IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MS. MARY GIDDINGS WENSKE, INDIVIDUALLY AND AS TRUSTEE OF THE THOMAS HUNTER GIDDINGS, JR. TRUST U/W/O THOMAS H. GIDDINGS DATED 5/23/2000,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 2017-0699-JRS**
BLUE BELL CREAMERIES, INC., BLUE BELL CREAMERIES, U.S.A., INC., PAUL W. KRUSE, JIM E. KRUSE, HOWARD W. KRUSE, GREG BRIDGES, RICHARD DICKSON, WILLIAM J. RANKIN, DIANA MARKWARDT, JOHN W. BARNHILL, JR., PAUL A. EHLERT, DOROTHY MCLEOD MACINERNEY, PATRICIA RYAN,	:	
Defendants.	:	
and	:	
BLUE BELL CREAMERIES, L.P.,	:	
Nominal Defendant.	:	

MEMORANDUM OPINION

Date Submitted: October 10, 2018
Date Submitted: November 13, 2018

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Timothy R. Dudderar, Esquire and Travis R. Dunkelberger, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware, Attorneys for Defendants Blue Bell Creameries, Inc., Blue Bell Creameries, U.S.A., Inc., Jim E. Kruse, Howard W. Kruse, Richard Dickson, William J. Rankin, Diana Markwardt, John W. Barnhill, Jr., Paul A. Ehlert, Dorothy McLeod MacInerney, Patricia Ryan, and Nominal Defendant Blue Bell Creameries, L.P.

Srinivas M. Raju, Esquire and Kelly L. Freund, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, Attorneys for Defendants Greg Bridges and Paul W. Kruse.

SLIGHTS, Vice Chancellor

On July 6, 2018, I issued a Memorandum Opinion (the "Opinion") in this limited partnership derivative action denying, in part, Defendants' motion to dismiss the operative Complaint.[1] I dismissed Count II of the Complaint, however, upon concluding Plaintiffs had not stated a claim against the parent company of the operating subsidiary based on vicarious liability, veil-piercing, or joint venture liability theories.[2] Plaintiffs move to reargue that aspect of the Opinion (the "Motion"), contending that I "misapprehended long-standing Delaware law regarding agency liability of a parent entity for its subsidiary's breach of contract."[3]

The Motion is improper because it either repeats arguments already made or makes new arguments that should have been raised in opposition to the underlying motion to dismiss. Nevertheless, I have revisited the old arguments and considered the new ones. Having done so, I remain satisfied that my dismissal of Count II is entirely consistent with settled Delaware law.[4] Accordingly, the Motion must be denied.

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[1] *Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 3337531 (Del. Ch. July 6, 2018). Capitalized terms are as defined in the Opinion unless otherwise defined.

[2] *Id.* at *15–17.

[3] Pls.' Mot. for Rearg. ("Mot.") 2 (D.I. 43).

[4] As discussed below, I do find that the Opinion adjudicated a claim not pled in the operative complaint and clarify that ruling here.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are limited partners of Blue Bell Creameries, L.P. ("BB LP"), a national producer and seller of ice cream products. BB LP is the operating subsidiary of an enterprise of Blue Bell entities that also includes Blue Bell Creameries USA, Inc. ("BB USA"), a Delaware subchapter S corporation, and Blue Bell Creameries, Inc. ("BB GP"). BB USA wholly owns BB GP; and BB GP is the exclusive manager and general partner of BB LP. BB USA owns 69.643% of the partner's equity in BB LP and its BB GP and BB LP ownership interests comprise all of BB USA's assets and liabilities.

In early 2015, the discovery of *Listeria monocytogenes* bacteria in Blue Bell ice cream products forced BB LP to recall all of its products and shut down all of its operations.[5] The resulting "trauma" prompted Plaintiffs to bring this derivative action on behalf of BB LP against BB GP, BB USA and members of the BB USA board of directors alleging, among other claims, breach of fiduciary duty and breach of BB LP's limited partnership agreement (the "LPA").[6]

In the Opinion, I dismissed the claims against BB USA and members of its board of directors (Count II) but allowed the claims against BB GP, as BB LP's

[5] Verified Deriv. Compl. ("Compl.") ¶ 2. *Listeria monocytogenes* is a deadly bacterium that causes listeriosis. *Id.*

[6] Compl., pmbl. & ¶¶ 2, 7–8.

general partner and (by contract) exclusive manager,[7] to proceed to discovery on Plaintiffs' breach of contract claim.[8] As noted, Plaintiffs seek to reargue the dismissal of Count II.

II. ANALYSIS

The Court will deny a motion for reargument "unless the Court has overlooked a decision or principle of law that would have a controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected."[9] "Where the motion merely rehashes arguments already made by the parties and considered by the Court when reaching the decision from which reargument is sought, the motion must be denied."[10] Likewise, reargument will be denied when the motion raises arguments that should have been made in connection with the underlying decision.[11]

As the briefing and arguments progressed on Defendants' motion to dismiss, it appeared that Plaintiffs' theory of liability against BB USA and its fiduciaries reduced to the question of whether BB USA could be held vicariously liable for

[7] LPA §§ 6.01(a), 6.10.

