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IN THE

Supreme Court of the State of Delaware

CARLOS EDUARDO LOREFICE LYNCH, Plaintiff Below-Appellant, v. R. ANGEL GONZALEZ GONZALEZ, TELEVIDEO SERVICES, INC., a Florida corporation, and JUAN PABLO ALVIZ, Defendants Below-Appellees.	No. 356, 2020 Court Below: Court of Chancery of the State of Delaware C.A. No. 2019-0356-MTZ

CORRECTED APPELLEES/DEFENDANTS-BELOW ANSWERING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....vi

NATURE OF PROCEEDINGS.....1

SUMMARY OF ARGUMENT.....3

COUNTER-STATEMENT OF FACTS.....7

I. RAGG's Acquisition of Argentine Media Assets; Lynch Hatches His Elaborate Scheme to Defraud RAGG.....7

II. RAGG Comes to Trust and Rely Upon Lynch and Hires Him as an Employee.....10

III. A Fortuitous Change in Argentine Law Gives Lynch a Window to Further Paper His Scheme.....12

IV. Lynch Proposes to Utilize Debt Restructuring Agreements to Maintain the Facade of Ownership.....16

V. Lynch's Activity Regarding the "Magnus Project" Reflects the True Intent of the Parties with Respect to the Ownership of GBH.....17

VI. Lynch Claims Ownership in GBH and Makes a Ransom Demand.....19

ARGUMENT.....21

I. THE COURT APPROPRIATELY APPLIED EQUITABLE ESTOPPEL, QUASI-ESTOPPEL, JUDICIAL ESTOPPEL AND UNCLEAN HANDS.....21

A. Question Presented.....21

B. Standard and Scope of Review.....21

C. Argument.....21

1. The Court Correctly Concluded that Lynch Failed to Timely Raise Equitable Estoppel, Quasi-Estoppel and Unclean Hands, and Expressly Waived Application of the Doctrine of Judicial Estoppel....22

2. The Court Correctly Concluded that Delaware Courts Do Not Apply the Doctrine of Judicial Estoppel to Statements Made Outside Litigation....24

3. The Court Appropriately Concluded that the Unclean Hands Doctrine Did Not Prohibit It from Finding in Favor of Appellees....25

II. THE COURT DID NOT ERR IN DECLINING TO ENFORCE THE MAY 4TH AGREEMENT, A DOCUMENT THAT DID NOT REFLECT THE ACTUAL OWNERSHIP OF GBH AND WAS THE PRODUCT OF FRAUDULENT INDUCEMENT ON LYNCH'S PART....30

A. Question Presented....30

B. Standard and Scope of Review....30

C. Argument....30

1. Lynch Never Raised and Failed to Preserve His Argument that the May 4th Agreement Contains Anti-Reliance Language....32

2. The May 4th Agreement Contains No Anti-Reliance Language, And Certainly No Explicit Waiver of the Defense that Such Agreement Was a Product of Fraudulent Inducement....33

3. The Court's Findings Regarding the May 4th Agreement Were Grounded on Clear and Convincing Evidence 38

III. THE COURT DID NOT IMPROPERLY RELY UPON SUBJECTIVE EVIDENCE TO CONCLUDE THAT THE MAY 4TH AGREEMENT WAS UNENFORCEABLE.....41

A. Question Presented 41

B. Standard and Scope of Review 41

C. Argument 41

1. The Court Objectively Concluded That There Was No Mutual Intent to Enter Into the May 4th Agreement 41

IV. THE COURT DID NOT ERR IN CONCLUDING THAT APPELLEES PROVED THEIR AFFIRMATIVE DEFENSE OF FRAUDULENT INDUCEMENT 45

A. Question Presented 45

B. Standard and Scope of Review 45

C. Argument 45

1. The Court Concluded that the May 4th Agreement was Voidable and Declared Void By Appellees 45

2. Lynch Never Asserted the Defense of Acquiescence, and, Nevertheless, There is No Evidence of the Same 47

V. THE COURT'S FACTUAL FINDINGS WERE SUPPORTED BY EVIDENCE AND THE PRODUCT OF A LOGICAL, DEDUCTIVE PROCESS 49

A. Question Presented 49

B. Standard and Scope of Review 49

C. Argument 50

1. The Court Did Not Exceed Its Jurisdiction 50

2. Appellees Never Admitted that Lynch was Sold Ownership in GBH, Rather They Admitted to Executing "Sham" Documents 51

3. The Record Supports the Court's Determination that the May 4th Agreement was the Product of Fraudulent Inducement 52

4. The Court Had Factual Support for its Findings Regarding Certifications That Address Ownership of GBH 53

5. The Court's Conclusions Regarding the Counterdocument are Supported by the Record 55

6. The Court Correctly Concluded That Documents Were Crafted by Lynch to Bolster the Sham Transaction 57

7. The Court Did Not Err in Concluding that RAGG Relied Upon Misrepresentations of Lynch in Signing the Restructuring Agreements 57

8. The Court Correctly Concluded That the "Purchase Price" for the Interests in GBH Purportedly Transferred to Lynch Was Arbitrary 59

9. The Parties Did Manifest an Intent to Paper a "Sham" Transaction 61

10. The Record Reflects that RAGG Relied Upon the Legal Advice and Expertise of Lynch in Entering Into the Subject Transactions 61

11. The Record Reflects That It Was Widely Known that RAGG Had Exclusive Control Over and Ownership of GBH 62

VI. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT LYNCH LITIGATED IN BAD FAITH AND SHIFTING ATTORNEYS' FEES 63

A. Question Presented 63

B. Standard and Scope of Review 63

C. Argument 64

CONCLUSION 66

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Abry Partners V, L.P. v. F & W Acquisition LLC,
891 A.2d 1032 (Del. Ch. 2006) 33

Bank of New York Mellon Tr. Co. v. Liberty Media Corp.,
29 A.3d 225 (Del. 2011).....40

Barrett v. Am. Country Holdings, Inc.,
951 A.2d 735 (Del. Ch. 2008) 23, 26, 31, 32

CDX Holdings, Inc. v. Fox,
141 A.3d 1037 (Del. 2016).....48, 51

In re Celera Corp. S'holder Litig.,
2012 WL 1020471 (Del. Ch. Mar. 23, 2012) 46

Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC,
166 A.3d 912 (Del. 2017).....34

Chrysler Corp. v. Dann,
223 A.2d 384 (Del. 1966).....62

DFC Global Corp. v. Muirfield Value Partners, L.P.,
172 A.3d 346 (Del. 2017).....59

Eagle Force Hldgs., LLC v. Campbell,
2019 WL 4072124 (Del. Ch. Aug. 29, 2019).....*passim*

Eagle Force Holdings, LLC v. Campbell,
187 A.3d 1209 (Del. 2018).....40, 42, 49, 57

Genger v. TR Inv'rs, LLC,
26 A.3d 180 (Del. 2011).....29, 38, 48

Hegerty v. American Commonwealths Power Corp.,
163 A. 616 (Del. Ch. 1932) 45

In re IBP, Inc. S'holders Litig.,
789 A.2d 14 (Del. Ch. 2001).....*passim*

Kaung v. Cole Nat. Corp.,
884 A.2d 500 (Del. 2005) 62, 63

Klaassen v. Allegro Dev. Corp.,
106 A.3d 1035 (Del. 2014) 44

Kotler v. Shipman Assocs., LLC,
2019 WL 4025634 (Del. Ch. Aug. 21, 2019) 49, 51

Martin Marietta Materials, Inc. v. Vulcan Materials Co.,
56 A.3d 1072 (Del. Ch. 2012) 41

