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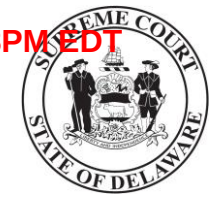

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRUCE P. EAMES, **ANDREY OMELTCHENKO, AVG HOLDINGS, LP,** and **ASTER SECURITIES (US) LP,**	
Defendants Below/Appellants	No. 338, 2019
v.	APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE,
QUANTLAB GROUP GP, LLC, **VELOCE, LP,** and **MARCO, LP,**	C.A. NO. 2018-0553-JRS
Plaintiffs Below/Appellees,	PUBLIC VERSION FILED SEPTEMBER 3, 2019
and	
QUANTLAB GROUP, LP,	
Nominal Defendant Below.	

APPELLANTS' OPENING BRIEF

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Dated: August 16, 2019

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NATURE OF PROCEEDINGS

This case is about the relationship between a 2016 limited partnership agreement and a 2010 voting trust agreement. Before any discovery, the parties filed cross motions for summary judgment. By letter opinion dated March 19, 2019, the court granted Plaintiffs' and denied Defendants' motions. Final judgment was entered on July 30, 2019. Defendants appeal.

SUMMARY OF ARGUMENT

1. When granting summary judgment in favor of Plaintiffs, the court weighed all inferences in their favor. The court found that Quantlab's limited partnership agreement (LPA) is unambiguous and fully integrated, and the voting trust agreement (VTA) must be incorporated into the LPA to be effective. It found the LPA does not allow transfer of voting interests per §17-702 of DRULPA. The court gave Plaintiffs their remedy – Quantlab's general partner need not accept votes from the Voting Trustee – by creating The *Quantlab* Rule: that a contract may be superseded by falling within the scope of an integration clause of a second fully integrated contract, yet remain valid, viable and enforceable. This creates a legal conundrum.

2. The court erred in finding that the *only* reasonable interpretation of the applicable contracts was that the integration clause of the Quantlab LPA superseded (*i.e.*, eradicated) a separate and irrevocable VTA involving a subset of Quantlab's partners. In so holding, the court (i) failed to adhere to the proper summary judgment standard, (ii) misconstrued the plain language of the integration clause, (iii) ignored the parties' stipulation as to the validity of the VTA, (iv) disregarded material fact disputes regarding the intention of the parties, and (v) prematurely rejected Defendants' unclean hands defense.

3. The court erred in finding that Defendants' waived the required contractual conditions precedent to an award of attorneys' fees to Plaintiffs, which mandate that the parties follow the alternative dispute resolution procedures contained in the agreement in order to obtain a contractual recovery of attorneys' fees. In so holding, the court inappropriately shifted the burden to Defendants to disprove waiver and awarded fees without any "unequivocal" evidence establishing that Defendants knowingly and intentionally waived the conditions precedent.

STATEMENT OF FACTS

Quantlab Group, LP ("Quantlab") is a Delaware limited partnership and holding company for a family of affiliated entities. Headquartered in Houston, Texas, Quantlab comprises one of the world's most successful high-frequency trading organizations. The workhorse/profit-center is Quantlab Financial, LLC ("Quantlab-Financial"). Quantlab has seventeen partners.[1] It is managed by its general partner, Quantlab Group GP, LLC ("QGP").

I. The Contracts

At issue in this case are (1) Quantlab's governing document, the Fourth Amended and Restated Limited Partnership Agreement[2] ("4LPA") and (2) a Voting Trust Agreement ("VTA") executed in 2009 and amended in 2010.[3] Plaintiffs stipulated, and the court recognized,[4] that the VTA is viable, valid, and enforceable:

> THE COURT: [W]hat I understand your argument to be is … you are prepared to, in essence, ***admit***….. the VTA can be assumed to be a ***viable*** agreement.

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[1] *See* A2435-43 (Schedule A identifying partners).

[2] Unless otherwise specified, the generic term "limited partnership agreement" is abbreviated herein as "LPA." A particular version is designated by its number, *e.g.*, the First Amended and Restated Limited Partnership Agreement is referred to as 1LPA.

[3] A2166, ¶1.

[4] A778:8-20; A819:3-15; *see also*, A948, n.3.

MR. REED: Yes.[5]

THE COURT: [F]or purposes of my construction of the agreements, I should assume [the VTA] is ***valid***.

MR. REED: Yes.[6]

MR. CZERWONKA: I wanted to make clear is that we're proceeding operating under the understanding that the [VTA] is a *valid and* ***enforceable*** *document*?

THE COURT: ***That's what I understood***. That's sort of the starting line, and we go from there.[7]

MR. REED: [Y]es. Absolutely….[W]e have not in any way presented to Your Honor the question of the validity of the [VTA]. We're going to assume it's ***valid***.…"[8]

MR. REED: [T]his case does not challenge the validity of the [VTA].[9]

The VTA irrevocably assigned 99% of Quantlab's Class A voting interests (the "Interests") to the Voting Trust (the "Trust") to be held by a Voting Trustee (the "Trustee").[10] It was recorded in Quantlab's books and records.[11] The only

[5] A778:8-14.
[6] A778:17-20 (emphasis added).
[7] A819:3-9.
[8] A819:13-15 (emphasis added).
[9] A751:10-11.
[10] A2167-68, §2.1. Although it is a party to the VTA, QGP did not assign its 1% interest to the Trust.

permitted mechanisms for termination of the trust, which is otherwise irrevocable, are unanimous written consent of all the Class A Partners or by its termination date in 2020.[12] Neither of these events has occurred.[13]

Ten of the seventeen Quantlab partners are not parties to the VTA.[14] The VTA parties are the Class A Partners, QGP, and the Trustee who is not a Quantlab partner.[15] Only three people control the Interests: Bruce Eames (23.058%), Andrey Omeltchenko (3.980%), and Ed Bosarge (71.967%).[16] The parties to the 4LPA and VTA are contrasted below:

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[11] A2543, ¶5.
[12] A2173, §7.1; A2166, ¶1. It is disputed when in 2020 the VTA will expire.
[13] A2173 at §7.3; *see also* A2542-44, ¶3-6.
[14] *Compare* A2166 (Introductory Paragraph) *to* A2435-43 (Schedule A listing all partners).
[15] *Id*.
[16] Eames controls Class A Partner AVG Holdings, LP. Omeltchenko controls Class A Partner Aster Securities (US) LP. Bosarge controls Marco, LP and Veloce, LP.

TABLE OF PARTIES	
VTA[17]	**4LPA**[18]
Eames Omeltchenko Marco Veloce Aster AVG QGP *Voting Trustee, individually*	Eames Omeltchenko Marco Veloce Aster AVG QGP *Quantlab Incentive Partners I, LLC* *Quantlab Incentive Partners II, LLC* *Quantlab Incentive Partners III, LLC* *The Bosarge Family Foundation* *5D Holdings, LP* *Quantlab Trading Partners U.S., L.P.* *Big Bird Partners* *Quantlab Trading Partners Offshore Ltd.* *Elite Destinations Ltd.* *Quantlab Consulting, LLC*

The 4LPA addresses the quantity of each partner's interest, assignment of interests, which partners have a right to vote and on what matters, and what threshold of votes are necessary to authorize various activities.[19] The 4LPA does not address how the partners vote or how to resolve a stalemate, *i.e.* the inability to reach Super Majority in Interest of the Limited Partners ("Super Majority").[20] A Super Majority is obtained if 80% of the Class A Partners vote in agreement.[21] The

[17] A2166 (Introductory Paragraph).
[18] A2435-43 (Schedule A listing all partners).
[19] A2743.
[20] A2375, §5.12.
[21] A2366, §1.136.

