UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

ENERGY DRILLING SERVICES, LLC, Case No. 22-31772-jda
Chapter 11 (Subchapter V)
Hon. Joel D. Applebaum

Debtor. /

OPINION AND ORDER DENYING MOTION TO DISMISS

The matter before the Court is Timothy Connors' and James Govan's ("Movants") Motion to Dismiss Energy Drilling Services, LLC's ("EDS") chapter 11 (subchapter V) bankruptcy case. For the reasons set forth below, the Motion to Dismiss is DENIED.

I.

FACTUAL BACKGROUND

EDS is a Michigan limited liability company, organized on December 12, 2020. Its primary business is providing foundation drilling and related support services to major regional utility companies across the nation.

On February 16, 2022, Kaitlyn Adler, James F. Govan, and Timothy Connors entered into the Operating Agreement of Energy Drilling Services, LLC, a Michigan Limited Liability Company (the "Operating Agreement") (Docket No. 39, Exhibit A, Operating Agreement). Pursuant to the Operating Agreement, the members of

EDS held the following titles and membership interests in EDS: Kaitlyn Adler, Managing Member ("Ms. Adler"), 51.0%; James F. Govan, Member ("Mr. Govan"), 24.5%; and Timothy Connors, Member ("Mr. Connors"), 24.5%.

On November 11, 2022, Mr. Govan and Mr. Connors entered into a "Unanimous Written Consent of the Eligible Members of Energy Drilling Services, LLC". Mr. Govan and Mr. Connors agreed to expel Ms. Adler as a member of EDS on the grounds that it had been "lawfully, factually, and validly shown" that Ms. Adler had committed theft and/or gross negligence against EDS under §15.04 of the Operating Agreement. The "Unanimous Written Consent" was obtained at a special telephonic meeting and states that Movants were the only members "present . . . [and] eligible to vote", citing § 6.04[1] of the Operating Agreement and/or MCL 450.4409(c).[2] The "Unanimous Written Consent" states that written notice was waived under § 8.05. (Docket No. 39, Exhibit K).

Also on November 11, 2022, Mr. Govan and Mr. Connors sent out a "Notice of Special Meeting of the Members" of EDS to be held on November 21, 2022 to

[1] Section 6.04, entitled **Contracts or Transactions with Interested Directors or Officers**, concerns the ratification of contracts in which a Member or officer has an interest. Under 6.04, the disinterested parties could move for EDS to reject or withdraw from such a contract. Section 6.04 does not discuss the termination of a membership interest. The full text is provided in the following section of this Opinion.

[2] MCL 450.4409(c) concerns transactions with interested parties. The full text is provided in the following section of this Opinion.

discuss and *ratify* the expulsion of Ms. Adler as a member of EDS pursuant to §15.01 of the Operating Agreement on the grounds that:

> Ms. Adler, in violation of her fiduciary duty to EDS and in violation of her statutory duty to EDS under MCL 450.4404(1), has engaged in theft from and gross negligence against EDS where such wrongful conduct that has adversely and materially affected the business and/or operation of EDS.

(Docket No. 39, Exhibit L, attachment A).

On November 21, 2022, the special meeting was held. Ms. Adler and her attorney were present along with Mr. Govan and his attorney, Mr. Connors and his attorney, and EDS' attorney. Mr. Govan and Mr. Connors unanimously voted to ratify the Consent Resolution of Expulsion. (Docket No. 39, Exhibit L).

On November 29, 2022, Ms. Adler caused EDS to file for chapter 11, subchapter V, bankruptcy.

On December 9, 2022, Mr. Govan and Mr. Connors filed their Motion to Dismiss Debtor's bankruptcy on the grounds that: (1) Ms. Adler did not have the authority to place EDS into bankruptcy on November 29, 2022 because she had been expelled as a Member and, therefore, removed as Managing Member of EDS, on November 21, 2022; and (2) in the event this Court finds that Ms. Adler's expulsion was invalid, Ms. Adler did not have the authority to place EDS into bankruptcy because the decision to file for bankruptcy is a "Fundamental Business Transaction" that requires the approval of a "Super-Majority," defined as "one or more Members having among them more than sixty-six and sixty-seven hundredths percent (66.67%) of the Percentage Interests of all Members." (Docket No. 39, Exhibit A).