Martin v. Med-Dev Corp.,
2015 WL 6472597 (Del. Ch. Oct. 27, 2015) 46

Mayor and Council of Wilmington v. Saint Stanislaus Kostka Church,
108 A.2d 581 (Del. 1954) 25, 26

Miller v. State,
4 A.3d 371 (Del. 2010) 29

Motorola Inc. v. Amkor Tech., Inc.,
958 A.2d 852 (Del. 2008) 24, 25

Pitts v. White,
109 A.2d 786 (1954) 63

Plummer v. Sherman,
861 A.2d 1238 (Del. 2004) 21, 29, 44

In re PNB Holding Co. S'holders Litig.,
2006 WL 2403999 (Del. Ch. Aug. 18, 2006) 23, 26, 31, 32

T v. T.,
2018 WL 509340 (Del. Fam. Jan. 17, 2018) 24, 25

STATUTES

6 *Del. C.* § 18-110 ..... 1, 64

10 *Del. C.* § 6501 1

RULES

Court of Chancery R. 8(c) 46

Supreme Court R. 8 .....30, 35

OTHER AUTHORITIES

Voss on Delaware Contract Law 42

NATURE OF PROCEEDINGS

Appellant filed a complaint against Appellees on May 14, 2019, whereby he sought injunctive, declaratory, and compensatory damages relating to Appellees' alleged improper efforts to strip Carlos Eduardo Lorefice Lynch ("Lynch" or "Appellant") of his purported right to solely manage Grupo Belleville Holdings, LLC ("GBH"), a Delaware limited liability company, and purported 65% ownership stake the company. Lynch asserted four counts for: declaratory relief pursuant to 6 *Del. C.* § 18-110; declaratory relief pursuant to 10 *Del. C.* § 6501; injunctive relief; and, conversion.

Appellees answered Lynch's complaint on June 14, 2019, denying all claims, asserting affirmative defenses of unclean hands, fraudulent inducement, misrepresentation, failure of valuable consideration, equitable estoppel and promissory estoppel, and also asserting six counterclaims for declaratory relief pursuant to 6 *Del. C.* § 18-110, declaratory relief as to the ownership of GBH pursuant to 10 *Del. C.* § 6501, declaratory relief as to the management of GBH pursuant to 10 *Del. C.* § 6501, conversion, fraud in the inducement, and fraudulent misrepresentation.

Lynch answered Appellees' counterclaims on July 5, 2019 and alleged certain affirmative defenses.

The matter advanced to a three-day trial, during which the court heard the live testimony ten witnesses.

After post-trial briefing and argument, the court issued a Memorandum Opinion on July 31, 2020 (Lynch's Opening Brief (the "OB"), Exhibit B, hereinafter "PTOM"), declaring Appellees to be the exclusive managers and owners of GBH. (PTOM at 129). The court denied all tort claims. (PTOM at 106-09). The court also concluded that Lynch had: (1) waived his claim that he was the sole manager of GBH (*Id*. at 103); (2) failed to timely raise the affirmative defenses of equitable estoppel or quasi-estoppel (*Id*. at 109-10); and (3) expressly waived his affirmative defense of judicial estoppel (*Id*. at 110-12). Finally, the court determined that Lynch had litigated in bad faith and ordered that Appellees' legal fees and costs be shifted to Lynch. (*Id*. at 124-29).

The final form of judgment was entered on October 2, 2020. (OB, Exhibit A, hereinafter the "Final Judgment").

Lynch initiated this appeal on October 26, 2020.

SUMMARY OF ARGUMENT

I. The court committed no errors in its application of equitable estoppel, quasi-estoppel, judicial estoppel and unclean hands. The court correctly held that Lynch failed to timely raise the defenses of equitable estoppel and quasi-estoppel, and expressly waived the defense of judicial estoppel.

Further, the court committed no error in refusing to expand the doctrine of judicial estoppel to apply to tax returns that were not the subject of a prior court proceeding.

Finally, the court did not err in its application of the doctrine of unclean hands, which the court had the discretion to apply, and appropriately concluded that a finding in favor of Lynch with respect to ownership of GBH would cut against equity and public policy.

II. The court did not err in determining that the May 4th Agreement was unenforceable because there was no mutual intent for it be a binding agreement, and, also, because such agreement was the product of fraudulent inducement.

Further, Lynch's contention that the May 4th Agreement contains an anti-reliance clause that prohibited the court from considering evidence outside its four corners to deduce the intent and understanding of the parties and to determine if RAGG was fraudulently induced to enter into such agreement, was not raised below.

Further, even if Lynch is deemed to have preserved the question he presents in this appeal, his theory fails on the merits as the May 4th Agreement contains no anti-reliance language.

III. The court committed no errors in its factual findings or application of law relating to its determination that the May 4th Agreement was unenforceable. The court appropriately relied upon objective and relevant evidence, including course of dealing between the parties, credible witness testimony and the conduct of the parties after execution of the May 4th Agreement. It was entirely appropriate for the court to consider extra-contractual evidence to understand the commercial context and posture of the parties and to decipher the parties' intent, particularly given that the May 4th Agreement contains no merger or anti-reliance language and because Appellees asserted that such agreement was the product of fraudulent inducement.

IV. The court was correct in concluding that the May 4th Agreement was unenforceable because RAGG was fraudulently induced by Lynch to execute the same. The court recognized and applied the correct legal standard that an agreement is voidable if it is the product of fraudulent inducement. The court went on to accurately determine that the May 4th Agreement was rendered void, implicitly recognizing that Appellees elected to challenge such agreement as unenforceable.

Lynch's additional argument that Appellees acquiesced to the terms of the May 4th Agreement also fails. First, Lynch never raised the defense of acquiescence in the court below. Nonetheless, the court found that the record unequivocally reflected that the parties to the May 4th Agreement did not intend for the same to be a binding agreement and did not comport themselves consistently with it. Further, the court noted that once Appellees became aware of Lynch's scheme, they took action to defend their rights.

V. There are no clear errors in the factual findings of the court, many of which turn on credibility assessments reached after the court had the opportunity to observe the demeanor of live witnesses. Contrary to Lynch's insistence that the court should not have considered evidence outside the four corners of the "sham" documents, it was entirely appropriate for the court to consider such evidence as there were no merger clauses or anti-reliance clauses in any of the agreements and because there were assertions of fraudulent inducement.

VI. The court did not abuse its discretion or err as a matter of law in concluding that Lynch had litigated in bad faith, justifying a shift of Appellees' legal fees. The court identified multiple examples of bad faith conduct on Lynch's part, beginning with his assertion of claims that he knew to be false and that were grounded on "sham" transactions that he has masterminded, designed and advised the Appellees to execute. Lynch continued his bad acts when he later attempted to

utilize Delaware's statutory structure as a weapon to prevent Appellees from asserting good faith defenses and counterclaims, and then testified untruthfully at trial. The court noted that in post-trial briefing Lynch abandoned the majority of his defenses and claim to management.

COUNTER-STATEMENT OF FACTS

I. RAGG's Acquisition of Argentine Media Assets; Lynch Hatches His Elaborate Scheme to Defraud RAGG

RAGG is an experienced acquirer of media assets throughout Latin America. (A-1304, 1308)(PTOM at 14). He owns and controls "Albavision," the trade name for a conglomerate of Latin American media companies, including Televideo and GBH. (A-1112-13)(PTOM at 14). The Albavision portfolio consists of approximately thirty radio and television stations that operate in at least twelve countries. (A-1304, 1308, 1319)(PTOM at 14). RAGG solely owns all of Albavsion's assets, except for one station that he owns with a partner. (A-1307-1308)(PTOM at 14-15). RAGG has only ever sold one media asset, a Puerto Rican radio station that he divested twenty-one years ago. (A-1308, 1310)(PTOM at 15).