[8] *See Wenske*, 2018 WL 3337531, at *13–15, *17.

[9] *Stein v. Orloff*, 1985 WL 21136, at *2 (Del. Ch. Sept. 26, 1985).

[10] *Wong v. USES Hldg. Corp.*, 2016 WL 1436594, at *1 (Del. Ch. Apr. 5, 2016) (citing *Lewis v. Aronson*, 1985 WL 21141, at *2 (Del. Ch. June 7, 1985)).

[11] *Id.*

BB GP's alleged breach of the LPA.[12] Specifically, Plaintiffs pressed the argument that BB USA may be vicariously liable for BB GP's breach of contract merely because BB USA allegedly dominates and controls BB GP.[13] They press that same argument even more vigorously in the Motion.[14] But they also expand their agency argument in the Motion by emphasizing their disagreement with Defendants' and the Court's characterization of BB USA as merely a holding company,[15] and by attempting to clarify that they are also prosecuting a "direct agency" theory of liability.[16]

In the Opinion, I held:

- "Plaintiffs' attempt to hold BB USA liable for BB GP's alleged breach of the LPA based on an agency theory fail[ed] because Delaware law recognizes no theory under which a principal can be *vicariously* liable for its agent's non-tortious breach of contract,"[17] and Plaintiffs did not

[12] *See, e.g.*, Pls.' Answering Br. in Opp'n to Defs.' Joint Mot. to Dismiss ("Answering Br."), 10 n.4 (arguing LPA § 6.08's exculpation provision "should not apply to Plaintiffs' claims against BB USA based upon an agency theory or joint venture liability, because Section 6.08 applies only to 'act or omission of such Indemnitee,' not also *third party vicarious liability for another's conduct* . . . .") (emphasis supplied) (D.I. 27); Oral Arg. on Defs.' Mot. to Dismiss Tr. ("Oral Arg. Tr.") 73:6–14 (describing Plaintiffs' theories of liability as "vicarious liability theories") (D.I. 39).

[13] *Id.*

[14] *See, e.g.*, Mot. 3 ("Even if the Court's novel requirements for imposing parent liability were to apply, Plaintiffs have sufficiently alleged facts that satisfy those requirements.").

[15] *See Wenske*, 2018 WL 3337531, at *2.

[16] Pls.' Letter Regarding Supplemental Auth. ("Pls.' First Rearg. Letter") 2–3 (D.I. 46).

[17] *Wenske*, 2018 WL 3337531, at *16 (emphasis supplied).

well-plead that "BB GP's (alleged) breach of LPA § 6.01(e) was tortious vis-à-vis Blue Bell"[18];

- Plaintiffs failed to plead a basis to "pierce the veil" of BB GP to get to BB USA under an "alter ego" theory because there were no well-pled allegations that BB GP was operated or structured to perpetrate a fraud or injustice[19]; and

- "Plaintiffs' claim that BB USA [was] liable as BB GP's joint venturer [was] preempted by the LPA, which governs all aspects of BB USA and BB GP's relationship with respect to Blue Bell."[20] The LPA vests BB GP with the exclusive authority to manage Blue Bell's business and affairs, thus revealing that "BB GP and BB USA, in fact, did not intend to 'act[] together in a joint venture to operate and manage Blue Bell.'"[21]

Having carefully reviewed the Opinion and the Motion, I remain satisfied that there was nothing novel or misapprehended with respect to these conclusions. Each applied settled Delaware law.

A. BB USA Is Not Vicariously Liable For BB GP's Breach of Contract

It is hornbook law that, ordinarily, only parties to a contract may be liable for breach of that contract.[22] Agency law does not negate or otherwise alter that

[18] *Id.* at *17.

[19] *Id.* at *15 (citing *Wallace ex rel. Cencom Cable Income P'rs II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999)). As discussed below, it is this aspect of the Opinion that addressed a claim that, upon review, I now see was neither pled nor argued in response to the Motion to Dismiss.

[20] *Id.* at *16.

[21] *Id.* at *17.

[22] 13 *Williston on Contracts* § 37.1 (4th ed. 2015) ("The mere fact of entering into a contract gives rise to a relationship between or among the contracting parties known as "privity." . . . [And, generally,] only parties in privity of contract [can] sue on the

fundamental tenet of contract law.[23] Under the doctrine of vicarious liability, a principal may be liable for torts committed by an agent acting within the scope of the agency relationship, i.e., where the agent's tortious conduct is undertaken pursuant to the agency relationship.[24] Delaware, however, has not extended the doctrine of vicarious liability to breach of contract claims. Indeed, this court's decisions in *NACCO Indus., Inc. v. Applica Inc.* and *Kuroda v. SPJS Hldgs., L.L.C.* (both cited in the Opinion)[25] make clear that Delaware does not depart from the

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contract."); *Wallace*, 752 A.2d at 1180 ("It is a general principle of contract law that only a party to a contract may be sued for breach of that contract."); *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 59 (Del. Ch. 2012) ("[B]asic contract principles [recognize] that a person not a party to [a] contract cannot be held liable to it.") (emphasis omitted).