On December 13, 2022, Debtor filed a response stating that Ms. Adler had the authority to place EDS in bankruptcy because: (1) she had neither been expelled as a Member nor removed as a Managing Member; and (2) placing EDS in bankruptcy is a not a Fundamental Business Transaction requiring agreement of a super-majority of Members.

On December 14, 2022, the Court held a hearing on this matter and requested additional briefing on the issues presented. On December 21, 2022, both Movants and Debtor filed Supplemental Briefs. On December 23, 2022, both Movants and Debtor filed Reply Briefs. [3]

II.

RELEVANT PORTIONS OF THE OPERATING AGREEMENT

[3] The Bank of Ann Arbor, Debtor's primary secured creditor, filed a Response to the Motion to Dismiss requesting dismissal under 11 U.S.C. § 1112(b)(1), arguing that EDS is not currently operating and, therefore, Bank of Ann Arbor does not see a path toward reorganization. The Court shares Bank of Ann Arbor's concerns as expressed in its Response (Dkt. 60). According to statements made by the parties and the Subchapter V Trustee at the Court's initial scheduling conference, however, resumption of operations may be imminent. Moreover, the Court cannot determine at this juncture whether dismissal or conversion would be in the best interests of creditors and the estate, among other possibilities. Bank of Ann Arbor's request to dismiss for "cause" under § 1112(b)(1) is, therefore, premature and is denied at this time.

The determination whether Ms. Adler possessed the authority as Managing Member to place EDS in chapter 11 (subchapter V) bankruptcy and whether Mr. Govan and Mr. Connors properly expelled Ms. Adler as a member is based on the Court's consideration of the language of the Operating Agreement. The most pertinent sections of the Operating Agreement are set forth below.

A. The Portions of the Operating Agreement Addressing the Scope of the Managing Member's Powers for the Purpose of Determining Whether the Managing Member had the Authority to Place EDS Into Bankruptcy.

Ms. Adler was appointed EDS's Managing Member with the express written consent of Mr. Govan and Mr. Connors. Operating Agreement, § 6.01(a). Section 6.01(a) vests the Managing Member with broad power "to manage control, administer, and operate the business . . . and to make decisions affecting the business and affairs of the Company." Specifically, § 6.01(a) states:

> (a) Except as expressly provided in Section 6.02 and otherwise herein, management of the Company shall be vested in the Managing Member. The Managing Member may not be removed or replaced by the Members but only upon the resignation of such Managing Member. *Except for matters to be approved by or consented to, by the Members under this Agreement, the Managing Member shall have full, exclusive, and complete discretion, power and authority, subject in all cases to the terms of this Agreement and the requirements of applicable law, to manage, control, administer, and operate the business and affairs of the Company for the purposes herein stated, and to make decisions affecting the business and affairs of the Company***.** All Members reserve fully all rights granted to the Members under this Agreement and to the extent of such rights, the power and authority of each Member shall be superior to the authority and power of the

> Managing Member. Kaitlyn Adler shall serve as the Managing Member. (emphasis added)

Section 6.01(b) more specifically sets forth the Managing Member's powers:

