STATE OF NORTH CAROLINA **COUNTY OF MECKLENBURG**	**IN THE GENERAL COURT OF JUSTICE** **SUPERIOR COURT DIVISION** **08-CVS-4304**
REID POINTE, LLC, TUCKER CHASE, LLC, MEADOW, LLC, SOUTHEASTERN LAND INVESTMENTS, LLC, KYLIGLEN, LLC, HARRY C. GRIMMER and HARRY GRIMMER AND ASSOCIATES, LLC, **Plaintiffs,** **v.** **CHARLES A. STEVENS and CAROLINA DEVELOPMENT OF CHARLOTTE, INC.** **Defendants.**	**BRIEF ON PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS**

Plaintiffs have moved to dismiss Defendants' counterclaims for dissolution, breach of contract and unfair and deceptive trade practices. The UDTP claim is defective because it is based solely on alleged contract breaches, internal corporate activity not involving "commerce," and incompletely pleaded defamation. The breach of contract claims are founded on non-binding and unenforceable contracts. The dissolution claim fails to plead any factual basis sufficient to support such relief. Accordingly, all counterclaims should be dismissed.

PROCEDURAL HISTORY

Plaintiffs commenced this action on February 26, 2008 and designated it a Business Court case because of issues involving the law of limited liability companies ("LLCs"). On February 28, the Chief Justice designated the case complex business, and Judge Tennille assigned it to Judge Diaz. Defendants answered and counterclaimed on March 26, 2008. Plaintiffs replied on May 7, 2008 and filed a First Amended Reply and the present Motion for Judgment on the Pleadings on May 15, 2008.

FACTS

For purposes of this motion the facts are taken from the pleadings, including exhibits thereto, with factual conflicts resolved in favor of the Defendants. *Wilson v. Crab Orchard Development Co.,* 276 N.C. 198, 206, 171 S.E.2d 873, 878-79 (1970) (court also may consider inferences reasonably drawn from the pleadings and facts subject to judicial notice). The Complaint alleges, and the Answer admits, that Plaintiff Harry C. Grimmer and Defendant Charles A. Stevens formed four single-purpose North Carolina limited liability companies for the development of four residential subdivisions and a fifth to hold commercial and muti-family residential parcels in two of the subdivisions. (Compl. ¶¶ 6-8; Ans. ¶¶ 6-8). The LLCs are all governed by written operating agreements. (Compl. ¶¶ 9, 12; Ans. ¶¶ 9, 12.) A prototype LLC operating agreement was appended to and incorporated in the Complaint and admitted in the Answer. (Compl. ¶ 9 , Ans. ¶ 9.) For completeness, all of the Operating Agreements are attached as the following exhibits to this Brief: Kyliglen, Exhibit A; Meadow, Exhibit B; Tucker Chase, Exhibit C; Reid Pointe, Exhibit D; and Southeastern, Exhibit E.

The Complaint also alleges, and the Answer admits, that CDC entered into a Land Development Construction and Management Services Agreement (referred to as the "Development Agreements") with Kyliglen, (Compl. ¶ 16 , Ans. ¶ 16), Meadow, Tucker Chase and Reid Pointe, (Compl. ¶ 13 , Ans. ¶ 13). The Complaint and Answer are in conflict as to whether CDC has received more or less fees than it has earned under the Development Agreements. (Compl. 29 ; Ans. ¶ 29.)

The Complaint and Answer agree that CDC was day-to-day manager of the LLCs' development projects through January 2008; that Tucker Chase and Reid Pointe suffered cost overruns; that Grimmer exercised his power to remove CDC as manager of the LLCs of which it

was manager in January 2008; and that Grimmer initiated capital calls in February 2008. (Compl. ¶¶ 15-20 ; Ans. ¶¶ 15-20.) Each Operating Agreement makes managers removable at the will of the majority and makes Grimmer (Grimmer and Associates in the case of Meadow) majority member. (Operating Agreements §§6.14(a), 1.22.)

In the Counterclaims, Defendants allege that Grimmer entered into a September 24, 2003 letter agreement with Stevens requiring Grimmer to "use my financial connections with a local lender to obtain the necessary financing for the project" [sic] and to "be the financier of the projects" he entered into with Stevens and allowing Stevens to be "the operational manager." According to the Counterclaims, the letter agreement also specified that "[w]hen further money was required after the initial loan, Grimmer was to make loans to the projects … at 9% APR."

