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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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

# APPELLANT'S REPLY BRIEF

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## PRELIMINARY STATEMENT

The primary matter to be decided on this appeal could not be more straight-forward: In connection with the consideration of what was purported to be a "Motion to Enforce Settlement Agreement," did the Settlement Agreement between the parties give the trial court the authority not simply to enforce the terms of that Agreement, but rather to enforce a wholly separate agreement and punish Defendant -- a punishment that included the unconscionable deprivation of approximately one half of the value of his interest in the business venture between Defendant and Plaintiffs -- and hand that value, **approximately $1,000,000.00**, to Plaintiffs. The answer, based on the clear and unambiguous language of the Settlement Agreement itself and based on the record that was before the trial court, is an unequivocal "no."

Plaintiffs' Answering Brief,[1] a mélange of contradictory and repetitive theories and positions, misconstrues Defendant's arguments in what can only be viewed as a calculated effort to misdirect this Court from considering the unauthorized and substantial harm the trial court inflicted on Defendant when it ignored Defendant's rights contained in both the Settlement Agreement and the Operating Agreement, and inexplicably awarded unprecedented relief punishing Defendant.

[1] Herein cited as "AB at ." All defined terms are as used in Defendant's Opening Brief, cited herein as "OB at ."

Indeed, Plaintiffs' extensive reliance on alleged and easily dismissed procedural issues and theories, rather than on defending the indefensible position of the trial court, readily highlights the reversible error made by the trial court in its incorrect finding that Defendant breached the Settlement Agreement.

Reversal is required because, rather than construe the Settlement Agreement as written, the trial court effectively, and inappropriately, created additional terms to be added to the Settlement Agreement, and, thereafter, unjustly and punitively applied such newly fabricated terms upon Defendant – terms which were neither made part of the Settlement Agreement by the Parties, nor otherwise agreed to by Defendant.[2]

Coloring all of this are the inequitable actions of Plaintiffs and their counsel in connection with the set up and bringing of the Enforcement Motion. The evidence offered in the record and set forth in the Opening Brief confirms that written promises made by counsel for Plaintiffs were not kept - promises which, if kept, would have obviated the Enforcement Motion **months** before it was brought - and such egregious behavior under the circumstances was of a sufficient nature to deny the relief being sought.

[2] *See Northwest Cent. Pipeline Corp. v. Mesa Petroleum Co.*, 1985 WL 44696 (Del. Ch., April 10, 1985)(Holding in construing a contract the court must enforce the bargain made by the parties, not reform or rewrite the agreement). *Jefferson Chemical Co. v. Mobay Chemical Co.*, 267 A.2d 635 (Del. Ch. 1970).

Sadly, it appears that the politics of today have crept into our profession, and in response to that showing, Plaintiffs and their counsel suggest that this Court should read out of existence the obligation of Delaware counsel to act with "candor" toward each other,[3] and simply find that the specific written promises made by counsel for Plaintiff "should never have been relied upon." AB at 41. A sadder statement of at least one counsel's view of his word to a fellow member of the bar and of the state of the profession could not have been offered.

Thankfully, the Court need not even address that outrageously unacceptable thought and behavior as a complete forfeiture of over half the value of a party's investment in MSC was never contemplated by any of the parties.

As set forth herein and in Defendant's Opening Brief, there is ample support, legally and factually, for restoring the approximately $1,000,000.00 in value taken from Defendant, and the actual terms of the agreements between the parties require that the Order must be reversed.

[3] Principles of Professionalism for Delaware Lawyers, Principle 1, Integrity, stating that stating that candor "requires both expression of the truth and the refusal to mislead others in speech and demeanor."

## ARGUMENT

### I. DEFENDANT DID NOT BREACH THE SETTLEMENT AGREEMENT.

#### A. The Clear and Unambiguous Terms of the Settlement Agreement did not Incorporate the Duties and Obligations Contained in the Operating Agreement.

As set forth in the Opening Brief, the **only** possible obligation that Defendant had relating to the Settlement Agreement that has anything to do with the matters that could be adjudicated by the trial court was the requirement that Defendant offer to sell his interest in MSC to the Plaintiffs. OB at 25.

