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Case No. 2023-0365-



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SCARABEE HOLDINGS, LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. _____
)	
4301 OPERATIONS, LLC,)	
)	
Defendant.)	
)	

VERIFIED COMPLAINT FOR ADVANCEMENT

Plaintiff Scarabee Holdings, LLC (“Scarabee”) alleges the following for its Verified Complaint for Advancement against defendant 4301 Operations, LLC (the “Company”).

NATURE OF ACTION

1. This advancement action presents a familiar story. On a clear day, the Company granted advancement rights to Scarabee for any claim in which Scarabee is involved by reason of the fact that Scarabee is a member of the Company. Now that Scarabee has need of advancement, the Company refuses to honor its obligation. Scarabee accordingly brings this action seeking advancement and fees on fees.

PARTIES AND JURISDICTION

2. Plaintiff Scarabee Holdings, LLC is a New York limited liability company with an address of 51 Willard Ave., Pocantico Hills, NY 10591.

3. Defendant 4301 Operations, LLC is a Delaware limited liability company with its principal place of business at 4301 N. Delaware Ave., Philadelphia, PA 19137. The Company is in the business of recycling appliances, refrigerants and other products.

4. The Company's registered agent in Delaware is Cogency Global Inc., 850 New Burton Road, Suite 201, Dover, DE 19904.

5. The Company, a Delaware LLC, may be sued in Delaware pursuant to 6 *Del. C.* § 18-105.

6. This Court has subject matter jurisdiction over this summary advancement proceeding pursuant to 6 *Del. C.* § 18-111.

BACKGROUND

A. 4301 Operations, LLC is Formed in 2009

7. The Company was formed in 2009 and is governed by the 4301 Operations, LLC Limited Liability Company Agreement by and among Safe Disposal Systems, Inc. and Scarabee Holdings, LLC dated as of April 16, 2009 (the "LLC Agreement") (Exhibit 1). The Company had (and has) two members, Safe Disposal Systems, Inc. ("Safe Disposal") and Scarabee. The members of the Company hold different classes of units. Safe Disposal holds 650,000 Class A Units. (*See id.* at Schedule A.) Scarabee holds 350,000 Class B Units. (*See id.*)

8. Brian Connors (“Connors”) signed the Operating Agreement for Safe Disposal as its President, and for the Company as its President. James Ford signed the Operating Agreement for Scarabee in his capacity as Scarabee’s Manager. (Ex. 1, LLC Agreement at p. 53.)

9. The Operating Agreement includes lengthy provisions addressing what should happen “upon the death” of Mr. Ford. (*Id.* at §§ 4.2, 8.4.) In brief, if the Class A Unitholders (*i.e.*, Safe Disposal) do not elect to exercise a “Repurchase Option” within 60 days of Mr. Ford’s death, then the Class B Unitholders (*i.e.*, Scarabee) are entitled to the “Class B Preferred Return,” payable on the last day of each calendar year. (*Id.* at § 8.4(b) (describing the Class B Preferred Return), § 1.1 (defining “Preferred Return”), § 2.6 (defining the fiscal year).)

10. There were only two members of the Company at its formation, namely Safe Disposal and Scarabee. In Article XIII, the LLC Agreement grants broad advancement rights in favor of the “Unitholders,” which provided this right to both members.

11. Section 13.1 of the LLC Agreement states:

Subject to the limitations and conditions as provided in this Article XIII, each Person who was or is made a party or is threatened to be made a party to or is involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or arbitral (hereinafter “Proceeding”), or any appeal in such a Proceeding or any inquiry or investigation that could lead to such a Proceeding, by reason of the fact that such Person, or a Person of which such Person is the legal representative, is or was a Unitholder, an Affiliate of a Unitholder, a Director, in their capacity

as such, shall be indemnified by the Company to the fullest extent permitted by applicable law, as the same exists or may hereafter be amended

(Ex. 1, LLC Agreement at § 13.1).

12. Section 13.2 grants the Company “the power, but not the obligation” to grant indemnification to any Officer, employee, or agent of the Company.