[23] *See O'Leary v. Telecom Res. Serv., LLC*, 2011 WL 379300, at *7 (Del. Super. Jan. 14, 2011); *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988).

[24] RESTATEMENT (THIRD) OF AGENCY § 7.03 (2006).

[25] *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009) ("A breach of contract is not an underlying wrong that can give rise to [vicarious liability under a] civil conspiracy [theory]."); *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 892 (Del. Ch. 2009) ("[U]nless the breach also constitutes an independent tort, a breach of contract cannot constitute an underlying wrong on which . . . civil conspiracy[-type] [vicarious liability] could be based[.]"). *See also All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *7 (Del. Ch. Aug. 9, 2004) (holding that an employer/principal would be vicariously liable for its agent's tortious activities that also breached the agent's non-compete agreement with her former employer/principal); *OptimusCorp v. Waite*, 2015 WL 5147038, at *56 (Del. Ch. Aug. 26, 2015) (holding that "Delaware law requires an independent tort underlying a civil conspiracy," and "[c]ivil conspiracy is vicarious liability."). *Accord*, RESTATEMENT (THIRD) OF AGENCY § 7.03(2) (no vicarious liability of principal without agent's "tortious" conduct); 74 Am.Jur.2d Torts § 60 (2012) ("[V]icarious liability assigns legal liability to a party who is blameless in fact based on the tortious acts of another."); 3 Am.Jur.2d Agency § 315 (2013) ("A plaintiff may sue a principal based on its vicarious liability for the tortious conduct of its agents . . . ."); *Wathor v. Mutual Assur. Adm'rs, Inc.*, 87 P.3d 559, 568 (Okla. 2004) ("[T]he law will recognize no vicarious responsibility for

general proposition that the law will not impose vicarious liability upon the principal for its agent's non-tortious breach of contract.[26]

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non-tortious acts of a contractually engaged (non-employee) agent . . . . Putting the principle in simpler language, vicarious liability is not imposable where no actionable claim may be pressed against the actor and there is no allegation of an independent tort by the vicariously liable obligor."); *Trivedi v. Golub*, 46 A.D.3d 542, 543 (N.Y. App. Div. 2d Dep't 2007) ("[I]n the absence of any wrongful or actionable underlying [tortious] conduct . . . there can be no imposition of vicarious liability . . . .") (quoting *Wende C. v. United Methodist Church*, 6 A.D.3d 1047, 1052 (N.Y. App. Div. 4th Dep't 2004), *aff'd*, 827 N.E.2d 265 (N.Y. 2005)); *Allen v. Allstate Corp.*, 2009 WL 325331, at *2 (Ariz. Ct. App. Div. 1 Feb. 10, 2009) (appellees moved to dismiss arguing there is no vicarious liability for breach of contract because vicarious liability is a theory that arises in tort, in response to which appellants agreed to dismiss their vicarious liability claim); *Freeman Mgmt. Corp. v. Shurgard Storage Ctrs., LLC*, 461 F.Supp.2d 629, 643 (M.D. Tenn. 2006) (holding that civil conspiracy is a means to establish vicarious liability in tort for a breach of contract); *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983) ("Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort.").

[26] Plaintiffs are critical of the Court for relying upon civil conspiracy jurisprudence in reaching its conclusion that their vicarious liability theory against BB USA for breach of contract is not viable. *See* Mot. 2 ("To Plaintiffs' knowledge, these requirements for parent liability have never been applied by any other Delaware court."). The Opinion's discussion of civil conspiracy liability speaks directly to the broader vicarious liability question, given that *civil conspiracy liability is a species of vicarious liability*. *See Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *11 (Del. Ch. Aug. 26, 2005) ("However captioned, civil conspiracy is vicarious liability."). In my view, a discussion of civil conspiracy liability was useful to address Plaintiffs' attempt to hold BB USA *vicariously* liable on a contract to which it clearly was not a party, particularly given that Plaintiffs failed to marshal any authority in support of their position. Remarkably, Plaintiffs are also quite exercised that the Court "[r]el[ied] on the Restatement (Third) of Agency . . . which had [not] been raised or briefed by the parties." Mot. 2. That is simply wrong; Plaintiffs themselves cited the Restatement. *See* Pls.' Answering Br. viii, 38–39; Pls.' Sur-Reply Br. in Opp'n to Defs.' Joint Mot. to Dismiss ("Pls.' Sur-Reply Br.") 2, 3 (D.I. 37) (citing the Restatement (Third) of Agency and Restatement (Second) of Agency).

Because Plaintiffs' arguments in response to Defendants' motion to dismiss, while unclear, appeared to argue that BB USA was *vicariously* liable for BB GP's breach of the LPA,[27] I addressed that argument and squarely rejected it.[28] That holding did not misapprehend Delaware law.[29]

[27] Pls.' Answering Br. 10 n.4.