Super Majority must agree to add or remove a general partner,[22] amend the LPA,[23] determine fair market value of Quantlab,[24] determine QGP's compensation, [25] or initiate a capital infusion event.[26] Super Majority consent is required to engage in certain business activities such as encumber, sell, convey, transfer or exchange Quantlab assets,[27]or terminate, liquidate or wind up Quantlab.[28] A Super Majority will never be obtained if Eames and Bosarge disagree because Omeltchenko and QGP do not own enough Interests to break a stalemate.[29]

The Trust was created to combine the voting of Interests in order to avoid Super Majority stalemates.[30] Specifically, the Class A Partners agreed to vote the Interests according to a majority decision of a Voting Trust Committee ("Committee")[31] comprised of Eames, Bosarge, and Omeltchenko.[32] The Trustee is tasked to vote the interests as directed by the Committee.[33]

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[22] A2370, §§5.3-5.4.
[23] A2375, §5.12(a)(ii).
[24] A2359, §1.79.
[25] A2373, §5.7.
[26] A2354, §1.20.
[27] A2377, §5.17.
[28] A2372, §5.6.
[29] *See* A2601-03.
[30] A2170, §4.4, *see also*, A2601-03.
[31] A2170, §4.4.
[32] A2169, §4.1.
[33] A2170, §5.2.

One section of the VTA at issue is §2.4.1, which requires its parties "to take all such actions as may be necessary under" the Delaware Revised Uniform Limited Partnership Act ("DRULPA") or the operative LPA, to amend the LPA to add the following notice:

> This [LPA] and the [Interests] of those Limited Partners that are a signatory hereto is restricted by and subject to the terms of that certain [VTA] dated as of January 1, 2009, a copy of which has been filed at the offices of [Quantlab]. The [VTA] shall not affect the rights or obligations of any other Partners.[34]

The VTA does not say it becomes "legally ineffective" if this notice is not in the LPA.[35]

There were five amended LPAs[36] prior to the 4LPA. The purpose of these revisions was to facilitate Bosarge's tax planning mechanisms and to restructure Quantlab in anticipation of a sale.[37] Each relevant iteration[38] of the LPA recognizes voting trust agreements specifically or that voting rights may be transferred to "Permitted Transferees" – which includes trusts created for the benefit of a partner.[39] The July 28, 2015 2LPA, for example, referred to voting trust

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[34] A2168.
[35] A1031.
[36] *See* A2075-77; 2091-96; 2098-164; 2179-2252; 2254-2348.
[37] A2542-43, ¶3-4; A2545-47, ¶10-13; A2555-56, ¶¶2, 4-5; A2559-60, ¶3-4.
[38] The relevant iterations are those created on or after the date of the VTA.
[39] **1LPA**: A2144-45, §13.4(c); A2110, §4.69; and A2111, §4.73. The 1LPA was executed on the same day as the VTA. *Compare* A2159 *to* A2166. **2LPA**: A2002-A2004; A2195, §1.137; A2222, §11.4(c); A2191, §1.109; A2189, §1.90; and

agreements in its definition of "Voting Interest" at §1.137.[40] The 4LPA specifically allows partners to transfer voting interests to a Permitted Transferee under §11.5(c).[41] However, the 4LPA's §11.5 limits the rights of *unauthorized* transferees to those set forth in §17-702(a)(3) of DRULPA, which does not include voting rights.[42] DRULPA §17-702(a)(3) does *not* address the validity of voting trust agreements.[43]

The integration clause changed through iterations of the LPA. The integration clause of the February 25, 2009 iteration stated:

> This [Amendment], the ***[VTA]***, and the [LPA] constitute and reflect the ***entire agreement*** among ***the Parties*** and ***supersede any prior understandings, agreements, or representations*** … to the extent they relate ***in any way*** to the subject matter hereof ….[44]

A2191, §1.105. **3LPA:** A2301, §11.5(c); 2266, §1.106; A2265, §1.88; and A2266, §1.102. **4LPA:** A2396, §11.5(c); A2362, §1.107; A2360, §1.89; A2362, §1.103.

[40] A2195, §1.137. ("Further *notwithstanding anything contained herein to the contrary* the Voting rights of any Partner *shall be expressly subject to the terms and provisions contained in any applicable voting trust agreement* as may [b]e in force from time to time." (emphasis added). The VTA was in force on July 28, 2015. *See* A2166.

[41] A2396, §11.5(c) (permits transfers of Limited Partnership Interests to Permitted Transferees); A2362, §1.107 (a Permitted Transferee includes the trustee of a trust created for the benefit of a partner); A2360, §1.89 (the definition of Limited Partnership Interest is, "the Partnership Interest owned by a Limited Partner); and A2362, §1.103 (definition of Partnership Interest includes "any right to Vote").

[42] A2396-97.

[43] *Compare* 6 *Del. C.* §17-702(a)(3) *to* 8 *Del. C.* §218, known as Delaware's "Voting Trust Statute" *See e.g. Adams v. Clearance Corp.*, 116 A.2d 893, 896 (Del. Ch. 1955); *Abercrombie v. Davies*, 130 A.3d 338, 344 (Del. Ch. 1957).

[44] A2076, §3(d) (emphasis added).

On February 25, 2009, all of the partners to the LPA were parties to the VTA.[45] On September 8, 2009, Class B, C, and E partners joined Quantlab as reflected in the Second Amendment to the LPA.[46] The integration clause was not changed and still identified the VTA, the Amendment to the LPA, and the LPA as a part of the entire agreement between the parties.[47]

When the 1LPA and VTA were both amended effective September 1, 2010, not all of the partners to the LPA were parties to the VTA.[48] The integration clause was revised to read: "This [LPA] contains the ***entire agreement among the Partners*** with respect ***to the matters of this Agreement***…."[49] Additionally, the references to the VTA, the LPA, and the Amendment to the LPA were all removed from the integration clause; however, the recitals reference the fact that the "then Partners in the Partnership had created a voting trust agreement…."[50]

The amendment to the VTA and the 1LPA were executed on the same day,[51] so both agreements were enforceable and partially integrated. The wording of the integration clause has not changed since 2010 despite three subsequent revisions. Though Plaintiffs now claim the VTA was superseded by this language, the

[45] A2088-89; A2076-77.
[46] A2091, §C, G.
[47] A2076, §3(d); A2091-93.
[48] A2159-60; A2176-77.
[49] A2158, §19.12 (emphasis added).
[50] A2098, ¶3.
[51] A2166 at preamble; A2107, §4.48.

evidence below demonstrates that Plaintiffs regarded the VTA as valid and enforceable until Plaintiffs first raised the issue in 2018.

A. The 2013 Replacement of the Trustee

On December 4, 2013 the Committee voted, through a Deed of Removal & Appointment, to remove and replace the Trustee with Joe Valentino, Bosarge's attorney.[52]

B. The July 8, 2016 Joinder

Simultaneous with the 4LPA's execution, the Committee executed a Joinder representing and warranting that they are bound to the terms of the VTA, acknowledging its authority, and instructing the Trustee "to take such actions as are necessary" to approve the 4LPA.[53] If the VTA was superseded as of the 2LPA (as Plaintiffs contend),[54] then there was no reason to execute this joinder. Valentino resigned as Trustee after executing and approving the 4LPA on July 25, 2016.[55]

C. Representations to Securities Regulators

Quantlab wholly owns and operates a Netherlands-based entity Quantlab Europe B.V. ("Quantlab-Europe").[56] To operate legally, Quantlab-Europe needed

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[52] A2624-27.
[53] A3292-94 (Joinders executed by the Committee to adopt the 4LPA and various Resolutions to which the Joinders are attached.)
[54] A950-51.
[55] A2629.
[56] A2542, ¶2.