> (b) The Managing Member's control over the Company includes, but is not limited to the following: (i) entering into, making, and performing contracts, agreements, and other undertakings binding the Company that may be necessary, appropriate, or advisable in furtherance of the purposes of the Company and making all decisions and waivers thereunder; (ii) opening and maintaining bank and investment accounts and arrangements, drawing checks and other orders for the payment of money, and designating individuals with authority to sign or give instructions to those accounts and arrangements; (iii) maintaining the assets of the Company in good order; (iv) collecting sums due the Company; (v) to the extent that the funds of the Company are available therefor, paying debts and obligations of the company; (vi) acquiring, utilizing for Company purposes, and disposing of any assets of the Company in the ordinary course of business, not otherwise in violation of this Agreement; (vii) borrowing money or otherwise committing the credit of the Company for Company activities and voluntary prepayments or extensions of debt, (vii) selecting, removing, and changing the authority and responsibility of lawyers, accountants, and other advisers and consultants; (ix) obtaining insurance for the Company; (x) determining distributions of Company cash and other property as provided in Section 5.02; (xii) establishing a seal for the Company; and (xii) [sic] designating one or more committees, each of which shall be comprised of one or more Members, to exercise any authority or the Members in the management, business and affairs of the Company.

Section 6.01(c) (the second of two subparagraphs labeled "c") bestows nearly all authority of the Members on the Managing Member, stating:

> (c) [sic] Except for rights vested in the Members pursuant to this Agreement and applicable law, no Member shall take, or commit the

> Company to take, any action, either in its own name in respect of the Company or in the name of the Company, unless the Managing Member has approved the same, under the authority granted herein.

Section 6.02 of the Operating Agreement delineates certain restrictions on the Managing Member. Specifically, a Managing Member may not enter into a Fundamental Business Transaction without approval by a super-majority of the Members. Section 6.02 states:

> 6.02 **Restrictions**. Notwithstanding the provisions of Section 6.01, the Members may not cause the Company to do any of the following without complying with the applicable requirements set forth below:
>
> > (a) enter into a Fundamental Business Transaction, without the approval by a Super-Majority of the Members (unless such provision is rendered inapplicable by another provision of applicable law).

The term "Fundamental Business Transaction," in turn, is defined in § 1.01 of the Operating Agreement as follows:

> "**Fundamental Business Transaction**" means those major transactions of the Company, including (a) merger, (b) an interest exchange, (c) a conversion, (d) sale of all or substantially all of an entity's assets (with or without good will), other than in the ordinary course of the Company's business, or (e) any other strategic acquisition of a target company, whether by acquisition of assets or equity.

B. The Portions of the Operating Agreement Addressing the Ability of Members to Expel a Member from the Company.

Section 15.04 of the Operating Agreement provides that Members can be expelled from the Company. Paragraph 15.04 states:

> 15.04 **Expulsion**. A Member may be expelled from the Company by unanimous vote of all other Members (not including the Member to be expelled) *if it is lawfully, factually and validly shown* that the Member (a) has willfully violated any provisions of this Agreement; (b) committed fraud, theft, or gross negligence against the Company or one or more Members of the Company; or (c) engaged in wrongful conduct that adversely and materially affects the business or operation of the Company. Such a Member shall be considered a Defaulting Member, and the Company of other Members may also exercise any one or more of the remedies provided for in Section 15.01.[4] The Company may offset any damages to the Company or its Members occasioned by the misconduct of the expelled Member against any amounts distributed or otherwise payable by the Company to the expelled Member. (emphasis added)

Section VIII "Meeting of Members" addresses the procedural requirements for holding a meeting of Members. Section 8.01(f) allows for special meetings of the Members.[5] Section 8.01(g) allows for special meetings so long as they are set

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[4] The remedy applicable to this case is set forth in 15.01(g), "Forfeiture of the Defaulting Member's Membership Interest."

[5] Section 8.01(f) states:

Special meetings of the Members for any proper purpose or purposes may be called at any time by the holders of at least ten percent (10%) of the Percentage Interests of all Members. If not otherwise stated in or fixed in accordance with the remaining provisions hereof, the record date for determining Members entitled to call a special meeting is the date any Member first signs the notice of that meeting, except that the date may not be earlier than the 60th day before the date the special meeting of Members is originally to be called. *Only business within the purpose or purposes described in the notice (or waiver thereof) required by this Agreement may be conducted at a special meeting of the Members*. (emphasis added).

not less than ten days nor more than 60 days before the date of the meeting and the notice sets forth the purpose or purposes of the meeting.

