refined interpretations which are intelligible only to lawyers." *Id.*, quoting 17A Am. Jur. 2d Contracts § 386.[1]

At the same time, "the background facts cannot be used to alter the language chosen by the parties" in their agreement. *Town of Cheswold* v. *Central Del. Bus. Park*, 188 A.3d 810, 820 (Del. 2018), quoting *Chicago Bridge & Iron Co. N.V.* v. *Westinghouse Elec. Co. LLC*, 166 A.3d 912, 926–927 (Del. 2017). A court may not "relieve sophisticated parties of the burdens of contracts they wish they had drafted differently." *CompoSecure, L.L.C.* v. *CadUX, LLC*, 206 A.3d 807, 811 n.6 (Del. 2018), quoting *DeLucca* v. *KKAT Mgmt., L.L.C.*, C.A. No. 1384-N, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006). "Parties have a right to enter into good and bad contracts, the law enforces both." *Id.*, quoting *Nemec* v. *Shrader*, 991 A.2d 1120, 1126 (Del. 2010).

To make sense of the disputed provisions, the Court must consider the contracts as a whole and construe each provision in context, not in isolation. *Stonewall Ins. Co.* v. *E.I. du Pont de Nemours & Co.*, 996 A.2d 1254 (Del. 2010). And it must interpret the contracts in a manner that gives "meaning and effect" to each word and provision, under the reasonable assumption "that the parties would not include superfluous verbiage in their agreement[s]." *Zimmerman* v.

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[1] Accord *Lowber* v. *Bangs*, 69 U.S. (2 Wall.) 728 (1864) ("All mercantile contracts ought to be construed according to their plain meaning, to men of sense and understanding, and not according to forced and refined constructions, which are intelligible only to lawyers, and scarcely to them.") (quoting *Crookewit* v. *Fletcher*, 1 Hurlstone & Norman 893, 912 (Ct. of Exchequer 1857))

Crothall, 62 A.3d 676, 691 (Del. Ch. 2013). In sum, the Court must "reconcile or harmonize" all of the contracts' provisions. *Hampton* v. *Turner*, civ. action 8963-VCN, 2015 WL 1947067, at * 3 (Del. Ch. 2015).

When harmonizing different contract provisions, courts may not mechanically deem every more specific provision to trump every more general one. Instead, the rule that, specific language in a contract controls over more general language "applies only 'where specific and general provisions conflict.' " *In re TransPerfect Global, Inc.*, C.A. Nos. 9700-CB and 10449-CB, 2012 WL 1711797, at *44 (Del. Ch. Apr. 30, 2021), quoting *DCV Holdings, Inc.* v. *ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005); accord *Merck & Co., Inc.* v. *Bayer AG*, C.A. No. 2021-0838-NAC, 2023 WL 2751590, at *10–*11 (Del Ch. 2023).

3. **Causation**. As noted above, Proskauer argues that Dr. Aghazadeh breached several provisions of the GPA as well as his common law fiduciary duty, and that each of these alleged breaches "severs the chain of causation between Proskauer's alleged conduct and Adelman's injury." In other words, Proskauer contends that it cannot be held liable for the harm suffered by Adelman because Aghazadeh's alleged misconduct is a "superseding cause." See *Kiribati Seafood*, 478 Mass. at 121 (superseding cause "breaks the chain of causation); *Mullins* v. *Pine Manor College*, 389 Mass. 47, 62 (1983) (superseding cause "sever[s] the chain of proximate causation). The Court is not persuaded.

3.1. **LPA § 3.2.5 Generally Trumps the GPA**. Proskauer argues that Aghazadeh violated GPA §§ 4.1.1(f) and 4.1.1(j) by causing the Partnership to sell its assets, including the Service Company, to Opal Parent. These provisions can be summarized as follows:

- Section 4.1.1(f) required Adelman's consent for any transaction involving a potential conflict between Aghazadeh's interests and the interests of the General Partner, Partnership, or Service Company; no consent was required for a transaction involving a conflict between the interests of Aghazadeh and Adelman.
- Section 4.1.1(j) provides that the Service Company must "remain wholly owned by the Partnership" so long as Adelman or Goodman remained a member of the General Partner or a limited partner of the Partnership.