Defendant did exactly that, and no dispute exists that he did so. A0021; A0076. Thus, no further obligations existed or could exist under that Settlement Agreement relating to that particular contractual obligation,[4] and once that obligation was fulfilled, as it was here, any claims, rights or alleged breaches of rights or obligations that arose following such offer, arose solely under the Operating Agreement that the parties previously executed and that was the sole basis for having organized their affairs for purpose of their business venture.

[4]The Settlement Agreement was not a final all-encompassing agreement, but was, by its very terms, a "Partial Settlement Agreement," clearly intending to and specifically leaving out those matters that were not addressed in that "Partial Settlement Agreement." A0063.

The Plaintiffs, not surprisingly, nowhere identify any provision of the Settlement Agreement that Defendant is alleged to have violated. They do not do so because they cannot do so. In short, a violation of the Operating Agreement, if one even existed, was a stand-alone violation of that Agreement, not the Settlement Agreement.

Nonetheless, desperate to hold on to their million-dollar windfall, Plaintiffs create a tortured and laborious argument that, according to them, requires all of the terms and conditions of the Operating Agreement to be included as part of the Settlement Agreement. OB at 20-32. Plaintiffs argument is that 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," that a breach of the Operating Agreement automatically becomes a breach of the Settlement Agreement. OB at 20-21. While certainly imaginative, that tenuous position simply cannot be squared with the actual language used within the four corners of the Settlement Agreement.

The very clear and unambiguous language of the Settlement Agreement itself dooms Plaintiffs' argument.[5] The terms of the Settlement Agreement "must be given

[5] *I.U.N. Am., Inc. v. A.I.U. Ins. Co.*, 896 A.2d 880 (Del. Super. 2006)(Holding extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity when a contract is unambiguous).

the ordinary meaning and should not be tortured to impart ambiguity where none exists.[6] Applying this well-established guidance to the plain meaning of the provisions of the Settlement Agreement means that once the offer to sell was made by Defendants to Plaintiffs in compliance with the terms of the Settlement Agreement (A0021; A0076), that Agreement had no further force and effect on what happened following the completion of the only duty required by its terms.

Plaintiffs' precarious linguistic house of cards ultimately collapses because these particular parties understood that when they actually wanted to incorporate the terms and conditions of all or any part of another document into the Settlement Agreement, they would clearly and explicitly do so.

The parties, represented by the same counsel now before this Court, knew exactly how to incorporate all the terms and conditions of another document, and, in fact, did so in the Settlement Agreement by explicitly incorporating rights and obligations of another document, the Resolution, and they definitively and clearly made sure that such terms were made part of the Settlement Agreement by stating "The Parties agree to the provisions of the Unanimous Consent of the Member and Managers of the Company dated February 19, 2016 (the "Resolution"), which is

[6] *Id*. at 885.

attached hereto as Exhibit A **and is incorporated in the Agreement**." (emphasis added).[7]

The Settlement Agreement is unequivocally devoid of any such incorporating language regarding the Operating Agreement, **and intentionally so**, and, therefore, the absence of this language confirms what the plain meaning of the terms in the Settlement Agreement had already confirmed: The terms of the Operating Agreement were never and were not intended to be incorporated into the Settlement Agreement.

Plaintiffs do assert, for first time, that what they allege is an "integration" clause in the Settlement Agreement overrides the clear language of that Agreement, and that this provision somehow magically mandates that every document which was an exhibit, whether the parties specifically incorporate the terms of a document into the Settlement Agreement or not, automatically becomes incorporated such that a breach of any provision of such exhibit becomes a violation of the Settlement Agreement. AB at 21. That Plaintiffs would put forth such a desperate theory, in the face of the undisputed evidence to the contrary, demonstrates the lengths they

[7] A-0063. The Settlement Agreement obligation to offer for sale Defendant's interest in MSC (A0064) is materially mirrored in the Resolution (A0072), which itself, consistent with the Settlement Agreement, is also devoid of any language which incorporates the Operating Agreement by reference or otherwise. *Id.*

will go to rewrite the parties' clear intention as expressed in the Settlement Agreement.