In 2006, RAGG sought to expand the Albavision brand into Argentina by acquiring Inversora de Medios y Comunicaciones Sociedad Anónima ("IMC"), which was owned by Gerardo Daniel Hadad. (B-1-90)(A-868-869, 951, 1113-1114, 1304-1305, 1395). IMC operated Canal 9, a well-known television station in Argentina. (A-812 at ¶¶ 7–8, 1379)(PTOM at 15).

RAGG retained an Argentine law firm to assist with negotiation and due diligence for the purchase of IMC. (A-868, 951, 1113-14, 1303-04). Lynch's uncle, a partner at the firm, was in charge of the firm's relationship with RAGG. (A-952)(PTOM at 15-16). Lynch was a junior attorney at the firm. (A-1114, 1303-04,

1379, 1396)(PTOM at 16). Although negotiations began in 2006, Lynch did not meet RAGG until January 2007, when he took RAGG paperwork that needed to be signed. (A-952-53). Lynch did not have a meaningful role in the IMC acquisition. (A-952, 1303-04, 1395-96)(PTOM at 16).

In January 2007, RAGG completed the purchase of 84.21% of IMC from Hadad for $24.2 million. (B-1-90)(A-868-69, 951, 1395)(PTOM at 17). To facilitate the IMC acquisition, RAGG formed GBH, which was to be the holding company for the assets of IMC. (A-869). Later in 2007, RAGG, through GBH, acquired the remaining ownership interest in IMC. (*Id*. at 871).

GBH needed a representative to appear on its behalf before the Argentine government. (B-100, 109, 119, 132, 141, 151, 153)(A-869, 1304-1305)(PTOM at 17). Lynch proposed that he, an Argentine resident, could fill this role and he was granted a power of attorney and designated as GBH's legal representative in Argentina. (B-100, 109, 119, 132, 141, 151, 153). Lynch was still employed at his uncle's law firm at this time. (A-953-54)(PTOM 17-18).

It was during the acquisition of IMC that Lynch first had RAGG execute documentation that would form the foundation for his scheme to defraud RAGG out of a 65% membership interest in GBH. Lynch used the IMC acquisition to obtain RAGG's signature on a document identifying Lynch as GBH's majority member although they had not discussed at that time to transfer any interests to Lynch.

(PTOM at 24-25). This document, marked as trial exhibit JX-7, is a "Certificate of Amendment of Grupo Belleville Holdings, LLC" that RAGG executed and Lynch filed with the Delaware Secretary of State on October 18, 2007. (A-1326-27). In fact, GBH did not own all of IMC at the time and had yet to acquire the balance of Hadad's interest. Lynch admitted "this document [JX-7] is wrong" because JX-7 was executed before Hadad sold his remaining interest in IMC to GBH. (*Id*. at 961)(PTOM at 26). The court accurately concluded that Lynch drafted and filed JX 7 in the context of the final Hadad acquisition, and presented it to RAGG under the guise that it was needed to carry out the final steps of that transaction. (A-961, 1115-17, 1326-27)(PTOM at 27). RAGG trusted Lynch's advice that the document was required to further that business objective. (PTOM at 27). RAGG testified that, aside from signing JX-7 at Lynch's direction, he was not involved with its preparation or filing. (A-1326-27)(PTOM at 27). Morelia testified that she did not receive JX-7 or any other paperwork indicating that there had been a transfer in 2007 and had not seen a copy of JX-7 until 2008 or 2009. (A-1115-17)(PTOM at 27). The court accurately concluded that Lynch prepared and filed JX-7 for his own benefit, knowing that RAGG would sign the document believing it was needed for the Hadad acquisition. (A-961, 1115-17, 1326-27)(PTOM 28).

While Lynch represented that he owned 65% of GBH when he filed JX-7 in October 2007, one month later, he filed a separate document for GBH for the

regulatory authorities in Argentina, JX-10, and in it represented that he owned just 5% of GBH. (A-871-72, 971-73, 1470)(PTOM at 28). Lynch offered no testimony credibly explaining this discrepancy. (A-871-72, 971-73)(PTOM at 28-29).

II. RAGG Comes to Trust and Rely Upon Lynch and Hires Him as an Employee

Ignorant of the scheme that Lynch was devising to defraud him, on or about August 2007, RAGG hired Lynch as an in-house legal advisor for Albavision. (A-1304). Lynch initially worked alongside Ms. Liliana Cassalegio, the senior-most lawyer advising GBH, but quickly rose to be the primary lawyer advising RAGG as to operations in Argentina. (*Id*. at 1305, 1313-1315, 1319, 1322, 1327, 1329, 1331-34, 1336, 1339, 1341, 1350, 1352, 1358-1359)(PTOM at 21).

Lynch became RAGG's "right-hand man" in Argentina. (A-1379)(PTOM at 22). RAGG trusted Lynch and relied upon his legal advice for purposes of making a variety of decisions for GBH. (A-973, 1114, 1305-07, 1310, 1319, 1322, 1329, 1331-33, 1336-37, 1341, 1359)(PTOM at 22).

One of Lynch's regular responsibilities was to prepare or oversee the preparation of legal documents relating to GBH's operations. (A-1305-07, 1310, 1319, 1322, 1329, 1331-33, 1336-37, 1341, A-59)(PTOM at 22). Morelia, RAGG's daughter, often facilitated Lynch's written and email communications with RAGG. (A-984, 1114-15)(PTOM at 22). As a non-lawyer and businessperson with many interests outside of GBH, RAGG was busy and expected that Lynch would prepare

documentation for his signature that reflected what they discussed and that the documents presented to him were in his best interests and the best interests of his companies. (A-1305-07, 1310, 1319, 1322, 1329, 1331-33, 1336-37, 1341, 1359)(PTOM at 94). The customary practice was for Lynch to physically bring RAGG legal documents to sign, summarize them briefly and offer legal and business explanations as to why the documentation was needed, and RAGG would sign the documentation at the conclusion of the meeting. (A-1306-07, 1358)(PTOM at 22-23). Lynch often assured RAGG that "he had already taken care of everything and not to worry about it." (A-1307)(PTOM at 23).

Despite the close relationship between RAGG and Lynch, it was understood that all major decisions regarding the operation of GBH were to be made by RAGG. (A-1299-1300, 1307-08, 1310-11, 1365-66, 1399-1400)(PTOM at 19). Consequently, Lynch was required to, and did, consult with RAGG and seek his approval before making significant decisions. (A-1308, 1311; 1365-66)(PTOM at 19). Advisors and employees of GBH and its subsidiaries, including Lynch's subordinates, understood that GBH was RAGG's company and that he controlled its operation. (A-1279-80, 1292, 1308, 1310-11, 1365-68, 1398-1400)(PTOM at 20).

III. A Fortuitous Change in Argentine Law Gives Lynch a Window to Further Paper His Scheme

In 2008, new Argentine legislation was proposed that would forbid foreigners from holding majority ownership of media companies operating in Argentina. (A-1305). Lynch devised a legal solution to this anticipated legislation that he advised would allow RAGG, a foreigner, to remain the sole owner of GBH (in both in individual capacity and through one of his companies, Televideo) while complying with the soon to be passed law. (*Id*. at 1314). Lynch recommended that he hold title in name only to a majority of the membership interest in GBH, for the ultimate benefit of Televideo and RAGG, and that the same would ensure compliance with the legislation. (PTOM at 32). Lynch also advised that to safeguard RAGG's ownership interest in GBH, Lynch and his wife would sign a "counterdocument" that would be kept private and that such document would acknowledge that the actual, beneficial owner of the company was RAGG. (A-1129, 1133, 1306)(PTOM at 86).

