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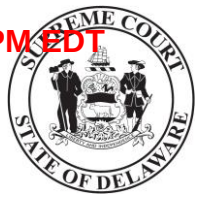

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GLENN D. SCHMALHOFER,	)	
	)	
Appellant/Defendant Below,	)	No. 14, 2017
	)	Court Below:
v.	)	Court of Chancery
	)	State of Delaware
LISA WARD and	)	C.A. No: 11-685 VCL
STEPHEN J. MOTTOLA,	)	
	)	
Appellees/Plaintiffs Below.	)	

APPELLEES' ANSWERING BRIEF

Dated: April 19, 2017

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NATURE OF PROCEEDINGS

Appellees/Plaintiffs below Lisa Ward and Stephen J. Mottola ("Plaintiffs" or "Appellees") and Appellant/Defendant below Glenn D. Schmalhofer ("Defendant" or "Appellant") entered into a limited liability agreement (the "Operating Agreement") to form Main Street Court, LLC (the "Company") on March 26, 2007.[1] Each of the parties had an equal one-third membership interest in the Company.[2] The Operating Agreement named Ms. Ward and Defendant as the Company's co-managers.[3] And any amendment of the Operating Agreement required unanimous consent of the members.[4]

On November 6, 2015, Plaintiffs filed a complaint seeking a declaratory judgment, dissolution, and damages resulting from Defendant's contract and fiduciary breaches (the "Complaint").[5] Plaintiffs' claims stemmed from Defendant's unilateral takeover of the Company, misappropriation of the Company's assets, and loggerheads among the parties.[6]

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[1] A-0033.
[2] A-0058.
[3] A-0034-; A-0042
[4] A-0055.
[5] B-0001-20.
[6] *Id*.

On December 8, 2015, Defendant answered the Complaint.[7] And on January 20, 2016, the Court of Chancery held a scheduling conference during which the parties agreed to expedite Plaintiffs' claims related to the control of the Company. The Court of Chancery scheduled a hearing on that issue for April 5, 2016. A few days before that hearing, the parties settled the control issues and agreed to a partial settlement and release of certain claims in the Complaint (the "Settlement Agreement"). The Plaintiffs' remaining claims related to the misappropriation of Company assets remain pending before the Court of Chancery.

The Settlement Agreement, in part, required Defendant to offer his one-third interest in the Company for sale to the Plaintiffs pursuant to the procedures laid out in the Operating Agreement. Plaintiffs eventually accepted that offer and triggered the provisions of the Operating Agreement to determine the price of Defendant's membership interest. Defendant failed to comply with those provisions of the Operating Agreement and, thus, the Settlement Agreement. And after providing more than adequate notice of his breach, Plaintiffs filed a motion to enforce the Settlement Agreement on August 31, 2016 (the "Motion").[8]

[7] A-0003; B-0027-53.
[8] A-0019.

The Court of Chancery held a hearing on the Motion on November 7, 2016.[9] On November 10, 2016, the Court of Chancery issued an order finding in Plaintiffs' favor and holding that Defendant breached the Settlement Agreement (the "November 10, 2016 Order").[10]

On November 21, 2016, Defendant moved to stay the enforcement of the November 10, 2016 Order and separately moved for an interlocutory appeal under Supr. Ct. R. 42.[11] In an effort to avoid an interlocutory appeal, the parties agreed to ask the Court of Chancery to hold that the November 10, 2016 Order was a partial final judgment pursuant to Ch. Ct. R. 54(b). On December 8, 2016, the Court of Chancery issued a partial final judgment pursuant to Ch. Ct. R. 54(b) that incorporated all the findings in the November 10, 2016, Order (the "December 8, 2016 Order" and together with the November 10, 2016, Order, the "Order").[12]

On January 9, 2017, the Court of Chancery conditionally granted Defendant's motion to stay the enforcement of the Order.[13] Defendant was required to file a motion for stay in this Court within ten days in order to continue the stay.[14] On January 24, 2017, Defendant filed a motion to stay the enforcement of the

[9] A-0435.
[10] A-0501.
[11] A-0511
[12] Exhibit B to Appellant's Opening Brief.
[13] B-0073-78.
[14] B-0078

Order pending his appeal.[15] On February 9, 2017 this Court denied Defendant's motion for a stay pending this appeal.[16]

Soon after this Court denied Defendant's request for a stay, the parties initiated the closing process on the sale of Defendant's membership interest to Plaintiffs. However, the parties were not able to agree to the terms of the closing within the sixty-day deadline imposed by the Order. And so, on March 16, 2017, Plaintiffs filed a motion for a rule to show cause why Defendant was not in contempt of the Order for failing to transfer his membership interest to the Plaintiffs in exchange for the purchase price as calculated pursuant to the Order.[17] On April 4, 2017, the Court of Chancery held a contempt hearing. With guidance from the Court of Chancery, and before the Court of Chancery could issue a ruling on whether Defendant was in contempt of the Order, the parties completed the closing on April 7, 2017. The only issues that remain pending before the Court of Chancery are the misappropriation claims that were not settled in the Settlement Agreement.

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[15] *See* Appellant's Motion to Stay Proceedings Pending Appeal filed by Counsel Morton (transaction no. 60112323).
[16] *See* February 9, 2017 Order Denying Appellant's Motion to Stay.
[17] B-0079-108.

Following a request for an enlargement of time to file his opening brief, on March 20, 2017, Appellant filed his Opening Brief. This is Appellee's Answering Brief.

SUMMARY OF ARGUMENT

1. **Denied.**

The Court of Chancery did not err as a matter of law in finding that Defendant breached the Settlement Agreement. In his first argument on appeal, Defendant argues that the Court of Chancery incorrectly construed the Settlement Agreement to incorporate the Operating Agreement. Defendant further argues that the Court of Chancery erred in concluding that he had breached the Settlement Agreement and then failed to cure that breach. The Settlement Agreement specifically incorporates two relevant documents as exhibits: (1) a Company resolution in which Defendant agrees to offer his membership interest to Plaintiffs pursuant to Article XI of the Operating Agreement; and (2) the Operating Agreement. Furthermore, section F of the Settlement Agreement is an integration clause that specifically incorporates the exhibits into the Settlement Agreement. Thus, a failure to comply with Article XI of the Operating Agreement constitutes a breach of the Settlement Agreement. And lastly, Plaintiffs provided Defendant written notice of his breach and gave him numerous opportunities to cure.

