COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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SENIOR MAGISTRATE IN CHANCERY

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Re: *In the matter of the CES 2007 Trust*,
C.A. No. 2023-0925-SEM

Dear Counsel:

Pending before me is a motion to dismiss a petition asking that this Court void a spendthrift provision in a Delaware trust or, alternatively, invalidate the trust altogether. The petition was filed by a creditor of the trust's grantor. The goal: to attach to, or collect from, the trust's assets to satisfy the grantor's debts. The grantor and beneficiaries of the trust moved to dismiss the petition, relying largely on the trust's status as an asset protection, or qualified disposition, trust, from which these types of collection efforts are barred. As explained herein, I recommend the motion be granted and the petition dismissed.

I. BACKGROUND[1]

Through this action, Can IV Packard Square, LLC (the "Petitioner") seeks an order from this Court either declaring the spendthrift provision in the CES 2007 Trust (the "Trust") void, or invalidating the Trust altogether.[2] In seeking such a drastic result, the Petitioner purports the Trust is a "sham," and more specifically, a shell to prevent Craig Schubiner (the "Respondent") from paying to the Petitioner a judgment awarded in Michigan.[3] I begin with a brief background.

A. The Parties' Early Disputes

The Respondent and the Petitioner have been at odds since at least 2018.[4] Their falling out was financial. In 2014, the Petitioner loaned one of the Respondent's companies the funds to finance a luxury retail and residential development project in Ann Arbor, Michigan. But the deal did not go as planned

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[1] The following facts are taken from the amended petition and related exhibits. Docket Item ("D.I.") 20, 22. The amended petition incorporates the exhibits filed in connection with the initial petition, D.I. 3–14, which are also taken into consideration for purposes of the motion to dismiss. *See* D.I. 24 (designating the amended petition's exhibit list). Citations to the motion to dismiss oral argument, D.I. 68, are in the form "Tr.".

[2] D.I. 20 ("Am. Pet.") at 25.

[3] *See* Am. Pet. ¶¶ 78 (averring the Respondent intends to "defraud creditors"), 89 ("Simply put, the Trust is a sham[.]").

[4] *See* D.I. 12, Ex. L(1) (awarding nearly $14 million plus attorneys' fees, consultant fees, interest, and costs to the Petitioner). This action centers on the judgment and will be explored further throughout this decision.

and, on May 4, 2018, the Petitioner sued the Respondent in Oakland County Circuit Court in Michigan (the "Michigan Court"), seeking repayment and additional relief.

Ultimately, on or around December 16, 2019, the Michigan Court entered a nearly $14 million judgment in favor of the Petitioner and against the Respondent (the "Judgment").[5] Soon after the Judgment, the Petitioner moved to enjoin the Respondent from transferring property before the Judgment could be satisfied, arguing that there was strong evidence to suggest the Respondent was preparing to transfer assets to avoid satisfaction.[6] The Michigan Court granted that motion on January 16, 2020, and "enjoin[ed] [the Respondent] from transferring assets outside of the normal course of business pending satisfaction of the final judgment [and further ordered that] any person or entity having knowledge of this Order shall be enjoined from accepting any interest in property from [the Respondent], individually or jointly" (the "Injunction").[7]

Since the Injunction, the Respondent has maintained he has no personal assets to satisfy the Judgment, and it remains unpaid.[8] His position and the Petitioner's

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[5] *Id.*

[6] *See* D.I. 12, Ex. L(2) (Michigan Court order adjudicating a motion for reconsideration and the motion to enjoin the transfer of property).

[7] *Id.* at 4.

[8] Am. Pet. ¶ 77.

collection efforts have spanned several proceedings in various jurisdictions through which the Petitioner has sought recovery not only from the Respondent, but from entities the Respondent owns or otherwise controls.[9] This is another such effort, this time seeking to pierce into a trust established by the Respondent long before the Judgment and Injunction.

B. The Trust

The Petitioner avers through this action that the Respondent is evading collection efforts through the CES 2007 Trust. I begin with the Trust's creation and terms, before turning to its assets and stewardship.