This solution involving a counterdocument and transfer of title ownership to Lynch was not foreign to RAGG because Lynch had previously proposed, and they utilized, a similar structure for RAGG's operations in other Latin American countries. (A-996, 1205). Given that Lynch was already serving as a nominal owner of other media interests of RAGG's throughout Latin America, RAGG trusted Lynch's advice and signed a series of documents over the ensuring period of several

years that Lynch presented to him and described as solving GBH's legal issues while leaving ownership unchanged. (A-1310, 1313-15, 1319, 1322, 1327, 1329, 1331-32)(PTOM at 10). Unbeknownst to RAGG, the structure Lynch led him into would later be used by Lynch in an effort to claim that the 65% membership interest in GBH that was listed in his name reflected actual ownership. At this time, no documentation memorializing the parties' intent and understanding regarding the transfer of the membership interest in GBH was discussed, prepared or signed. Further, no "purchase price" was discussed or negotiated for the membership interests being transferred because there was no intent to sell them to Lynch. (A-1116-17).

On or about December 31, 2008, RAGG and Morelia executed a certificate for GBH that was prepared and presented by Lynch, and it was subsequently recorded with the Delaware Secretary of State. The certificate reflected that Lynch held a 65% membership interest in GBH, such interest having previously been held by Televideo. (A-1117-18, 1624).

Nearly a year later in 2009, Lynch advised RAGG that they needed to execute additional documents, including "purchase agreements," to memorialize that Lynch held 65% of the GBH membership interest in his name. (B-159-66) (A-1306). Lynch prepared a set of eight documents for RAGG to execute, which he collectively delivered to RAGG, through Morelia, via an email dated October 22, 2009. (A-

1127, 1531). In the body of the email, Lynch informed RAGG that he will leave the set of documents to be "signed on this trip [him]self…or [he will] take it with [him] signed and bring everything signed to Buenos Aires." (*Id*. at 1531).

Consistent with other transactions that Lynch had previously devised for RAGG in Latin America, one of the eight documents in the set was a document that Lynch and his wife were to execute, known as the "Counterdocument." (*Id*. at 1306). The purpose of the Counterdocument was to privately reflect the true intent and understanding regarding the ownership of GBH, and served as an agreement that membership interests in GBH that would be held in Lynch's name were owned by RAGG and would be returned upon his demand. (*Id*. at 996, 1129, 1133, 1536). RAGG understood, based upon the advice and explanation provided to him by Lynch, that this set of documents were necessary to comply with Argentine legislation and that he (individually and through Televideo) would remain the actual owners of all membership interests in GBH. (*Id*. at 1314).

Because counterdocuments are commonly used for business transactions throughout Latin America, including transactions previously arranged by Lynch for other media entities owned and controlled by RAGG, Lynch's suggestion did not strike RAGG as extraordinary or concerning. (*Id*. at 1310). While RAGG trusted his lawyer, RAGG was nevertheless insistent upon the execution of the

Counterdocument and would not have executed any of the documentation presented at the time without the same. (*Id*.).

At trial, Lynch testified that while he promised RAGG in email that he would sign the Counterdocument, the promise was in fact a bald lie. (*Id*. at 1001). Lynch falsely testified at trial that he convinced RAGG at a meeting that occurred after his email that the Counterdocument did not need to be signed and that RAGG agreed. (PTMO at 47 n.218 ("I am unpersuaded. Only Lynch's own testimony supports his position that he told Gonzalez he would not sign the Counterdocument, and that Gonzalez agreed.")). No documentation was presented in support of Lynch's contention that RAGG agreed to forgo the Counterdocument. To the contrary, RAGG, Morelia and third parties testified that they saw at least a partially signed copy of the Counterdocument. (A-1132-33, 1306).

Two other documents that were part of this eight-document set, were purchase agreements, dated September 1, 2007 and January 8, 2008(respectively, the "FPA" and "SPA"), that reflect Televideo was transferring a collective 65% membership interest in GBH to Lynch in two tranches. (*Id*. at 1443, 1473). Both purchase agreements were backdated by Lynch to pre-date the certificate for GBH that he had recorded with the Delaware Secretary of State on December 31, 2008 in an effort to reflect that he was a holder of membership interests in GBH only after there was transactional documentation reflecting the same. (*Id*. at 1126). The record reflects

that the purchase prices listed in the FPA and SPA were arbitrarily selected by Lynch without any negotiation with or agreement by RAGG because there was no intent for them to convey actual, beneficial ownership in GBH. (*Id*. at 1116-17). No contemporaneous documents support Lynch's position that the FPA and SPA were intended to convey to him actual ownership in GBH. (PTOM at 24).

IV. Lynch Proposes to Utilize Debt Restructuring Agreements to Maintain the Facade of Ownership

Later on, Lynch proposed and drafted a series of debt restructuring agreements to maintain a paper trail in support of his holdings in GBH. First in 2010, Lynch had RAGG execute the first restructuring agreement (the "2010 Restructuring Agreement")(A-1610). Lynch advised RAGG that this agreement was needed because none of the payments called for by the FPA or SPA had been made by Lynch. (*Id*. at 886). The 2010 Restructuring Agreement forgave the missed payments and outstanding interest that would have been owed pursuant to the SPA. (*Id.*).

In the fall of 2016, Lynch again proposed restructuring agreements because interest and principal payments had not been made by him as called for by the purchase agreements. The first of these agreements was backdated by Lynch to May 2, 2016 (the "May 2nd Agreement"), and it lowered the purchase price of the membership interest by 30% and forgave outstanding principal and interest payments totaling $4,539,853.41 that were past due. (*Id*. at 887-88, 1025, 1722). In

2017, Lynch modified the May 2nd Agreement, first with an amendment dated May 3, 2016 (the "May 3rd Agreement") and again with the May 4th Agreement, both of which were backdated by Lynch.

The May 4th Agreement was identical to the May 3rd Agreement except for one critical difference - Lynch inserted a clause in the May 4th Agreement at Section 2.05 that purported to invalidate the Counterdocument or any other document that stated Lynch did not own a 65% membership interest in GBH. (B-343)(*Id*. at 1054, 1750, 1780). Lynch had slipped Section 2.05 into the May 4th Agreement without notifying RAGG of the same or explaining its purpose and effect. (A-1059). The court recognized that Lynch had no basis for including Section 2.05 other than to further support his fraud and to serve as an insurance policy against the Counterdocument. (PTOM at 63, 67).

V. Lynch's Activity Regarding the "Magnus Project" Reflects the True Intent of the Parties with Respect to the Ownership of GBH

The Magnus Project was conceived prior to the preparation and execution of the restructuring agreements in the fall of 2016 and was intended to prepare Albavision for a potential sale to a third party. (A-1065, 1112-13). At Lynch's suggestion, RAGG retained and paid for the law firm of Greenberg Traurig ("GT"), the accounting firm of Ernst and Young ("EY") and Bank of America to conduct due diligence as to potential structure and marketing. (*Id*. at 1065). Lynch was heavily involved in the project and he and those operating under his direction were

the conduit for GT, EY and the bankers to receive information regarding the existing operation and ownership structure of Albavision, including GBH. (*Id*. at 1065-66, 1168, 1196-97, 1208).

As part of the project and in reliance upon information from Lynch, GT prepared a PowerPoint presentation that reflected the ownership of GBH as follows: "Sworn declaration stating that the true owner of the shares is [RAGG]". (*Id*. at 1068-69). Lynch and two Albavision employees that operated under his director, Messrs. Lambert and Landaburu, admitted in trial that they had an opportunity to review and comment on multiple versions of this PowerPoint presentation and yet allowed the reference to the Counterdocument to remain. (*Id*.). In effort to explain away such evidence, Mr. Lambert testified that they allowed the Counterdocument reference to remain because Lynch wanted other Albavision employees to believe that RAGG was the owner so as not to make them jealous, and that they planned to eventually inform GT that Lynch was an actual owner of GBH. *Id*. The court found this testimony to be entirely far-fetched. (PTMO at 72).