2. **Denied.**

The Settlement Agreement does not limit the parties' form of relief to just monetary damages, nor does it limit the Court of Chancery's ability to award equitable relief. Section D of the Settlement Agreement specifically states that

monetary damages may not be enough and that the parties may apply to any court of competent jurisdiction in Delaware to seek equitable relief.

3. **Denied.**

Defendant further argues Plaintiffs must have proven damages. Again, the Settlement Agreement specifically contemplates that monetary damages alone may not be sufficient and that the parties can seek equitable relief. Defendant additionally argues that the Court of Chancery erred in awarding relief without a full evidentiary hearing and that such failure to grant such a hearing violated his due process rights. Notwithstanding the fact that Defendant did not raise this issue in the briefing process below, that briefing process and the hearing on the Motion were more than adequate to satisfy Defendant's due process rights.

4. **Denied.**

Defendant's final argument is that Plaintiffs' conduct barred any relief that they sought. Plaintiffs complied with the Settlement Agreement and Operating Agreement throughout the entire buy-out process. In spite of the fact that Plaintiffs were not required to assist Defendant in retaining an appraiser or to provide his appraiser with the Company's documents, Plaintiffs did in fact give Defendant access to their appraiser's documents. Defendant, on the other hand, offered no evidence to support his contention that Plaintiffs' conduct barred him from complying with the Settlement Agreement and the Operating Agreement.

STATEMENT OF FACTS

I. The formation of the Company and filing of the underlying action.

The Company is a Delaware limited liability company that owns and manages a rental complex in Newark, Delaware (the "Property").[18] The Property consists of both residential and commercial units.[19] The residential units are primarily intended for the use of college students.[20]

On March 26, 2007, the parties entered into Operating Agreement, which required management by way of unanimous action of it mangers, Defendant and Ms. Ward.[21] Further, amendment of the Operating Agreement required the "unanimous" consent of the Members.[22] There was no mechanism for changing the managers or otherwise breaking loggerheads other than or apart from amending the Operating Agreement.

By 2013, Plaintiffs and Defendant's relationship had fractured, and it became impossible for Ms. Ward and Defendant to manage the Company together. As alleged in the Complaint, Defendant took unilateral control of the Company by changing the locks on the Company's doors, changing the Company's accounting

[18] A-0033-35.
[19] A-0020.
[20] A-0020.
[21] A-0033.
[22] A-0033; A-0055.

software to prohibit Ms. Ward from accessing the Company's books, and removing Ms. Ward's name from the Company's bank accounts.[23]

As further alleged in the Complaint, the parties attempted to resolve these disputes in February of 2014 by agreeing to hire a third-party manager to manage the Property.[24] However, Defendant ultimately refused to agree to hire the property manager the parties had originally chosen, leaving the parties in deadlock.[25] Plaintiffs then submitted a written demand to inspect and copy the Company's books and records pursuant to 6 Del. C. § 18-305 on March 24, 2015.[26] After reviewing the books and records, on November 11, 2015, Plaintiffs filed the Complaint, alleging that Defendant had misappropriated the Company's assets, was in breach of the Operating Agreement for unilaterally taking control of the Company, and was seeking dissolution of the Company due to loggerheads.[27] Plaintiffs also sought the appointment of a receiver pendente lite.[28]

[23] B-0005-6.
[24] B-0006.
[25] *Id*.
[26] B-0036.
[27] B-0019.
[28] B-0021-26.

After Defendant filed his answer, the Court of Chancery held a scheduling conference on January 20, 2016, where the Court expedited claims concerning the control of the Company.[29] The Court scheduled a hearing for April 5, 2016.[30]

II. The parties enter into the Settlement Agreement.

On February 19, 2016, the parties agreed to meet at the offices of Michael P. Morton, P.A. in Greenville, Delaware to resolve the Company's control issues. The parties agreed to a resolution, titled the "Unanimous Written Consent of the Members and Managers of Main Street Court, LLC" (the "Resolution").[31] Among other things, the parties agreed in the Resolution that Defendant would serve a formal notice of his offer to sell his interest in the Company to Plaintiffs.[32] However, notwithstanding the agreements in the Resolution, the parties could not resolve the control issues of the Company and so the parties prepared for trial. But a few days before trial, the parties resolved their management issues and entered into the Settlement Agreement.[33]

As part of the Settlement Agreement the parties agreed to incorporate the Resolution.[34] Specifically, section A(1) of the Settlement Agreement states: "The

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[29] B-0058.
[30] B-0072.
[31] A-0072-74.
[32] A-0072.
[33] A-0063-71.
[34] A-0063.

Parties agree to the provisions in the Unanimous Written Consent of the Member and Mangers of the Company dated February 19, 2016 (the "Resolution"), which is attached hereto as Exhibit A and is incorporated in the Agreement."[35] Section A(4) of the Settlement Agreement goes on to state "In accordance with the Resolution, [Defendant] will present an offer to [Plaintiffs] to sell his interest in the Company within 10 days of the execution of this Agreement."[36] The Resolution states that Defendant agreed to "serve formal written notice, pursuant to ARTICLE XI of the [Operating Agreement], with a proposed Purchase Price."[37] And the Settlement Agreement's integration clause specifically incorporates the Settlement Agreement's exhibits—Exhibit C being the Operating Agreement.[38]

III. Defendant makes his offer pursuant to the Settlement Agreement and the parties proceed to determine his purchase price.

On April 11, 2016, Defendant served Plaintiffs his signed written notice of his offer to sell his interest in the Company (the "Notice") for a price of $5,250,000.00.[39] The Notice specifically stated that "I, Glenn D. Schmalhofer, hereby offer for sale, pursuant to Article 11.4(a) of [the Operating Agreement], my 33.33% interest in Main Street Court, LLC to the members of Main Street Court,

[35] A-0063.
[36] A-0064.
[37] A-0072.
[38] A-0064; A-0067.
[39] A-0076.