The letter agreement is attached and incorporated into the First Amended Reply. In contrast to Defendants' characterizations, it states that it is "a confirming, brief outline of the proposed working relationship between you and me relative to … purchasing land for … selling developed lots" and provides in relevant part:

> We have agreed on the following:
>
> 1. We will establish a new LLC for each project we agree to engage in. …
>
> a. The ownership of each LLC shall be 70% for Harry Grimmer and 30% for Charles Stevens. It is suggested that we capitalize the company in an amount to be determined, with the capital account to be funded on a prorated share of ownership.
>
> b. Each of us will be classified as a Managing Partner; however, your responsibility will be to manage the company's day-to-day affairs. I will serve more as a silent investor, advisor, and consultant, with the final decision-making authority (if required).
>
> …
>
> 3. The LLC agrees to provide a developmental service fee in the amount of 15% of <u>actual hard</u> cost (infrastructure costs), and shall not include land or financing or other <u>soft</u> costs. The fee will be advanced as a prorated

percentage of completed work, but such advance shall not be less than $5,000 per month. The advance may come from the A&D loan deposits, or prorated share of lot proceeds at closing.

4. My responsibility shall be to use my financial connections with a local lender to obtain the necessary financing for the project that will provide a Land Acquisition and Development Loan in the amount sufficient to provide for all project costs including an interest reserve (if possible) that would carry the financial requirements of the project for approximately one year. However, in all probability, the loan amount will not be sufficient to cover the full distribution of the 15% of the hard cost development fee, and the payment for same shall occur as lots close, as mentioned previously herein. …

Miscellaneous footnotes to the above proposal are as follows:

…

3. Any loan advances from the partners shall be treated as note payables by the LLC to those partners, with interest accruing at 9% APR, and will require the other general partner's approval. Original capitalization shall be treated as stock or equity.

…

I am sure there are probably other items that need to be discussed; however, the information enclosed herein would cover the majority of our concerns relative to the proposed partnership.

(1st Amd. Reply, Ex. A.)

Defendants allege that Kyliglen was formed prior to this alleged letter agreement, (Counterclaims ¶¶ 2-5), and that Meadow, Tucker Chase and Reid Pointe were formed "[a]cting on this agreement," (*id.* ¶ 10). Defendants also admit, however, that each of these LLCs as well as Southeastern has a written operating agreement. The Meadow, Tucker Chase and Reid Pointe operating agreements are in identical form (hereinafter, the "Form Operating Agreement"), which was appended as Exhibit A to the Complaint. (Compl. ¶ 9, Ans. ¶ 9.) The Kyliglen operating agreement was Exhibit B to the Complaint. (Compl. ¶ 12, Ans. ¶ 12.)

Defendants also acknowledge—notwithstanding their assertions about the September 24, 2003 letter agreement—that CDC entered into the Development Agreements. (Compl. ¶¶ 13, 16; Ans. ¶¶ 13, 16.) Each operating agreement and each Development Agreement contains an integration clause. (*See* Exhibits A-D hereto, § 11.2; Compl., Ex. B, at 8.) The clauses in the Development Agreements expressly state that those agreements "supercede[] all prior negotiations, representations, or agreements, either written or oral, with respect to" "services to be performed by the Developer under this Agreement."

ARGUMENT

For the reasons that follow, all of the counterclaims are subject to dismissal.

I. NO CLAIM IS STATED FOR UNFAIR AND DECEPTIVE TRADE PRACTICES.

Defendants' claim for unfair and deceptive trade practices is founded upon the following allegations:

> The actions of Grimmer and Grimmer and Associates amounts to unfair and deceptive acts and practices including, but not limited to, using their superior position in the LLCs to discharge CDC as manager without good cause, making untrue and damaging statements about CDC to various suppliers, service providers and regulators, denying payments due to CDC and at the same time demanding a capital call from CDC, knowing that by failing to pay amounts due to CDC it would be less likely to be able to pay a capital call, and making a capital call to CDC instead of providing loans and bank financing as expressly promised in previous agreements.

(Counterclaims Sec. III, ¶ 3.) The conduct alleged of Grimmer and Grimmer and Associates, LLC (hereinafter, the "Grimmer Plaintiffs") consists of alleged contract breaches by ("denying payments due to CDC" and failing to provide "loans and bank financing"), removing CDC as manager "without good cause," initiating capital calls, knowing that CDC cannot pay, and

making unspecified "untrue" statements about CDC to others. None of this alleged conduct constitutes a violation of N.C. Gen. Stat. § 75-1.1.