13. Section 13.3 provides advancement rights:

The right to indemnification conferred in this Article XIII shall include the right to be paid or reimbursed by the Company the reasonable expenses incurred by a Person entitled to be indemnified under Section 13.1 or for whom the Company has agreed to provide indemnification under Section 13.2 who was, is or is threatened to be made a named defendant or respondent in a Proceeding in advance of the final disposition of the Proceeding and without any determination as to the Person’s ultimate entitlement to indemnification; *provided, however*, that the payment of such expenses incurred by any such Person in advance of the final disposition of a Proceeding shall be made only upon delivery to the Company of a written affirmation by such Person of his or her good faith belief that he or she has met the standard of conduct necessary for indemnification hereunder and a written undertaking, by or on behalf of such Person, to repay all amounts so advanced if it shall ultimately be determined that such indemnified Person is not entitled to be indemnified hereunder.

(*Id.* at § 13.3).

14. Under this provision, a Unitholder has “the right to be paid or reimbursed by the Company the reasonable expenses incurred by a Person entitled to be indemnified under Section 13.1 . . . in advance of the final disposition of the Proceeding” (*Id.*) Thus, a Unitholder is entitled to advancement if it is “involved” in an action, suit or proceeding “by reason of the fact” that it is a Unitholder. (*Id.* at § 13.1.) The LLC Agreement grants advancement to a

Unitholder that brings suit to vindicate its rights as a Unitholder.

15. The LLC Agreement creates differing advancement rights for Unitholders versus officers, employees, and agents. Under Section 13.3, for an officer (or employee, or agent) to obtain advancement, that person must be defending against a claim. And, it is only officers (or employees, or agents) who must be defending against a claim to obtain advancement. This is plain because the phrase that discusses defending a claim immediately follows the discussion of persons granted indemnification pursuant to Section 13.2. The Unitholders agreed to disable the Company from providing advancement to an officer (or employee, or agent) unless that person is defending a claim. In contrast, the Unitholders granted themselves more expansive rights.

16. Section 13.3 does not condition a Unitholder's entitlement to advancement on the Unitholder being a defendant. Rather, a Unitholder is entitled to advancement to the same extent it is entitled to indemnification under Section 13.1.

17. This different treatment reflects that the Unitholders owned the Company and granted themselves broad advancement rights. An arrangement establishing broad advancement rights was appropriate in the context of an LLC with two members, particularly where a principal of one of the members served as the President.

B. Scarabee Files Suit To Enforce Rights It Holds By Reason Of The Fact It Is a Unitholder

18. On December 29, 2022, Scarabee filed its Verified Complaint for Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing in *Scarabee Holdings, LLC v. 4301 Operations, LLC*, No. 2022-1207-MTZ (Del Ch.) (the “Action”). See Verified Complaint, attached as Exhibit 2 hereto. The remainder of this section recounts allegations from the Complaint.

19. Mr. Ford passed away on June 28, 2019, and is survived by his wife, Rebeca Ford. Rebeca Ford is now the manager of Scarabee. After James Ford passed away, the Repurchase Option was not exercised. Accordingly, the first payment of the Class B Preferred Return to Scarabee was due on December 31, 2019. No such payment was made, and the Company has failed to make any payments of a Class B Preferred Return to Scarabee. The Class B Preferred Return is due and owing for each of 2019, 2020, 2021, and 2022.

20. In the Complaint, Scarabee brings two claims. In Count I, Scarabee brings a claim for breach of contract for the Company’s failure to pay the Class B Preferred Return. In Count II, Scarabee brings a claim for breach of the implied covenant of good faith and fair dealing, again to address the Company’s failure to pay the Class B Preferred Return. Both counts seek to enforce Scarabee’s entitlement, as a Class B Unitholder and under the LLC Agreement, to the Class B Preferred Return.