First, of course, the parties knew how to actually "incorporate" the terms of documents, and did so when it was actually desired by them. *See supra*. Second, and more damning for their position, is that fact that such provision, which confirms that the Agreement as whole is the entire agreement between the parties and that there are no other agreements "with respect to the subject matters hereof," does not "incorporate" any or all of the provisions of the exhibits into the that Settlement Agreement and nothing in the language of that provision requires such incorporation. A0067. That provision is not an "incorporation" provision, and if it were, it would have said that all of the provisions of the exhibits set forth herein are "incorporated by reference." That it does not say so, confirms that it does not operate to do so.

Plaintiffs next seek, through the use of extrinsic evidence, to convince this Court that the words and terms do not say what they say. AB at 22-23. Such effort is to no avail.

The unambiguous language of the Settlement Agreement sets the Parties' duties and obligations. Only if the language is ambiguous, which it is not, could Plaintiffs seek to offer such outside evidence, and since the Agreement is not ambiguous, Plaintiffs' attempt to use the subsequent conduct of the Parties as evidence of their intent when they entered into the Settlement Agreement is barred.

Therefore, Plaintiffs' attempt to go beyond the four corners of the Settlement Agreement in a last-ditch attempt to create ambiguity where none exists must fail.[8]

Plaintiffs' final contention that Defendant somehow "waived" its argument (AB at 23-24) is nonsense given the unequivocal record before this Court. Defendant certainly did not waive this issue, and most assuredly brought this issue before the trial court. In fact, as it is here in this Court, it was the **very first argument** made to the trial court at the only hearing held by the trial court. A0453-54. An argument actually made and presented, and made under the very unique, and, frankly, improper procedural circumstances engaged in below,[9] certainly cannot be held to be a waiver of that argument, especially where, as here, neither the trial court nor these Plaintiffs objected to that argument being presented or considered by the trial court.[10]

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[8] *I.U.N. Am., Inc. v. A.I.U. Ins. Co.*, 896 A.2d at 885. Even if this Court could consider evidence such as this, the only evidence is that once Defendant complied with his obligations under the Settlement Agreement, which he clearly did, his only remaining obligations were under the Operating Agreement.

[9] As discussed in the Opening Brief, rather than bring a new action or an amended pleading in this action, Plaintiffs brought the matter before the trial court via routine "speaking" motion, akin to a Motion for Sanctions for breach of a Court Order, with the entire issue being considered on a very limited paper record. No Court Order had been breached, no formal briefs were submitted, no trial was held and no testimony was taken or was permitted to be offered.

[10] Plaintiffs own failure to object is itself a waiver of their ability to make this argument. *Eustice v. Rupert*, 460 A.2d 507, 511 (Del. 1982).

Moreover, the sole authority cited by Plaintiffs is of no help to them, as it has no bearing on this Court's consideration of whether Defendant waived his right to assert this claim in this appeal. *Martinez v. E.I. Dupont De Nemours & Co.*, 2012 WL 6845678 (Del. Super., Dec. 5, 2012) arose in an entirely different procedural setting, and the focus of the analysis made in *Martinez* was directed towards **the moving party only**. Thus, because that Superior Court case does not speak to a non-moving party's obligations regarding how arguments are to be preserved for appeal, *Martinez* provides no support for Plaintiffs' position.

Ultimately, Plaintiffs' argument must fail because, as the Order makes clear, the trial court actually considered Defendant's argument and decided it against him, finding that the Settlement Agreement incorporates the Operating Agreement, and because the court made that determination (OB, Exhibit A, p. 9), Defendant is absolutely permitted to challenge the trial court's ultimate decision on that point was in error, when it plainly is. Accordingly, Plaintiff's procedural argument must fail in light of (i) Defendant's well preserved, and well-supported, arguments, and (ii) the trial court's action in rejecting Defendant's argument.[11]

[11]Pursuant to Supreme Court Rule 8, all arguments contained in Defendant's Opening Brief were fairly presented before the trial court. Moreover, even if this Court gives credence to Plaintiffs' argument that Defendant has waived certain arguments, such contention does not automatically bar Defendant's arguments. Indeed, since such arguments are outcome dispositive, justice requires this Court consider them. *Shawe v. Elting*, 2017 Del. LEXIS 62, at *31-32 (Del. 2017).