[28] *Wenske*, 2018 WL 3337531, at *16 ("Delaware law recognizes no theory under which a principal can be vicariously liable for its agent's non-tortious breach of contract," and Plaintiffs "d[id] not contend that BB GP's (alleged) breach of LPA § 6.01(e) was tortious vis-à-vis Blue Bell.").

[29] In their Motion, Plaintiffs contend for the first time that they "sufficiently alleged that BB GP's conduct was tortious [vis-à-vis Blue Bell]." Mot. 10. That contention is not only untimely, it is not supported by the Complaint, which nowhere characterizes BB GP's conduct as tortious (either explicitly or implicitly). Moreover, if the Complaint had requested relief on the theory that BB GP's (alleged) breach of LPA § 6.01(e) was tortious, it would have conflicted with Delaware's "bootstrapping" doctrine. *See, e.g.*, *Cornell Glasgow, LLC v. La Grange Properties, LLC*, 2012 WL 2106945, at *8 (Del. Super. June 6, 2012) ("Delaware courts will not permit a plaintiff to 'bootstrap' a breach of contract claim into a tort claim merely by intoning the *prima facie* elements of the tort while telling the story of the defendant's failure to perform under the contract."); *EZLinks Golf, LLC v. PCMS Datafit, Inc.*, 2017 WL 1312209, at *3 (Del. Super. Mar. 13, 2017) ("For both a breach-of-contract claim and a tort claim to coexist in a single action, 'the plaintiff must allege that the defendant breached a duty that is independent of the duties imposed by the contract.'"). Plaintiffs' new found tort theory also writes out of existence LPA § 6.11(d), which "unconditionally eliminates" BB GP's common law duties of care to Blue Bell and its limited partners. *See Wenske*, 2018 WL 3337531, at *13 ("[L]anguage such as appears in LPA § 6.11(d) 'unconditionally eliminate[s] all common law standards of care and, fiduciary duties, and substitute[s] a [general] contractual good faith standard of care.'") (quoting *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 253 (Del. 2017)).

B. The Complaint Did Not Well Plead that BB USA Is Directly Liable for BB GP's Breach of Contract

Although it was not clear that Plaintiffs were making a "direct agency" argument, I addressed that theory in the Opinion and determined, "[t]he Complaint fails to plead any facts that would allow an inference that BB USA authorized BB GP to enter into the LPA on its behalf much less to commit BB USA to manage Blue Bell in accordance with a specified standard of conduct."[30] Plaintiffs challenge that conclusion as well.

Plaintiffs' direct agency argument ignores the fact that for liability to attach under customary agency, "an arrangement [must] exist[] between the two corporations so that one acts on behalf of the other and within usual agency principles, [and] the arrangement must be relevant to the plaintiff's claim of wrongdoing."[31] As explained in the Restatement (Third) of Agency (followed in Delaware)[32]: "When an agent acting with actual authority makes a contract on behalf of an undisclosed principal, (1) unless [specifically] excluded by the contract, the principal is a party to the contract; (2) the agent and the third party are parties to the

[30] *Wenske*, 2018 WL 3337531, at *16 n.132.

[31] *O'Leary*, 2011 WL 379300, at *7 (quoting *Phoenix*, 842 F.2d at 1477).

[32] "Delaware follows the Restatement of Agency." *Pisano v. Del. Solid Waste Auth.*, 2006 WL 3457686, at *9 (Del. Ch. Nov. 30, 2006) (citing *Billops v. Magness Constr. Co.*, 391 A.2d 196, 198 (Del. 1978)).

contract; and (3) the principal, if a party to the contract, and the third party have the same rights, liabilities, and defenses against each other as if the principal made the contract personally, subject to [certain exceptions and limitations not relevant here]."[33]

This "direct agency" theory of contractual liability has no application here because: (1) BB USA is expressly not a party to the LPA; (2) LPA §§ 6.01(a) & (e) and 6.10, by their terms, impose no contractual obligation on BB USA and, instead, make clear that BB GP is exclusively charged with managing BB LP[34]; and (3) nothing in the Complaint suggests that BB USA authorized BB GP to bind BB USA to the LPA generally, much less to the "best efforts" covenant in LPA § 6.01(e). Simply stated, the Complaint pleads no facts that support a reasonable inference that BB USA directed BB GP to enter into the LPA on its behalf or to commit BB USA to manage BB LP in accordance with a specified standard of conduct.[35]

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[33] RESTATEMENT (THIRD) OF AGENCY § 6.03.

[34] *See* LPA § 6.01(a) ("[BB GP] shall have the exclusive right and full authority to manage, conduct, control and operate [Blue Bell's] business"); LPA § 6.01(e) ("[BB GP] shall use its best efforts to conduct [Blue Bell's] business . . . in accordance with sound business practices in the industry."); LPA § 6.10 ("No Limited Partner . . . may take part in the management . . . of [Blue Bell's] business and affairs.").