Section 8.05 addresses “Action by Unanimous Written Consent Without Meeting.” Section 8.05 states, in part:

> (a) Any action required or permitted to be taken at any annual or special meeting of Members may be taken without a meeting, without prior notice, and without a vote, by unanimous written consent of the Members or committee members, as the case may be, setting forth the action so taken . . . .

Section 6.04 addresses “Contracts or Transactions with Interested Directors or Officers.” Section 6.04 allows for such contracts so long as (i) the relationship is disclosed and approved of by the Members, (ii) the contract is fair to the Company when it was entered, or (iii) is ratified by the Members. Section 6.04 states:

> This provision applies only to a contract or transaction between the Company and one or more of its Members or officers, or between the Company and an entity or other organization in which one or more of the Company’s Members or officers is a managerial official or has a financial interest. An otherwise valid contract or transaction is valid notwithstanding that a Member or officer of the company is present at or participates in the meeting of the Members or officers, or of a committee of the Members or officers that authorizes the contract or transaction, or votes or signs, in the person’s capacity as a Member or officer, a written consent of Members or officers to authorize the contract or transaction, if: (1) the material facts as to the relationship or interest and as to the contract or transaction are disclosed to or known by (a) the Members or officers or a committee of the Members or officers and the Members or officers or committee in good faith authorize the contract or transaction by the affirmative vote of the majority of the disinterested Members or officers or committee members, regardless of whether the disinterested Members or officers or committee members constitute a quorum; or (b) the Members of the

> Company, and the Members in good faith approve the contract or transaction by vote of the Members; or (2) the contract or transaction is fair to the Company when the contract or transaction is authorized, approved, or ratified by the Members or officers, a committee of the Members or officers, or the Members of the Company.

III.

ANALYSIS

About the only thing Movants and Debtor agree upon is that the Operating Agreement is a contract, the interpretation and construction of which presents a question of law for the Court to decide. *Titan Ins. Co. v. Hyten*, 817 N.W.2d 562 (Mich. 2012). "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v. Auto-Owners Ins. Co.*, 740 N.W.2d 503, 529 (Mich. Ct. App. 2007). The Court must also endeavor to give effect to every word, phrase, and clause in a contract, and avoid a contract interpretation that would render any part of the contract surplusage or nugatory. *Solo v. United Parcel Service Co*., 819 F.3d 788, 794 (6th Cir. 2016) (applying Michigan law).

A. Filing a Petition Under Chapter 11 of the Bankruptcy Code is not a "Fundamental Business Transaction" as Defined in the Operating Agreement.

This Court will first address whether placing EDS in chapter 11 (subchapter V) bankruptcy is a Fundamental Business Transaction. As previously noted, a super-majority is required to enter into a Fundamental Business Transaction. Fundamental Business Transaction "means those major *transactions* of the Company, including (a) merger, (b) an interest exchange, (c) a conversion, (d) sale of all or substantially all of an entity's assets (with or without good will), other than in the ordinary course of the Company's business, or (e) any other strategic acquisition of a target company, whether by acquisition of assets or equity." (emphasis added)

The plain and ordinary meaning of the word "transaction" is "something transacted -- especially an exchange or transfer of goods, services, or funds." *Merriam-Webster.com* The application of this definition is supported by the very examples used in the Operating Agreement's definition of Fundamental Business Transaction, each of which involve an *exchange* of stock or interests (merger/interest exchange), a *sale* other than in ordinary course of business (purchase transaction – an exchange of goods or services for money), or a strategic *acquisition* of target company by acquisition of assets or equity (either purchase transaction or equity exchange). The filing of a petition under chapter 11 of the Bankruptcy Code is not included in the definition of Fundamental Business Transaction for the simple reason that the filing of a petition under chapter 11 of the Bankruptcy Code is not a *transaction* as that term is defined or used in the Operating Agreement.