"Declarations of No Objection" (DNOs) from Dutch securities regulators De Nederlandsche Bank N.V. (the "Regulators") for each of its controlling persons and entities.[57] The Dutch branch of Norton Rose Fulbright ("NRF") represented Quantlab-Europe in this effort.[58]

On August 3, 2017, NRF informed Quantlab-Europe that the Regulators "want to receive an exact overview of which parties have real and ultimate control over [Quantlab-Europe] … and how such control is exercised…." and "a formal confirmation from a lawyer confirming that the (exercise of) [sic] the described control is true and accurate…."[59]

On August 7, 2017, Simon Garfield ("Garfield"), the Associate General Counsel of Quantlab-Financial, forwarded NRF's correspondence to Quantlab's general counsel and attached a draft reply which Garfield wrote based upon Quantlab's records.[60] On August 10, 2017, NRF sent Quantlab's reply to the Regulators confirming that QGP, Quantlab and Quantlab-Financial exercise

[57] A2542, ¶2; A2559, ¶2.
[58] A2542.
[59] A3123 (emphasis added).
[60] A3121.

control over Quantlab-Europe,[61] that the VTA "constitutes an agreement to delegate voting rights…." and: [62]

> The Class A partners … entered a voting trust agreement in which voting is delegated to a three-member committee…. W.E. Bosarge, Jr., Bruce Eames, and Andrey Omeltchenko…. The committee operates by majority rule and each member receives one vote.[63]

D. Garfield's September 13, 2017 Email

In this email, [64] Garfield explained the purpose of the VTA:

> [T]he [4LPA] requires an 80% super majority to make certain decisions…. When the Bosarge family and Eames families' [sic] interests align, the super majority provisions are satisfied, but when their interests diverge, there is no mechanism to make decisions. In light of the prospect of a deadlock on important business matters, **the [VTA] was executed to provide a dispute resolution mechanism by which Dr. Omeltchenko serves as a tie breaker**…..[65]

Tim McInturf ("McInturf"), General Counsel and Secretary of Quantlab-Financial, agreed with Garfield's assessment.[66] Because QGP controls Quantlab, which in turn controls Quantlab-Financial and Quantlab-Europe, the representations made by Garfield and McInturf were made by persons or entities ultimately controlled by QGP and Quantlab. [67]

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[61] A2568-69 at subsection (B) *Controlling Interest in QEB*; *see generally,* A2562-78 (section describing control).
[62] A2567, n.7; A2591, Art. 7.
[63] A2565, Art. 2(A)(2).
[64] A2601-03.
[65] A2602 (emphasis added).
[66] A2601.
[67] A3030, ¶2; A2589 (recital at §D); A2591, ¶5; A2592, §(d).

E. Garfield's October 25, 2017 Emails

After Valentino resigned as Trustee, Garfield noted "The [Regulators] ha[ve] reviewed the [VTA] and associated [Trustee] vacancy and requested that we fill the position and submit the trustee to [DNO] screening."[68] Garfield suggested a new Trustee,[69] to whom Eames agreed, and to whom Garfield believed Bosarge would "not be opposed based on conversations with Valentino."[70]

II. *Quantlab I*

From 2008-2016, Quantlab-Financial was operated by Eames/Omeltchenko, as the majority of its Management Board.[71] In early 2016, Bosarge began exercising control over QGP and the management of Quantlab.[72] Bosarge had never managed or controlled either company.[73] Under Bosarge's control, Quantlab's profits dropped over 80%.[74] With no resolution in sight, and fearing for the profitability of Quantlab, the Committee voted to remove QGP and replace it with a general partner that was not subject to Bosarge's sole control.[75] Eames and

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[68] A2633.
[69] A2633-34.
[70] *Id*.
[71] *See* A2592, §(d).
[72] A1513-16.
[73] A1513, ¶50.
[74] A1517, ¶55.
[75] A1517, ¶57; *see also*, Exhibit C, p.2.

Omeltchenko asked the Court of Chancery to declare the replacement valid.[76] Unfortunately, the mechanics of the replacement did not comply with all provisions of the 4LPA and QGP's operating agreement.[77] This was the only issue determined in *Quantlab I*.[78]

In its last briefing in *Quantlab I*, QGP claimed the VTA was invalid[79] but the court declined to resolve that issue.[80] Thus, the validity of the VTA was put into question.

To answer that question, on June 4, 2018 Defendants filed a declaratory judgment suit in Houston, Texas.[81] Texas was chosen because Houston is where Bosarge, Eames and a majority of the witnesses live and work; Quantlab and QGP are headquartered; all relevant documents are maintained; all of the contracts were executed; and all or nearly all of the witnesses are subject to the subpoena power of a Texas court but not a Delaware court.[82] There are no unique and complex issues

[76] That litigation, C.A. No. 2017-0792-JRS; *Eames et al v. Quantlab Group LLP et al*; is referred to herein as *Quantlab I. See also*, A504-12 (complaint).
[77] A1517, ¶58; Exhibit C, p.2-3.
[78] Exhibit C, pages 2-3; *see also,* A537-62 (Letter Opinion); A1931-33 (Final Order).
[79] A74, ¶46.
[80] A76, ¶48.
[81] *See* A568-88 (Petition).
[82] A791:9-A792:14.

of Delaware law involved: this dispute involves "pure contractual interpretation" as Plaintiffs admit.[83]

III. *Quantlab II*

On July 24, 2018 QGP unilaterally amended the 4LPA to "clarify the VTA's lack of effect" upon the 4LPA.[84] QGP then filed this litigation, *Quantlab II*, seeking four declarations that would invalidate the VTA and/or ensure it could no longer be used to challenge Bosarge.[85] The requested declarations were:

I. The Amendment to the 4LPA is valid;
II. The VTA has "no legal effect" upon the 4LPA due to the 4LPA's integration clause;
III. The VTA cannot be used to execute a "writing" to amend the 4LPA; and
IV. The VTA cannot be used to amend the 4LPA's clauses governing admission and removal of QGP.[86]

Plaintiffs invoked equitable jurisdiction under 10 *Del. C.* §341[87] and requested relief under 6 *Del. C.* §17-111.[88] Plaintiffs requested the court to "interpret the language of the LP[A.]"[89]

Because the validity of the VTA was the subject of the Texas Litigation, Defendants filed a motion to dismiss and/or stay based upon forum non conveniens

[83] A667-68.
[84] A82-83, ¶63.
[85] A86-96.
[86] A86-96.
[87] A59, ¶13.
[88] A89.
[89] A942.

and the *McWane* doctrine.[90] That motion was denied.[91] QGP may only unilaterally amend the 4LPA if it adversely affects no rights of a partner.[92] Defendants argued that it clearly adversely affected their voting rights.[93] Thus, at this hearing the court raised the issue of abatement and the necessity of awaiting the Texas court's determination of VTA rights in the first-filed Texas action.[94] To avoid abatement, Plaintiffs stipulated and the court recognized that the VTA is valid.[95] The court noted, "for purposes of what [is] filed here in Delaware, we assume that [Defendants have] won in Texas.[96] Integration, as applied to the VTA, is a validity argument as a matter of law. Thus, Plaintiffs' stipulation precluded the court's rulings.

IV. The Court's Findings

The court held the 4LPA is unambiguous and fully integrated.[97] The court found the phrase "among the Partners" does not require an "exact parity of partners between signatories of the VTA and [4]LPA."[98] The court reasoned "[t]he word 'among' does not *necessarily* mean a condition applies equally to all members of

[90] A589-90 (motion); A591-623 (brief in support thereof).
[91] Exhibit B.
[92] A2409-10, §17.9.
[93] A609-10.
[94] A742:21-25; A757:2-9.
[95] A778:8-20; A819:3-15; *see also*, A948, n.3.
[96] A789:8-9.
[97] Exhibit C, p.8, ¶2.
[98] Exhibit C, p.16, n.45.

the reference group."[99] The court also found "among" can indicate "undefined" relationships.[100] The court found the VTA and the 4LPA involve the same subject matters.[101]

The court found "[e]very iteration" of the LPA has contained some form of an integration clause,"[102] that no version of the LPA made after 2010 made reference to the VTA,[103] and "that all of the signatories to the VTA agreed to remove any reference to the VTA in the LPA" [104] In light of Plaintiffs' stipulation, the court's determination means the VTA was somehow superseded by the 4LPA yet remains valid, viable and enforceable in some other way. The court did not elucidate how this is even possible.