Proskauer's invocation of these provisions is misplaced because the LPA expressly provides that they do not apply to any Strategic Transaction.

The last sentence of LPA § 11.1 provides that the General Partner's authority to have the Partnership engage in Strategic Transactions is not limited by any part of the GPA other than § 4.1.1(g). This sentence states that, "Subject to 4.1.1(g) of the GP Agreement, nothing herein or in any other agreement shall prevent the General Partner from entering into a Strategic Transaction." This provision unambiguously means that the Partnership's sale of its assets could not have violated § 4.1.1(f) or § 4.1.1(j), because those provisions did not apply to such a transaction.

Proskauer makes two arguments as to why the last sentence of LPA § 11.1 does not mean what it clearly says. Neither is persuasive.

First, the fact that this sentence appears in a contract section titled "Transfer of Limited Partners' Interests in the Partnership" does not mean that this sentence is limited in scope to that topic. The parties agreed, in LPA § 14.7.11(d), that captions "are for convenience only and do not define or limit any term of this Agreement." As a result, the section heading does not limit the scope or alter the plain meaning of the last sentence.

Second, Proskauer seems to assert that, even if the last sentence of LPA § 11.1 frees the General Partner from complying with most parts of the GPA when it undertakes a Strategic Transaction, it does not exempt the General Partner's Manager from doing so. That makes no sense. The General Partner was a limited liability company that could only act through its Manager. If the General Partner was generally not subject to the GPA when undertaking a Strategic Transaction, that means that the Manager was not subject to the GPA when he caused the General Partner to undertake a strategic transaction.

Like a corporation, a limited liability company is an artificial entity that can act only through its agents; it follows that if the corporate entity has the power to take certain actions, then its principal executive officers (like the manager of an LLC) have the authority to cause the entity to take those actions. See *Hessler, Inc.* v. *Farrell*, 226 A.2d 708, 712 (Del. 1967); *Keyser* v. *Curtis*, C.A. No. 7109-VCN, 2012 WL 3115453, at *16 n.145 (Del. Ch. July 31, 2012).

3.2. **Alleged Breach of GPA § 4.1.1(g)**. Proskauer also contends that Aghazadeh violated GPA § 4.1.1(g) by causing the General Partner to agree to the Opal Transaction without receiving Adelman's consent or, in the alternative,

disclosing in advance all the benefits that Aghazadeh was to receive in connection with that transaction.[2]

This provision required Aghazadeh to disclose all benefits that he would receive "in connection with or related to" the Strategic Transaction, whether those benefits were employment-related or not. GPA § 4.1.1(g) required Aghazadeh to disclose in writing:

> all compensation, payments or other benefits provided to or otherwise made available, explicitly or implicitly, directly or indirectly, to Aghazadeh and any related or affiliated parties in connection with or related to any such Strategic Transaction, including the terms of Aghazadeh's employment with the Partnership, the Service Company or the third party (or its Affiliates) to such Strategic Transaction following any such Strategic Transaction.

This broad disclosure requirement is all-encompassing. Adelman's argument that it only required Aghazadeh to disclose employment-related compensation or benefits is incorrect.

However, § 4.1.1(g) did **not** require Aghazadeh to disclose in advance that a consequence of a planned Strategic Transaction would be that the Partnership would exercise its contractual rights to redeem Adelman's ownership interest in the Partnership or his interest in any Carry Vehicle and future carry generated by the Service Company. The plain language of the LPA and GPA made clear that a Strategic Transaction would trigger such redemption rights. Section 4.1.1(g) cannot fairly be read as requiring Aghazadeh to disclose consequences of the LPA and the GPA. Instead, it required disclosure only of additional compensation or other benefits that would accrue to Aghazadeh as part of a Strategic Transaction.