With the sole exception of the restrictions in § 6.02 of the Operating Agreement, the only pertinent one being the restriction on entering into Fundamental

Business Transactions, the Managing Member is exclusively vested with broad management authority over Debtor's affairs pursuant to § 6.01 of the Operating Agreement. Because the filing of a chapter 11 bankruptcy petition is not a Fundamental Business Transaction, it was within Ms. Adler's sole authority as Managing Member to place Debtor into bankruptcy.

Movants raise two closely related arguments why filing bankruptcy must be considered a Fundamental Business Transaction requiring the prior approval of a super-majority of the Members. First, Movants contend that the definition of Fundamental Business Transaction uses the word "including," a word of enlargement that "conveys the conclusion that there are other items includable, though not specifically enumerated . . . ." (Dkt. No. 99, p.8, citing *Michigan Bell Tel. Co. v. Department of Treasury*, 518 N.W.2d 808 (Mich. 1994). According to Movants, this expansive term, coupled with the canon *noscitur a sociis* ("it is known by its associates"), requires the conclusion that putting the Debtor into bankruptcy is so fundamental and has such far reaching consequences that it must be considered a Fundamental Business Transaction. In connection with this argument, Movants distinguish what appears to be a majority of non-binding opinions holding the other way. Second, in their companion argument, Movants assert that the authority granted to the Managing Member under § 6.01 of the Operating Agreement is not as expansive as Ms. Adler claims, and is more properly understood to vest sole authority for *ordinary* operations of the Debtor. Filing bankruptcy clearly falls outside the ordinary operations of the Debtor and, therefore, must also fall outside of the scope of Ms. Adler's unilateral authority as Managing Member.

Turning to Movants' first argument, the Court agrees that the term "including" is a word of enlargement that "conveys the conclusion that there are other items includable, though not specifically enumerated . . . ." *Id*. The Court also agrees that the canon *noscitur a sociis* ("when several words have something in common, they should be assigned a permissible meaning that makes them similar,")[6] is applicable here. The Court disagrees, however, with Movants' conclusion that the word "including" and application of the canon *noscitur a sociis* require a finding that filing a bankruptcy petition is a Fundamental Business Transaction.

The Court's overarching obligation here is to determine and enforce the parties' intent by reading the agreement as a whole, applying the plain language used by the parties to reach their agreement, and endeavoring to give effect to every word, phrase, and clause in a contract. As noted above, the examples used in the Operating Agreement's definition of Fundamental Business Transaction all involve an *exchange*, a *sale* (other than in ordinary course of business), or strategic *acquisition* of target company. These examples fall squarely within the plain and ordinary

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[6] *Atlantic Casualty Inc. Co. v. Gustafson*, 891 N.W.2d 499, 503 (Mich. Ct. App. 2016).

meaning of the word "transaction" as "something transacted -- especially an exchange or transfer of goods, services, or funds." Even accepting that the term "including" is a word of enlargement that means there are other items includable, though not specifically enumerated, the Court cannot insert items that fail to comport with the definition of "transaction." This conclusion is borne out by a proper application of the canon *noscitur a sociis*. Here, the Operating Agreement contains several words that fall squarely within the definition of "transaction." The use of the word "including" means that there may be additional examples of an exchange or transfer of goods, services, or funds. But the Court cannot apply *noscitur a sociis* to add dissimilar, non-transactional items to the definition of Fundamental Business Transaction that do not fall within the definition of "transaction" as that word is ordinarily understood. To do as Movants' suggest would be to disregard the canon *noscitur a sociis* upon which Movants' rely.