1. The Trust's Terms

The Trust predates the Petitioner's loan and the follow-on Michigan litigation. The Respondent established the Trust, as grantor, on April 30, 2007,[10] naming the

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[9] *See, e.g.*, *Can IV Packard Square, LLC v. Harbor Real Estate Co., L.L.C.*, Case No. 1:23-cv-00934-CYC (Colo. Ct. App.).

[10] It appears the parties dispute the date of formation of the Trust. *Compare* Am. Pet. ¶ 6 (noting an establishment date of April 30, 2007), *with* D.I. 50 at 3 (noting an establishment date of July 13, 2007). But, the Trust's agreement is dated April 30, 2007. D.I 3, Ex. A ("Trust Agreement") at 1.

The Trust is irrevocable except as identified in Article Ninth. *Id.* at 21–22. Article Ninth explains that the trustee(s) who are not related or subordinate to the Respondent, and who are not beneficiaries of the trust's income or principal, may amend its terms in a manner that would not alter any beneficial interest in the Trust "by an acknowledged written instrument filed with the trust records[.]" *Id.*

U.S. Trust Company of Delaware as trustee (the "Initial Trustee").[11] But the trustee's power came alongside power that the Respondent: (1) retained for himself as the "Advisor" with "full power to manage the investments of the trusts" "in a fiduciary capacity[,]"[12] and (2) gave to his brother as the "initial Trust Protector," to remove the trustee, appoint a successor trustee, appoint a successor advisor, and appoint co-trustees or co-advisors.[13] Within this scheme, the Respondent set two limitations: (1) the trustee retained sole and absolute discretion at any time to distribute the net income and the principal of the Trust as the trustee determines for the benefit of the beneficiaries,[14] and (2) the Respondent, as the grantor, barred himself from acting as trustee.[15]

By its terms, the Trust was set up for the benefit of its beneficiaries, namely the Respondent's wife (if any), parents, and issue thereof, if alive.[16] The parties agree the Respondent is currently unmarried with one minor daughter, one living parent,

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[11] *Id.* at 1.

[12] *Id.* at 16–17.

[13] Am. Pet. ¶ 15; Trust Agreement at 18–19.

[14] Trust Agreement at 1–2.

[15] *Id.* at 5.

[16] *Id.* at 1.

and two brothers.[17] The trustee bears sole responsibility and discretion regarding distribution to the beneficiaries.[18]

Directly at issue in this action is the Trust's spendthrift provision, which provides:

> No beneficiary's interest in any trust hereunder, whether in income or in principal, shall be subject to anticipation, assignment, pledge, hypothecation, sale or transfer in any manner, and no beneficiary of any such trust or other person interested therein shall have the power to anticipate, assign, pledge, hypothecate, sell, transfer, encumber or charge his or her interest therein, and no trust estate created hereunder shall be liable for or subject to the debts, contracts, obligations, liabilities or torts of any beneficiary of any such trust or other person interested therein; provided, however, that nothing contained herein shall be construed as preventing any beneficiary from making a qualified disclaimer within the meaning of [S]ection 2518 of the Code with respect to interests herein. This section constitutes a restriction on the transfer of the Grantor's beneficial interest in the trust estate that is enforceable under applicable non-bankruptcy laws within the meaning of Section 541(c)(2) of the Bankruptcy Code (11 U.S.C.A Section 541(c)(2)) or any other similar or successor statute.[19]

This is the provision the Petitioner asks this Court to invalidate.

2. The Trust's Assets

In pertinent part, the Trust's assets include a ninety-percent interest in three Delaware limited liability companies: 304 Associates LLC (the "304 LLC"), 305

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[17] Am. Pet. ¶ 8; D.I. 46 ¶ 8.

[18] Trust Agreement at 1–2.

[19] *Id.* at 3.