Most of the benefits that Proskauer says Aghazadeh failed to disclose were consequences of his ability to redeem Adelman's economic interests in the hedge fund after a Strategic Transaction, and were not benefits that Aghazadeh was to receive in connection with the Opal Transaction. Aghazadeh was able to

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[2] Section 4.1.1(g) provides that Aghazadeh may not cause the General Partner to agree to any Strategic Transaction without Adelman's consent, unless (i) Aghazadeh discloses in advance all benefits that he would received "in connection with or related to" the Strategic Transaction, and (ii) those benefits "do not exceed market terms of employment for a similarly qualified individual" or, if they do, Adelman will receive 27.5 percent of such excess.

obtain full control of the Service Company because he could redeem Adelman's ownership interest in the Partnership as a result of causing the Partnership to sell its assets; this was a consequence of the Opal Transaction, but not a benefit that Aghazadeh received as part of or in connection with that transaction. The same is true of Aghazadeh's ability to seize all rights to carry from the Service Company; this was also a consequence of the Opal Transaction, which allowed Aghazadeh to redeem Adelman's interest in the Carry Vehicle.

The Court concludes that the same is true of Aghazadeh's ability to receive all of the Class B units in Opal Parent. The Court understands, and Proskauer says, that the Opal Transaction was structured so that these Class B units would all be paid to the Partnership, as consideration for its sale of its assets to Opal Parent. But, upon execution of the Opal Transaction contracts, Aghazadeh obtained and immediately exercised the contractual right to redeem Adelman's shares in the Partnership. Having done so, and thus having become the sole owner of the Partnership, Aghazadeh was then free to direct that the Class B shares be issued to him rather than to the Partnership. This result was, once again, a consequence of the redemption rights that Proskauer included in the LPA, not compensation or other benefits that was to be paid to Aghazadeh in connection with the Opal Transaction itself.

Aghazadeh's receipt of a 50 percent ownership interest in Opal Parent's general partner is different. It appears that this was a benefit that Aghazadeh received in connection with the Opal Transaction. He was therefore required to disclose this benefit in advance, or obtain Adelman's consent to the Opal Transaction.[3]

Nonetheless, the summary judgment record does not establish that this was a material breach, because it does not conclusively demonstrate whether this interest in the Opal Parent general partner had value that, this interest together with Aghazadeh's other compensation and benefits, exceeded the market terms of employment for a similarly-qualified individual. If not, then under the terms of GPA § 4.1.1(g) it seems unlikely that Adelman would have any right to

[3] The last clause of GPA § 4.1.1(g) does not exclude Aghazadeh's 50 percent interest in Opal Parent's general partner from the requirements of this provision. That clause says that "any sale consideration shared among the limited partners of the Partnership in proportion to their respective Transaction Percentages, shall not be treated as 'compensation, payments or other benefits' " for the purposes of applying the rest of the section. It does not apply to Aghazadeh's interest in Opal Parent's general partner, because no part of that interest was ever shared with Adelman.

unwind the redemption of his hedge fund interests or to obtain any compensatory damages from Aghazadeh for breaching § 4.1.1(g).

In sum, even on Proskauer's theory of causation, Proskauer is not entitled to summary judgment based on what may have been a technical but otherwise inconsequential violation of § 4.1.1(g).

3.3. **Alleged Breach of Fiduciary Duty**. Proskauer's assertion that the contract document preserved the full scope of Aghazadeh's fiduciary duty to Adelman, and that Aghazadeh breached that duty by carrying out the Opal Transaction and then redeeming Adelman's economic interests in the hedge fund and its carry, is without merit. In fact, the plain language of the GPA eliminated any fiduciary duty that Aghazadeh would otherwise have owed to Adelman individually, and made clear that redeeming Adelman's interests as provided in the LPA and GPA would not be a breach of fiduciary duty.