A. Breaches of Contract.

"A mere breach of contract, even if intentional, is not an unfair or deceptive act under G.S. § 75-1.1." *Jones v. Capitol Broadcasting Co.*, 128 N.C. App. 271, 276, 495 S.E.2d 172, 175 (1998). Failure to pay fees due to CDC is, if anything, merely a breach of the Development Agreements. Failure to "provid[e] loans and bank financing" is, if anything, merely a breach of the alleged September 24, 2003 letter agreement. Nothing is alleged sufficient to transform such breaches of contract into violations of Section 75-1.1.

B. Not Commerce.

Two of the actions alleged as the predicate for the UDTP claim are not even arguably a breach of contract. These are "using [the Grimmer Plaintiffs'] superior position in the LLCs to discharge CDC as manager without good cause" and "demanding a capital call from CDC." The Operating Agreements explicitly afford the holder of the majority of the member interest to remove any manager "at any time for any reason." (Operating Agreement §§ 6.14(a), 1.22.) Likewise, they empower the majority to make capital calls. (*Id.* § 5.1.) In light of Defendants' admission that the projects budgeted costs "increased dramatically," (Counterclaims ¶ 15), little appears from the Counterclaims to explain how the exercise of these contractual powers by Grimmer is unfair or deceptive so as to constitute a UDTP.

In any event, this alleged conduct concerns internal corporate governance and capital raising activities and is not the type of "regular, day-to-day" business activity that is the principal focus of Section 75-1.1. *See HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991) (holding that the trade, issuance, and redemption of corporate securities are not activities "in or affecting commerce," and therefore are not covered by the

UDTPA). Because these actions were not "in commerce," the UDTP claim cannot stand based on those predicate acts.

C. Defamation Predicate Not Sufficiently Alleged.

The final leg of the pleaded UDTP predicate is the allegation that the Grimmer Plaintiffs "ma[de] untrue and damaging statements about CDC to various suppliers, service providers and regulators." The only elaboration on this conclusory statement in the common factual allegations fails even to assert that Grimmer's statements were untrue:

> 25. Grimmer contacted various service providers to the LLCs and criticized Stevens and CDC openly, undermining the confidence of the service providers of the LLCs.
>
> 26. Upon information and belief, Gimmer has communicated unfavorably with governmental regulators, banking institutions and others which has compromised the ability of the LLCs to obtain necessary permitting and approvals.

(Counterclaims, ¶¶ 25, 26.)

To found a UDTP claim upon defamation, the tort must be validly alleged. *Craven v. Cope*, 656 S.E.2d 729, 734 (N.C. App. 2008). These allegations are insufficient to state a claim for defamation because they do not allege the content of the allegedly untrue statements "substantially *in haec verba*, or with sufficient particularity to enable the court to determine if the statement was defamatory." *See Andrews v. Elliot*, 109 N.C. App. 271, 426 S.E.2d 430 (1993). In other words, Defendants were obliged to allege what was said, not mere conclusions that untruths were uttered. Because defamation has not been alleged, the allegation of untrue statements fails to state a UDTP claim.

II. THE ALLEGED CONTRACTS ARE NOT ENFORCEABLE BY DEFENDANTS.

Defendants' contract claim alleges two or perhaps three separate contracts that they allege to have been violated. They allege that the Development Agreements have been violated

by failure to pay fees due to CDC of $291,717 in respect of Reid Pointe and $144,476 in respect of Tucker Chase. (Counterclaims, Sec. II, ¶¶ 2-4.) They also allege that the "September 24, 2003 agreement" required Grimmer to "arrange financing to complete the Tucker Chase and Reid Pointe projects," apparently no matter the extent of cost overruns, and that Grimmer has failed to do so. (*Id.* ¶¶ 5-6.) A factual allegation incorporated into the claim further alleges that when the initial loan money ran out for any project, Grimmer was required to make personal loans in any amount needed. (Counterclaims, ¶ 8.) The claim also includes an allegation that "Meadow has undistributed profit which Grimmer has failed and refused to distribute," and that Stevens is entitled to such distribution, although it fails to state what contractual obligation has been violated, if any. (*Id.* ¶ 7.) None of these allegations, taken in light of the contract documents that are appended to the pleadings, is sufficient to allege a contract duty that has been breached.