Associates LLC (the "305 LLC"), and 306 Associates LLC (the "306 LLC" and collectively, the "LLCs").[20]

The LLCs are each managed by the Respondent.[21] The 305 LLC owns two properties located at 200 Aspen Road in Birmingham, Michigan (the "Birmingham Property"), and vacant land directly adjacent to the Birmingham Property at 201 Linden Road, also in Birmingham, Michigan (the "Linden Property").[22] The 306 LLC owns real property located at 941 and 943 E. Hyman Avenue in Aspen, Colorado (the "Aspen Property").[23]

3. The Trustees

The Initial Trustee served in its appointed capacity for over a decade. But on May 10, 2017, the Initial Trustee filed a petition with this Court seeking to resign, have a successor trustee appointed, and receive past-due compensation for its

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[20] Am. Pet. ¶ 17. The remaining ten-percent interest in the LLCs is held by two South Dakota trusts—the CES S.D. Trust, formed on December 15, 2009, D.I. 3, Ex. B ("CES S.D. Trust Agreement"), and the JDS S.D. Trust, formed on February 26, 2010, D.I. 3, Ex. C ("JDS S.D. Trust Agreement"). The Respondent is the grantor of the CES S.D. Trust and James Schubiner is the grantor of the JDS S.D. Trust. *See* CES S.D. Trust Agreement at 1; JDS S.D. Trust Agreement at 1. The Petitioner avers that the Respondent has improperly identified himself as the "100%" owner of the 305 LLC in at least three financial statements. Am. Pet. ¶ 18.

[21] *Id.* ¶ 19. The pleadings do not contain any information about the 304 LLC's assets.

[22] *Id.* ¶¶ 47–48, 64–67.

[23] *Id.* ¶ 74.

services, alleging the Respondent and his brother (as advisor and trust protector) had ignored requests for payment and to resign.[24] Shortly after the Initial Trustee served its petition both on the Respondent and Sondra, Kenneth, and James Schubiner, the Respondent notified the Initial Trustee that a successor had been located and, presumably, the fee request was resolved;[25] on August 4, 2017, the Initial Trustee filed a notice voluntarily dismissing its petition.[26] The current trustee is First State Trust Company (the "Current Trustee").[27]

The Petitioner avers, however, that the Respondent is the *de facto* trustee. The Petitioner calls into question the Respondent's role as the manager of the LLCs, through which he engaged in the transfers addressed below.

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[24] C.A. No. 2017-0358-AGB (Del. Ch.); *see* D.I. 4, Ex. D.

[25] D.I. 4, Ex. E.

[26] D.I. 4, Ex. F.

[27] Am. Pet. ¶ 30; D.I. 4, Ex. F at 2; *see* Tr. 16:21–24 (confirming that "First State Trust [Company] . . . [has] been acting [as trustee] since July 2017").

C. The Transfers[28]

The Petitioner's requests for invalidation of the spendthrift provision in the Trust, or to invalidate the Trust, arise from transfers of assets to the LLCs, which, again, are ninety percent owned by the Trust. Three properties are at issue: the Birmingham Property, the Linden Property, and the Aspen Property. I address them in turn.

The Birmingham Property is currently owned by the 305 LLC. But it was originally the Respondent's, personally. On June 30, 1999, the Respondent purchased the Birmingham Property for $450,000.[29] To finance construction, the Respondent then procured a loan of approximately $1.3 million, secured by a mortgage on the Birmingham Property.[30] After construction, the Respondent used, or claimed, the Birmingham Property as his primary residence from 2001 to 2018.[31]

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[28] Although I have considered the amended petition, with exhibits, in full, I have declined to include the Petitioner's averments regarding the Respondent's transfers to, or conduct regarding, other trusts and entities not at issue in this action. *See, e.g.*, Am. Pet. ¶¶ 70–73 (alleging impropriety in connection with real property conveyed to Harbor Real Estate Company, L.L.C.).

[29] *See id.* ¶ 50 (noting a $450,000 purchase price); D.I. 13, Ex. M(1) (deed dated March 13, 2002, purportedly "to replace a lost or misplaced deed dated June [30], 1999").

[30] Am. Pet. ¶ 50.

[31] *Id.* ¶¶ 51–52.