Parties to a limited liability company agreement are free to restrict or eliminate fiduciary duties that would otherwise be owed by the manager or members, so long as they make their intent to do so "plain and unambiguous." See *Ross Holding and Management Company* v. *Advance Realty Group, LLC*, C.A. No. 4113-VCN, 2014 WL 4374261, at *13 & n.138 (Del. Ch. Sept. 4, 2014), quoting *Feeley* v. *NHAOCG, LLC*, 62 A.3d 649, 664 (Del. Ch. 2012). The Delaware Limited Liability Company Act "permits the elimination of some, or all, fiduciary duties for members, managers or others through a provision in an LLC agreement." *CelestialRX Investments, LLC* v. *Krivulka*, C.A. No. 11733-VCG, 2017 WL 416990, at *16 (Del. Ch. Jan. 31, 2017) (citing 6 Del. C. § 18-1101(c)).

Aghazadeh's fiduciary duties as Manager of the General Partner were substantially limited by contract. The first sentence of GPA § 4.1.1(i) says that Aghazadeh "owes, to the fullest extent provided by Delaware law, fiduciary duties to the [General Partner] and the other Members **as a group**." The second sentence explains what this means. It says that, so long as Aghazadeh and the General Partner act in a manner that is consistent with their fiduciary duties to the various venBio funds and their portfolio companies, then Aghazadeh will not "be deemed to have breached any fiduciary duties to the [General Partner] and the other Members." And the third sentence specifies that causing a redemption of any Member's interests in the funds, in a manner consistent with the GPA and the funds' governing agreements, "shall not be considered a breach of Aghazadeh's fiduciary duties to the Company and the other Members."

This provision is a plain and unambiguous statement that Aghazadeh owed no fiduciary duty to Adelman individually, other than to act fairly toward the hedge funds and their portfolio companies.

Proskauer's further argument that Aghazadeh nonetheless owed fiduciary duties to Adelman in Aghazadeh's capacity as a limited partner of the LPA is beside the point. Aghazadeh's status as a limited partner did not allow him to exercise any control over the Partnership or to cause it to enter into the Acuta Financing or the Opal Transaction. The Partnership was controlled by the General Partner. Aghazadeh's power to run the Partnership came from his position as Manager of the General Partner. As a result, the GPA's elimination of any fiduciary duty owed by Aghazadeh to Adelman personally disposes of Proskauer's assertion that Aghazadeh's orchestration of the Opal Transaction was a violation of a fiduciary duty owed to Adelman.

3.4. **Alleged Breach of Consideration Sharing Provisions**. Proskauer further argues that Aghazadeh breached provisions of the LPA that required him to transfer to Adelman a proportionate share of the Class B units that Opal Parent gave as consideration for acquiring the Service Company, and that Aghazadeh's failure to do so insulates Proskauer from liability. Both parts of this argument are without merit.

3.4.1. **Not Implicated**. First, Proskauer has not shown that the Aghazadeh breached the LPA's consideration-sharing or asset-distribution provisions.

LPA § 3.2.5 provides that, "in connection with any Acquisition, the Limited Partners shall share in the consideration paid with respect to such Acquisition in proportion to their Transaction Percentages." But there is no evidence that the Opal Transaction was an Acquisition as that term is defined in the LPA. Instead, it was structured as an Asset Sale. And § 3.2.5 as drafted by Proskauer does not require any consideration-sharing in the event of an Asset Sale.

The LPA distinguishes between Acquisitions and Asset Sales. The former is defined as "an acquisition of the business of the Partnership (including without limitation any merger or consolidation of the Partnership or sale of interests in the Partnership by all of the Partners)." The latter term means "the sale of all or substantially all of the assets of the Partnership to a success in the business of the Partnership." Under these definitions, the sale of all of the Partnership's assets is an Asset Sale, not an Acquisition.

It is not clear why § 3.2.5 would make this distinction between an Acquisition of the Partnership and an Asset Sales of the Partnership's main asset, the Service Company. But it did. Though Proskauer may now wish that the consideration-sharing sentence in LPA § 3.25. had protected Adelman in the event of an Asset Sale, and not just in the event of an Acquisition, the Court cannot disregard the distinction that the contracting parties drew between the two kinds of events. See, e.g., *Nemec*, 991 A.2d at 1126.