A. <u>September 24, 2003 Agreement.</u>

The September 24, 2003 Agreement does not obligate Grimmer to arrange further financing or make personal loans for three reasons. First, the document simply does not say that. Paragraph 4 of the terms "[w]e have agreed on" assigns Grimmer "responsibility" to use financial connections to procure from a lender "necessary financing for the project … in the amount sufficient to provide for all project costs including an interest reserve (if possible) that would carry the financial requirements of the project for approximately one year." There is no allegation Grimmer failed to do that. Similarly, the document nowhere says that Grimmer must make personal loans, but rather "[a]ny loan advances from the partners shall be treated as note payables by the LLC."

Second, the September 23, 2004 letter is merely an agreement to agree. Its opening words state that it is merely "a confirming, brief outline" and that "[w]e have agreed" that "[w]e

will establish a new LLC for each project we agree to engage in." (Emphasis added.) An agreement to make a contract, or as the cases sometimes phrase it, "an agreement to agree," does not constitute a binding obligation. *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 657, 267 S.E.2d 584, 586 (1980).

Third, for each project that Grimmer and Stevens undertook, they formed a new LLC and executed a written operating agreement and Development Agreement. When the same parties enter into successive contracts, "[i]f the second contract deals with the subject matter of the first so comprehensively as to be complete within itself or if the two contracts are so inconsistent that the two cannot stand together a novation occurs." *Whitaker General Medical Corp. v. Daniel*, 324 N.C. 523, 526, 379 S.E.2d 824, 827 (1989). If the two contracts can co-exist, there is no substitution, *Wachovia Insurance Services, Inc. v. McGuirt*, 2007 NCBC 3, ¶¶ 44-50, but the Operating Agreements and Development Agreements cannot be read other than as comprehensively supplanting the September 24, 2003 letter.

Each Operating Agreement deals thoroughly with capitalization, raising additional capital and member loans. (Operating Agreement §§ 5.1-5.8 & Ex. C.) It leaves no impression that Grimmer is sole financier—capital contributions are proportional to membership interest—or that he has any obligation to make personal loans to the LLCs. The Operating Agreements, together with the Development Agreements (which comprehensively address CDC's fees), supersede the September 24, 2003 letter.

B. The Development Agreements.

CDC's fee claim under the Development Agreements also rests on contracts not enforceable at law because they are rendered illegal by CDC's failure to be licensed as a general contractor in North Carolina and construction manager in South Carolina. North Carolina General Statutes Section 87-1 defines the practice of general contracting in this state:

> ... [A]ny person or firm or corporation to for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm, or corporation that is not licensed as a general contractor..., the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more,... shall be deemed to be a general contractor engaged in the business of general contracting in the State of North Carolina.

N.C. Gen. Stat. § 87-1 (West 2000). The phrase "undertakes to superintend or manage" is defined by regulation to mean that one:

> is responsible for superintending or managing the entire construction project, *and either* contracts directly with subcontractors to perform the construction for the project *or* is compensated for superintending or managing the project based upon the cost of the project *or* the time taken to complete the project.

N.C. Admin. Code tit. 21, r. 12.0208.

In the Development Agreements between CDC and Tucker Chase and Reid Pointe, CDC undertakes to superintend and manage their respective subdivision development projects, including construction of infrastructure. The opening page states the "intent of this Agreement" to be for CDC "to provide to the Company all of the services required to take the subject property in its undeveloped raw land state and improve the property into a completed and developed state." (*See* Exhibits C and D, Development Agreement portion, at 1.) Section I of the Agreement is captioned "Development Management, Construction Services, and Marketing Services," and the third subsection thereunder is captioned "Construction Phase" and requires CDC to:

> 1. Develop construction schedules with all contractors.
>
> 2. Supervise, coordinate and expedite construction of all site improvements per approved construction drawings.
>
> 3. Resolve day-to-day problems related to site construction without involving the Company, unless absolutely necessary.

> 4. Schedule and supervise the installation of on-site utilities, including electric, gas, telephone and cable TV.
>
> 5. Coordinate construction surveying and engineering services necessary for site improvements, staking of lot corners, etc.
>
> 6. Work with builders, if necessary, to resolve problems on individual lots.
>
> 7. Work with Contractors to obtain padded lots where required by the plans and satisfactory compaction tests on lots and streets as needed.