There is, in short, no way to read the unambiguous, clear language of Section A, Paragraph 4 of the Settlement Agreement (A0064) as incorporating all of the terms and conditions of the Operating Agreement, and the trial court's conclusion otherwise, by effectively revising the Settlement Agreement to include such obligations without citation to any legal authority and without being supported by record evidence, was an act beyond the trial court's authority and must be reversed.[12]

### B. Defendant Fully Complied with the Unambiguous and Clear Terms of the Settlement Agreement.

As set forth in the Opening Brief, there was no breach of either the Settlement or Operating Agreements which could be adjudicated by the trial court as Plaintiffs failed to provide the contractually required advance notice and time period to cure. OB at 29-32.

Plaintiffs' April 27, 2016 10-day notice to cure (the "Notice") required Defendant to "pick" an appraiser to value MSC.[13] On May 6, 2017, Defendant, through counsel, undisputedly did just as Plaintiffs requested, and, as the Operating Agreement specifies, Defendant "designated" or "pick[ed]" Doug Nickel as his appraiser.[14]

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[12] *Northwest Cent. Pipeline Corp.* at *9.

[13] A0078-79.

[14] A-0051 and A-0084 respectively.

The Answering Brief effectively concedes that Defendant did what was explicitly asked of him by Plaintiffs' counsel in the Notice, and it is of no surprise that it did so, as there was no obligation to "retain" his appraiser required in the Notice, and any position to the contrary, as discussed fully in the Opening Brief, would fail for several reasons, including the fact that the Parties mutually shared understanding of the obligation created by Article XI of the Operating Agreement was simply to "pick" or designate an appraiser.[15]

To avoid the consequences of its failed legal position, Plaintiffs now assert a new alleged basis for a breach, a basis which was not asserted in their Enforcement Motion, and, most significantly, **one which the trial court did not have chance to consider in the first instance**. Plaintiffs now contend that it was not the Notice alone that allows them to have brought the Enforcement Motion, but rather it is the Notice in conjunction with two (2) additional emails between counsel for the Parties that provide the contractually required condition precedent notice of the breach of

[15] Plaintiffs, did not, and, of course, cannot, dispute the fact that they did not retain their own appraiser **until nearly a month after "picking" him**. A0201. Such fact, of failing to "retain" his appraiser, when they themselves were equally engaged in an alleged breach, so thoroughly undermines Plaintiffs' primary argument below that "pick" allegedly means "retain," that Plaintiffs do not even attempt to address it in their Answering Brief.

the Settlement Agreement.[16] This argument, based on an entirely new cause of action, is easily dispatched.

On appeal, Plaintiffs are not permitted to create and pursue a new claim for a new and entirely separate breach based on new and separate condition precedent notices. Plaintiffs' effort to challenge the basis for a breach of the Settlement Agreement rests only on those grounds offered in the Enforcement Motion, and the Notice, **and no other document**, is used for the basis of compliance with contractual obligations precedent to the alleged right to bring their Motion. A0028.

Any new basis for pursuing a new breach, as this one certainly is since it is not based solely on the Notice itself, must be the subject of another motion where both the Defendant and the trial court have a chance to address the issues in the first instance, including, for example, whether relying on such other emails as the contractual notice is proper especially in light of whether or when such 10-day cure period began. Plaintiffs cannot now ask this Court to consider, without the benefit of the trial court's consideration, a new basis for satisfying their conditions precedent to asserting another separate breach of the Settlement Agreement.[17]

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[16] AB at 24-28. Such argument was neither raised in Plaintiffs' Enforcement Motion nor at the hearing. A0019-31. Moreover, because appropriate notice is a prerequisite to seeking any relief under the Settlement Agreement, Plaintiff cannot now attempt to retroactively cure what would be an inherently defective Motion.

[17] In any event, because neither email informs Defendant, as the Settlement Agreement specifically requires, that he had 10 days to cure such alleged violation

At the time the Notice was sent and answered, both Plaintiffs and Defendants had the same understanding that "pick" does not mean "retain," as neither Plaintiffs nor Defendants had retained their appraiser at the time that they picked him. Because Defendant did what the Notice required of him within the 10-day window, the trial court did not have the authority to adjudicate the Enforcement Motion, and the trial court's finding that the Settlement Agreement was breached was in error, and must be reversed.