LPA § 7.2.3 is not implicated here either. It provides that "any distributions of cash or other assets relating to or otherwise resulting from a Strategic Transaction shall be made to all Partners in proportion to their respect Transaction Percentages." This provision does not entitle Adelman to 27.5 percent of any assets payable to the Partnership in connection with a Strategic Transaction. Instead, it says only that if assets are distributed to the partners then they must be allocated in proportion to the agreed-upon shares. Neither the Opal Transaction nor the Acuta Financing resulted in any distribution of any assets to Partnership members. The subsequent distribution of the Class B units in Opal Parent to Aghazadeh does not implicate § 7.2.3 because, as discussed above, that did not happen until after Adelman's interest in the Partnership had been redeemed.

3.4.2. **Not a Superseding Cause**. In any case, even if Aghazadeh had violated the consideration-sharing requirement of LPA § 3.2.5 or the proportionate asset-distribution requirement of LPA § 7.2.3, that would not be a superseding cause that absolves Proskauer of liability.

The summary judgment record suggest that Aghazadeh would not have been able to redeem Adelman's interests and put him in the position of having to try to enforce these provisions but for Proskauer's alleged negligence. It seems foreseeable that, once Proskauer drafted the LPA to let Aghazadeh engage in a Strategic Transaction without Adelman's consent and use that event to trigger a redemption, then Adelman could have trouble collecting his share of the Strategic Transaction consideration from Aghadazeh.[4] And a jury could reasonably find that Proskauer could have protected Adelman from the risk of

[4] If foreseeability is in dispute with respect to causation, it would have to be resolved at trial, not on a motion for summary judgment. See *Copithorne* v. *Framingham Union Hosp.*, 401 Mass. 860, 865 (1988) (reversing summary judgment for defendant on this ground).

suffering this harm, for example by not including the Strategic Transaction provision in the LPA.

The summary judgment record therefore does not establish that Aghazadeh's alleged breach of the consideration-sharing and asset-distribution provisions of the LPA is a superseding cause that would relieve Proskauer of liability for its own negligence. See *Kiribati Seafood*, 478 Mass. at 120–121. The decisions that Proskauer cites from the *Chang* and *Greenwald* cases are not to the contrary.[5]

3.5. **Causation as to Loss of Carry**. Proskauer also contends that Adelman cannot sue for the loss of his interest in the Service Company's carry because it was not caused by Proskauer's inclusion of the Strategic Transaction's provision in LPA § 3.2.5. Proskauer makes several arguments in support of this point. They are all unavailing.

First, although redemptions of Adelman's interest in the Carry Vehicle are addressed in GPA § 4.1.1(i), and not in LPA § 3.2.5, it is nonetheless Aghazadeh's ability to cause the Partnership to engage in an Asset Sale under § 3.2.5 that triggered his right to redeem Adelman's interest in any venBio carry vehicle under § 4.1.1(i). The summary judgment record creates a triable issue as to whether Proskauer's alleged negligence in adding and failing to limit the Strategic Transaction provision to the LPA was a but-for cause of Adelman's loss of his interest in the Service Company's valuable carry.

Second, though Adelman had assigned his interest in the Carry Vehicle to a Nevada trust, that did not limit Aghazadeh's right to redeem Adelman's assigned interest in the event of an Asset Sale, as Proskauer contends. GPA § 13.6 provides that the agreement, including the redemption provision, is binding on the parties' successors and assigns. (The LPA has a parallel

[5] The legal malpractice claim in *Chang* failed both because there had been no breach of the standard of care, as Chang did not say that agreement was improperly drafted, and because Chang suffered no harm from the alleged malpractice, as it did not deprive him of the opportunity to make a claim against settlement proceeds that were held in trust for that very purpose. See *Chang* v. *Winklevoss*, 95 Mass. App. Ct. 202, 216–217 (2019). The unpublished decision in *Greenwald* did not turn on causation either, but instead turned on the absence of harm. See *Greenwald* v. *Burns & Levinson, LLP*, No. 13-P-367, 2014 WL 101577, at *1–*2 (Mass. App. Ct. Jan. 13, 2014). In any case, no Appeals Court decision or unpublished rescript by an Appeals Court panel may trump the Supreme Judicial Court's holding in *Kiribati Seafood*.

provision.) As Adelman's assignee, the Trust was bound by the redemption right granted in GPA § 4.1.1(i).