The Magnus Project never came to fruition and was called off in 2017. (A-1062). Once it was clear to Lynch that the Project Magnus project was going to be aborted, he prepared, and had RAGG execute, the backdated May 3rd Agreement and May 4th Agreement in an effort to demonstrate that the Counterdocument was nullified before Project Magnus failed. (*Id*. at 1062-63).

The court also heard evidence that around this time, Lynch, and his agents, had access to the copy of the Counterdocument, signed by at least RAGG, that had been stored in a safety deposit box controlled by RAGG and concluded that it was likely Lynch, or his agents, hid or destroyed same. (PTOM at 67).

VI. Lynch Claims Ownership in GBH and Makes a Ransom Demand

In February of 2018, Mr. Guillermo White ("White"), a trusted advisor for RAGG, received a phone call from Lynch that was unexpected. (A-1379). Lynch requested that White convey the following message to RAGG: "[A]s of this date, Argentina will no longer answer to Miami. It's going to be handled as an independent operation, and he [RAGG] will be treated as any of the other shareholders." (*Id*. at 1380). RAGG was confused by the message and requested that White meet with Lynch. (*Id*.). At the meeting, Lynch demanded extraordinary sums and protections for himself and his agents to return the 65% membership interest in GBH to Televideo. (*Id*. at 1381-82). White testified that it was clear to him that Lynch was giving ransom demands for returning something that was rightfully owned by RAGG. (*Id*. at 1383). RAGG was surprised by the scheme because Lynch had become so trusted and because he had previously relinquished upon demand, and without ransom, his record ownership of other Albavision companies that he held via counterdocuments. (*Id*. at 2137).

Once RAGG refused Lynch's ransom, the parties embarked in a series of reciprocal actions by which they recorded documentation in Argentina and Delaware, each claiming ownership over the disputed membership interest in GBH. (B-157-80, 181-229, 330-34)(*Id*. at 2102). Lynch ultimately commenced the lawsuit in Delaware.

ARGUMENT

I. THE COURT APPROPRIATELY APPLIED EQUITABLE ESTOPPEL, QUASI-ESTOPPEL, JUDICIAL ESTOPPEL AND UNCLEAN HANDS

A. Question Presented

Did the court err as a matter of law in concluding that equitable estoppel, quasi-estoppel, judicial estoppel and unclean hands did not prohibit Appellees from prevailing on their claim that RAGG/Televideo owns the 65% membership interest in GBH at issue?

Appellees' Response: No.

B. Standard and Scope of Review

Questions of law are reviewed *de novo*. *Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004).

C. Argument

Lynch wholly ignores the fatal procedural problems with these defenses; including, that he: (1) failed to timely raise the defenses of equitable estoppel and quasi-estoppel; and (2) expressly waived the defense of judicial estoppel in his post-trial briefing.

Despite having expressly waived judicial estoppel as a defense, the court nevertheless considered the same on the merits and concluded that it would fail because Delaware courts have narrowly limited its application to statements made

in a prior adjudication before a court and there was not such adjudication regarding GBH's tax returns.

Further, the court appropriately rejected Lynch's argument that the doctrine of unclean hands required the court to find in his favor. The court concluded that Lynch, in his capacity as a trusted lawyer, devised a scheme under the guise of sound legal advice, and as part of the same prepared "sham" documents that did not reflect the understanding and intent of the parties with respect to the management and ownership of GBH. Such scheme placed Appellees in a legal predicament that Lynch then attempted to exploit for a personal windfall. The court appropriately applied the principles from the Delaware courts application of the doctrine of unclean hands and concluded that it would cut against equity and public policy to reward Lynch for his deception and that the status *quo ante* was to return the parties to the position they were in prior to the "sham" transactions.

1. The Court Correctly Concluded that Lynch Failed to Timely Raise Equitable Estoppel, Quasi-Estoppel and Unclean Hands, and Expressly Waived Application of the Doctrine of Judicial Estoppel

The court correctly concluded that the defenses of equitable estoppel, quasi-estoppel and unclean hands Lynch sought to assert were not timely and properly raised and, thus, were waived. (PTOM at 109-10, 115-16).

The court also concluded that the doctrine of judicial estoppel was expressly waived by Lynch in his post-trial briefing. (*Id*. at 110-12).

Concerning the doctrines of equitable estoppel and quasi-estoppel, these doctrines were not raised as defenses in Lynch's pleadings, pre-trial brief or opening post-trial brief and were waived given that they were untimely mentioned for the first time in Lynch's post-trial answering brief. (*Id*. at 109-10).

The court also concluded that Lynch waived the defense of unclean hands because he failed to raise the defense in his post-trial opening brief. (*Id*. at 115-16).

Delaware courts have long held that a party waives defenses that it fails to appropriately plead and preserve. (*See Barrett v. Am. Country Holdings, Inc*., 951 A.2d 735, 745 n.33 (Del. Ch. 2008); *In re PNB Holding Co. S'holders Litig*., 2006 WL 2403999, at *18 (Del. Ch. Aug. 18, 2006); *In re IBP, Inc. S'holders Litig*., 789 A.2d 14, 62 (Del. Ch. 2001)). The court's determination that Lynch failed to preserve the foregoing defenses are supported by the record and were not errors of law.

Lynch fails to address in his OB that the court concluded he failed to preserve and/or waived his assertions of equitable estoppel, quasi-estoppel, judicial estoppel and unclean hands. Unless Lynch first succeeds in having reversed the court's conclusions that he waived these defenses (an issue he does not pose in this appeal), the questions he presents concerning: (1) the court's refusal to extend application of

the doctrine of judicial estoppel to information contained in non-Delaware tax returns; and, (2) alleged misapplication of the doctrine of unclean hands, are inconsequential with respect to the court's ultimate determination that RAGG/Televideo are the owners of GBH.

2. *The Court Correctly Concluded that Delaware Courts Do Not Apply the Doctrine of Judicial Estoppel to Statements Made Outside Litigation*

Despite Lynch's expressed waiver of judicial estoppel as a defense, the court considered and rejected its application on the merits. The court concluded that the doctrine of judicial estoppel has been narrowly applied by Delaware courts to statements made by a party in a prior judicial proceeding, and then only where the prior statement was adopted by the court as a fundamental basis for a ruling. (PTOM at 110-12)(*See Motorola Inc. v. Amkor Tech., Inc*., 958 A.2d 852, 859–60 (Del. 2008)).

At the trial level, Lynch cited to no Delaware case law in which the doctrine of judicial estoppel was applied to information contained in tax returns. In his OB, Lynch cites an opinion of the Delaware Family Court, *T v. T*., 2018 WL 509340 (Del. Fam. Jan. 17, 2018). This opinion, which considers the question of whether a couple was legally married, does not detail under what theory the court determined that the husband was estopped from contending that he was not legally married given that he represented in Federal tax returns that he was married. If the *T v. T* court is

assumed to have ruled based upon application of the doctrine of judicial estoppel, the opinion appears contrary to the Delaware Supreme Court's and Court of Chancery's long-standing, narrow application of the doctrine because there is no reference in *T v. T* to the subject tax returns having been relied upon in a prior proceeding as a basis for a court finding. *See Motorola*, 958 A.2d at 859. Further, this opinion from the Family Court of Delaware is distinguishable in that it involves issues far different from those of corporate ownership and control that are posed in the instant matter, and, nevertheless, does not constitute a binding authority on the Court of Chancery, which had discretion in deciding whether and how to apply the doctrine. (*See Mayor and Council of Wilmington v. Saint Stanislaus Kostka Church,* 108 A.2d 581, 585 (Del. 1954)(only opinions of courts of last resort are binding precedent); (PTOM at 111 n.476 (citing Donald J. Wolfe, Jr. & Michael A. Pittinger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 15.02[d], at 15-18 (explaining that courts have discretion in applying the doctrine of judicial estoppel and may consider public policy concerns in analyzing whether and how it will be applied)))).