(A-0089; A-0094) those emails do not meet the Settlement Agreement's notice requirements, and, therefore, they cannot create a right to seek relief as provided for in the Settlement Agreement.

## II. THE TRIAL COURT ERRED IN AWARDING THE RELIEF SOUGHT BY PLAINTIFFS

The trial court's award of a judicially compelled forfeiture of approximately one million dollars in value and a substantial divestiture of Defendant's rights under the Operating Agreement was not contemplated by the Settlement Agreement nor agreed upon by the Parties.[18] Plaintiffs fail to demonstrate how any equitable relief sought was anything other than mooted by Defendant retaining his appraiser on August 23, 2016, **prior to the filing of the Enforcement Motion**.[19]

Moreover, Plaintiffs fail in any meaningful way to respond to the fact that the actual relief sought was well beyond the scope of that permitted in the Settlement Agreement. What Plaintiffs sought was a substantial abrogation of Defendant's rights under that Agreement, and under the Operating Agreement, by seeking a

[18] The Settlement Agreement specifies the scope of relief permitted by any non-breaching party. Even if this Court finds Plaintiffs were entitled to equitable relief after Defendant retained his appraiser, the language of the Settlement Agreement clearly indicates that the relief contemplated by the Parties was not a forfeiture of value, as ordered by the trial court, but rather injunctive relief designed to compel the breaching party to perform under the Operating Agreement, as well as monetary damages to restore the non-breaching party to their status prior to the breach. *See* A0066. Such relief is entirely consistent with the clear intent of the Parties to respectively sell/purchase Defendant's interest in MSC to separate themselves from a clearly toxic relationship. What was clearly not contemplated or intended by the Parties was the punitive-like relief awarded by the trial court to Plaintiffs, designed specifically and solely to punish Defendant.

[19] *See* A0578-81.

forfeiture of Defendant's rights to have an independent third-party appraiser determine the value of his interest in MSC and requiring that he accept Plaintiff's inordinately low valuation number. Nowhere in the Settlement Agreement is such a punitive penalty permitted.[20]

On this appeal, however, Plaintiffs assert that Defendant "waived" his rights under the Settlement Agreement and Operating Agreement by failing to "retain" his appraiser within the ten-day cure period.[21]

Defendant did no such thing.

There was no knowing, voluntary intention of Defendant to waive his rights under the Operating Agreement.[22] Indeed, as the record reflects, at all times,

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[20]Defendant further notes that not only was such relief not contained in the Settlement Agreement, but that such relief is not equitable. Indeed, the Court of Chancery does not have jurisdiction to award punitive damages or relief effecting a forfeiture. *See Beals v. Washington International, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978) (Holding the Court of Chancery "should not take it upon itself to change a centuries-old limitation on its jurisdiction and undertake to assess damages in excess of what is necessary to make an injured party whole.").

[21]AB at 31. Further, Plaintiffs argue that Defendant's argument necessitates the finding that the 10-day cure period provided in the Settlement Agreement would be meaningless if Defendant's rights under the Settlement Agreement were maintained. Such argument entirely misconstrues the relief permitted by the Settlement Agreement. Whether equitable relief is awarded or not, the non-breaching party would still be entitled to monetary damages making the 10-day cure period anything but "meaningless."

[22] *Prizm Group, Inc. v. Anderson*, 2010 Del. Ch. LEXIS 105, *26 (Del. Ch., May 10, 2010) (Holding waiver is the voluntary and intentional relinquishment of a known right with the intention being the foundation of waiver which must clearly appear

Defendant sought to enforce his rights under the Operating Agreement, and sought to obtain the information that was promised to him to comply with his obligations under the Agreement. Every breach of contract is not a waiver of the rights under the contract, and there was certainly no evidence of a waiver offered, and certainly none that would evidence any intent that Defendant in fact waived his rights.[23]

Not surprisingly, the trial court **never** found a "wavier," holding only that Defendant breached the Settlement Agreement, and, without comment, awarding the relief requested. OB, Exhibit A at 9. There is simply **no** evidence in the record that a waiver existed here, or even that waiver was an appropriate punishment given the circumstances, and if the Court was inclined to consider whether a waiver could, in fact, trump the parties unambiguous agreement on the scope of rights for a breach of the Settlement Agreement, because there was no factual determination that Defendant did intentionally waive his rights, the matter must be remanded for a trial on whether there was, in fact, a knowing voluntary relinquishment by the Defendant

from the evidence); *see also Norberg v. Security Storage Co.*, 2000 Del. Ch. LEXIS 142 (Del. Ch. Sept. 19, 2000) (holding that the intent to relinquish a right is a prerequisite to applying waiver as an equitable defense.)