The court determined the verbiage in Section 2.4.1 of the VTA must be included in the 4LPA in order for the VTA to be "legally effective," otherwise the partners are prohibited from transferring voting rights under Section §11.5(f) of the

[99] Exhibit C, p.16, n.45 (emphasis added).
[100] *Id.*
[101] *See* Exhibit C at p.16-17.
[102] Exhibit C at p.15-16 n.43.
[103] *See id.* at p.12-13.
[104] *Id.* at p.15.

4LPA, which did not exist in the LPA at the time the Trust was created and the Interests transferred.[105]

The court found the unclean hands defense unavailable because Plaintiffs did not seek equitable relief, and the representations proffered by Defendants were not made by Plaintiffs or anyone under Plaintiffs' control.[106]

Finally, the court found Plaintiffs were entitled to attorneys' fees under §17.4 of the 4LPA because Defendants waived certain conditions precedent required by that clause.[107]

[105] A948-50; Exhibit C, p.14-15; A2396; A2398, §11.5(f); A2736-A2737; A3094, n.28; *see generally,* A2142-50 (1LPA sections governing transfers of Partnership Interests).
[106] *See* Exhibit C, p.17-18.
[107] Exhibit D, 29:18-31:1.

ARGUMENT

I. The court erred in granting summary judgment on Count II by not adhering to the proper summary judgment standard.

A. Question Presented

Whether the court erred by failing to follow the summary judgment standard when (i) finding the 4LPA unambiguous, (ii) holding that the 4LPA is fully integrated such that it superseded (*i.e.*, eradicated) the VTA, (iii) finding discovery was not needed, while at the same time selectively considering extrinsic evidence, (iv) holding Defendants' unclean hands defense is inapplicable and/or lacking evidentiary support, and (v) ignoring and overturning Delaware law governing trusts and stipulation? These issues were preserved below. *See, e.g.*, A2029-31; A2069; A3324; A3336-41.

B. Scope and Standard of Review

This Court reviews a summary judgment *de novo*.[108] Summary judgment is appropriate only when there is no genuine issue of material fact and the evidence proves the moving party is entitled to judgment as a matter of law.[109] A court cannot weigh evidence or resolve any conflicts presented thereby,[110] but instead "examine the factual record and make all reasonable inferences therefrom in the

[108] *Sunline Commercial Carriers, Inc. v CITGO Petrol. Corp*, 206 A.3d 836, 845 (Del. 2019).
[109] *Id.*
[110] *Id.* at 852, n.96.

light most favorable to the nonmoving party…."[111] Summary judgment is not appropriate if the evidence reveals a dispute concerning a material fact, a more thorough inquiry into the facts would help clarify the proper application of the law, or the movant has not satisfied its burden of proof.[112]

C. Merits of Argument

As shown below, the court improperly weighed the evidence and resolved factual conflicts to make its findings, failed to make all reasonable inferences in favor of Defendants, and failed to follow the law governing the unclean hands defense. The integration and ambiguity analysis overlap and intertwine because this case concerns whether the 4LPA is ambiguous or fully integrated.

(i) The 4LPA is Ambiguous

Delaware courts interpret a contract by looking to its text.[113] If the text of the contract is clear and unambiguous, the court gives effect to the plain meaning of the contract without consideration of extrinsic evidence.[114] The court does this through an "objective" interpretation, analyzing how an objective, reasonable third party would understand the contract.[115] This analysis considers the contract as a

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[111] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).
[112] *Id.*
[113] *Sunline*, 206 A.3d at 846.
[114] *Id.*
[115] *Id.*

whole, gives meaning to each term, allows more specific terms to qualify the meaning of general terms, and avoids making any term "mere surplusage."[116]

When, however, a contract is "reasonably susceptible" to two or more objective interpretations, the contract is ambiguous and a court must consider all admissible evidence surrounding the creation of the contract to determine the parties' intent.[117] Such evidence may include overt statements and acts of the parties, prior dealings between the parties, antecedent agreements, communications, and other relevant evidence.[118] If a contract is ambiguous, summary judgment concerning its interpretation is never appropriate.[119]

The integration clause states the 4LPA "contains the entire agreement among the Partners with respect to the matters of this Agreement."[120] The 4LPA defines "Partners" to include both the general and limited partners of Quantlab,[121] of which there are seventeen.[122]

The integration clause of the 4LPA is ambiguous because it is "reasonably susceptible" to two or more objective interpretations. Defendants argue the 4LPA

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[116] *Id.*
[117] *Id.* at 847-48, n.78.
[118] *United Rentals, Inc. v. RAM Holdings, Inc.* 937 A.2d 810, 834-35; *Klair v. Reese*, 531 A.2d 219, 223 (Super. Ct. 1987.)
[119] *Sunline*, 206 A.3d at 846, n.60
[120] A2410, §17.12.
[121] A2361, §1.100.
[122] *See* A2339-47 (Schedule A identifying partners of Quantlab).

only supersedes prior agreements concerning the matters of the 4LPA to which all seventeen partners are parties. This interpretation understands the term "among" to be effectively synonymous with "between."[123] Such an interpretation of "among the Partners" is an objectively reasonable reading of the plain language of the 4LPA and its defined terms.

The court interpreted the phrase to mean that the 4LPA supersedes all prior agreements concerning the matters of the 4LPA, even when less than all of the partners are parties.[124] The court found "among the Partners" does not require "exact parity of partners between signatories."[125] Citing a different dictionary, the court reasoned "[t]he word 'among' does not *necessarily* mean a condition applies equally to all members of the reference group."[126] The court also found "among" can indicate "undefined" relationships.[127] If "among" is not ***necessarily*** defined by its plain meaning, and if it can indicate either defined or undefined relationships, then the term, particularly at this stage of the proceedings, must be construed as ambiguous because it has alternate meanings.

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[123] Oxford American Dictionary, 1986; *see also,* Frank H. Vizetelly, *A Desk-Book on Errors in English* 14 (1906) ("*Among* may apply to any number; *between* applies to two only.")
[124] *See* Exhibit C, p.11-12; 16-17, n.45. There is still a non-partner who is a party to the VTA: the Trustee.
[125] Exhibit C, p.16, n.45.
[126] Exhibit C, p.16, n.45 (emphasis added) (citing *Chicago Manual of Style* 269 (16th ed. 2010)).
[127] *Id.*

The court's own statements acknowledge that the word "among" could reasonably be interpreted by an objective third party to mean either all, or less than all, members of a referenced group. Because the integration clause of the 4LPA is "reasonably susceptible" to two or more objective interpretations, it is ambiguous.[128]

The court's interpretation that §11 prohibits the transfer of voting rights renders the 4LPA ambiguous because it applies §11.5(f) to all transfers.[129] Section §11.5(f) of the 4LPA, which did not exist in the governing LPA at the time the Voting Trust was created,[130] discusses *unauthorized* transfers of partnership interests and limits those transfers to rights set forth in §17-702(a)(3) of DRULPA, which does not include the right to vote.[131] However, §11.5(c) of the 4LPA permits the transfer of a "Limited Partnership Interest" to "Permitted Transferees."[132] The definition of "Limited Partnership Interest" is "the Partnership Interest owned by a Limited Partner."[133] The definition of "Partnership Interest" includes "any right to Vote."[134] A "Permitted Transferee" includes "the trustee of a trust created for the

[128] The 4LPA is also ambiguous as to the "matters of this Agreement" as discussed in Section C(ii)(f), *infra*.
[129] *See* Exhibit C at p.14.
[130] A2398, §11.5(f).
[131] A2396-97.
[132] A2396.
[133] A2360.
[134] A2362.

benefit of a partner."[135] The 4LPA's terms allow the parties to transfer voting interests to a trust, and exempt such transfers from prohibitions existing elsewhere in the 4LPA.[136] Each iteration of the LPA either references "voting trust agreements" or recognizes that voting rights can be transferred to "permitted transferees."[137] The court's application of §11.5(f) to permitted transferees, ignoring §11.5(c), means that the 4LPA simultaneously allows yet prohibits the transfer of voting rights.