[35] I note that although Plaintiffs did not allege ratification or "direct participation" in their Complaint, or raise those arguments in their opposition to the motion to dismiss, they do raise them in their Motion. Mot. 9 (citing *Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739, 757 (7th Cir. 1989) ("It is solely where a parent disregards the separate legal personality of its

C. The Complaint Did Not Well-Plead a Basis to Pierce BB GP's Corporate Veil on a Domination and Control Theory

Plaintiffs' veil-piercing argument is essentially a continuation of their direct agency argument.[36] Specifically, Plaintiffs contend that "BB USA dominated and directed both the management and day-to-day actions of its subsidiary, BB GP, including its breach of key provisions under the governing LPA."[37] While Plaintiffs characterize the Court's treatment of their veil-piercing arguments as "novel,"[38] the true novelty would be to disregard the separateness of parent and subsidiary simply because a plaintiff would prefer to hold both liable for the subsidiary's breach of contract. Our law does not countenance this result. Indeed, "the separate legal

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subsidiary . . . and exercises direct control over a specific transaction, that derivative liability for the subsidiary's unfair labor practices will be imposed . . . ."). Although I have entertained several arguments raised for the first time in the Motion as grounds to challenge the Opinion, Plaintiffs' direct participation argument raises an entirely new theory of liability not raised in the Complaint or even insinuated in the briefing on the motion to dismiss. I decline, therefore, to address that new claim on reargument. *See inTeam Assocs., LLC v. Heartland Payment Sys., Inc.*, 2016 WL 6819734, at *2 (Del. Ch. Nov. 18, 2016).

[36] *See* Mot. 7 (Plaintiffs argue an "agency test" for veil-piercing has been satisfied). It is not clear that Plaintiffs' "agency test," as proffered, is consistent with Delaware law. "'Agency' in th[e] sense of complete domination and control is synonymous with 'alter ego,' 'instrumentality,' 'piercing the corporate veil,' and 'disregarding the corporate entity.' Litigants cannot, simply by substituting the label 'agency' in place of 'alter ego,' also change the substantive law." *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F.Supp. 260, 271 n.15 (D. Del. 1989) (citing David A. Drexler, et al., *Delaware Corporation Law and Practice* § 8.02 (1988)). To be clear, anything short of "complete domination and control" will not suffice to "pierce the corporate veil" on an "agency theory."

[37] Mot. 3.

[38] *Id.*

existence of juridical entities is fundamental to Delaware law."[39] Thus, there exists a presumption of corporate separateness, even when a parent wholly owns its subsidiary and the entities have identical officers and directors.[40]

When Plaintiffs and other limited partners invested in BB LP, they contracted with BB GP, not BB USA.[41] That contract, the LPA, vested the exclusive authority to manage BB LP in BB GP. It also stated the bases upon which BB GP may be held liable to the limited partners for breach of the LPA. Under these circumstances, Plaintiffs' conclusory allegations of "domination and control" cannot overcome the presumption of separateness and the express provisions, and limitations, of the LPA.[42]

Although not referenced in the Motion, paragraph 83 of the Complaint best captures the gravamen of Plaintiffs' domination and control theory:

> BB GP controls [BB LP] through the LPA. BB USA controls [BB LP] through its 100% ownership of BB GP and through its officers that also

[39] *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 667 (Del. Ch. 2012).

[40] *See Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1038 (Del. Ch. 2006); 1 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 26, at 82, 84–85 (Perm. Ed., Rev. Vol. 2015) ("A subsidiary corporation is presumed to be a separate and distinct entity from its parent corporation.").

[41] *See Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 2000 WL 1476663, at *20 (Del. Ch. Sept. 27, 2000) (Strine, V.C.) ("When limited partners contract to join a limited partnership run by a corporate general partner, . . . it is the [corporate general partner] entity that the limited partners agreed would manage their assets.").

[42] *See, e.g.*, Mot. 3, 10.

> act as officers of, and operate, [BB LP]. BB USA also appointed all of the directors of BB GP.[43]

In essence, Plaintiffs rest their domination and control veil-piercing claim on allegations that: (1) BB USA is 100% owner of BB GP and, in that capacity, appointed all of BB GP's directors; (2) BB USA and BB GP have overlapping officers and directors; and (3) BB GP manages BB LP. These allegations fall short of the factual predicate required to justify piercing the veil on an agency theory.

A parent corporation is not liable for the acts of its subsidiary merely because it owns (and votes) a majority of the subsidiary's stock or shares common shareholders, directors or officers with the subsidiary.[44] Nor will conclusory

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[43] Compl. ¶ 83.