[23] *Id.*

of his rights under the Operating Agreement sufficient to divest him of some but not other rights under that Operating Agreement.[24]

In the end, Plaintiffs cannot have it both ways. They cannot assert that Defendant waived his rights for a particular breach, when they themselves did the exact same thing. Plaintiffs did not retain their own appraiser until May 24, 2016, nearly a month after designating him, and Plaintiffs never explain how their identical failure should work a forfeiture on Defendants, but not on themselves. Their position is as absurd as it is inequitable.

Because the relief granted went beyond that which was agreed to by the parties in their agreements, the trial court committed reversible legal error.

[24]The absence of any finding of the trial court about why this particular punishment should have been inflicted on Defendant confirms the inappropriate punitive nature of the relief awarded, and requires the reversal of the trial court's Orders.

## III. THE TRIAL COURT ERRED AS IT DENIED DEFENDANT ADEQUATE DUE PROCESS RIGHTS PRIOR TO EFFECTING A FORFEITURE OF APPROXIMATELY HALF HIS INTEREST IN MSC.

The issue here is: Whether, as a result of this alleged breach, Plaintiffs were actually damaged -- a fact in actual dispute -- and, if so, what was the correct amount of damages – a fact also in dispute. Only a trial of those disputed issues of fact could resolve them.

In the Enforcement Motion, and at the hearing, Plaintiffs provided the trial court with no evidence that they had been damaged. With no evidence of damages flowing from the breach having been placed in the record, and none being evident, Defendant argued at the hearing that a trial on the issue of damages was required before the trial court could award any damages or relief. A0478.

The Opening Brief amply addressed the fact that no trial was granted on that issue and that no written explanation of why such trial was denied was issued. OB at 37-40. The Brief also explained why the issue of damages was unquestionably in factual dispute, which due process required a trial to determine whether any damages existed and what, if any, damages Plaintiffs would have been entitled. *Id.*

In response, Plaintiffs argue extensively that sufficient evidence regarding the "breach" was in the record, and, therefore, no trial was necessary.[25] That of course,

[25] AB at 37-40.

does not address the issue before the Court, and thus such arguments are irrelevant, and do nothing to defeat the showing made in the Opening Brief.

That Plaintiffs focus solely on the alleged merits rather than the issue of damages is of no surprise. Plaintiffs have no response to the fact that **no** proof of damages is in the record, and that, at the very least, there is a dispute of material fact about whether damages even exist, and if they do, what would be the amount of such damages.

The award of relief amounting to approximately $1million in damages to these Plaintiffs by the trial court, on a record with **no** proof of their damages, and without any procedural due process protections being afforded to Defendant on that issue, clearly amounted to an erroneous deprivation of Defendant's constitutionally protected property interest in MSC. The error is clear. A trial on the contested issues of damages would have satisfied the due process obligations, but no such trial was granted, and, as a result, such action deprived Defendant of his due process rights, requiring a reversal and remand of the Order.

## IV. THE TRIAL COURT ERRED IN FAILING TO FIND PLAINTIFFS' OWN CONDUCT AND THAT OF THEIR COUNSEL BARRED THE VERY RELIEF SOUGHT AND AWARDED.

Plaintiffs' self-serving arguments addressing their own egregious conduct merely attempt to deflect from the compelling, and largely undisputed, factual background originally before the trial court and now before this Court concerning their own inequitable behavior and that of their counsel.