Third, Proskauer's apparent assertion that the reference to "Asset Sale" in GPA § 4.1.1(i) has nothing to do with the declaration of a Strategic Transaction under LPA § 3.2.5 is also without merit. The last sentence of § 4.1.1(i) expressly incorporates the definitions of Acquisition and Asset Sale established in the LPA. Since Asset Sale means the same thing in both provisions, any Asset Sale that is a Strategic Transaction under LPA § 3.2.5 would trigger Aghazadeh's right to redeem Adelman's interest in the Carry Vehicle under GPA § 4.1.1(i).

Fourth, Proskauer's further argument that it is entitled to summary judgment as to carry damages because GPA § 4.1.1(i) only authorized a redemption of Adelman's interest in the Carry Vehicle upon a "third party Asset Sale" fails for two reasons.

Even assuming that the § 4.1.1(i) redemption right was triggered only by an Asset Sale to a "third party"—a term that the GPA did not define—whether the sale of assets through the Opal Transaction was to a "third party" is a disputed issue of material fact. Which means that, even if Proskauer were reading this provision correctly, this issue could not be resolved on summary judgment.

In any case, Proskauer's assertion that 4.1.1(i) redemption rights are not triggered by an Asset Sale that is not to a "third party" is incorrect. The last sentence of § 4.1.1(i) of the GPA says that:

> Notwithstanding any provision contained herein to the contrary, Aghazadeh shall be permitted to cause the redemption of each of Adelman and Goodman from any venBio Carry Vehicle in the event of a third party Acquisition with respect to 100% of the limited partner interests in the Partnership or Asset Sale of the Partnership (each as defined in the Partnership Agreement).

Proskaeur's argument that this provision applies only to Assets Sales that are made to a third party is unconvincing.

The most natural reading of this sentence is that "third party" modifies only the noun phrase that immediately follows, and thus the sentence refers to (i) any Acquisition by a third party of 100 percent of the limited partnership interests, and to (ii) any Asset Sale of all or substantially all of the Partnership's assets, whether the sale is to a "third party" or not.

This interpretation is consistent with "the nearest-reasonable referent canon," which the Delaware Chancery Courts has followed when applying Delaware contract law. See *ITG Brands, LLC* v. *Reynolds American*, civil action no. 2017-0129-AGB, 2017 WL 5903335, at *7 & n.38 (Del. Ch. Nov. 30, 2017), citing *Parm* v. *National Bank of California, N.A.*, 835 F.3d 1331, 1336 (11th Cir. 2019). This principle tells us that, "[w]hen the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent." *Parm*, *supra*, quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 152–153 (2012)); accord *BG Gulf Coast LNG, L.L.C.* v. *Sabine-Neches Navigation District of Jefferson County, Texas*, 49 F.4th 420, 426 (5th Cir. 2022); *United States* v. *Shaw*, 957 F.3d 734, 739 (7th Cir. 2020). The two noun phrases in this sentence of the GPA—"Acquisition with respect to 100% of the limited partner interests in the Partnership" on the one hand, and "Asset Sale of the Partnership" on the other—are not at all parallel in construction. That is why an objective, reasonable third party would understand "third party" to modify the Acquisition noun phrase but not the Asset Sale phrase.[6]

Plus, Aghazadeh determined that the Opal Transaction was an Asset Sale, and LPA § 3.2.5 provides that this determination "shall be binding" on Adelman. Adelman is therefore bound by Aghazadeh's determination unless it was not made in good faith. See *Brandywine Development Group, L.L.C.* v. *Alpha Trust*, No. Civ. A. 19321-NC, 2003 WL 241727, at *5 (Del. Ch. Jan. 30, 2003). Though Proskauer argues that the Opal Transaction was not really an Asset Sale as that term is defined in the LPA, any dispute as to whether Aghazadeh made his determination in good faith cannot be decided on summary judgment.