[44] *See* 1 Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 26, at 82, 84–85 ("A subsidiary corporation is presumed to be a separate and distinct entity from its parent corporation. This rule applies even where one corporation wholly owns another and even though the entities have identical officers and directors. . . . The mere ownership of the capital stock of one corporation by another does not create . . . the relationship of principal and agent, or representative, or alter ego between the two."); *Leslie v. Telephonics Office Tech., Inc.*, 1993 WL 547188, at *8 n.13 (Dec. 30, 1993) (Allen, C.) ("Delaware courts have upheld the legal significance of corporate form, in a corporate-subsidiary complex, despite the fact of substantial overlap in the management and control of the two entities.") (citing *Japan Petroleum*, 456 F.Supp. at 840; *Pauley Petroleum Inc. v. Continental Oil Co.*, 231 A.2d 450 (Del. Ch. 1967), *aff'd*, 239 A.2d 629 (Del. 1968) (wholly owned subsidiary which was financed by parent and contained common members of board of directors with parent, retained adequate indicia of independence to justify a separate corporate existence)); *Skouras v. Admiralty Enters., Inc.*, 386 A.2d 674, 681 (Del. Ch. 1978) ("Mere control and even total ownership of one corporation by another is not sufficient to warrant the disregard of a separate corporate entity.") (internal citations omitted); *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 658 F.Supp. 1061, 1084 (D. Del. 1987), *aff'd*, 842 F.2d 1466 (3d Cir. 1988) **(**applying Delaware law and holding that parent corporations were not liable for the activities of their subsidiaries despite finding that: (1) they were wholly owned by the parent; (2) there were officers and directors common to the boards of both parent and

allegations that the parent's management exclusively dominated and controlled the subsidiary's management suffice to state a claim for veil-piercing.[45]

The allegations in the Complaint that *are* referenced in the Motion fare no better.[46] These allegations either reiterate the point that BB USA wholly owns BB GP and shares officers and directors with its subsidiary, or they restate conclusory allegations of domination and control (especially regarding structural, as opposed to

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subsidiary; and (3) the parent corporations were involved in substantial financial decisions of the subsidiaries); *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012, at *4 (Del. Super. Mar. 30, 1988) (holding that to make a parent liable for its subsidiary's activities, a plaintiff must sufficiently allege that the parent's control over the subsidiary is actual, participatory and total) (citing *Japan Petroleum*, 456 F.Supp. at 841); *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("[I]t is hornbook law that 'the exercise of the 'control' which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal.'").

[45] *See O'Leary*, 2011 WL 379300, at *7–8 (ruling that mere repetition of the elements of an agency theory for veil-piercing do not meet the minimum pleading requirements and holding that "the Court may disregard" such allegations when analyzing an alleged "basis for veil-piercing").

[46] *See, e.g.*, Compl. ¶ 55 (describing BB USA's ownership stake in BB GP, the overlapping officers and directors and summarily alleging that "BB USA does not serve any function other than to direct the actions of BB GP and Blue Bell"); Compl. ¶ 56 (describing BB USA board minutes where BB USA resolved to seek amendments to the LPA relating to limits on the number of limited partners, debt and equity financing and other structural changes to BB LP not involving day-to-day management functions); *Id.* (discussing a "Confidential Offering Memorandum" that describes the overlapping board and officers of BB USA and BB GP); Compl. ¶ 67 (conclusory allegation of BB USA's "complete dominion and control" over BB GP); Compl. ¶ 69 (alleging summarily that BB USA "orchestrated" deficient "environmental testing plans, use of poorly designed and filthy facilities and equipment" and then "failed to implement sound industry standard corrective actions").

operational, issues) relating to BB GP's management of BB LP. These allegations cannot overcome the presumption of separateness.[47]

D. The Opinion Needlessly Addressed a "Fraud" Theory of Veil-Piercing

Piercing the corporate veil is appropriate in instances where "the corporate structure caused fraud or similar injustice."[48] In such instances, "[e]ffectively, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud."[49] Determining whether to disregard the corporate form on these grounds requires a fact intensive inquiry, which may involve any of the following factors: "(1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the controlling shareholder siphoned company funds; or (5) whether, in general, the company simply functioned as a facade for the controlling shareholder."[50]

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[47] *See Sarn Energy LLC v. Tatra Defense Veh. AS*, 2018 WL 5794599, at *6 (Del. Super. Ct. Nov. 5, 2018) (holding that the domination and control must extend beyond causing subsidiary to breach a contract and must, instead, reflect "exclusive domination and control . . . to the point that [the subsidiary] no longer has legal or independent significance of [its] own.") (citations and quotations omitted).

[48] *Wallace*, 752 A.2d at 1184 (citing *Hart Hldg. Co. v. Drexel Burnham Lambert, Inc.*, 1992 WL 127567, at *11 (Del. Ch. May 28, 1992) (Allen, C.).

[49] *Id.* (citing *Outokumpu*, 685 A.2d at 729).

[50] *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *5 (Del. Ch. Dec. 23, 2008); *Mason v. Network of Wilmington, Inc.*, 2005 WL 1653954, at *3 (Del. Ch. July 1, 2005).