LLC."[40] Defendant further stated in the Notice that "[he] desire[d] to resign and sell [his] entire ownership interest to the members of the Main Street Court, LLC in accordance with the other terms and conditions in Article XI of the [Operating] Agreement."[41]

Sections 11.4(b) and 11.4(c) of the Operating Agreement control how the purchasing members may respond to an offer pursuant to 11.4(a) of the Operating Agreement. In short, those sections allow the purchasing members (Plaintiffs) to accept the offer and elect the option to buy the offering member's interest for a purchase price that is determined by section 11.6 of the Operating Agreement.[42]

On April 15, 2016, pursuant to sections 11.4(b) and (c) of the Operating Agreement, Plaintiffs notified Defendant that they had accepted his offer to buy his interest, and that they were rejecting Defendant's proposed purchase price and were instead exercising their right to determine the purchase price of his interest pursuant to section 11.6 of the Operating Agreement.[43]

IV. The Operating Agreement's process for determining the value of Defendant's membership interest.

Section 11.6 begins by stating: "Whenever a Membership Interest is to be purchased under this Agreement, the purchase price shall be determined as

[40] A-0076.
[41] A-0076.
[42] A-0049.
[43] A-0078-79.

follows:"[44] Subsection (a) allows the parties to mutually agree on a price.[45] Since Plaintiffs rejected Defendant's purchase price, they invoked the provisions in subsection (b) to determine the price.

Section 11.6(b)(i) first states that "the purchase price . . . shall be determined as of the end of the month immediately preceding the date of the mailing of the offer to Sell under this Article (hereafter 'the Date of Valuation')."[46] Because Defendant sent his offer on April 11, 2016, the Date of Valuation is March 31, 2016.

Section 11.6(b)(ii) then states that the purchase price "shall be the Offeror's Capital Account balance, adjusted to reflect the gain or loss that would have accrued to the Offeror's Capital Account if the assets of the Company had been sold at their fair market value as of the Date of Valuation (hereafter the 'Adjusted Capital Account')".[47]

Section 11.6(b)(iii) states that if the parties "cannot agree on the fair market value of the Adjusted Capital Account of the Offeror, and cannot agree on an appraiser or appraisers whose determination of the fair market value of the Company's assets will be binding on them within twenty (20) days of the Date of

[44] A-0050.
[45] A-0050.
[46] A-0050.
[47] A-0050-51.

Valuation," then the parties "shall each independently designate an appraiser, and within thirty (30) days after the Date of Valuation, the designated appraisers shall jointly appoint a third appraiser."[48]

Section 11.6(b)(iv) states that if a majority of the appraisers (2 of the 3) "agree on fair market value of the assets, that value shall be binding and conclusive for use in determining the value of the Offeror's Adjusted Capital Account."[49] Section 11.6(b)(v) states that if there is no majority, then neither the highest nor the lowest value shall be binding (i.e. the median value) for use in determining the value of the Offeror's Adjusted Capital Account.[50] And section 11(b)(vi) state's that half of the expense of the appraisals required to come up with the purchase price shall be paid by the offeror and the other half shall be paid by the offeree.[51]

V. Defendant refuses to proceed with the appraisal process.

Following Plaintiffs' April 15th letter, Defendant made it clear to Plaintiffs that he had no intention of going through with the appraisal process as set forth in the Operating Agreement. So pursuant to the Settlement Agreement, on April 27, 2016, Plaintiffs notified Defendant that he was in breach of the Settlement Agreement and that he had ten days to cure that default by either agreeing to one

[48] A-0051.
[49] A-0051.
[50] A-0051.
[51] A-0051.

appraiser or picking his own appraiser so that the parties' appraisers could pick a third neutral appraisal.[52]

On May 6, 2016, counsel for Defendant emailed Plaintiffs' counsel and stated that Defendant had "chosen Doug Nickel of Integra Realty Resources as his chosen appraiser under 11.6(iii) of the [Operating] Agreement" and that Defendant agreed that Mr. Nickel and Plaintiffs' appraiser must pick a third appraiser.[53]

On May 12, 2016, Plaintiffs informed their appraiser, Jay White of Apex Realty Advisory, that Defendant had retained Mr. Nickel as his appraiser and that the two of them needed to pick a third appraiser to complete the appraisal process.[54] And so, after being retained by Plaintiffs, Mr. White reached out to Mr. Nickel on May 25, 2016.[55] Mr. Nickel told Mr. White that although he had spoken with Defendant and had sent him a proposal, Defendant had not yet retained him to undertake the appraisal of the Property.[56]

That same day, counsel for Plaintiffs contacted Defendant's counsel to inform him that Defendant had not yet retained Mr. Nickel and that Mr. Nickel would not proceed with the buy-out process until he had been retained.[57]

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[52] A-0081.
[53] A-0084.
[54] A-0252.
[55] A-0252.
[56] A-0252.
[57] A-0086-87.

Defendant's counsel responded on May 26, 2016, explaining that he had thought Defendant had retained Mr. Nickel, but that both appraisers were waiting for additional information regarding the Company's finances before they could start the appraisal process.[58] Defendant's counsel also reiterated the suggestion that it would be best for both parties if both appraisers had access to the same information.[59] Contrary to his later assertions, Defendant's counsel did not say that Mr. Nickel could not be retained until Defendant had access to that information.

With regards to the appraisers sharing the same documents, Mr. White had suggested to Plaintiffs' counsel that he, Mr. Nickel, and the third appraiser all use the same documents through an online repository (e.g. Dropbox). And so, Ms. Ward created a Dropbox to upload those various documents on May 25, 2016.[60] That same day she sent Defendant an invitation to access it.[61] Ms. Ward spent the next month or so working with the property manager to gather the necessary documents so that she could upload them to the Dropbox.[62]

On June 15, 2016, counsel for Defendant contacted Plaintiffs' counsel to check on the status of the appraisal process and to consider filing a joint status

[58] A-0086-87.
[59] A-0086-87.
[60] A-0218-19.
[61] A-0218-19.
[62] A-0219.

letter to the Court of Chancery.[63] Plaintiffs' counsel responded by informing Defendant's counsel that Mr. White had moved forward with an inspection of the Property but that it was still unclear if Defendant had retained Mr. Nickel.[64]

On June 17, 2016, counsel for Defendant stated that Mr. Nickel was still waiting on information from Mr. White.[65] Counsel for Plaintiffs responded by asking if he could contact Mr. Nickel directly to confirm if he had been retained and, if so, what other information he needed.[66] Counsel for Plaintiffs also reiterated that if Defendant had not engaged Mr. Nickel, that Plaintiffs would be filing a motion to enforce the Settlement Agreement.