Ownership of the Birmingham Property changed hands several times through transactions initiated at the whims of the Respondent. In 2004, the Respondent quitclaimed the Birmingham Property to a bonding agency for collateral related to a lawsuit.[32] Then in 2006, the Respondent transferred ownership from himself (presumably having regained ownership after the 2004 quitclaim) to the 305 LLC for $1.00.[33] That transfer did not last long, though, and on the same day, the Respondent transferred the Birmingham Property back to himself for the same *de minimus* price.[34] He again transferred the Birmingham Property to the 305 LLC on March 19, 2007[35] and several years later, on March 4, 2014, shored up that conveyance.[36] Finally, in early 2020, the Birmingham Property went through successive transfers out of the 305 LLC to the Respondent, personally, who pledged the property toward a personal indebtedness, before quitclaiming it back to the 305 LLC a few days later.[37] It remains owned by the 305 LLC.

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[32] *Id.* ¶ 54; D.I. 13, Ex. M(2).

[33] Am. Pet. ¶ 55; D.I. 13, Ex. M(4).

[34] Am. Pet. ¶ 56; D.I. 13, Ex. M(5).

[35] Am. Pet. ¶ 58; D.I. 13, Ex. M(6).

[36] Am. Pet. ¶ 59; D.I. 13, Ex. M(7).

[37] Am. Pet. ¶¶ 60–64; D.I. 13, Ex. M(9)–(11).

Another property at issue is the Linden Property, which is currently owned by the 305 LLC. Originally, on April 21, 2009, the Respondent and the 305 LLC purchased the Linden Property as joint tenants with rights of survivorship.[38] On January 20, 2020, through the same deed used to convey the Birmingham Property, the Respondent conveyed his interest in the Linden Property to the 305 LLC for $1.00.[39]

Finally, I turn to the Aspen Property. Unlike the Birmingham Property and the Linden Property, the Respondent has never personally owned the Aspen Property. Rather, it was owned by 303 Associates, LLC, an entity the Respondent solely owned. On April 5, 2007, 303 Associates, LLC, through the Respondent as its agent, conveyed the Aspen Property to the 306 LLC for $10.00.[40] Then, on March 30, 2016, the Respondent refinanced a lien on the Aspen Property by transferring the property to himself and, after obtaining the loan, transferred the property back to the 306 LLC.[41] Per the briefing in this action, there is pending litigation regarding this transfer in the District Court of Piktin County, Colorado.[42] There are also, per

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[38] Am. Pet. ¶ 65.

[39] *Id.* ¶ 66; D.I. 13, Ex. M(11).

[40] Am. Pet. ¶ 74.

[41] *Id.* ¶ 75.

[42] D.I. 50 at 7.

the briefing, additional proceedings in Colorado and Michigan challenging property transfers and alleged avoidance of the Judgment.[43] This action is another attempt by the Petitioner to challenge these property transfers and collect on the Judgment.

II. PROCEDURAL POSTURE

The Petitioner initiated this action on September 11, 2023.[44] After summonses were issued but before any response was filed, the Petitioner, on October 12, 2023, amended the petition (the "Amended Petition").[45] Through the Amended Petition, in addition to the Respondent, the Petitioner named the following as interested parties: the Current Trustee, Sondra Schubiner, James Schubiner, Kenneth Schubiner, and V.S. (a minor beneficiary).

Initially, this matter was off to a slow start. With no responses on file, the Petitioner moved for default judgment on February 7, 2024.[46] I scheduled a hearing on the motion for April 2, 2024, but after the parties met and conferred, and agreed to extended response deadlines, the hearing was cancelled and the motion withdrawn.[47]

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[43] *Id.* at 7–8.

[44] D.I. 1.

[45] Am. Pet.

[46] D.I. 35.

[47] *See* D.I. 38–42.

On April 18, 2024, the Current Trustee answered the Amended Petition[48] and the remaining parties, including the Respondent (the "Moving Parties"), jointly moved to dismiss this action.[49] Through its answer, the Current Trustee confirmed it continues to act as the trustee and denied that the Trust is a "sham" and should be voided, in whole or part, to satisfy the grantor's debts.[50] Through the motion, the Moving Parties argue that the Amended Petition should be dismissed in full. Per a June 21, 2024 letter, the Current Trustee joined and adopted the Moving Parties' motion to dismiss in part, agreeing that the Petitioner's claims are time barred and that the Petitioner failed to plead sufficient facts that the Trust failed to be an asset protection, or qualified disposition, trust, but taking no position on the conduct of the Respondent (or other interested parties).[51] I heard argument on the motion on December 5, 2024, at which time I took this matter under advisement.