3. *The Court Appropriately Concluded that the Unclean Hands Doctrine Did Not Prohibit It from Finding in Favor of Appellees*

The court concluded that it would not apply the doctrine of unclean hands in a manner that would result in Lynch being declared an owner of GBH because such

a ruling would yield an inequitable result and reward Lynch with a windfall obtained through a fraud. (PTOM at 120-21). The court recognized that it was Lynch that brought this suit in Delaware and attempted to use the court as a pawn in his scheme to strip ownership and majority control of GBH from RAGG and concluded that finding in favor of Lynch would put the court in a position of validating a series of "sham" transactions that were designed by Lynch to deceive regulators and that Lynch also attempted to use to defraud his own clients. (*Id*.).

Lynch challenges the court's application of the doctrine of unclean hands, and, specifically, its refusal to apply the doctrine to prohibit Appellees from being granted relief on their claims to ownership of GBH. (OB. at 21-22). Critically, Lynch does not appeal the court's determination that he waived the right to assert unclean hands because he failed to raise the defense in his post-trial opening brief. (PTOM at 115-16). (*See Barrett*, 951 A.2d at 745 n.33; *In re PNB Holding Co. S'holders Litig*., 2006 WL 2403999, at *18; *In re IBP, Inc. S'holders Litig*., 789 A.2d at 62). Accordingly, there is no basis to reach the merits of Lynch's argument.

Even if this Court is willing to look past Lynch's waiver of this defense, his argument that the court misapplied the same is flawed. Lynch argues that the doctrine of unclean hands should have been applied such that the court enforced the "sham" transactions in his favor, despite the compelling evidence that there was no intent for the transactions to be binding and despite the public policy concerns

expressed by the court that to do so would reward Lynch with a windfall after concocting a scheme under the guise of legal advice and through which he simultaneously deceived both Argentine regulators and his clients and sought to deceive the court. (PTOM at 119-20).

The court found Lynch's explanations with respect to the intent and understanding of the parties to the "sham" transactions to be wholly unbelievable and determined that the true intent of the parties with respect to ownership of GBH is reflected in the terms of the Counterdocument -- RAGG and Televideo are the owners of GBH. (PTOM at 30-36, 39-47).

The doctrine of unclean hands is a "rule of public policy" rather than a true affirmative defense asserted on behalf of a litigant, and, accordingly, the court had latitude to exercise discretion in its application. (*Id*. at 114)(citing *Nakahara v. NS 1991 American Trust*, 718 A.2d 518, 523 (Del. Ch. 1998)).

The court identified two principles regarding application of the doctrine that it believed were relevant to resolution of the present case: (1) the doctrine will bar relief to an offending party so that they do not reap an undeserved windfall; and (2) the doctrine must not be applied in a manner that makes the court complicit in an illicit scheme. (*Id*. at 119). Viewing the case with these principles in mind, the court concluded that it would not reward Lynch a windfall and declare him an owner of GBH because to so find would cut against the clear and convincing evidence that

Lynch was the offending party that sought to deceive regulators, his clients and the court. (*Id*. at 120-23). The court also noted there was compelling evidence that the intent of the parties to the subject transactions was for Lynch to hold the membership interests in his name only as nominee and for the benefit of RAGG and Televideo, and concluded that to find Lynch to be the owner of the subject membership interests in GBH would facilitate an undeserved windfall for him given that he fraudulently induced RAGG to sign "sham" documents under the guise of sound legal advice and never paid valuable consideration for the interests he held. (*Id*. at 119-20). The court appropriately refused to allow Lynch to rely upon the doctrine such that he would benefit from a legal predicament that he concocted and led his clients into under the guise of sound legal advice. (*Id*. at 120-21).

The court was also within its right to determine as it did that applying the doctrine of unclean hands to bar Appellees' claims would also conflict with public policy because it would cause the court to implicitly approve transactions that were intended to deceive regulators. (*Id*. at 121).

The court was not compelled to enforce the "sham" transactions (while ignoring the Counterdocument) at face value. Rather, the court was permitted to proceed as it did in considering evidence outside the four corners of the agreements to decipher the intent of the parties, and to consider public policy concerns and the equitable interests of the parties, before issuing its opinion that such agreements

were unenforceable. The court engaged in sound reasoning in reaching the determination that the appropriate outcome was to return the parties to the status *quo ante* with respect to the ownership of GBH before the parties entered into the "sham" transactions.

II. THE COURT DID NOT ERR IN DECLINING TO ENFORCE THE MAY 4TH AGREEMENT, A DOCUMENT THAT DID NOT REFLECT THE ACTUAL OWNERSHIP OF GBH AND WAS THE PRODUCT OF FRAUDULENT INDUCEMENT ON LYNCH'S PART

A. Question Presented

Did the court err as a matter of law in concluding that the May 4th Agreement was unenforceable?

Appellees' Response: No.

B. Standard and Scope of Review

Questions of law are reviewed *de novo*. (*Plummer*, 861 A.2d at 1242). Mixed questions of fact and law are reviewed *de novo* with respect to the court's legal determinations and for clear error with respect to factual findings. (*Miller v. State*, 4 A.3d 371, 373 (Del. 2010)). Factual determinations that turn on credibility assessments are entitled to "enhanced" deference. (*See Genger v. TR Inv'rs, LLC*, 26 A.3d 180, 190 (Del. 2011)(quoting *Cede & Co. v. Technicolor, Inc*., 758 A.2d 485, 491 (Del. 2000)).

C. Argument

Lynch contends that the May 4th Agreement contains an anti-reliance clause that prohibited the court from considering evidence outside its four corners to deduce the intent and understanding of the parties to the same and to determine if RAGG was fraudulently induced to enter into the agreement. (OB at 26). Lynch's effort to

get the court to narrowly focus on the language of the May 4th Agreement without considering the voluminous and highly pertinent evidence outside its four corners that put such agreement in context, fails.

First, Lynch failed to raise his assertion that the May 4th Agreement contains anti-reliance language at the trial level. At no time prior to this appeal did Lynch allege that section 2.05 of the May 4th Agreement is an anti-reliance provision that affected the court's ability consider extra-contractual evidence. Indeed, none of the cases cited in Section II(B) of Lynch's OB were cited in his answering post-trial brief in which he claims to have preserved this issue. This is an entirely new legal theory, improperly asserted for the first time on this appeal in violation of Supreme Court Rule 8.

Second, even if Lynch is deemed to have fairly preserved the issue, his theory is easily dispensed with on the merits. The May 4th Agreement contains no anti-reliance language as is recognized by Delaware courts, let alone one that explicitly disclaims the defense of fraudulent inducement. Additionally, there is no "merger" language in the May 4th Agreement that bound the court to its four corners.

Finally, in addition to appropriately concluding that the May 4th Agreement was unenforceable based on fraud, the court separately determined that as a matter of fact there was no mutual intent between the parties to enter into the May 4th Agreement as a binding agreement. There is no clear error in the court's factual

determination as to the intent of the parties to the May 4th Agreement, which turned in large part on credibility assessments.