> So I suggest that we confirm from Doug [Nickel] that he has been retained and that he is waiting to get in touch with my appraiser, Jay White. If he has not been retained, and it is apparent that Glenn has no intention to retain him, we will present Glenn with our appraisal number. If he does not accept it, we will have to file a motion with the Court to enforce the settlement agreement and the buyout process and seek attorney fees.[67]

Ten days later, on June 27, 2016, and in response to that demand, Defendant's counsel simply replied: "You can have your appraiser contact ours. Ours can't do

[63] A-0091-92.
[64] A-0091.
[65] A-0090.
[66] A-0089.
[67] A-0089.

anything until he gets the information needed."[68] Notably, Defendant's counsel would not confirm that Defendant retained Mr. Nickel.[69]

In response to that email, counsel for Plaintiffs responded by asking Defendant's counsel to confirm that Mr. Nickel had been retained and, if so, to state the date Defendant retained him. Counsel for Plaintiffs expressed concern that if Mr. White tried to contact Mr. Nickel, Mr. Nickel would respond by reiterating that he would not do the appraisal until Defendant retained him.[70] Plaintiffs' counsel also reminded Defendant's counsel that Mr. Nickel did not have to get any information from Mr. White because Defendant could have obtained whatever information Mr. Nickel needed to complete an appraisal of the Company independently.[71]

And so, Mr. White contacted Mr. Nickel on June 28, 2016, and, sure enough, Mr. Nickel told Mr. White that he had done nothing since they had last spoken and that his engagement letter was still outstanding with Defendant.[72] At that point, it was clear that Defendant had no intention of fulfilling his part of the Settlement Agreement. Plaintiffs were left with no choice but to allow their appraiser to finish the appraisal and present their appraisal to Defendant. And on

[68] A-0089.
[69] A-0089.
[70] A-0089.
[71] A-0089.
[72] A-0253.

August 11, 2016, Plaintiffs did just that.[73] Plaintiffs then filed the Motion on August 31, 2016.

In response to a courtesy copy letter of the Motion, Defendant's counsel informed Plaintiffs' counsel that Defendant had just retained Mr. Nickel but not to produce an appraisal of his own. Instead, Mr. Nickel had only been retained to opine on Mr. White's appraisal.[74] On September 9, 2016, Defendant's counsel notified Plaintiffs' counsel that Mr. Nickel thought the appraisal was low and that Defendant intended to fully retain him to appraise the Property.[75]

On September 12, 2016, Defendant's counsel sent Defendant's signed retainer agreement to Plaintiffs' counsel, advising that he would be contacting the property manager to get the required information.[76] Defendant then finally accepted that Dropbox invitation on September 30, 2016.[77] On October 4, 2016, Defendant's counsel informed Plaintiffs' counsel that Mr. Nickel was in possession of the requisite documents.[78]

[73] A-0094.
[74] A-0421-25.
[75] A-0427.
[76] A-0429.
[77] A-0219; A-0229; A-00249.
[78] A-0207.

ARGUMENT

I. The Court of Chancery did not err in finding Defendant had breached the Settlement Agreement.

A. Question Presented

Did the Court of Chancery err in finding that the Settlement Agreement incorporated the Operating Agreement and in finding that Defendant's actions constituted a breach of the Settlement Agreement?

B. Standard of Review

This Court reviews questions of contract interpretation *de novo*.[79] This Court reviews the trial court's factual finding under the highly deferential clearly erroneous standard.[80]

C. Merits of the Argument

i. The Settlement Agreement incorporated the Resolution and the Operating Agreement.

By incorporating the Resolution and the Operating Agreement into the Settlement Agreement and agreeing to make his offer pursuant to the terms set forth in the Resolution, which requires that Defendant make his offer pursuant to

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[79] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (citing *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009)).

[80] *See RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015) (citing *DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago, Ill.*, 75 A.3d 101, 108–09 (Del. 2013)).

Article XI of the Operating Agreement, Defendant's failure to comply with Article XI's procedures constituted a breach of the Settlement Agreement.

The Resolution specifically states that Defendant agreed to "serve formal written notice, pursuant to ARTICLE XI of the [Operating Agreement], with a proposed Purchase Price."[81] By agreeing in the Resolution to submit his offer pursuant to Article XI of the Operating Agreement, Defendant agreed to allow Plaintiffs to accept that offer pursuant to such article, which then triggers the process to determine the purchase price of his membership interest.

In other words, by agreeing to incorporate the Resolution into the Settlement Agreement, the parties agreed to have Defendant sell his interest to Plaintiffs through the procedures laid out in Article XI of the Operating Agreement. Thus, Defendant's refusal to follow those procedures is a breach of the Settlement Agreement. Moreover, the Settlement Agreement's integration clause specifically incorporates its exhibits as part of the Settlement Agreement; the Operating Agreement is Exhibit C.[82] Where parties to a contract reference and attach other agreements as exhibits and incorporate those agreements through an integration clause, those additional agreements are made part the agreement.[83]

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[81] A-0072.
[82] A-0064; A-0067.
[83] *Cf ev3 Inc. v. Lesh*, 114 A.3d 527, 537 (Del. 2014) (holding that an integration clause's provision that allowed a letter of intent to survive had the effect of

The parties clearly intended the incorporation of the both the Resolution and the Operating Agreement to require the parties to comply with Article XI of the Operating Agreement. Should it not be clear on the face of the Settlement Agreement, Defendant's own actions support this. For example, the Notice specifically stated that "I, Glenn D. Schmalhofer, hereby offer for sale, pursuant to Article 11.4(a) of [the Operating Agreement], my 33.33% interest in Main Street Court, LLC to the members of Main Street Court, LLC."[84] Defendant further stated in the Notice that "[he] desire[d] to resign and sell [his] entire ownership interest to the members of the Main Street Court, LLC in accordance with the other terms and conditions in Article XI of the [Operating] Agreement."[85] His references to the Operating Agreement are not unintentional.

Indeed, by letter dated April 27, 2016, Plaintiffs first accused Defendant of breaching the Settlement Agreement by not retaining an appraiser as was required

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ensuring that the expressly binding provisions contained in the letter of intent would not be extinguished by the integration clause, but that the non-binding provisions would be extinguished); *see also H & S Ventures, Inc. v. RM Techtronics, LLC*, No. CV N15C-11-082 JRJ, 2017 WL 237623, at *2 (Del. Super. Ct. Jan. 18, 2017) (holding that an asset purchase agreement and LLC agreement were integrated when, among other things, the LLC agreement was an exhibit to asset purchase agreement and the asset purchase agreement's integration clause stated that it and its exhibits constituted the entire agreement).

[84] A-0076.