C. Scarabee is Entitled to Advancement for the Action

21. Scarabee is entitled to advancement for the Action.

22. The Company committed to provide Scarabee advancement pursuant to Section 13.3 of the Operating Agreement, which provides “[t]he right to indemnification conferred in this Article XIII shall include the right to be paid or reimbursed by the Company the reasonable expenses incurred by a Person entitled to be indemnified under Section 13.1. . . .”

23. Under this provision, Scarabee is entitled to advancement for the Action. Scarabee is a Person because it is a limited liability company. The LLC Agreement defines “Person” as, among other things, a “limited liability company.” (LLC Agreement § 1.1 at p. 8.) Scarabee is entitled to be indemnified for the Action under Section 13.1. Specifically, as plaintiff in the Action seeking to enforce its right to payment of the Class B Preferred Return, Scarabee is involved in an action, suit or proceeding by reason of the fact that Scarabee is a Unitholder and in its capacity as such a Unitholder.

24. On March 3, 2023, Plaintiff sent the Company a request for advancement in connection the Action. (Exhibit 3.) Scarabee explained that Section 13.1 of the LLC Agreement grants broad indemnification rights to it as a Unitholder, and that Section 13.3 grants Unitholders broad advancement rights.

Plaintiff provided the affirmation and undertaking called for by the LLC Agreement.

25. On March 7, 2023, the Company rejected Scarabee’s advancement demand. (Exhibit 4.) The Company provided no explanation for its refusal and no discussion of the merits of Scarabee’s advancement demand beyond the conclusory assertion that the Company “disagrees that the Agreement provides Scarabee with either (1) any right to indemnification or (2) any right to the advancement of Scarabee’s fees and expenses incurred and/or to be incurred in connection with the Action.” (*Id.*) The Company did, however, threaten that if Scarabee were to file an advancement proceeding, the Company “will be seeking to recover from Scarabee the attorneys’ fees and costs incurred by 4301 Operations in defending against such a bad faith and frivolous pursuit” (*Id.*)

26. The Company has failed to fulfill the promise it made to provide advancement. Plaintiff therefore brings this action to vindicate its advancement rights, seeking to establish that the Company must advance Plaintiff reasonable expenses (including attorneys’ fees) in connection with its efforts to recover the amounts it is owed under the Operating Agreement, and must pay fees on fees for amounts incurred prosecuting this action.

COUNT I
(Advancement)

27. Plaintiff repeats and realleges paragraphs 1 through 26 as if fully set forth herein.

28. Under the LLC Agreement, the Company has a contractual obligation to provide advancement to Scarabee for the Action.

29. Plaintiff has satisfied all conditions to its entitlement to advancement.

30. Pursuant to Section 13.3 of the Operating Agreement, Plaintiff is entitled to advancement of expenses, including attorneys' fees, that it has incurred and will incur in connection with the Action. The expenses that Plaintiff has incurred to date and will continue to incur in connection with the Action are reasonable. The Company must pay Plaintiff for these reasonable expenses, including interest.

COUNT II
(Fees on Fees)

31. Plaintiff repeats and realleges paragraphs 1 through 30 as if fully set forth herein.

32. Plaintiff is entitled to an award of fees on fees as compensation for its reasonable expenses, including attorneys' fees, incurred in bringing this action for advancement.

33. Plaintiff has incurred, and will continue to incur, expenses in pursuing this action for advancement. The expenses Plaintiff has incurred and expects to incur in connection with this advancement action are reasonable. The Company must pay Plaintiff for these reasonable expenses, including interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Scarabee Holdings, LLC respectfully requests that the Court grant relief in its favor and against Defendant 4301 Operations, LLC as follows:

- (a) Awarding Scarabee advancement for all expenses, including attorneys' fees, that it has incurred and will incur in connection with the Action;
- (b) Awarding Scarabee its attorneys' fees, costs, and other expenses, plus interest, which it has incurred and will continue to incur in prosecuting this action;
- (c) Awarding pre- and post-judgment interest;
- (d) Entering a *Fittracks* order governing the procedures for advancement;
and
- (e) Granting such other and further relief as the Court may deem appropriate.

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By: /s/ Patrick A. Costello

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