Finally, Proskaeuer's argument that Aghazadeh breached a common law obligation to pay Adelman the fair value of his redeemed carry interests, and that Adelman's damages from losing his carry were caused by this breach rather than by Proskauer's alleged negligence, is also without merit. If Aghazadeh breached such a common law duty, a jury could find that such a breach would not have happened but for Proskauer's negligence and that such a breach was foreseeable when Proskauer drafted the spin-off contract

[6] In its reply memorandum, Proskauer invokes the principle "that, in a parallel series of nouns, a 'modifier normally applies to the entire series.' " Reply Mem. at 14, quoting A. Scalia & B. Garner, Reading Law, *supra*, at § 19. This principle does not apply here because the last sentence of GPA § 4.1.1(i) does not contain a parallel series of nouns.

documents. That would mean this alleged further breach by Aghazadeh is not a superseding cause and does not absolve Proskauer of liability. See *Kiribati Seafood*, 478 Mass. at 120–121.

4. **Standing as to Loss of Carry**. Finally, Proskauer's assertion that Adelman lacks standing to assert a claim for the loss of his interest in the Service Company's carry, because he has assigned that interest to an irrevocable trust, is without merit.

At the time of the Opal Transaction, all of the carry generated by the Service Company was paid to the existing Carry Vehicle. It is undisputed that Adelman had irrevocably assigned his interest in that Carry Vehicle to a Nevada trust that he formed for the benefit of his family, for estate-planning purposes.

Proskauer argues that Adelman's only interest in the carry was as a beneficiary of this Trust, and that Adelman has no standing as a trust beneficiary to sue Proskauer for his loss of carry.

This argument is unavailing for three, independent reasons.

First, where a family trust holds legal title to ownership interests in a business entity, the beneficiary of the trust has standing to bring suit to enforce those interests. See *Demoulas* v. *Demoulas Super Markets, Inc.*, 424 Mass. 501, 516–517 (1997); *Lambert-Egan* v. *Lambert*, Suffolk Super. Ct. no. 1884CV00275-BLS1, 2018 WL 6184623, at *4 (Mass. Super. Sept. 12, 2018) (Davis, J.). It follows that Adelman has standing to enforce whatever ownership interests he assigned to the Nevada trust.

Second, though Adelman had irrevocably assigned his interest in the existing Carry Vehicle to his family trust, he did not assign his broader right to future carry from the Service Company. The LPA, GPA, and Service Company operating agreement all make clear that Adelman, personally, had a right to receive a specified percentage of the carry earned by the Service Company. This right belonged to Adelman, not to the Carry Vehicle. Proskauer has not shown that Adelman was barred from directing his share of future carry payments to a new carry vehicle, other than venBio LLC. Now, Aghadazeh would still have been able to redeem Adelman's interest in a new carry vehicle, under GPA § 4.1.1(i). But the fact that Adelman's personal right to a share of the carry was not irrevocably tethered to the existing Carry Vehicle means that Adelman's assignment of his interest in the Carry Vehicle to his family trust did not

deprive him of standing to sue Proskauer for causing Adelman to lose his right to a share of future carry.

Third, if the last two points were incorrect, then Adelman could nonetheless press his claim that Proskauer was negligent in failing to advise Adelman that assigning his interest in the Carry Vehicle to the Trust would bar Adelman from being able to enforce his contractual right to receive a share of the carry earned by the Service Company. Though this is a different kind of alleged negligence than malfeasance in drafting the spin-off contract documents, the damages flowing from it would be the same—Adelman's loss of his interest in future carry payments.

ORDER

Defendant's motion for summary judgment is **denied**. A final pretrial conference will be held on July 25, 2023, at 2:00 p.m., to discuss the scheduling of the trial of this case and all necessary pretrial events.

Kenneth W. Salinger
16 May 2023 Justice of the Superior Court