(*Id.* at 4.) This is but a sampling of such language in the document.

CDC's compensation under the Development Agreements is based upon the cost of improvements. Specifically, Section III, titled "Compensation," states, "Compensation for the services contained herein shall be on a 'percentage of completion' basis, such fee calculated by multiplying fifteen percent (15%) times the defined 'hard costs' associated with the project, shown on line 55 of the 'Budget Analysis',... attached hereto." Because CDC undertook to superintend and manage the construction of improvements[1] and agreed to be compensated based on project cost, it fell within the definition of general contracting in North Carolina.

With respect to Reid Pointe, whose subdivision is located in Lancaster County, South Carolina, CDC meets the statutory definition of construction manager:

> "Construction manager" means an entity working for a fee whose duties are to supervise and coordinate the work of design professionals and multiple prime contractors, while allowing the design professionals and contractors to control individual operations and the manner of design and construction. Services provided by a construction manager may include:
>
> (a) coordination, management, or supervision of design or construction;
>
> (b) cost management, including estimates of construction costs and development of project budgets;
>
> (c) scheduling, which may include critical Path techniques, for all phases of a project;

[1] The budgeted cost of improvements is appended to the Operating Agreements and far exceeds the $30,000 threshold.

(d) design review, including review of formal design submission and construction feasibility; and

(e) bid packaging and contractor selection....

S.C. Code Ann. § 40-11-20(5). A construction manager is required in South Carolina to hold a general or mechanical contractor's license or to be a registered engineer or architect. *Id.* §40-11-20. The description of CDC's duties in the Reid Pointe Development Agreement meets the statutory definition of construction manager.

Under North Carolina caselaw, a contractor's failure to comply with the licensing requirements of Chapter 87 precludes him from recovery on a contract. *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968). The South Carolina Supreme Court has reached the same result. *W & N Construction Co. v. Williams*, 472 S.E.2d 622, 623 (1996). The holding of the latter case applies with equal force to an unlicensed South Carolina construction manager.

The Complaint alleges that CDC is not properly licensed in North or South Carolina. (Compl. ¶ 30.) The Answer responds with a general denial, but elsewhere acknowledges implicitly that CDC is not licensed. Specifically, paragraph 13 of the Answer states that CDC "was not a 'contractor' required to be licensed by the State of North Carolina." Further, online searches of licensee databases at the North Carolina Licensing Board for General Contractors (http://www.nclbgc.org/lic_fr.html) and the South Carolina Department of Labor, Licensing & Regulation (https://verify.llronline.com/LicLookup/Contractors/Contractor.aspx? div=69) indicates the absence of any licensure for CDC. Such public records are subject to judicial notice. N.C.R. Evid. 201 (judicial notice of fact "not subject to reasonable dispute" that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" is mandatory upon request.)

Because the Development Agreements unmistakably require CDC to render services that constitute general contracting in North Carolina and construction management in South Carolina, and CDC does not have the requisite licensing, it cannot recover fees that it asserts are owed in respect of Tucker Chase and Reid Pointe. The contract claim is subject to dismissal to the extent that it rests on that basis.

C. Undistributed Profit.

The lone paragraph alleging the existence of undistributed profit in Meadow, LLC is insufficient to sustain a breach of contract because it fails to allege the contract and term that has been breached by the failure to distribute profit. The sole relevant provisions of the Operating Agreement appear to be Sections 1.13 and 7.2, which define and treat "Distributable Cash." The definition provides that it is an amount determinable in the "reasonable discretion of the Managers," taking into account "reasonable provision" for "current liabilities" and "a reasonable reserve … for Company operating expenses." Plaintiffs have failed to find any provision requiring the distribution of "undistributed profit." This allegation states no claim.

III. THE DISSOLUTION CLAIM DOES NOT LIE ON ANY GROUND.

The remaining claim is for judicial dissolution, alleged against all five of the LLCs owned by Grimmer and Stevens. The governing statute authorizes such relief on behalf of a member on four alternative grounds:

> (i) The managers are in deadlock, the members cannot break the deadlock, "and irreparable injury to the [LLC] is threatened or being suffered, or the business and affairs of the [LLC] can no longer be conducted to the advantage of the members generally, because of the deadlock."
>
> (ii) Liquidation is "reasonably necessary for the protection of the rights or interests of the complaining member."
>
> (iii) The assets of the limited liability company are being misapplied or wasted.