[85] A-0076.

by the Operating Agreement.[86] That letter made specific references to Article XI and gave Defendant notice that he had ten days to cure his breach.[87] Ten days later, on May 6, 2016, Defendant's counsel responded by stating:

> Please find this email in response to your letter dated 4/27. Glenn will not agree to the appraiser chosen by your clients. Therefore, Glenn has chosen Doug Nickel of Integra Realty Resources as his chosen appraiser **under 11.6(iii) of the LLC agreement**. . . . As we were not able to agree upon a single appraiser, we will need to have the two appraiser appoint a third appraiser. . . .[88]

Defendant's attempt to cure the breach by designating an appraiser pursuant to section 11.6(iii) of the Operating Agreement further demonstrates that as part of the Settlement Agreement Defendant agreed to sell his interest pursuant to the procedures in the Operating Agreement—otherwise, there would be no need to abide by the Settlement Agreement's ten-day notice provision.

Even more telling is that Defendant failed to raise this specific argument in his response to the Motion. His response consisted of two arguments: (1) that Plaintiffs failed to comply with the Settlement Agreement's notice procedures, and (2) that Plaintiffs own conduct barred their requested relief.[89] The argument that the Settlement Agreement only required Defendant to offer for sale his

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[86] A-0081.
[87] A-0081.
[88] A-0084 (emphasis added).
[89] A-0110-16.

membership interest pursuant to Article XI and not abide by any of the other provisions of that article was only raised at oral argument for the first time.[90] The trial court did not even need to consider it. New arguments presented for the first time at oral argument should not be considered by the Court and should be deemed waived.[91]

ii. Defendant failed to comply with the Settlement Agreement.

As explained above, a failure to comply with the Article XI of the Operating Agreement constitutes a breach of the Settlement Agreement. In short, Defendant argues that Defendant's alleged breach of the Settlement Agreement is nothing more than an allegation that Defendant failed to "retain" an appraiser and that there was no demand for him to do that, only a demand that he "pick" an appraiser. This is sophistry.

Plaintiffs' April 27, 2016, letter was the first of three notices to cure Defendant's breach of the Settlement Agreement. That letter explicitly put Defendant on notice that he was required to participate in Article XI's buyout process and that a failure to do so constituted a breach of the Settlement Agreement:

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[90] A-0453; A-0480. *See also* Exhibit A to Appellant's Opening Brief at 7.

[91] *See Martinez v. E.I. DuPont De Nemours & Co.*, No. CIV.A. N10C-04209ASB, 2012 WL 6845678, at *4 (Del. Super. Ct. Dec. 5, 2012) (citing *In re National City Corp. S'holder Litig.*, 998 A.2d 851, 2010 WL 2585282, at *2 (Del. 2010)).

> Glenn is obligated to participate in Article XI's buyout process. . . . We have a binding contract. Glenn cannot unilaterally "renege" on the deal. Refusing to do so is a breach of the Settlement Agreement. . . . Glenn has 10 days to either agree to Lisa and Steve's proposed appraiser, or pick his own appraiser so that the parties' appraisers can pick an third pursuant to Section 11.6 of the Agreement. . . .[92]

Among other things, section 11.6(b)(vi) of the Operating Agreement states that the purchaser is responsible for one-half of the appraisal price and the offeror is responsible for one-half of the purchase price.[93] The fact that the April 27, 2016, letter also demanded that Defendant "pick" an appraiser, as opposed to more fully spelling out each of the requirements under section 11.6 of the Operating Agreement, does not excuse Defendant's failure to comply with all the terms of Article X1.

At that point Defendant was failing to comply with section 11.6 of the Operating Agreement for failing to designate an appraiser. And so, on May 6, 2016, Defendant's counsel notified Plaintiffs' counsel that in accordance with section 11.6(iii)[94] of the Operating Agreement, Defendant had chosen Mr. Nickel. If Defendant were truly acting in accordance with all of section 11.6, Defendant would be required to pay or "retain" Mr. Nickel's services. As the Court of

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[92] A-0082.
[93] A-0051.
[94] It should be noted that there is no section 11.6(iii) of the Operating Agreement.

Chancery correctly pointed out, merely picking an appraiser without retaining him so that he can pick a third appraiser is an empty gesture.[95]

By simply naming Mr. Nickel, Defendant in no way furthered his required participation in the buy-out process. Indeed, to interpret Section 11.6(b)(iii) of the Operating Agreement to mean that Defendant merely had to name an appraiser without actually hiring him would render that provision illusory or meaningless, and Delaware courts hold that contracts are to be interpreted in a way that does not render any provision illusory or meaningless.[96]

But assuming arguendo that Defendant's naming of the appraiser cured the breach referenced in the April 27, 2016, letter, and that as a prerequisite to filing the Motion, the Settlement Agreement required Plaintiffs to serve written notice to Defendant that he was in breach of the Settlement Agreement for not retaining an appraiser, Plaintiffs did in fact notice Defendant that his failure to retain Mr. Nickel constituted a breach of the Settlement Agreement.

As mentioned above, the April 27, 2016, letter was the first of three written notices to Defendant. The second was an email from Plaintiffs' counsel to Defendant's counsel on June 17, 2016, which stated in part:

> Do you mind if I call your appraiser to figure out what he needs?

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[95] Exhibit A to Appellant's Opening Brief at 7.

[96] *See O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 287 (Del. 2001).

> I suspect if I talk to my appraiser, he will tell me that [Mr. Nickel] has not been retained yet. We need to figure this out. My clients are concerned that Glenn is playing games to avoid the appraisal process.
>
> If [Mr. Nickel] has not been retained, and it is apparent that Glenn has no intention to retain him, we will present Glenn with our appraisal number. If he does not accept it, we will have to file a motion with the Court to enforce the settlement agreement and the buyout process and seek attorney fees.[97]

That email was part of a larger email exchange that began on June 15, 2016. It started with an email from Defendant's counsel seeking a status update on the appraisal process.[98] In response, Plaintiffs' counsel informed Defendant's counsel that it was still unclear if Defendant had actually retained Mr. Nickel. And so, without confirmation from Defendant's counsel—only the vague statement that he spoke with Defendant and that Defendant said his appraiser was waiting on information from Mr. White[99]—Plaintiffs' counsel asked to contact Mr. Nickel directly.

The third notice was on August 11, 2016, when Plaintiffs' counsel followed up on the June 17, 2016 email exchange by attaching Mr. White's appraisal and asking if Defendant had agreed to cure his breach by accepting Mr. White's

[97] A-0089.
[98] A-0091-92.
[99] A-0090.

appraisal.[100] Neither Defendant nor his counsel responded to the August 11, 2016 notice until Defendant's counsel was served with courtesy copies of the Motion on August 31, 2016. It was only then that he notified Plaintiffs that he had "retained Doug Nickel in a limited scope to review [Mr. White's] appraisal and offer an opinion as to its accuracy."[101] Even then, Defendant was still in breach of the Settlement Agreement for having never actually retained him to complete an appraisal and pick a third appraiser.