The court's interpretation of the term "subject matter" in the 4LPA's integration clause as referring to anything and everything associated with the partnership also creates an ambiguity as to the interpretation of "subject matter."[138] These ambiguities preclude summary judgment and create fact issues.[139]

(ii) The 4LPA is Not Fully Integrated

A fully integrated contract expresses the final and total agreement of the parties.[140] The presence of an integration clause creates a presumption that the contract is fully integrated.[141] This presumption may be rebutted by analyzing the following factors: (a) the parties' intent, if discernible; (b) the language of the

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[135] A2396; A2362, §1.107; A2362, §1.103.
[136] *See* n.41, *supra*.
[137] *See* n.39, *supra*.
[138] *See* Section C(ii)(f), *infra*.
[139] *Sunline*, 206 A.3d at 846 (Del. 2019).
[140] *Taylor v. Jones*, 2002 Del. Ch. LEXIS 152, *10-11 (Del. Ch. Dec. 17, 2002).
[141] *Addy v. Piedmonte*, 2009 Del. Ch. LEXIS 38, *29 (Del. Ch. Mar. 18, 2009)

contract including any integration clause; (c) whether the contract was drafted carefully and formally; (d) the time afforded the parties to consider the contract's terms; (e) whether the parties bargained over specific terms; and (f) whether the contract addresses questions naturally arising from its subject matter.[142] Parol evidence is applicable when determining partial or complete integration.[143] Intent always controls.[144]

a. The Discernable Intent of the Parties Supports Partial Integration

First, Plaintiffs' stipulation that the VTA is a valid and enforceable agreement is itself evidence that the parties lacked intent to eradicate the VTA. Second, QGP and Quantlab's actions, via their agents Quantlab-Europe, Quantlab-Financial, NRF, Garfield, Valentino, and McInturf,[145] establish a fact issue on intent.

- On July 8th, 2016, the Committee voted to adopt the 4LPA and executed the Joinder.[146]
- Garfield's September 13, 2017 email acknowledged that the VTA was created to remedy a Super Majority stalemate.[147]

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[142] *Addy*, 2009 Del. Ch. LEXIS 38 at *29, n.45; *Carrow v. Arnold*, 2006 Del. Ch. LEXIS 191, *16 (Del. Ch. Oct. 31, 2006); *see also, James v. United Med. LLC,* 2017 Del. Super. LEXIS 161, *13 (Super. Ct. March 31, 2017).
[143] *Addy*, 2009 Del. Ch. LEXIS. 38 at *29-30, n.44.
[144] *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 Del. Ch. LEXIS 254, *19 (Del. Ch. Dec. 30, 2010); *James*, 2017 Del. Super. LEXIS 161 at *12.
[145] *See Statement of Facts* at Section I(A-E), *supra.*
[146] A3292-94 (Joinders executed by the Committee to adopt the 4LPA and various Resolutions to which the Joinders are attached.)

- On August 10, 2017, NRF confirmed to the Regulators that the VTA was *currently* a control mechanism of Quantlab.[148]

- On October 25, 2017, Garfield worked to satisfy the Regulators' requirement that Quantlab fill the Trustee vacancy after Valentino's resignation.[149]

The parties' intent not to fully integrate is also expressed by their failure to terminate the VTA.[150] The VTA created a true trust under Delaware law.[151] A voting trust can only be terminated by the specific conditions and procedures provided for in its governing document.[152] This trust has not been terminated according to the VTA, so it still exists and holds the Interests vested in the Trustee.[153] The failure to purposefully terminate the trust according to the VTA's terms creates a fact issue as to the parties' intent. As described below, the language of the 4LPA and its bargained-for provisions also raise fact issues as to the parties' intent.

b. The Language of the Contract Including the Integration Clause Supports Partial Integration

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[147] A2602.
[148] A2565, ¶3(emphasis added).
[149] A2633.
[150] *See, e.g.*, A2173 at §§7.1-7.3; A2542-44, ¶3-6; A2166, ¶1.
[151] *See, Adams v. Clearance Corp.*, 121 A.2d 302, 324 (Del. Ch. 1956) (discussing voting trust's formation date, lawful purpose, *res*, and termination.)
[152] *Mangano v. Pericor Therapeutics, Inc.*, 2009 Del. Ch. LEXIS 197, *3 (Del. Ch. Dec. 1, 2009); *In re RegO Co.*, 623 A.2d 92, 102 (Del. Ch. 1992).
[153] *See Nationwide Emerging Managers, LLC v. NorthPointe Holdings, LLC,* 112 A.3d 878, 881 (Del. 2015) ("When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement….").

The court found "[e]very iteration" of the LPA has contained some form of an integration clause,"[154] that no version of the LPA made after 2010 referenced the VTA,[155] and "that all of the signatories to the VTA agreed to remove any reference to the VTA in the LPA" [156]

The 4LPA integrated all agreements "*among the Partners* with respect to the *matters of this Agreement"* and "supersede[s] and govern[s] all prior agreements, written or oral, including, without limitation, the [3LPA.]"[157] The clause is self-limiting to ensure it only supersedes agreements among all of the partners and only with respect to the matters of the 4LPA. The language of the contract creates a fact issue as to intent to integrate.

First, the Trustee is not a Partner,[158] thus the VTA is not an agreement "among the Partners" and cannot fall within the express terms of the 4LPA's integration clause. The court held "exact parity" among the parties is not required for contractual integration,[159] but both contracts include persons and entities who

[154] Exhibit C, p.15-16, n.43.
[155] *Id.* at 12-13.
[156] *Id.* at p.15.
[157] A2410, §17.12 (emphasis added).
[158] *Compare* A2166 (Introductory Paragraph) *to* A2435-43 (Schedule A listing all partners).
[159] Exhibit C, p.16, n.45.

are parties to one of the agreements, but not the other.[160] Therefore, an objective reading of the parties to the two contracts also creates a fact issue as to whether the 4LPA is fully integrated.

Second, the revisions to the integration clause from the First Amendment to the LPA to the 1LPA show the parties' intent to partially integrate. From the execution of the First Amendment to the LPA to the 1LPA, the integration clause was changed from "the entire agreement among the Parties, and supersede[s] any prior understandings ... by or among the Parties … to the extent they relate *in any way* to the subject matter hereof" to "the entire agreement among the Partners" and any reference to the VTA, prior LPA, or prior amendments were removed.[161] The integration clause in the First Amendment to the LPA established the fact that the VTA, the prior LPA, and the First Amendment to the LPA reflect the entire agreement among the ***parties*** to those three agreements – which included the Trustee.

New Class B, C, and E partners, who did not execute the VTA, joined Quantlab in the Second Amendment to the LPA. In order to ensure the integration clause did not affect the VTA and the VTA remained enforceable, the parties intentionally used "Partner" in order to limit the integration clause to only

[160] *Compare* A2166 (Introductory Paragraph) *to* A2435-43 (Schedule A listing all partners).
[161] *Compare* A2076, §3(d) (emphasis added) *to* A2158, §19.12 (emphasis added).

agreements executed by all of the partners (*i.e.*, the LPAs) as opposed to the broad and inclusive term "Parties," which would have included the parties to the VTA and the LPA due to the VTA's inclusion in the prior integration clause. Had the integration clause not changed, it would have eliminated the VTA.

Third, the fact that the 3LPA and 4LPA's integration clausees do *not* specifically include the VTA as an agreement to be integrated – but *do* include the prior LPA, which is among different *parties* – evidences intent that the VTA remain enforceable, and only prior LPAs *not* remain enforceable.

Plaintiffs' stipulation of the VTA's validity[162] also makes the 4LPA partially integrated under Delaware law because the parties agree that there are two valid contracts governing their relationship.[163]

Whether the VTA is "among the Partners" of the 4LPA creates a fact issue on integration. Although Defendants clearly raised fact issues as to the parties' intent, the court granted summary judgment. In so doing, the court selectively reviewed the current and historical versions of the LPA, the VTA, and parol evidence, and improperly weighed evidence and inferences taken therefrom in the light most favorable to the Plaintiffs.