III. ANALYSIS

The Moving Parties seek dismissal under Court of Chancery Rule 12(b)(6). Under that lens:

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[48] D.I. 46.

[49] D.I. 45.

[50] D.I. 46 ¶¶ 31, 89.

[51] D.I. 52.

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are "well-pleaded" if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and [(iv)] dismissal is inappropriate unless the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[52]

I need not, however, "simply accept conclusory allegations unsupported by specific facts, nor . . . draw unreasonable inferences" in favor of the pleader.[53] And, in my review, I may take into consideration documents "incorporated into the pleadings by reference and may take judicial notice of relevant public filings."[54]

The Moving Parties' primary, gatekeeping arguments are that: (1) the requests for relief in the Amended Petition are barred by 12 *Del. C.* § 3572, (2) the Initial Trustee was a "qualified trustee" (as is, they argue, the Current Trustee), which received "qualified dispositions" of membership interests in the LLCs (not the underlying real property assets), vitiating the Petitioner's ability to pierce through to collect, and (3) the Petitioner's claims are untimely under Michigan law.

Should I disagree and reach the merits of the Petitioner's claims, the Moving Parties make several additional arguments, including: (1) that the Petitioner has

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[52] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002) (citations omitted).

[53] *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).

[54] *See Fairthorne Maint. Corp. v. Ramunno*, 2007 WL 2214318, at *4 (Del. Ch. Jul. 20, 2007).

failed to plead any fraudulent conduct regarding the challenged real estate transfers, defeating any claim for relief related thereto, and (2) that the Petitioner should be estopped from asserting its claims in this action because they are, under the Moving Parties' theories, contrary to the Petitioner's positions before a different court.

I begin (and end) my analysis with the gatekeeping questions. The Petitioner has failed to plead a reasonably conceivable claim for avoidance of the protections afforded to the Trust, and its beneficiaries, as an "Asset Protection Trust." As more fully explained herein, the Trust meets the statutory requirements for such protections, and the Petitioner has failed to plead facts which would overcome that showing, or affirmatively demonstrate that the trustees were not qualified, the Respondent was somehow a *de facto* trustee, or the spendthrift provision should be invalidated. With these holdings, I need not reach the timeliness issues or the remaining merits-based arguments.

A. The Trust is an Asset Protection Trust.

The parties agree that the Trust was intended to serve as an asset protection, or qualified disposition, trust. They disagree, however, regarding whether it truly meets the statutory mandates for such treatment. I find it does.

In 1997, Delaware codified the ability to create Delaware self-settled asset protection, or qualified disposition, trusts (Asset Protection Trusts).[55] The Qualified Dispositions in Trust Act (the "Act") permits someone to create an Asset Protection Trust, and irrevocably transfer assets to the trust, to protect those assets from claims against the grantor/former owner.[56] For assets to be protected, however, the transfer must be a "qualified disposition" to a "qualified trustee."[57] The trust agreement must also invoke Delaware law, include a spendthrift provision, and be irrevocable.[58] The Trust contains each of these requirements.

1. The LLC interests were qualified dispositions to qualified trustees.

A qualified disposition is a defined in the Act as an irrevocable transfer, conveyance, or assignment of real or personal property (or the interests therein) to one or more trustees, at least one of which is a "qualified trustee."[59] The transferor/grantor cannot be a "qualified trustee," which must be either a Delaware resident or an entity authorized to act as a trustee in Delaware; a "qualified trustee"

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[55] 12 *Del. C.* §§ 3570–76.

[56] *See generally id.*

[57] *Id.* § 3570(7)–(8).

[58] *Id.* § 3570(11).