As the Court of Chancery correctly held, "the Settlement Agreement requires that the non-breaching party 'provide a written demand to cure the breach and provide 10 days for the breaching party to cure such breach.' The Settlement Agreement does not prescribe a particular form of demand, and Delaware law does not require magic words."[102] Each of the three aforementioned notices was sufficient to require Defendant to cure his breach by retaining Mr. Nickel. He did not until after the Motion was filed. That is too little too late.

[100] A-0094.
[101] A-0421-25.
[102] Exhibit A to Appellant's Opening Brief at 8 (citing *Oracle P'rs, L.P. v. Biolase, Inc.*, 2014 WL 2120348, at *16 (Del. Ch. May, 21 2014)).

II. The Court of Chancery did not err in awarding the relief sought by Plaintiffs.

A. Question Presented

Did the Court of Chancery err by awarding the relief sought by Plaintiffs because Plaintiffs did not prove that they suffered damages as required by the Settlement Agreement? As with several of his other arguments, Defendant did not brief this issue below and only made fleeting references to this issue for the first time at oral argument and, thus, the Court should not consider this argument.[103]

B. Standard of Review

This Court reviews questions of contract interpretation *de novo*.[104]

C. Merits of the Argument

Aware of the fact that the Settlement Agreement allows Plaintiffs to seek equitable relief in addition to monetary damages, Defendant is forced to use the tortured argument that the need for equitable relief was mooted at the time Plaintiffs filed the Motion. His basis for that argument is that Defendant "retained"

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[103] *See Shockley v. Abbott Supply Co.*, 135 A.2d 607, 612 (Del. 1957) (holding that a casual statement by counsel cannot possibly be treated as a serious attempt to argue below); *see also Martinez*, 2012 WL 6845678 at *4 (citing *In re National City Corp. S'holder Litig.*, 2010 WL 2585282 at *2).

[104] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (citing *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009)).

Mr. Nickel on August 23, 2016.[105] Defendant is arguing that he had nonetheless cured his breach of not retaining an appraiser and that Plaintiffs should have only been entitled to monetary damages. The problem with that argument is that (1) the contract set the length of time he had to cure (ten days); and (2) he hired an appraiser for the purposes appraising the Property and picking a third appraiser only after Plaintiffs filed the Motion.

Defendant fails to mention that he only retained Mr. Nickel on August 22, 2016, for the limited purposes of reviewing Mr. White's appraisal and not for conducting his own appraisal or working with Mr. White to pick a third as is required by the Settlement Agreement.[106] Nor did he mention that Defendant only notified Plaintiffs of this limited retention after receiving courtesy copies of the Motion. Such a limited retention would not cure the breach. Moreover, when the breaching party performs after the non-breaching party files suit, that performance does not cure the breach.[107]

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[105] Appellant's Opening Brief at 34.

[106] It should be noted that Appellant attached as part of his Appendix a copy of the limited engagement letter from Mr. Nickel and an email from his counsel to Plaintiffs' counsel attaching that limited engagement letter (A-0578-90). Those documents were not part of the record below and this Court should not consider them. *Delaware Elec. Cooperative v. Duphily*, 703 A.2d 1202, 1207 (Del. 1997).

[107] *See Derwell Co. v. Apic, Inc*., 278 A.2d 338, 342 (Del. Ch. 1971) (holding that an attempt to cure after an action had been filed was ineffective).

Furthermore, the Settlement Agreement is clear: the non-breaching party may seek equitable relief from a Delaware court of competent jurisdiction if the breaching party fails to cure the breach within ten days.[108] The Settlement Agreement does not allow the breaching party to limit that relief if the breaching party attempts to perform after the cure period ends.

By refusing to retain an appraiser in order to participate in the buy-out process within the ten-day cure period and allowing Plaintiffs to move forward without him, Defendant waived his rights under the Settlement Agreement and Operating Agreement. And so, with no specific provision in the Settlement Agreement or the Operating Agreement to remedy Defendant's refusal to participate in the appraisal process, the Court of Chancery correctly considered the overt acts of the parties.[109] As the Restatement of Contracts (Second) § 202 cmt. g (2008) states: "Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or ***waiver*** by one party."[110]

Here, Plaintiffs put Defendant on notice that if he did not retain an appraiser that they would present him with their appraisal and if he did not accept it they

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[108] A-0066.

[109] *Julian v. Julian*, 2010 WL 1068192, *5 (Del. Ch. Mar. 22, 2010) (citing *Wilm. Firefighters Ass'n, Local 1590 v. City of Wilm.*, 2002 WL 418032, at *10–11 (Del. Ch. Mar. 12, 2002)).

[110] Restatement of Contracts (Second) § 202 cmt. g (2008) (emphasis added).

would file the Motion.[111] In response, Defendant did nothing. The Operating Agreement states that if the parties cannot agree on an appraiser to determine the value of the Property, then they each shall independently designate an appraiser.[112] Plaintiffs chose and retained Mr. White. Defendant had ample opportunities to retain his appraiser so that the parties could proceed with the three appraisal process. But Defendant chose not to participate, even when put on notice that his failure to do so would result in the Plaintiffs seeking relief from the Court of Chancery to enforce the Settlement Agreement using only one appraiser. Defendant only fully retained his appraiser after Plaintiffs filed the Motion[113]—more than four months after the parties were supposed to have picked a third appraiser. To allow Defendant to now enjoy the benefits of his appraisal and that of third appraiser would be inequitable and would render the ten-day cure provision meaningless. Thus, the Court of Chancery was correct in awarding the relief sought by Plaintiffs.

[111] A-0082; A-0089; A-0094.
[112] A-0051.
[113] A-0429.

III. The Court of Chancery did not deny Defendant his due process rights.

A. Question Presented

Did the Court of Chancery deny Defendant of his due process rights by not holding a trial? Defendant cites A0478 as the moment in record below where he raised this issue. However, Defendant's counsel—during oral argument—only stated that he "believe[d] that a trial must be held if they are going to have proof of damages." And so, this argument on appeal was never raised in the briefing nor was there further elaboration of that claim. Thus, this argument should not be considered.[114]

B. Standard of Review

This Court reviews denial of a constitutional rights *de novo*.[115]

C. Merits of the Argument

The fact that there was not a trial before Defendant was ordered to move forward with sale of his membership interest in the Company using only Mr. White's appraisal value for the determination of his purchase price is not a violation of Defendant's due process rights under both the U.S. and Delaware Constitutions.