It is notable that this question presented by Lynch regarding the enforceability of the May 4th Agreement is not outcome determinative with respect to ownership of GBH. The court's determination that the May 4th Agreement is unenforceable is only outcome determinative as to ownership of GBH if the court's independent conclusion that the FPA and SPA were unenforceable is first reversed by this Court. The FPA and SPA are the foundation for Lynch's claim to ownership and if the court's determination that they were unenforceable stands, it is irrelevant whether the May 4th Agreement that Lynch asserts contains language that invalidated the Counterdocument is unenforceable.

1. *Lynch Never Raised and Failed to Preserve His Argument that the May 4th Agreement Contains Anti-Reliance Language*

Lynch has failed to preserve his argument that the court erred in not construing the May 4th Agreement as containing an anti-reliance clause because he never raised the same before the trial court. (*See Barrett*, 951 A.2d at 745 n.33; *In re PNB Holding Co. S'holders Litig*., 2006 WL 2403999, at *18; *In re IBP, Inc. S'holders Litig*., 789 A.2d at 62).

Turning first to the fact that Lynch never asserted at the trial level that the May 4th Agreement contains an anti-reliance clause, the section of Lynch's post-trial

answering brief that he cites to in support of having preserved the issue does not address his allegation that there was anti-reliance language in the agreement. (A-2294-95). Nowhere in the cited portion of this brief or elsewhere in any of Lynch's post-trial briefs does he allege that section 2.05 of the May 4th Agreement should be viewed as an anti-reliance provision that prohibits the court from considering evidence relating to RAGG's reliance upon statements, documents, course of dealing or anything else outside the four corners of the document in entering into the same or for purposes of establishing the intent of the parties with respect to the same.

Further, even if this Court were to accept that Lynch fairly raised the issue at the trial level, raising it for the first time in a post-trial answering brief as he contends is not sufficient to have preserved the issue for purposes of appeal. Courts in this state have long recognized that arguments not raised before trial and/or preserved in post-trial **opening** briefs are waived. (*See Barrett v. Am. Country Holdings, Inc*. 951 A.2d at 745 n.33; *In re PNB Holding Co. S'holders Litig*., 2006 WL 2403999, at *18; *In re IBP, Inc. S'holders Litig*., 789 A.2d at 62).

2. *The May 4th Agreement Contains No Anti-Reliance Language, And Certainly No Explicit Waiver of the Defense that Such Agreement Was a Product of Fraudulent Inducement*

The May 4th Agreement does not contain any anti-reliance language as the same is understood and applied in the Delaware courts. Further, even if section 2.05 of the May 4th Agreement is found to contain anti-reliance language, it certainly does

not contain express and explicit language indicating that RAGG waived the ability to assert the defense that such agreement was the product of fraudulent inducement.[1]

Delaware courts take a hawkish view with respect to assertions that an agreement contains anti-reliance language that affirmatively waives a party's ability to assert that such agreement was the product of fraudulent inducement. Accordingly, a waiver of the defense of fraudulent inducement must be explicitly and unambiguously stated. (*See Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1058-59 (Del. Ch. 2006)("…we have not given effect to so-called merger or integration clauses that do not clearly state that the parties disclaim reliance upon extra-contractual statements. Instead, we have held…that murky integration clauses, or standard integration clauses without explicit anti-reliance representations, will not relieve a party of its oral and extra-contractual fraudulent representations.").

There is no anti-reliance language anywhere in May 4th Agreement, including section 2.05, let alone language that clearly and unambiguously waived RAGG's ability to assert that he was fraudulently induced into the same by Lynch. Section

[1] Additionally, Lynch does not address in this appeal the court's ruling that the May 4th Agreement was equally unenforceable because RAGG also proved his defense of collateral estoppel. (PTOM at 93-102). Accordingly, even if this Court were to reverse the court's determination that RAGG had proven his defense of fraudulent inducement, the court's ultimate determination as to the ownership of GBH will remain unchanged.

2.05 contains terms that purport to modify earlier agreements between the parties and declare as void any document stating that Lynch does not own 65% of GBH (i.e. without expressly stating so, this clause is describing the terms of the Counterdocument that Lynch was careful in his drafting to not expressly recognize for fear of implicitly suggesting its significance and authenticity).

Given that the May 4th Agreement contained no anti-reliance language, or merger clause for that matter, it was appropriate for the court to consider such agreement in view of the overall relationship and course of dealing between Lynch and RAGG with respect to GBH and other companies and "through the prism of the parties scheme" with respect to the regulators before reaching its conclusions that the agreement was not mutually intended to be enforceable and was the product of fraudulent inducement. (PTOM at 13-14)(*See Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 927 (Del. 2017)(opining that in interpreting a contract the court must consider the commercial context between the parties)).

The court concluded that RAGG reasonably relied upon the protection of the Counterdocument in agreeing to execute the May 4th Agreement and that he also reasonably relied upon the repeated representations of Lynch regarding the true ownership of GBH and the false pretense that the May 4th Agreement was necessary

for the exclusive purpose of responding to any inquiry from regulators. (PTOM at 99-101).

Contrary to Lynch's position that Appellees accepted the terms of the May 4th Agreement for months without objection and thus waived their right to assert that the agreement was unenforceable, the record reflects no such acceptance or waiver.[2] The court recognized that both RAGG and Lynch operated following the execution of the May 4th Agreement with the understanding that the Counterdocument remained effective and reflected the true ownership of GBH. (*Id*. at 59-63). In fact, well after execution of the May 4th Agreement, Lynch and those operating under his instruction continued to acknowledge the existence of the Counterdocument and its reflection of the true ownership of GBH, including explaining to third-party lawyers, accountants and bankers that the Countedocuument reflects the true ownership of GBH held by RAGG. (*Id*. at 68-71). The employees of Albavision who testified at trial all consistently explained that they understood at all times that GBH was owned and controlled by RAGG, not Lynch. (*Id*. at 19-20). The record also reflects that Lynch repeatedly assured RAGG and Morelia that the Counterdocument existed, reflected that RAGG and Televideo owned GBH, and served as protection for those ownership interests. (*Id*. at 32-33, 49-50).

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[2] Moreover, this contention was not presented at the trial level and may not be raised for the first time upon this appeal. (Supreme Court Rule 8).

Once Lynch "sprung his trap" and announced to RAGG that he intended to assert a claim to actual ownership in GBH, RAGG and the other Appellees took action to defend against the same, beginning with calling a meeting to understand what Lynch was claiming and desired. (*Id*. at 73-75). Following such meeting, Appellees rejected Lynch's efforts to extract a ransom and filed documentation in Argentina and Delaware that reflected the true ownership of GBH. (*Id*. at 75-78). Appellees acted in a manner that demonstrated they were not complicit with Lynch's claim to actual ownership.

Lynch also asserts that Appellees cannot succeed in having the May 4th Agreement declared unenforceable by arguing that RAGG was unaware of its terms simply because he failed to read the same. (OB at 31). Appellees have never made this claim and the court did not issue its rulings in reliance on any such claim or finding. Rather, Appellees contended, and the court agreed that the May 4th Agreement was unenforceable because: (1) there was never a mutual intent for the same to constitute a binding agreement as to ownership of GBH; and (2) Lynch got RAGG to sign the same under false pretenses. The court considered the language in section 2.05 of the May 4th Agreement in assessing the intent of the parties, but the court's findings did not turn on whether RAGG carefully reviewed the same because RAGG understood that the terms of such agreement were meaningless with respect to the ownership of GBH. (PTOM at 101 - "Gonzalez justifiably relied on Lynch's

misrepresentations and false promises and signed various documents, believing that the documents' terms were meaningless, that his signature was necessary to satisfy Argentine regulators, and that Televideo's interest was secured by the Counterdocument.").