[59] *Id.* § 3570(4)–(6).

must also be "subject to supervision by the Bank Commissioner of the State, the Federal Deposit Insurance Corporation, or the Comptroller of the Currency[.]"[60]

A qualified disposition, made to a qualified trustee, may only be attached or avoided in limited circumstances. For pre-transfer creditors, their avenue is through 6 *Del. C.* §§1304–05 (fraudulent transfers); for post-transfer creditors, they must prove "the qualified disposition was made with actual intent to defraud such creditor."[61] Both avenues have time limits.[62]

Here, the Petitioner appears to challenge both dispositions to the Trust and whether the trustees (the Current Trustee and the Initial Trustee) are "qualified trustees." For the former, the Petitioner invites me to conflate the real property, which is an asset of the LLCs, with the LLCs, which are assets of the Trust. I decline to do so. For the latter, the Petitioner argues that the Respondent's retention and exercise of control over the real property undermines the role played by the trustees of the Trusts, rendering them not qualified and superfluous. I disagree.

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[60] *Id.* § 3570(8)(a).

[61] 12 *Del. C.* § 3572.

[62] *See id.*

The Trust's assets are the LLCs, for which the Trust has a ninety-percent interest. Under Delaware's LLC Act:[63] "A limited liability company interest is personal property. A member has no interest in specific limited liability company property."[64] Thus, the Trust, through its membership interest in the LLCs, has no interest in the specific real estate owned (or no longer owned) thereby. It would be inappropriate for this Court, through this type of proceeding, to adjudge the real estate transactions at the LLC level under the guise of potential fraudulent transfer sufficient to void the Trust's spendthrift provision.[65] There are, simply put, no transfers to/from the Trust which would give rise to such an inquiry, and the Petitioner has pled no basis on which this Court should engage in veil piercing.[66]

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[63] I refer to Title 6, Chapter 18 of the Delaware Code more broadly as the Delaware LLC Act.

[64] 6 *Del. C.* § 18-701.

[65] *Cf. Stone & Paper Inv'rs, LLC v. Blanch*, 2020 WL 3496694, at *10 (Del. Ch. June 29, 2020), *judgment entered*, (Del. Ch. 2023), *aff'd*, 312 A.3d 1155 (Del. 2024), *and aff'd sub nom. Skinner v. Stone & Paper Inv'rs, LLC*, 319 A.3d 270 (Del. 2024) (rejecting a conclusory conversion count wherein there was no allegation of conversion of the assets of the companies at issue, their membership interests were not reduced, and they had no viable claim to pierce through to the company's assets); *see also In re Opus E., LLC*, 2012 WL 4867169, at *10 (Bankr. D. Del. Oct. 12, 2012) ("As sole member of [the LLC], the [d]ebtor [(a different LLC)] does not have any interest in [the LLC's] property including any cause of action alleging that [the LLC] suffered an injury. Therefore, the Court concludes that the [t]rustee lacks standing to bring a direct cause of action for tortious interference with, or conversion of, [the LLC's] property.").

[66] *See Harco Nat. Ins. Co. v. Green Farms, Inc.*, 1989 WL 110537, at *4 ("[P]ersuading a Delaware Court to disregard the corporate entity is a difficult task.").

The Petitioner has also failed to plead a reasonably conceivable claim that the trustees of the Trust were not "qualified trustees." Both meet the statutory definition, and the Amended Petition does not provide any factual averments that would demonstrate that either of the trustees failed to "[m]aintain[] or arrange[] for custody in this State of some or all of the property that is the subject of the qualified disposition, maintain[] records for the [T]rust on an exclusive or nonexclusive basis, prepare[] or arrange[] for the preparation of fiduciary income tax returns for the [T]rust, or otherwise materially participate[] in the administration of the [T]rust."[67]

It is the last clause to which the Petitioner grips, arguing the trustees were never intended to materially participate in the administration of the Trust. This conclusion is not, however, supported by the well-pleaded facts in the Amended Petition. At most, the Amended Petition reflects that little administration was necessary for the Trust; for a trust holding solely membership interests in the LLCs, it is not difficult to understand and appreciate such dormancy.

The Petitioner argues, however, that it was more than dormancy, and points to the Initial Trustee's earlier petition to this Court, wherein it complained about its inability to perform under the circumstances. To some extent, yes, the allegations in

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[67] 12 *Del. C.* § 3570.

that earlier action are concerning but they were: (1) resolved, and (2) followed by the appointment of a successor trustee, the Current Trustee, who meets the definition of a Qualified Trustee, and continues to serve in such role. Absent any allegations regarding the stewardship of the Current Trustee, the resolved allegations in the 2017 action are insufficient to state a cognizable claim that the Current Trustee is not a qualified trustee, such that this action should move past the pleading stage.