> (iv) The member is entitled to dissolution under the article organization or a written operating agreement.

N.C. Gen. Stat. § 57C-6-02(2).

Defendants' abbreviated allegations in support of this claim seem to reference the first three of these alternative grounds:

> Pursuant to N.C.G.S. § 57C-6-02 CDC has established that the business affairs of each of [Kyliglen, Meadows, Tucker Chase, Reid Pointe and Southeastern] can no longer be conducted to the advantage of CDC and that liquidation is reasonably necessary for the protection of the rights or interests of CDC. Upon information and belief with Grimmer as manager, the assets of each of the [LLCs] are being or will be misapplied or wasted.

(Counterclaims, Sec. I, ¶ 3.) The allegations fail, however, to allege completely any of the alternative grounds.

The first ground is not alleged because there is no allegation of deadlock, nor could there be. Grimmer has the power to and has removed CDC as manager, resolving any deadlock. Further, alleging that the business and affairs of the LLCs cannot be conducted "to the advantage of CDC" is not the same as alleging that they cannot be conducted to the advantage of the general membership.

The third ground is not alleged because there is no fact-based allegation of misapplication or waste of LLC assets. Rather, Defendants cast aspersions on Grimmer's capabilities as sole manager, alleging that because "he is not capable to competently manage the affairs of the LLCs at issue," "the assets of these [LLCs] will be misapplied or wasted under the management of Grimmer." (Counterclaims, ¶ 33.) Waste of corporate assets means their diversion for improper or unnecessary purposes or the "exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." 3A William Meade Fletcher, Fletcher Cyc. Corp. § 1102 (2007). It arises

where managers "irrationally squander or give away corporate assets." *Id.* Management decisions within its discretion do not constitute waste. *Id.*

The remaining ground that Defendants attempt to allege is that judicial dissolution is "reasonably necessary for the protection of the rights or interests of" CDC as member. Facts pled in support of this claim are also insufficient. No allegation of the counterclaims alleges any deprivation of a right secured to Defendants under any provision of an operating agreement. As noted previously, although Defendants complain of CDC's removal as manager without good cause, the Operating Agreements clearly afford Grimmer that power. Defendants complain that Grimmer has initiated capital calls, but again his actions have been in accordance with the Operating Agreements.

In addition to rights specified in the Operating Agreement, member rights or interests protectable by judicial dissolution include their "reasonable expectations." *See Classic Coffee Concepts, Inc. v. Anderson*, 2006 NCBC 21, ¶ 118 (2006):[2]

> To obtain relief under the "reasonable expectations" analysis, a complaining stockholder must prove that: (a) he had one or more reasonable expectations known or assumed by the other stockholders; (b) the expectation has been frustrated; and (c) the frustration was without fault of the complaining stockholder and was, in large part, beyond his control; and (d) under all of the circumstances of the case, the complaining stockholder is entitled to some form of equitable relief.

Id. ¶ 119. Only expectations that are reasonable and commonly known or assumed and concurred in are recognized. *Id.* ¶ 120.

A claim for dissolution that does not allege a sufficient factual basis for a claim of frustrated reasonable expectations is subject to dismissal. *Id.* ¶¶ 121, 125. Here, Defendants have failed to plead any factual basis for their conclusory allegation that dissolution is necessary

to protect their rights and interests in the LLCs. To the extent they may contend that they had reasonable expectations that CDC would not be removed as manager or that Grimmer would not initiate capital calls, such expectations are "flatly contradicted by the express terms" of the Operating Agreements. *See id.* ¶ 121. Because the Operating Agreements expressly allowed Grimmer (as majority member) to remove CDC "at any time for any reason," and empowered him to initiate capital calls in his discretion, contrary expectations were not reasonable as a matter of law, and the dissolution claim is subject to dismissal. *Id.* ¶ 125.

CONCLUSION

For these reasons, Plaintiffs request that the Counterclaims be dismissed.

This 15th day of May, 2008.

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[2] Although *Classic Coffee Concepts* was decided under the Business Corporations Act, the language of the LLC dissolution statute is modeled on the corporate dissolution statute, suggesting that the same principles apply.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing complies with the length limitations of BCR 15.8 and that on May 15, 2008, I served a copy of the foregoing on all counsel by mail in accordance with Rule 5 of the Rules of Civil Procedure, at the following addresses:

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_____
J. Daniel Bishop