This conclusion is also supported by cases holding that an operating agreement may grant a managing member authority to file a bankruptcy petition, as exemplified by the case *In re East End Development, LLC*, 491 B.R. 633 (Bankr. E.D.N.Y. 2013). In *East End Development*, the court recognized that the "entity vested with 'the power of management' has the requisite authority to file a petition in bankruptcy." *Id*. at 638, quoting *Price v. Gurney*, 324 U.S. 100, 104 (1945). The *East End Development* court properly examined the operating agreement to determine the manager's authority to file a bankruptcy petition, applying traditional rules of contract interpretation as this Court has done. As in this case, the operating agreement did not explicitly grant the managing member authority to file a bankruptcy petition, nor did the operating agreement prohibit it. Nevertheless, the court noted that the operating agreement granted the managing member "broad powers" to act on behalf of the debtor, whereas the actions for which member consent was required were narrow and specific. As a result, the court concluded that the operating agreement was sufficiently clear and unambiguous and that the managing member was authorized to file the bankruptcy petition. *See also, In re Lexington Hospitality Group, LLC,* 577 B.R. 676, 686-688 (Bankr. W.D. Ky. 2017) (grant of broad authority to managing member included authority to file bankruptcy petition).

As in *East End Development* and *Lexington Hospital Group*, the Operating Agreement here does not explicitly grant Ms. Adler, as managing member, authority to file a bankruptcy petition. What the Operating Agreement does, however, is grant the managing member the authority to take *all* actions on behalf of the company unless otherwise restricted. Operating Agreement, § 6.02. As noted above, the only applicable restriction on the authority of the managing member is entering into a Fundamental Business Transaction which, for the reasons discussed above, is not applicable to the filing of a bankruptcy petition.

In contrast to the above cases, Movants direct the Court to *In re Avalon Hotel Partners, LLC*, 302 B.R. 377 (Bankr. D. Ore. 2003). In that case, the applicable operating agreement provided that "Major Decisions" required the approval of members holding in excess of 75% of the Ownership Interests. *Id*. at 380. The court determined that filing a bankruptcy petition is a decision outside of the ordinary course of business and, therefore, constituted a "Major Decision" requiring member approval in excess of 75%. The court also held that Oregon law requires the consent of a majority of members to convert an LLC into any other type of entity, and that a bankruptcy filing "converted" the company into a debtor-in-possession in violation of this provision of Oregon law. *Id*. at 380-381.

The Court does not find the *Avalon Hotel Partners* case persuasive for two primary reasons. First, the Court must look to the language used in the Operating Agreement, as the *Avalon Hotel Partners* court recognized. The term "*Decision*" is very different from the more narrowly defined term "*Transaction*" used in the instant Operating Agreement. Second, a company's authority to file bankruptcy is controlled by state law. *In re Curare Laboratory, LLC*, 642 B.R. 787, 801 (Bankr. W.D. Ky. 2022). Unlike the Oregon statute, this Court is unaware of (and the parties have not directed the Court to) any provision of Michigan law that would prohibit a manager of a manager-operated limited liability company from filing a bankruptcy petition if authorized to do so under the applicable operating agreement.

As to Movants' assertion that the authority granted to the Managing Member under § 6.01 of the Operating Agreement is not as expansive as Ms. Adler claims, and is more properly understood to vest sole authority for *ordinary* operations of the Debtor, the Court rejects this argument. Nothing in the Operating Agreement purports to limit Ms. Adler's authority solely to "ordinary" operations, although the parties could have drafted the Operating Agreement that way. Rather, the Operating Agreement was drafted to vest the Managing Member with authority over the business of the company except for Fundamental Business Transactions. Therefore, Ms. Adler possessed the requisite authority to file the bankruptcy petition on behalf of the Debtor.

B. The Attempt to Expel Ms. Adler was Legally and Procedurally Invalid.

Movants attempt to expel Ms. Adler as a Member was legally invalid because Movants failed to comply with § 15.04 of the Operating Agreement. That section provides in pertinent part:

> 15.04 **Expulsion**. A Member may be expelled from the Company by unanimous vote of all other Members (not including the Member to be expelled) *if it is lawfully, factually and validly shown* that the Member (a) has willfully violated any provisions of this Agreement; (b) committed fraud, theft, or gross negligence against the Company or one or more Members of the Company; or (c) engaged in wrongful conduct that adversely and materially affects the business or operation of the Company.

(Emphasis added)

As Movants emphasized in their Reply Brief (Dkt. No. 99), the Court is obligated to determine and enforce the parties' intent by reading the agreement as a whole, apply the plain language used by the parties to reach their agreement, and endeavor to give effect to every word, phrase, and clause in the Operating Agreement.