The Petitioner further argues that the Respondent's retention of control under the Trust's agreement undermines the trustee's authority. I disagree. As advisor, the Respondent has the power to manage investments and delegate authority in accordance with his fiduciary duties. Such is in line with what the Act, which permits the settlor/grantor to appoint advisors and protectors with rights, including but not limited to: (1) removing the trustee and appointing a new qualified trustee, and (2) directing, consenting to, or disapproving distributions.[68]

The Petitioner argues that these statutorily permitted rights do not include the right of a settlor to continue to manage, control, and operate a business owned by the Trust. True, such is not explicitly spelled out in the Act. But it does not need to be, given the layers of protection inherit in such a setup. The Trust owns a ninety-

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[68] *Id.* § 3570(8)(c).

percent interest in the LLCs. That membership interest does not, as already addressed, grant the Trust any right, claim, or title to the assets of the LLCs, but the LLC Act (and any LLC agreements) define the Trust's rights, claims, and interests as a member. The Trust, through the Current Trustee, can invoke those rights as the trustee sees fit, subject to a beneficiary check on the Current Trustee's exercise of its duties.[69] To grant the relief the Petitioner seeks would be to ignore these layers of protection.

Finally, the Petitioner argues that the Respondent, regardless of the propriety of the rights retained in the Trust's agreement, exercises near-complete dominion and control over the Trust, disregarding and failing (or refusing) to recognize its separate existence. This leap in logic is unsupported by the allegations in the Amended Petition, which is scant with any factual averments regarding how the Respondent acted regarding the Trust and management of the Trust's assets. The Trust does not own or have a direct interest in the real estate at issue. It owns the LLCs, and its membership interests therein remain unchanged. To entertain the

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[69] At oral argument, the Current Trustee confirmed it does not have knowledge about the underlying management of the LLCs and argued that policing management of the LLCs is beyond its fiduciary responsibilities as trustee. Tr. 66:2–13. Through this report, I need not—and do not—address the scope of the Current Trustee's fiduciary duties. My acknowledgement that the Trust has rights in connection with its membership interests should not be read as any response to the Current Trustee's position or indication that actions could, or should, have been taken.

Petitioner's theory would require this Court to disregard the layers of business entities and ignore the LLC Act's and Act's clear legislative intent. I decline to do so.

2. The Trust's agreement complies with the statutory mandates.

To be treated as an Asset Protection Trust under the Act, the Trust's agreement also needed to incorporate Delaware law, include a spendthrift provision, and be irrevocable. It did, does, and is.

Under Section 3570(11)(a) of the Act, the trust instrument must "expressly incorporate [Delaware law] to govern the validity, construction and administration of the trust].]"[70] Article Eighth of the Trust's agreement has precisely that, providing: "[t]his Trust Agreement shall be construed under, and all trusts created hereunder shall be governed by, the laws of Delaware. Any action or proceeding relating to this trust shall be brought and enforced in any state or federal court of competent jurisdiction in the State of Delaware."[71]

Section 3570(11)(c) also requires that the trust instrument contain a spendthrift provision, which:

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[70] 12 *Del. C.* § 3570(11)(a).

[71] Trust Agreement at 21.

> Provides that the interest of the transferor or other beneficiary in the trust property or the income therefrom may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before the trustee or trustees actually distribute the property or income therefrom to the beneficiary, and such provision of the trust instrument shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of [Section] 541(c)(2) of the Bankruptcy Code (11 U.S.C. § 541(c)(2)) or any successor provision thereto.[72]

In Article Second (B) of the Trust, the spendthrift provision provides:

> No beneficiary's interest in any trust hereunder, whether in income or in principal, shall be subject to anticipation, assignment, pledge, hypothecation, sale or transfer in any manner, and no beneficiary of any such trust or other person interested therein shall have the power to anticipate, assign, pledge, hypothecate, sell, transfer, encumber or charge his or her interest therein, and no trust estate created hereunder shall be liable for or subject to the debts, contracts, obligations, liabilities or torts of any beneficiary of any such trust or other person interested therein; provided, however, that nothing contained herein shall be construed as preventing any beneficiary from making a qualified disclaimer within the meaning of [S]ection 2518 of the Code with respect to interests herein. This section constitutes a restriction on the transfer of the Grantor's beneficial interest in the trust estate that is enforceable under applicable non-bankruptcy laws within the meaning of Section 541(c)(2) of the Bankruptcy Code (11 U.S.C.A Section 541(c)(2)) or any other similar or successor statute.[73]

Thus, I find 12 *Del. C.* § 3570(11)(c) is met.