In the Opinion, I held the Complaint "fell short" of pleading that BB GP's "corporate structure cause[d] fraud or similar injustice."[51] Upon reviewing the Complaint, and Plaintiff's arguments in opposition to the Motion to Dismiss, I stand by that conclusion. With that said, it is now clear to me that the Complaint did not plead fraud because it did not try to plead fraud. In other words, I dismissed a claim that Plaintiff, at least at that point in time, did not intend to plead.

In instances where the plaintiff is not likely to know of evidence of fraud before fact discovery, there is no expectation the plaintiff will attempt to plead fraud in her initial pleading, particularly given the enhanced factual basis required to state that claim.[52] Here, it is not reasonable to expect that Plaintiff, a holder of BB LP limited partnership units, would have been in possession of facts that would have allowed her to plead that BB USA had maintained BB GP "as a vehicle for fraud."[53] There was, therefore, no basis for the Court to address a veil piercing claim based on that theory in the Opinion.

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[51] *Wenske*, 2018 WL 3337531, at *15.

[52] *See H_W Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 146 (Del. Ch. 2003) (holding that the court will require less particularity from a plaintiff alleging fraud "when the facts lie more in the knowledge of the opposing party than of the pleading party.").

[53] *Wallace*, 752 A.2d at 1184. Such evidence may include, for example, evidence that BB USA maintained BB GP with inadequate capital "for the undertaking" of (or to be accountable for) its role as exclusive manager of BB LP. *Winner Acceptance Corp.*, 2008 WL 5352063, at *5.

E. The Complaint Does Not Well-Plead Joint Venture Liability

As Plaintiffs correctly observe, "Delaware law recognize[s] that facts and circumstances *may* support an intent to form a joint venture . . . ."[54] In their Motion, Plaintiffs, again, seek to exploit this general proposition to support an argument that the Complaint's allegations regarding "how [BB LP] was actually managed" support a reasonable inference that BB GP and BB USA formed a joint venture to manage BB LP.[55] Plaintiffs are correct that facts and circumstances *may* demonstrate the existence of a joint venture, even if an agreement expresses a contrary intent.[56] The facts and circumstances as pled here, however, do not support a reasonable inference that BB GP and BB USA formed a joint venture to manage BB LP.

First, the Complaint entirely overlooks the undisputed fact that the LPA vests BB GP with the *exclusive* authority to manage BB LP's business and affairs. Having failed even to acknowledge this provision in their pleading, Plaintiffs now argue, in a fit of lost irony, that "[t]he Court contravened established law by improperly weighing [that] one section of the LPA's purported expression of the parties' intent as conclusive, over and above the specific facts and circumstances alleged by the

[54] Mot. 11 (citing *Providence Creek Acad. Charter Sch. v. St. Joseph's Providence Creek*, 2005 WL 2266490 (Del. Ch. Sept. 4, 2005)) (emphasis supplied and omitted).

[55] Mot. 12.

[56] *See, e.g.*, *Providence Creek*, 2005 WL 2266490, at *1–2.

non-movant Plaintiffs."[57] Once again, that is just wrong. The Court considered and applied *several* LPA provisions that clearly define BB GP's role, as agreed to by all parties to the LPA (including Plaintiffs).[58] Plaintiffs cannot, on the one hand, incorporate the LPA by reference in their Complaint and then, on the other hand, completely ignore its operative provisions.[59] Nor can the Court engage in this sort of result-oriented "cherry-picking," even when operating under the deferential standards governing a motion to dismiss.[60]

Second, Plaintiffs' belated attempt to invoke LPA § 6.14(c) as a basis to argue the LPA actually contemplated that BB USA would assist in the management of BB LP is both procedurally barred (because Plaintiffs failed to raise it before) and wrong on the merits.[61] Section 6.14(c) provides, in relevant part, that "[BB GP], on

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[57] Mot. 12.

[58] *See, e.g.*, *Wenske*, 2018 WL 3337531, at *17 n.136. Of course, the Complaint mentions none of these provisions.

[59] *Reiter ex rel. Capital One Fin. Corp. v. Fairbank*, 2016 WL 6081823, at *5 (Del. Ch. Oct. 18, 2016).

[60] *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. 2016) ("The incorporation-by-reference doctrine permits a court to review the actual document to ensure that the plaintiff has not misrepresented its contents and that any inference the plaintiff seeks to have drawn is a reasonable one.") (citing *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169–70 (Del. 2006)).

[61] *See Heartland*, 2016 WL 6819734, at *2 (reiterating that new arguments will not support a motion for reargument); *Filasky v. Von Schnurbein*, 1992 WL 187619, at *1 (Del. Ch. July 29, 1992) ("The plaintiffs were clearly on notice of this contention . . . yet they elected not to [raise it]. Thus, the plaintiffs waived their right to litigate that issue.").

[BB LP's] behalf, may engage itself or another Partner to provide management or other services to [BB LP]."[62] This provision does nothing more than preserve BB GP's right *separately* to engage the services of another Partner to provide "management or other services" to BB LP. It does not, by its terms, reflect the parties' agreement or understanding that BB USA, by virtue of the LPA itself, was to be involved in the management of BB LP such that it could be held liable for a breach of the LPA. In light of the clear and contrary provisions in LPA §§ 6.01 and 6.10, therefore, Plaintiffs cannot state a claim that LPA § 6.14(c) reflects a shared intent that BB GP and BB USA would manage BB LP's business and affairs as joint venturers.[63]

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[62] LPA § 6.14(c).