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[162] A778:8-20; A819:3-15; *see also*, A948, n.3.
[163] *James*, 2017 Del. Super. LEXIS 161 at *15

c. Whether the Contract was Drafted Carefully and Formally Requires Discovery

As discussed above, the integration clause utilized specific terms to only integrate prior versions of the LPA and ensure transfers to a voting trustee were not only permitted, but were exempted from compliance with other requirements.[164] While the specific language of the *integration* clause may evidence a careful and formal process fully reflecting the parties' intent to partially integrate, the ambiguities[165] in the 4LPA create fact issues as to whether the contract really was drafted carefully and formally.

James[166] requires denial of summary judgment to Plaintiffs as well because here, as in *James*, the parties agree there exists *two* valid, viable, and enforceable contracts governing their relationship: the 4LPA and the VTA.[167] While the court recognized that stipulation in these proceedings,[168] it failed to give it the required weight of a conclusively established fact. Instead, the court found the 4LPA is fully integrated and the currently valid and enforceable VTA has no legal effect, thus the court created The *Quantlab* Rule – a dangerous and ill-defined exception to Delaware's black letter law.

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[164] *See* A2392, §11.1 ("Except as provided in [§]11.5… neither title nor beneficial ownership of a Partnership Interest may be transferred without Required Consent…."); *see also* n.41, *supra*.
[165] *See* Section C(i), *supra.*
[166] *James*, 2017 Del. Super. LEXIS 161 at *15
[167] A778:8-20; A819:3-15; *see also*, A948, n.3.
[168] Exhibit B, p.2, ¶4.

The law has always been that a fully integrated agreement "supersede[s] all prior agreements and understandings between the parties."[169] Though the court here did not find the two agreements inconsistent or in conflict, the court did specifically find that the 4LPA is fully integrated and covers the same subject matters as the VTA. Under clear and longstanding Delaware law, these findings would necessarily mean the VTA was made void by the 4LPA. But the one conclusively established fact of this case so far is that the VTA was not invalidated by the 4LPA, so the two must work together.

The parties' stipulation that the VTA is a valid, viable, and enforceable agreement means there are only two possible explanations for this case under established Delaware law. The first possibility is that the VTA simply falls outside the scope of the integration clause of the 4LPA. Under this possibility, the 4LPA did not invalidate the VTA because the VTA is not an "agreement among the Partners with respect to the matters of" the 4LPA. The only other possibility is that the 4LPA *still* did not invalidate the VTA because the parties did not truly intend for the 4LPA to state the full and final expression of their agreement.

The court's failure to reach one of these two conclusions, and instead to create a new alternative where one agreement can terminate the "legal effect" of

[169] *ev3, Inc. v. Lesh*, 114 A.3d 527, 533 (Del. 2014); Black's Law Dictionary 1177 (6th ed. 1990) (Supersede means to "[o]bliterate, set aside, annul, replace, make void, inefficacious or useless, repeal.")

another agreement while not at the same time superseding that agreement, is error that demands this Court's attention and reversal.

d. Discovery is Required to Determine the Time the Parties had to Consider the Contract Terms

The time the parties had to consider the terms of the 4LPA is unknown as no discovery was performed in *Quantlab II*. That the court erred in granting summary judgment without the benefit of discovery is discussed in Section (C)(iii), *infra.*

e. The Parties Never Bargained to Supersede the VTA

The issues for which the Parties bargained in entering into the 4LPA also requires discovery. However, the Court can consider what the parties bargained for based on revisions to important terms between prior and later iterations of the LPA.[170] The prior versions of the LPA support partial integration.

The integration clause changed since the execution of the 1LPA.[171] On September 1, 2010, the VTA (whose parties had not changed) was an agreement **among some of the partners and a non-partner**, not **among the partners**. The VTA did not need to be excluded from integration by the plain language of the

[170] *Orthopaedic Assocs. of S. Del. v. Pfaff*, 2017 Del. Super. LEXIS 678, *19 (Super. Ct. Dec. 22, 2017).
[171] *See Statement of Facts* at Section I, *supra.*

1LPA's integration clause because the VTA is not an agreement **among the *partners*** executing those iterations of the LPA, as is the case to this day.[172]

Based on the use of this specific language, the parties bargained for the continued enforceability of the VTA by only superseding agreements among the partners with respect to the matters of the 4LPA. The term "entire agreement among the Partners with respect to the matters of this Agreement" within the integration clause has not changed since 2010, despite three subsequent revisions. Additionally, the Parties amended the VTA on the same day as the 1LPA which shows their intent that the 1LPA would not incorporate the VTA.[173] Therefore, the original bargained-for exchange which limits integration of prior agreements still exists in the 4LPA.[174]

There was no consideration exchanged for Defendants' surrender of the Trust, the favorable voting structure set forth therein, or the benefits derived by virtue of serving as members of the Committee.[175] The negotiations between the parties to the 4LPA contemporaneous with, and prior to, its execution establish that the only purpose of entering into the LPAs was to facilitate Bosarge's tax planning

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[172] *Compare* A2166 (Introductory Paragraph) *to* A2076-77 (signature pages); *see also, Statement of Facts* at Section I, Table of Parties, *supra*.
[173] A2159-60; A2176-77.
[174] A2410 at §17.12.
[175] A2542-43 ¶3-4; A2545-47 ¶10-13; A2555-56 ¶¶2, 4-5; A2559-60 ¶3-4.

mechanisms and to restructure Quantlab in anticipation of a future sale.[176] To the extent the Plaintiffs discussed the purpose of the revised LPAs with the Defendants, they never represented that the purpose was to supersede the VTA.[177]

f. Whether the contract address questions that naturally arise out of its subject matter

The fact that the subject matter of the VTA addresses questions naturally arising out of the 4LPA evidences the parties' intent that the 4LPA is not a full and final expression of the parties' agreement. The 4LPA designates which partners have a right to vote on which matters, and what threshold of votes are necessary to authorize various activities.[178] One threshold of votes so established is the Super Majority.[179] However the 4LPA does not address how the partners cast votes, express their votes or resolve a Super Majority stalemate.[180] Under Delaware law "[a] new contract … will control over the old contract with respect to the *same subject matter* to the extent that the new contract is inconsistent with the old contract…."[181] Plaintiffs failed to identify a single provision in the 4LPA that addresses and governs how partners vote[182] because there are no such provisions.

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[176] *Id*.
[177] A2542 ¶3
[178] A2743.
[179] A2375, §5.12.
[180] *Id.*
[181] *Country Life Homes, Inc. v. Shaffer*, 2007 Del. Ch. LEXIS 23, *19-20, (Del. Ch. Jan. 31, 2007).
[182] A962-65.

The VTA addresses these matters without contradicting or violating the terms of the 4LPA because they work together. The Trust established a structure to vote the Interests[183] that resolves any Super Majority stalemate.[184] This is specifically the purpose of the Trust, as confirmed in Garfield's September 13, 2017 email and further acknowledged by McInturf, both of whom are subject to the control of QGP.[185] The coexistence of the contracts clearly creates a fact issue as to this *Addy* element.

(iii) The court Erred in Granting Summary Judgment on Count II Without Discovery

"It is black letter law that before a motion for summary judgment is decided, the non-movant must be afforded an opportunity to take all necessary discovery."[186] Discovery rules are subject to the court's discretion,[187] which is guided by the rule that discovery is permitted unless the court "is satisfied that the administration of justice will be impeded by such an allowance."[188] Summary judgment is not appropriate where there are material fact issues or where it is

[183] A2170, ¶¶4.4 and 5.2.
[184] A2601-03.
[185] *See* A2601-03.
[186] *Kier Constr., Ltd. v. Raytheon Co.*, 2002 De. Ch. LEXIS 138, *6 (Del. Ch. Nov. 4, 2002); see also, *In re Santa Fe Pac. Corp. Shareholder Litig.*, 669 A.2d 59, 69 (Del. Nov. 22, 1995).
[187] *Dann v. Chrysler Corp.*, 166 A.2d 431, 432 (Del. Ch. 1960).
[188] *Fish Eng'g Corp. v. Hutchinson*, 162 A.2d 722, 725 (Del. Super. 1960).

desirable to inquire more thoroughly into the facts to clarify legal application.[189] In this case, no discovery has occurred and there are material fact issues that require discovery. Nonetheless, the court granted summary judgment.