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[114] *See Shockley*, 135 A.2d at 612 (holding that a casual statement by counsel cannot possibly be treated as a serious attempt to argue below).
[115] *Hartman v. State*, 918 A.2d 1138, 1140 (Del. 2007).

As this Court stated in *Cohen v. State ex rel. Stewart*,[116] "a person may not be deprived of life, liberty, or property without due process of law."[117] The question here is what constitutes due process of law? In *Cohen*, this Court stated: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[118] Certainly, having the opportunity to respond to the Motion and having the opportunity to appear before the Court of Chancery at a hearing constitute being heard at a meaningful time and in a meaningful manner. That is, "due process does not require an evidentiary hearing approximating a judicial trial before every deprivation of rights; indeed, such extensive process is only required in certain limited circumstances."[119]

To determine whether a challenged procedure satisfies due process, Delaware Courts have employed the analysis set out in *Eldridge*.[120] The "Eldridge factors" instruct a Court to balance:

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[116] 89 A.3d 65, 86 (Del. 2014).
[117] *Id.*
[118] *Id.* at 86-87 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1100 (Del. 1989)).
[119] *Id.* at 87. According *Cohen*, as it pertains to deprivation of property rights, in only one case, *Goldberg v. Kelly*, 397 U.S. 254 (1970) has the U.S. Supreme Court held that a hearing closely approximating a judicial trial is necessary and that case dealt with the termination of welfare benefits. *Cohen*, 89 A.3d at 87 (citing *Eldridge*, 424 U.S. 333-34; *Goldberg*, 387 U.S. at 266-71*; Slawik v. State*, 480 A.2d 636, 645 n. 11 (Del. 1984)).
[120] *Id.*

> the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail.[121]

Here, Defendant is claiming that his private interest is his value for his one-third interest in the Company. He's claiming the Order forces him to sell his interest at an almost $1 million loss. That is pure speculation. That figure presumably comes from the difference between Mr. White's appraisal and Mr. Nickel's appraisal.[122] What Defendant fails to take into account is that if he were successful in his arguments, a third appraiser would still have to be employed. It is more likely the case that a third appraiser would value the property somewhere between the two appraisers' valuations.

But Defendant's real issue is whether there was a risk of an erroneous deprivation of his rights by the Court of Chancery's denial of a trial. The answer is no. The Court of Chancery was presented with numerous emails between the

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[121] *Id.* (citing *Eldridge*, 424 U.S. at 335.)

[122] Mr. White appraised the Property at $9,850,000. Mr. Nickel appraised the Property at $12,300,000. To calculate the purchase price, the $7,049,576.39 debt that the Company owed at the time of the valuation must be subtracted by the proposed value of the Property. Then that number must be divided by three in order to determine Defendant's one-third interest. Using Mr. White's number the purchase price is $933,474.54. Using Mr. Nickel's number the purchase price is $1,750,141.20, which leaves a difference of **$816,666.66**, not $1,000,000.

parties' counsel, all the relevant agreements, and affidavits from Ms. Ward and Mr. White. Further, through her affidavit Ms. Ward presented clear evidence that Plaintiffs provided Defendant with all the information he was seeking in order for him to "retain" Mr. Nickel.[123]

Defendant had the opportunity below to present his evidence and even demand a trial. He did not. He merely responded to the motion without raising any concerns that the trial court should not rule on the papers. He even had the opportunity to provide affidavits from himself and from Mr. Nickel to corroborate his claim that Plaintiffs acted with unclean hands. He did not. Thus, there were no material issues of fact, and the Court of Chancery correctly ruled on the papers without the need for a trial.

Further, having a full trial on these issues would not have added any probative value. There was no dispute that Defendant did not retain an appraiser until after the Motion was filed, which means it was just a contract interpretation question as to whether naming an appraiser was enough to cure the alleged breach. With regard to Defendant's claims that Plaintiffs acted with unclean hands in preventing him from gathering information in order for him to retain Mr. Nickel, the record clearly showed that Defendant had access to those documents. A trial would only be duplicative, allowing Defendant to repeat by way of testimony that

[123] A-0217-20.

he did not check his emails.[124] And even that presumes that the agreements required Plaintiffs to give Defendant access. They did not—another contract interpretation question that the Court of Chancery decided correctly.

And finally, Defendant could have raised these issues below. He did not, and he should not get to further add to the Court of Chancery's already busy docket a trial that would not change the fact he did not hire an appraiser until after Plaintiffs filed the Motion to enforce the Settlement Agreement.

[124] A-0474-75.

IV. The Court of Chancery did not err in finding that Plaintiffs' conduct did not bar them from the relief they were seeking.

A. Question Present.

Whether the Court of Chancery erred by not finding that Plaintiffs acted with unclean hands.

B. Standard of Review

A question of unclean hands is factual and the Court's review is limited to an inquiry as to whether the findings below support the conclusion that Plaintiffs had unclean hands.[125] "'The Court of Chancery has broad discretion in determining whether to apply the doctrine of unclean hands.'"[126]

C. Merits of the Argument.

"The doctrine of unclean hands is '[e]quity's maxim that a suitor who engaged in his own reprehensible conduct in the course of [a] transaction at issue must be denied equitable relief . . . ., a rule which in conventional formulation operated in limine to bar the suitor from invoking the aid of the equity court . . . ."[127] "In effect, the Court refuses to consider requests for equitable relief in circumstances where the litigant's own acts offend the very sense of equity to

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[125] *See RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 876 (Del. 2015) (citing *Collins v. Burke*, 418 A.2d 999, 1004 (Del. 1980)).
[126] *Id.* (quoting *SmithKline Beecham Pharms. Co. v. Merck & Co., Inc.*, 766 A.2d 442, 448 (Del. 2000)).
[127] *Id.* (quoting *McKennon v. Nashville Banner Publ'g. Co.*, 513 U.S. 352, 360, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995)).

which he appeals.'"[128] In essence the doctrine of unclean hands protects the integrity of a court of equity.[129]

Defendant begins his argument by stating that Plaintiffs cannot expect Defendant to have had to retain his appraiser when they themselves did not retain their appraiser until well after they designated him—an argument made for the first time on appeal.[130] The problem with that rationale is that (1) Defendant's alleged grievance does not amount to the type of act that offends the very sense of equity, and (2) that the retention of Mr. White was never an issue holding up the appraisal process.

