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*Brian T. Olson v. O. Andreas Halvorsen, David C. Ott, Viking Global Investors LP, Viking Global Partners LLC, Viking Global Performance LLC, and Viking Global Founders LLC,*  
**C.A. No. 1884 (Del. Dec. 15, 2009) (Steele, C.J.)**

In an issue of first impression for the Supreme Court of Delaware, the Court affirmed a Court of Chancery decision holding that “the Delaware LLC Act does not explicitly remove LLC agreements from the application of the statute of frauds” and in turn, “the statute of frauds applies to LLC agreements.”

Appellant, Brian Olson, formed a hedge fund (to be named Viking Global) with Andreas Halvorsen and David Ott. At the time of the formation, the partners orally decided that the three founders would operate Viking and divide all of its profits annually. Furthermore, if any one of them left Viking, he would receive only his capital account balance and earned compensation (the “cap and comp” agreement). After formation of entities to carry on the Viking business, Olson directed Viking’s counsel to draft operating agreements for the entities. All draft agreements and executed agreements included the “cap and comp” language the founders had discussed earlier.

Olson later proposed formation of a new entity, Viking Global Founders LLC, that would pay a founder an earnout upon his departure from Viking. Though Ott and Halvorsen did not reject the idea, the parties never signed an operating agreement for the entity or reached any agreement on the earnout concept. In 2005, the management committee unanimously terminated Olsen and Viking paid Olsen over \$100 million, representing his 2005 compensation and his capital account in each Viking entity.

In early 2006, Olsen filed suit in the Court of Chancery, seeking to collect the earnout he claimed that Viking owed him under the unsigned Founders operating agreement. Olson argued that the partners had orally agreed to amend their agreement to permit the earnout contemplated by the unsigned Founders operating agreement. The Court of Chancery held that Olson failed to prove an amendment, and that the statute of frauds applies to LLC operating agreements. Because the earnout provision Olson was seeking to enforce could not be performed within one year, such agreement was unenforceable pursuant to the statute of frauds because it was not in writing.

The Supreme Court of Delaware affirmed, finding that there was very little evidence, if any, that indicated that the founders departed from the “cap and comp” agreement. Further, the Court addressed, as a matter of first impression, whether the statute of frauds applies to LLC agreements. After careful analysis of the text and legislative history of the LLC Act, the Court found that there was no implied repeal of the statute of frauds and therefore, the statute of frauds applies to LLC agreements.