Under Delaware law, discovery is required before the court can make a definitive determination whether the 4LPA is fully or partially integrated.[190] Discovery is also necessary because, as set forth above, the 4LPA is ambiguous.[191] Permitting discovery under the circumstances of this case does not impede justice; it enhances justice by seeking the truth. The court erred by prematurely granting summary judgment without providing Defendants a fair opportunity to pursue discovery.

(iv) Defendants Raised a Fact Issue as to Unclean Hands

The court also erred in granting summary judgment on Defendants' unclean hands defense.[192] The doctrine of unclean hands prohibits a party from seeking equitable relief when it "has violated conscience or good faith or other equitable principles of conduct"[193] or "in circumstances where the litigant's own acts offend

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[189] *AeroGlobal*, 871 A.2d at 444.
[190] *Addy*, 2009 Del. Ch. LEXIS 38 at *29.
[191] *U.S. West, Inc. v. Time Warner Inc.*, 1996 Del. Ch. LEXIS 55, *32-35 (Del. Ch. June 6, 1996).
[192] Exhibit C, p.17-18.
[193] *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 449 (Del. 2000) (internal citations omitted).

the very sense of equity to which he appeals."[194] A court has broad discretion when applying the unclean hands doctrine.[195]

The court ruled that the doctrine of unclean hands is unavailable as an affirmative defense because Plaintiffs' Count II sought purely legal relief.[196] Plaintiffs cited no cases involving a partnership dispute and no cases involving 6 *Del. C.* §17-111.[197] The court agreed with Plaintiffs and ruled that the doctrine is unavailable.[198] The Court of Chancery has not ruled consistently on this issue[199] and research has not revealed any controlling precedent from this Court for this legal conclusion.

Plaintiffs invoked equitable jurisdiction under 10 *Del C.* §341[200] and requested relief under 6 *Del. C.* § 17-111.[201] Plaintiffs specifically requested the court to "interpret the language of the LP[A]".[202] Such claims are inherently equitable in nature because "an action at law, as distinguished from an action in equity, is not maintainable between partners with respect to partnership

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[194] *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998).
[195] *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 Del. Ch. LEXIS 28, 2009, *22-23 (Del. Ch. Feb. 27, 2009).
[196] Exhibit C, p. 17.
[197] A2745-46.
[198] Exhibit C, p.17.
[199] *See Phillips v. Hove*, 2011 WL 4404034, at *25 (Del. Ch. Sept. 22, 2011) (declining to award damages to plaintiff based on application of unclean hands)
[200] A59, ¶13.
[201] A89.
[202] A942.

transactions unless there has been an accounting or settlement of the partnership affairs."[203] This has been the law of Delaware since 1845.[204]

There are two reasons why partnership disputes proceed in equity rather than at law.[205] One "is to arrive at an account concerning which the parties are unable to agree;" the second "is that at law no one can sue himself … if the account be unsettled or in dispute and both parties have an interest in it[,] resort must be to equity...."[206] "Disputes between partners will almost always involve equitable issues."[207] For this reason, the Court of Chancery, a court of equity, "maintains the superior ability to resolve all outstanding matters between [partners]."[208] It is axiomatic that this case involves a dispute between partners necessarily invoking equity.

The court alternatively found QGP and Quantlab's representations[209] were not made by Plaintiffs nor by anyone under Plaintiffs' control.[210] As established in the Statement of Facts at Section I, *supra*, incorporated herein, the statements were

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[203] *Mack v. White*, 165 A. 150, 150 (Del. Super. 1933); *see also, Albert v. Alex. Brown Mgmt. Servs*., 2004 Del. Super. LEXIS 303, *15, 18-19 (Del. Super. 2004).
[204] *Mack*, 165 A. at 150, citing *Redden v. Ellis,* 4 Del. 309 (Del. Super. 1845).
[205] *Id*, *see also Albert*, 2004 Del. Super. LEXIS 303 at *18 (applying *Mack* to limited partnerships).
[206] *Mack* at 151.
[207] *Albert* at *18.
[208] *Id.* at *18-19.
[209] *See Statement of Facts* at Section I(A-E), *supra.*
[210] *See* Exhibit C, p.18.

made by QGP's agents Quantlab-Financial, Quantlab-Europe, NRF, Garfield, and McInturf. QGP and Quantlab control its agents.[211] Those statements show misrepresentations to regulators and the court by providing contradictory stances regarding the VTA. The court erred when it wholly disregarded statements made by those agents regarding the active use of the VTA. At an minimum, Defendants should be entitled to take further discovery concerning the circumstances of these statements before the unclean hands defense is summarily dismissed.

(v) The *Quantlab* Rule Conundrum

A voting agreement constitutes a voting trust if the parties (1) separate voting rights from other attributes of ownership; (2) irrevocably grant those rights for a determined amount of time; and (3) the principal purpose of the grant is to acquire voting control of the entity.[212] The VTA clearly created a voting trust.

The court's ruling overturns Delaware jurisprudence that has existed since 1925 when the Voting Trust Statute was enacted. DRULPA recognizes voting trusts,[213] which "derive their validity *solely from the statute.*"[214] A voting trust cannot exist unless it is created under the legislative authority of the Voting Trust

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[211] *See, e.g.*, A2568-69 at subsection (B) *Controlling Interest in QEB*; *see generally*, A2562-78 (section describing control).
[212] *See Lehrman v. Cohen*, 222 A.2d 800 (Del. 1966).
[213] 6 Del. §17-101(14).
[214] *Abercrombie,* 130 A.3d at 345, citing *Perry v. Missouri-Kansas Pipe Line Co.*, 191 A. 823 (Del. 1937) (emphasis added).

Statute, and it cannot be valid, or invalidated either, except under the terms of that statute:

> Voting trusts do not stand or fall on common-law theories of public policy. They are recognized and regulated by statute. **Whether they would be valid at common law** in the absence of a statute defining and regulating them **is immaterial**. Public policy in regard thereto is defined by the Legislature…. No voting trust not within the terms of the statute is legal, and any such trust, so long as its purpose is legitimate, coming within its terms, is legal. **The test of validity is the rule of the statute. When the field was entered by the Legislature it was fully occupied and no place was left for other voting trusts.**"[215]

The Voting Trust Statute requires a voting trust to be (1) in writing; (2) signed by the parties; and (3) filed with the entity[216] in order for it to be valid. This is the *sole* test of validity.[217] "The statute lays down for voting trusts the law of their life."[218] It is immaterial whether the parties intended to integrate the VTA because "[t]he *provisions of the [VTA] determine its legal effect*, and if they clearly create a voting trust, *any intention of the parties to the contrary is immaterial*."[219] By its plain terms, the VTA is irrevocable and could not be terminated absent a unanimous written consent. No such written consent exists. The court sidestepped

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[215] *Perry,* 191 A. 823, 826, quoting with approval *Matter of Morse,* 160 N.E. 374, 376 (Ct. App.—N.Y. 1928) (italics in in original have been removed and emphasis added in bold).
[216] 8 *Del. C.* §218.
[217] *Abercrombie*, 130 A.3d 338, 244, quoting *Perry*, 191 A. 823, 827.
[218] *Id.*
[219] *Id.* (emphasis added); citing *Aldridge v. Franco-Wyoming Oil Co.*, 7 A3d 753 (Del. Ch. 1939).

this sole test of validity, ruling that voting trusts can be invalidated outside the terms of the statute and the voting trust agreement by an *integration clause* in a separate entity's governing document.

The court also rejected the ongoing contractual duty to incorporate the VTA into the 4LPA because "no such language appears in the VTA".[220] This is incorrect. The VTA plainly states the parties to the VTA should "take all such actions *as may be necessary*" under DRULPA or the LPA, to include Section 2.4.1 in the LPA.[221] Since the VTA is valid and enforceable, when Plaintiffs took the position that it became necessary to incorporate the VTA's §2.4.1 into the 4LPA, they trigger the VTA's contractual obligation to "take all such actions as may be necessary" to amend the 4LPA to include Section 2.4.1.[222] The court determined the VTA *requires* Section 2.4.1 to be incorporated into the 4LPA yet it somehow does not impose a *contractual duty* to do so.