Here, the Operating Agreement clearly envisions that a Member may not be expelled from membership unless it is *lawfully, factually and validly shown* that the Member willfully violated the Operating Agreement; committed fraud, theft, or gross negligence against the Company or one or more Members of the Company; or engaged in wrongful conduct that adversely and materially affected the business or operation of the Company. The Operating Agreement does not set forth any procedures for making this determination.

While the Operating Agreement does not set forth procedures for showing *lawfully, factually and validly* that a Member has committed what are serious acts of misconduct against the Company or other Members, the words "*lawfully, factually and validly shown*" must be given meaning. At a minimum, *before* expulsion, there must be a hearing with proper procedural protections where the alleged misconduct is lawfully, factually and validly established.

In this case, Movants arrogated to themselves the right to act as prosecutor, judge, and jury, as is obvious from their November 11, 2022 "Notice of Special

Meeting of the Members" to be held on November 21, 2022 "to discuss and *ratify* the expulsion of Kaitlyn Adler as a member of EDS . . . ." While one can argue over the standards of procedural due process that should have been afforded to Ms. Adler, notifying her that Movants had already decided to expel her falls woefully short. By decreeing a right of expulsion without hearing and with themselves as the sole decision makers, they effectively assert the right to expel Ms. Adler for any reason or for no reason whatsoever. This flies in the face of the language in the Operating Agreement and renders the phrase "*lawfully, factually and validly shown*" meaningless.

Even if Movants had provided a modicum of due process and had "*lawfully, factually and validly shown*" that Ms. Adler committed misconduct justifying expulsion under § 15.04 of the Operating Agreement, Movants failed to adhere to the proper procedural requirements for expelling Ms. Adler from EDS.

In the document entitled "Unanimous Written Consent" dated November 11, 2022, Movants indicate that they held a "special telephonic meeting", with written notice being waived under § 8.05, for the purpose of considering the expulsion of Ms. Adler as a Member of EDS and that they, alone, were the only members present at that meeting. (Docket No. 39, Exhibit K, line 1). The document also states that Movants did not notify Ms. Adler of this meeting because they believed that they were the only Members eligible to vote, citing on § 6.04 of the Operating Agreement and/or MCL 450.4409(c).

This Court finds that the meeting held on November 11, 2022 was not governed by § 8.05 because § 8.05 is titled "Action by Unanimous Written Consent *Without Meeting*" (emphasis added), and the document itself states that a "special telephonic meeting" was held. In addition, the findings set forth in the November 11, 2022 document were not by unanimous consent because Ms. Adler did not consent and had not yet been determined to be ineligible to vote.

Instead, the requirements for a meeting set forth in § 8.01(g)(the provisions for special meetings) apply in this instance. Section 8.01(g) requires written or printed notice of meetings and,

> in the case of a special meeting, the purpose or purposes for which the meeting is called shall be given not less than ten (10) days nor more than sixty (60) days before the date of the meeting, either personally or by mail . . . to each Member entitled to vote at such meeting.

In this case, Ms. Adler was not notified of the telephonic special meeting and, therefore, the November 11, 2022 meeting was not properly held and any decisions made at that meeting are void. This Court rejects any argument that, based on § 6.04 and/or MCL 450.4409(c), Ms. Adler need not be notified of the telephonic special meeting because neither § 6.04 nor MCL 450.4409(c) address notice of meetings or in any way imply that notice is waived, and Ms. Adler had not yet been shown to be ineligible to vote. For these reasons, the November 11, 2022 meeting was not properly held and any decisions made at that meeting are void.

ORDER DENYING MOTION TO DISMISS

Accordingly, for the reasons set forth in this Opinion,

IT IS HEREBY ORDERED that Movants' Motion to Dismiss is DENIED.

Signed on January 13, 2023

/s/ Joel D. Applebaum

Joel D. Applebaum
United States Bankruptcy Judge