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[72] 12 *Del. C.* § 3570(11)(c).

[73] Trust Agreement at 3.

Finally, the Act requires the trust instrument be irrevocable.[74] Article Ninth of the Trust's agreement provides: "The Grantor declares that the trust is irrevocable, and, except as provided in Paragraph B of this Article Ninth, this Trust Agreement may not be revoked, altered, amended or otherwise changed."[75] The provision in paragraph B merely provides that the trustee(s) who are not related or subordinate to the Respondent, and who are not beneficiaries of the trust's income or principal, may amend its terms in a manner that would not alter any beneficial interest in the Trust "by an acknowledged written instrument filed with the trust records[.]". Thus, 12 *Del. C.* § 3570(11)(b) is also met.

B. The Petitioner has pled no basis on which to invalidate the Trust's spendthrift provision.

The Petitioner argues that, even if the Trust is an Asset Protection Trust, the Act still permits this Court to invalidate the Trust or its spendthrift provision under common law. I agree that such an avenue exists, but it is not applicable here.

The Petitioner sees this avenue in Section 3536(a) of the Act which retains creditors' rights against a beneficiary's interest in an Asset Protection Trust as otherwise provided "by the laws of this State." Then-Vice Chancellor Jacobs

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[74] 12 *Del. C.* § 3570(11)(b).

[75] Trust Agreement at 21.

analyzed this language in 2002 in *Kulp v. Timmons*.[76] Therein, the Vice Chancellor found that this language clarified that common law on voiding a trust was not statutorily displaced. That common law, in the Asset Protection Trust realm, he held "clearly reflect[ed] a basic principle: our courts will not give effect to a spendthrift trust that has no economic reality and whose only function is to enable the settlor to control and enjoy the trust property without limitations or restraints, as was done before the trust was created."[77] The Vice Chancellor went on to explain the two primary doctrines underlying such principle.

The first: public policy. As he explained, public policy will not permit someone to create a spendthrift trust solely for their own benefit because where "the trustee controls the assets and income of the trust for his own benefit, unconstrained by any fiduciary duties owed to others, the purpose of a spendthrift trust—to protect the beneficiary from his or her own improvidence—is lost."[78] The second underlying doctrine is that of merger. "Under that doctrine, a trust becomes void where the interests of the beneficiaries and the interests of the settlors are identical."[79]

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[76] 944 A.2d 1023 (Del. Ch. 2002).

[77] *Id.* at 1031.

[78] *Id.* at 1032.

[79] *Id.*

Neither doctrine supports the Petitioner's request for relief in this action. The Trust's assets are its membership interests in the LLCs, which a qualified trustee holds for the benefits of all the beneficiaries of the Trust. As already explained, I decline to pierce down, treat the LLCs as shams or alter egos of the Respondent, and convert the Trust's membership interests therein to real property interests. *Kulp* does not support the Petitioner's claims, which should be dismissed at the pleading stage.

IV. CONCLUSION

For the foregoing reasons, the Petitioner has failed to state a claim to void the spendthrift provision of the Trust or invalidate the Trust altogether. Accordingly, the Respondent's motion to dismiss the Amended Petition should be granted, and the Amended Petition should be dismissed.

This is a final report, and exceptions may be filed under Court of Chancery Rule 144.[80]

Respectfully Submitted,

/s/ Selena E. Molina

Senior Magistrate in Chancery

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[80] The Moving Parties clarified at oral argument that they wished to preserve the ability to move for fees. Any motion for fees must be filed within twenty days of a final order of the Court on the motion to dismiss, either issued because no exceptions are timely filed or in connection with exceptions heard by a constitutional officer of this Court.