Finally, The *Quantlab* Rule eviscerates the law of integration as described above. The *Quantlab* Rule also undermines the bedrock principle that parties will be held to their stipulations of fact, and the opposing party is entitled to rely upon those stipulations. Factual stipulations are "formal concessions … that have the effect of withdrawing a fact from issue and dispensing wholly with the need for

[220] Exhibit C, p.15.
[221] A2168 (emphasis added).
[222] A1031.

proof of the fact. Thus, a judicial admission … is conclusive in the case."[223] The court's ruling completely ignores Plaintiffs' stipulation[224] upon which Defendants relied.

The court's findings should be overturned. Courts must interpret contracts in a manner that gives sensible life to the contract.[225] Without the VTA, Quantlab cannot perform certain activities during a Super Majority stalemate without violating the 4LPA. Additionally, several sections of the 4LPA are jettisoned by the court as meaningless, solely for the purpose of eliminating the valid, viable, and enforceable VTA.[226] Partial integration is the only reasonable interpretation that gives sensible life to both the VTA and the 4LPA.

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[223] 2 K. Broun, *McCormick on Evidence* §254, p.181 (6th ed. 2006) (footnote omitted).
[224] *See generally,* Exhibit C.
[225] *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 926-27 (Del. 2017); *Heartland Payment Sys., LLC v. Inteam Assocs., LLC*, 171 A.3d 544, 557 (Del. 2017).
[226] *See* n.39, *supra.*

II. The court erred in awarding attorneys' fees to Plaintiffs.

A. Question Presented

Did the court err by awarding attorneys' fees to Plaintiffs despite their failure to satisfy the conditions precedent to recovery? This issue was preserved below. *See*, *e.g.*, A3562-68.

B. Scope and Standard of Review

This Court reviews a court's interpretation of a contractual fee shifting provision and the issue of waiver *de novo*.[227]

C. Merits of Argument

The court awarded attorneys' fees based upon §17.4 of the 4LPA.[228] Section 17.4 of the 4LPA[229] is subject to the conditions precedent set forth in Article XVI, which in turn requires the parties to engage in a specific dispute resolution process.[230] Thus, to recover attorneys' fees in this matter, Plaintiffs had to prove either its own substantial compliance with the conditions precedent of §17.4 or that

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[227] *See, e.g.*, *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 676 (Del. 2013) (attorneys' fees); *AeroGlobal*, 871 A.2d 428, 444 (waiver).
[228] Exhibit D, 29:18-31:1.
[229] *Id.*
[230] A2407-A2408, §16.2-16.4, 16.7.

Defendants waived those conditions.[231] The court found Defendants waived these conditions.[232]

A condition precedent is an action that must occur before a duty to perform arises.[233] If a party fails to satisfy a condition precedent, that party forfeits the subject right under the contract.[234] Conditions precedent may, however, be waived.[235]

Waiver is established only by satisfying a "quite exacting" burden of proof.[236] The party seeking waiver must prove that the waiving party knowingly and intentionally relinquished a known right.[237] Waiver "implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those [] rights."[238] The established elements of a waiver are: (1) a condition to be waived; (2) knowledge of the condition by the waiving party; and (3) the intent of the waiving party to waive that condition.[239] The proponent must

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[231] *Ewell v. Certain Underwriters of Lloyd's*, 2010 Del. Super. LEXIS 351, *17 (Del. Super. Aug. 27, 2010).
[232] Exhibit D, 29:18-31:1
[233] *Seaford Assocs. Ltd. P'shp v. Subway Real Estate Corp.*, 2003 Del. Ch. LEXIS 58, *18. n.30 (Del Ch. May 21, 2003).
[234] *See Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church*, 2006 Del. Super. LEXIS 349, at *85-86 (Del. Super. Aug. 31, 2006).
[235] *AeroGlobal*, 871 A.2d 428, 444.
[236] *Bantum v. New Castle Cnty. Vo-Tech, Educ. Ass'n*, 21 A.3d 44, 50 (Del. 2011).
[237] *See id.*
[238] *Id.*
[239] *Id.* at 51.

establish these elements with "unequivocal" evidence.[240] "[W]aivers of contractual rights are not lightly found."[241]

The existence of these conditions precedent are not disputed, nor is it disputed that Plaintiffs failed to satisfy the conditions. Instead, Plaintiffs simply argued Defendants waived the condition precedent by voluntarily engaging in litigation.[242]

Plaintiffs never even attempted to meet their burden to establish that Defendants waived these conditions precedent.[243] Plaintiffs provided the court with no evidence that Defendants had any knowledge that not compelling arbitration would waive the conditions precedent for recovery of attorneys' fees under Section 17.4. Similarly, Plaintiffs provided the court with no evidence that Defendants actually intended to waive the conditions precedent. Defendants do not bear the burden of forcing Plaintiffs to comply with conditions precedent, it is Plaintiffs' burden to perform.[244] Defendants are entitled to and have invoked the

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[240] *Id.* at 50.
[241] *James J. Gory Mech. Contr., Inc. v. BPG Residential Partners V, LLC*, 2011 Del. Ch. LEXIS 200, at *9 (Del. Ch. Dec. 30, 2011).
[242] A3526; *see also* A3534 (order granting leave to file sur-reply).
[243] *See generally,* A54-A100 (complaint); A3460-3461 (briefing); A3526-3529 (briefing).
[244] *Bantum*, 21 A.3d at 50 (nonperforming party carries the burden to prove unequivocal facts establishing waiver).

right to have an obligation to pay such fees and costs conditioned on the parties first engaging in the alternative dispute resolution process of Article XVI.[245]

The court found Defendants waived the alternative dispute resolution process because the parties litigated claims "without either party seeking to invoke the alternative dispute provisions as a means to terminate the litigation."[246] The court also impermissibly shifted to Defendants the Plaintiffs' burden to prove waiver and blamed Defendants for resisting an award of attorneys' fees once the litigation was "all but concluded." [247] Yet the issue was raised by Plaintiffs only after the Defendants requested a final judgment.[248]

The court erred in awarding Plaintiffs attorneys' fees without any "unequivocal" evidence establishing that Defendants knowingly and intentionally waived the conditions precedent to their recovery. The court also erred when it shifted the burden to *disprove* waiver upon Defendants. Additionally, the award for attorneys' fees should be reversed because the court also erred in granting summary judgment in favor of Plaintiffs as elucidated in Point of Appeal Number I, *supra.*

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[245] A3561-62 and A3567-68.
[246] Exhibit D, p.30:5-8.
[247] Exhibit D, p.31:9-15; p.9:3-7; A3482-85.
[248] *Compare* A3394-450 (motion for judgment) *to* A3482-85 (motion for fees).

III. Conclusion

Plaintiffs' stipulation that the VTA was valid, viable and enforceable established facts that precluded Plaintiffs requested relief as a matter of Delaware law. The court erred in granting summary judgment by failing to apply the appropriate standard of review. It disregarded Defendants' evidence and refused to construe evidence and all inferences from it in Defendants' favor. As a result, the court committed error by determining that the 4LPA is fully integrated and unambiguous. The court also committed error by dismissing Defendants' affirmative defense of unclean hands. For these errors, Defendants seek reversal of the judgment and remand for further proceedings.

The court erred by awarding attorneys' fees against Defendants despite the Plaintiffs' failure to prove waiver of the conditions precedent as a matter of law. For this error, Defendants seek reversal and pray the Court will render judgment accordingly.

Finally, the court erred as a matter of law by finding that a Delaware trust may be invalidated by the integration clause of a separate entity's organizational contract. For this error, Defendants seek reversal and pray the Court will render judgment accordingly.

August 16, 2019

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CERTIFICATE OF SERVICE

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