[63] *See Wenske*, 2018 WL 3337531, at *17 (holding that the LPA reflects "that BB GP and BB USA, in fact, did not intend to 'act[] together in a joint venture to operate and manage Blue Bell.'"). I note that this case is distinguishable from *Providence Creek Acad. Charter Sch. v. St. Joseph's Providence Creek*, 2005 WL 2266490 (Del. Ch. Sept. 9, 2005). *See* Mot. 11 (citing *Providence Creek*, 2005 WL 2266490, at *1–2.). There, a lease agreement "expressly recited that the parties were not engaged in a joint venture." *Id.* at *1. Even so, following the execution of the lease agreement, "the parties frequently amended it (more than ten times) to reflect the changing nature of their relationship." *Id.* In denying a motion to dismiss a joint venture liability claim, the court found that the complaint's extensive allegations of "coordination and support between [the parties]" supported a reasonable inference that the parties had formed a joint venture, notwithstanding the contrary recital in the initial lease agreement. *Id.* at *2. Here, by contrast, the Complaint pleads no non-conclusory facts that suggest the parties acted to nullify the LPA's clear grant to BB GP of the exclusive authority to manage BB LP's business and affairs in order to repose that authority in BB GP and BB USA jointly.

F. Leave to Amend Must Be Denied

As their final argument, Plaintiffs seek leave to re-plead because the "dispositive issues were . . . raised by the Court in the first instance in the Opinion" and "Plaintiffs were not afforded an adequate opportunity to access the pertinent information before filing their answering brief."[64] Once again, Plaintiffs' argument is wrong factually; and, again, it comes too late.

Court of Chancery Rule 15(aaa) limits the parties' ability to re-plead.[65] "When confronted with a motion to dismiss under [Court of Chancery] Rules 12(b)(6) or 23.1, Rule 15(aaa) requires [a] plaintiff[] to choose between standing on [her] complaint and answering the motion[,] or amending [the complaint] (or seeking leave to amend) before . . . response to the motion is due."[66] Here, Plaintiffs chose to stand on their Complaint and contest Defendants' motion to dismiss. When they did so, their arguments with respect to BB USA were less than precise. And so,

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[64] Mot. 12–13 (arguing, under these circumstances, that a strict application of Rule 15(aaa) may not be just, citing *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *5 (Del. Ch. Oct. 19, 2006)).

[65] *Stern v. LF Capital P'rs, LLC*, 820 A.2d 1143, 1143–44 (Del. Ch. 2003). *See also* Ct. Ch. R. 15(aaa) ("[P]laintiffs, when confronted with a motion to dismiss . . . [must] elect to either: stand on the complaint and answer the motion; or, to amend or seek leave to amend the complaint before the response to the motion [is] due. . . . [I]f a plaintiff chooses to file an answering brief in opposition to a motion to dismiss rather than amend the complaint, any subsequent dismissal pursuant to the motion is with prejudice . . . .").

[66] *Crowley*, 2006 WL 3095952, at *3 (citing *Stern*, 820 A.2d at 1146).

when they argued at the motion hearing that the BB USA liability issues had not been properly joined for decision, I granted them leave to submit supplemental arguments.[67] I addressed those arguments in the Opinion as best as I could discern them. I have addressed them again, along with new ones, here. Under these circumstances, I cannot conclude that allowing amendment of a thoroughly vetted complaint would be just.[68]

III. CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Reargument must be **DENIED**.

IT IS SO ORDERED.

[67] *See* Pls.' Answering Br.; Oral Arg. Tr. 75:22–76:4; Pls.' Sur-Reply Br.

[68] My determination that leave to amend must be denied does not extend to any attempt to amend based on an alter ego/fraud theory. As decided above, the Opinion addressed that theory when it had not been pled or even insinuated in the Complaint. While Defendants may certainly oppose any effort to seek leave to amend in order to state that claim, I cannot say at this point that Rule 15(aaa) would bar that amendment. *Cf. Leichliter v. Becker*, 2017 WL 117596, at *4 (Del. Ch. Jan. 12, 2017) (holding that Rule 15(aaa) precluded plaintiff's attempt to state an entirely new cause of action after he had opposed a motion to dismiss his initial pleading). To the extent Plaintiff can demonstrate that the evidence of "fraud" necessary to plead a claim under an alter ego theory was not available to her when she filed her complaint, and that "it would be inequitable for this Court to uphold a legal distinction between" BB USA and BB GP based on well-pled facts, the Court may be compelled to find that "good cause" exists to allow the amendment. *Mahon, Nugent & Co. v. Texas Am. Energy Corp.*, 1990 WL 44267, at *5 (Del. Ch. Apr. 12, 1990).