For instance, Mr. White had agreed to be Plaintiffs' appraiser on or about April 20, 2016.[131] Shortly thereafter, Defendant already made it clear to Plaintiffs that he had no intention of even picking an appraiser and so Plaintiffs sent him formal written notice that he was in breach of the Settlement Agreement.[132] When

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[128] *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998).
[129] *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11.07[a] (2016).
[130] Again, Defendant did not make this specific argument below. He may have argued that Plaintiffs' were guilty of uncleaned hands, but he never specifically addressed whether Plaintiffs' retaining of Mr. White in May of 2016 demonstrated unclean hands. His arguments only addressed whether Plaintiffs impeded Defendant's ability to access and obtain documents for his appraiser. As such the Court should not consider this argument. *See Shockley*, 135 A.2d at 612.
[131] A-0251.
[132] A-0081.

Defendant informed Plaintiffs that he had designated Mr. Nickel on May 6, 2016, Plaintiffs formally retained Mr. White on May 24, 2016 who reached out to Mr. Nickel to pick a third appraiser on May 25, 2016.[133] That is when Mr. White learned that Mr. Nickel had not been retained and did not intend to do anything until Defendant signed his engagement agreement.[134]

Defendant's actions were the only thing stopping the appraisal process from happening. His attempt to cure his breach on May 6, 2016, by simply designating an appraiser while never actually intending to retain him does not cure his breach of failing to participate in the appraisal process. His counsel's May 6, 2016, email only deceived the Plaintiffs into thinking that he was agreeing to participate in the buy-out process.

Had Defendant not refused to designate an appraiser back in April 2016, there would have been no delay in retaining Mr. White. Plaintiffs only formally retained Mr. White when they were being falsely assured that Defendant was moving forward with the appraisal process. Their delay in retaining him had everything to do with Defendant's failure to proceed as agreed. Plaintiffs' action

[133] A-0252.
[134] A-0252.

are neither inconsistent nor do they rise to the unscrupulous conduct needed for the Court of Chancery to find that they acted with unclean hands.[135]

Defendant further complains of Plaintiffs and their counsel's conduct with regards to them not giving Defendant access to the Company's records. This argument is presumably based on Defendant's reliance that Plaintiffs would be solely responsible for obtaining whatever documents the appraisers would need to conduct their valuations. Such promise was never bargained for and should never have been relied upon. But even if Defendant did rely on it, Plaintiffs had no legal

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[135] *See In re Silver Leaf, L.L.C.*, No. CIV. A. 20611, 2005 WL 2045641, at *12 (Del. Ch. Aug. 18, 2005) (holding that both parties were guilty of unclean hands because their company was nothing more penny stock fraud); *Nakahara v. NS 1991 American Trust*, 718 A.2d 518, 794 (Del. Ch. 1998) (finding unclean hands where the plaintiffs violated a standstill agreement and had utterly disregarded an ongoing judicial proceedings when they, through self-help, withdrew approximately $900,000 from the trust's account to pay for their own counsel's fees and when doing so was intended to hide the transaction until it was too late to be undone); *Cook v. Fusselman*, 300 A.2d 246, 251 (Del. Ch. 1972) (holding that defendant was barred from seeking to enforce a bargain which he forced from a badgered board of directors and where the evidence suggested that it was not an arms-length transaction); *Parfi Holding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 934 (Del. Ch. 2008) (dismissing plaintiffs' claims where they, among other things made misrepresentations to the court to gain a tactical advantage in the litigation). *But compare Matter of Enstar Corp.*, 593 A.2d 543, 553 (Del. Ch. 1991) (holding that there was no duty to inform corporation of sale of stock and thus no unclean hands), *rev'd on other grounds*; *Merck & Co. v. SmithKline Beecham Pharm. Co.*, No. C.A. 15443-NC, 1999 WL 669354, at *51 (Del. Ch. Aug. 5, 1999), aff'd, 746 A.2d 277 (Del. 2000), and aff'd, 766 A.2d 442 (Del. 2000) ("If every breach of contract automatically evoked the unclean hands doctrine, then any non-breaching party to a breached contract would have the effective ability to act inequitably against the breaching party with impunity").

duty to provide him with information.[136] Nothing in the agreements required that the parties share their appraisal documents, let alone that it be the sole responsibility of Plaintiffs. The idea that the parties share documents was nothing more than a suggestion in order to proceed as efficiently as possible. Defendant's contention that his appraiser needed those documents before being retained is dubious. If that were the case, he would not have retained him even after Plaintiffs filed the Motion.

But all of this also assumes that Defendant did not in fact have access to the Company's records. He did. First and foremost, Defendant was still a member of the Company and could have accessed the Company's records at any time he wanted by asking the new property manager to produce those records or by going to the Property and making copies of them. The Settlement Agreement specifically allowed Defendant to visit the Property whenever he wanted as long as he gave 24-hour notice of his visit.[137] Every day since at least May 25, 2016, Defendant sent daily emails giving his 24-hour notice, so he could have gone to the Property whenever he wanted to make copies of the Company's documents.[138]

Second, and most importantly, Ms. Ward created the Dropbox on May 25, 2016 so that she could share documents with Mr. White and Defendant. That same

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[136] *See Matter of Enstar Corp.*, 593 A.2d at 553 (Del. Ch. 1991).
[137] A-0064.
[138] A-0256-419.

day she sent Defendant an invitation to access it.[139] Defendant had no excuse for not accessing that Dropbox, other than his counsel stating that he did not check that email regularly.[140] He did however eventually access it on September 30, 2016 using the same email address that the invitation had been sent to originally.[141] Defendant also complained of not having access to Buildium, the Company's online accounting software. Again, the user log from Buildium says otherwise: Ms. Ward sent Defendant a password to access Buildium on May 2, 2016.[142]

If anything, Plaintiffs have demonstrated that they went well beyond what the Settlement Agreement and Operating Agreement required them to do. As such, Defendant's claim on unclean hands rings hollow, and this Court should give deference to the Court of Chancery's finding.

[139] A-0247; A-0211.
[140] A-0474-75.
[141] A-0249.
[142] A-0219; A-0222.

CONCLUSION

Defendant's arguments on appeal are mostly arguments he could have made below but either completely failed to or only made ephemeral references to. The Court should not consider those arguments. Notwithstanding those arguments though, Defendant has failed to demonstrate the Court of Chancery committed a reversible error. And so, for the reasons stated above, the Court should affirm the Order.

Dated: April 19, 2017

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