Yet, Plaintiffs cannot hide from the fact that, despite having all facts laid out before it, the trial court inexplicably found that Defendant alone had breached the Operating Agreement, when the clear and undisputed fact is that Plaintiffs themselves were just as culpable in any such alleged breach, since both parties did exactly as Plaintiffs had requested be done in the Notice – designate, but not retain, an appraiser.[26]

Plaintiffs also cannot wish away the undisputed and amply supported record evidence that (i) counsel for Defendant repeatedly informed Plaintiffs' counsel that, despite what Plaintiffs may have believed at the time, Defendant simply did not have

[26]*See* A0201; Note 15, *supra*. Plaintiffs further argue again, in what has become a tedious repetition, that Defendant has waived his argument. It clearly cannot be disputed that Defendant raised his unclean hands argument in both his Response to the Enforcement Motion and at the hearing. *See* A0112-16; A0473-77. Moreover, Defendant's specific argument contesting Plaintiffs' assertion that Defendant had an obligation to "retain" his appraiser is equally found in both the paper record and at oral argument. A0112-16; A0457-73.

access to the required financial information,[27] (ii) that despite repeated promises to counsel for Defendant by counsel for Plaintiffs that such information would be forthcoming, it was not,[28] (iii) that Defendant's counsel explicitly informed counsel for Plaintiffs that, without the requested information, Defendant was prevented from proceeding with his appraisal,[29] and (iv) that although it would have been a simple matter for Plaintiffs' counsel, who, it turns out, personally had the very access counsel for Defendant sought, to have told counsel for Defendant such information would not be provided, or, alternatively, that he would, at least, provide access consistent with his promises to do so, the record is devoid of any evidence of Plaintiffs' counsel doing either.

Nor can Plaintiffs ignore the fact that the trial court made a factual finding about motivation, without consideration of live testimony and without deposition submissions, in the face of the undisputed, repeated requests made by counsel for Defendant for production of the information needed by Defendant to start his appraisal.[30]

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[27]A0165-78; A0191.

[28] A0168-78; A0191.

[29] A0165-78.

[30]AB at 42; A0165-78. Without live testimony, affidavits or deposition transcripts, it is hard to understand the trial court's factual finding that Defendant's repeated requests for production of the information he did not have was a "pretext," especially

Incredibly, in response to that well-documented inequitable conduct of Plaintiffs and their counsel, and after confirming that counsel for Plaintiffs actually made the promises the record demonstrates were made, Plaintiffs and their counsel offer this professionalism nugget to the Court: One Delaware counsel had **no** right to rely upon another Delaware counsel's promises that the information requested and needed in the litigation between them would be provided.[31]

That members of the Bar of this Court would ever make such an assertion, and to do it in a submission to this Court is, in a word, shocking.

That Plaintiffs articulate such a thought and hold such a position confirms their already obvious inequitable conduct, and now supplies the actual intent behind it. With counsel for Plaintiffs completely failing to inform counsel for Defendant that he should never have relied on the promises a fellow Delaware lawyer was making to him, it is now certain that Plaintiffs' counsel was setting up Defendant for the Enforcement Motion that could only be brought, and/or would be better positioned for the inequitable relief they were seeking, if Defendant was not given the documents he requested and was promised prior to the filing of that Motion.

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where, as here, such requests were repeated and **began well-before Plaintiffs asserted that Defendant's response to the Notice was allegedly deficient**. A0508.

[31] *See* AB at 41; A0191. Indeed, Plaintiffs' counsel states with regard to his repeated promises to provide the required appraisal information, such promises "should **never** have been relied upon." AB at 41(emphasis added).

The conduct of Plaintiffs and their counsel leading up to the Enforcement Motion is reprehensible and offends the very sense of fair play, decorum, appropriate behavior among Delaware counsel and equity, and the disturbing assertion in the Answering Brief that **one Delaware legal counsel does not have the right to rely on the written representations of another**, should shock the conscience of this Court such that the demonstrable inequitable conduct, within the confines of this litigation and, indeed, in light of the very motion being pursued, absolutely bars the relief being sought.[32]

The trial court's refusal to consider the egregious conduct of Plaintiffs and their counsel in the background leading up to the Motion they brought, was in error, and must be reversed.

[32] *Nakahara v. NS 1991 Am. Trust,* 718 A.2d 518, 522 (Del. Ch. 1998).

## CONCLUSION

WHEREFORE, for the reasons set forth in this Reply Brief and Defendant's Opening Brief, Defendant respectfully requests that this Court reverse the Order, and remand the matter to the Court of Chancery.

Respectfully submitted,

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