3. *The Court's Findings Regarding the May 4th Agreement Were Grounded on Clear and Convincing Evidence*

The court concluded that the May 4th Agreement was unenforceable for two independent reasons. First, there was no clear evidence that the parties had a mutual intent to enter into the same as binding agreement. (*Id*. at 84-88). Second, even if the parties intended to enter into the May 4th Agreement as a binding contract, it was nevertheless unenforceable because Lynch fraudulently induced RAGG to execute the same by misrepresenting its purpose and effect. (*Id*. at 100-02).

The court determined that the parties did not intend for either the May 2nd Agreement, May 3rd Agreement or May 4th Agreement to be enforceable, but rather to serve as paper trail to satisfy regulators. (*Id*. at 56). The court recognized that RAGG was indifferent to the terms of these agreements because he understood them to be unenforceable and not reflective of the parties' intent and agreement with respect to the ownership of GBH, the true nature of which was memorialized in the Counterdocument that RAGG reasonably believed Lynch had signed as promised (a

promise that Lynch testified at trial was a lie and deception to convince RAGG to meet with him). (A-997-1001)(PTOM at 58-59).

The court concluded that the testimony of Lynch as to the intent of the parties with respect to section 2.05, beyond functioning as cover for regulators, were wholly incredible. (PTOM at 63 n.291). Lynch claimed that the section was intended to avoid the type of litigation disputing ownership of GBH the parties found themselves in, when it was Lynch that filed suit. (*Id*.). Lynch also claimed that he was concerned that RAGG might try to create a forgery to deprive him of ownership in GBH, when the Court concluded that the most logical inference is that the section was intended by Lynch to serve as protection for himself against the Counterdocument. (*Id*.). In rejecting the outrageous explanations offered by Lynch as to the intent and understanding of the parties to the May 4th Agreement, the court made credibility assessments that were wholly reasonable and the same are entitled to significant deference given that the trial judge had the benefit of viewing the live witness testimony. (*See Genger*, 26 A.3d at 190 (quoting *Cede & Co. v. Technicolor, Inc*., 758 A.2d 485, 491 (Del. 2000)("Moreover, '[where] factual findings are based on determinations regarding the credibility of witnesses ... the deference already required by the clearly erroneous standard of appellate review is enhanced."')).

The court further noted that Lynch's own actions indicate that he too did not intend and understand the May 4th Agreement to be a binding agreement that

nullified the Counterdocument because after the execution of this agreement, Lynch and those operating under his instruction represented on multiple occasions to outside lawyers, accountants and bankers that the Counterdocument exists and reflects the actual ownership of GBH. (PTOM at 100). Further, Lynch reassured Morelia and RAGG multiple times not to worry about the ownership of GBH because the Counterdocument will protect RAGG's ownership interests. (*Id*. at 49-50).

III. THE COURT DID NOT IMPROPERLY RELY UPON SUBJECTIVE EVIDENCE TO CONCLUDE THAT THE MAY 4TH AGREEMENT WAS UNENFORCEABLE

A. Question Presented

Did the court err as a matter of law in concluding that the May 4th Agreement was unenforceable because it relied upon subjective evidence as to the intent of the parties?

Appellees' Response: No.

B. Standard and Scope of Review

The question of whether parties had the requisite mutual intent to enter into a binding contract is a question of fact. (*Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1230 (Del. 2018)). This court reviews findings of fact to assess whether they were clearly erroneous. (*Bank of New York Mellon Tr. Co. v. Liberty Media Corp*., 29 A.3d 225, 236 (Del. 2011)).

C. Argument

1. *The Court Objectively Concluded That There Was No Mutual Intent to Enter Into the May 4th Agreement*

The court, applying an objective standard, correctly evaluated all the evidence presented and found that there was no mutual assent to enter into the May 4th Agreement as an enforceable agreement. (PTOM at 82-83).

"[I]n resolving this issue of fact [i.e. whether there was intent to form a binding contract], the court may consider evidence of the parties' prior or contemporaneous agreements and negotiations…." (*Id*. at 83 n.388). In assessing whether Lynch and RAGG had mutual intent to enter into the May 4th Agreement as a binding contract, it was proper for the court to consider the actions of the parties following execution of the same. (*Martin Marietta Materials, Inc. v. Vulcan Materials Co*., 56 A.3d 1072, 1119 (Del. Ch. 2012), *aff'd*, 45 A.3d 148 (Del. 2012), and *aff'd*, 68 A.3d 1208 (Del. 2012)(citing RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. g (1981)("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.")).

Lynch's argument that the court misapplied the mutual assent standard necessary for parties to contract under Delaware law, described in *Voss on Delaware Contract Law*, misses the mark. (OB at 36). Specifically, Lynch argues that the court failed to recognize that *Voss on Delaware Contract Law* speaks to the intent of the parties **before** a written agreement is executed. (*Id*.) The court's reference to *Voss on Delaware Contract Law* was accurate because it does stand for the proposition that where the parties have objectively demonstrated intent to eschew the terms of a written contract, the contract is voidable. (PTOM at 83-84). The court concluded that the parties never intended at any time to transfer actual ownership of any membership interests in GBH to Lynch. (*Id*. at 68-71, 84-85, 87-88). Further,

it was entirely proper for the court to have considered the course of dealing between the parties before the May 4th Agreement was executed to ascertain their intent with respect to the same. (*Eagle Force Hldgs., LLC*, 187 A.3d at 1230 ("[W]here the putative contract is in the form of a signed writing, that document generally offers the most powerful and persuasive evidence of the parties' intent to be bound. However, Delaware courts have also said that, in resolving this issue of fact, the court may consider evidence of the parties' prior or contemporaneous agreements and negotiations in evaluating whether the parties intended to be bound by the agreement.").

The court also appropriately conducted its fact-finding from the perspective of a reasonably objective businessperson. The court took into consideration the parties prior and contemporaneous course of dealing regarding transactions designed by Lynch for RAGG for media assets other than GBH, where Lynch held ownership interests as a mere nominee for RAGG's benefit (*Id*. at 19), the course of dealing between Lynch and RAGG regarding the affairs of GBH and the promise and repeated representation from Lynch that the Counterdocument would protect RAGG's ownership (*Id*. at 32, 86), and the parties actions following the execution of the May 4th Agreement (*Id*. at 68-71).

The court never concluded that the parties were "bound to the Counterdocument" as Lynch asserts. (OB at 36). Rather, the court concluded that

the Counterdocument reflected the true intent of the parties with respect to the ownership of GBH and that the FPA, SPA and May 4th Agreement did not reflect the parties' mutual intent and were intended as non-binding, "sham" agreements. (PTOM at 87-88).

Lynch notes that the court mentioned RAGG's "beliefs" and "understanding" regarding the May 4th Agreement and posits that these words indicate that the court improperly relied upon RAGG's subjective intent in concluding that there was no mutual intent for the same to constitute a binding agreement. (OB at 36-37). Lynch inaccurately interprets the court's finding. The court expressly noted that its determination as to whether RAGG intended to enter into the May 4th Agreement as an enforceable contract was reached "**objectively** from the standpoint of a reasonable negotiator…." (PTOM at 84-85)(emphasis added). Lynch's partial quote of the court's opinion is misleading because it excludes the language unequivocally demonstrating that the court was analyzing whether the parties mutually intended for the May 4th Agreement to be a binding contract through application of an objective standard. The full quotation of the sentence from the trial opinion is: "In the context of the parties' **objective** agreement to paper the sham transaction, a reasonable negotiator in Lynch's position could not have concluded that Gonzalez intended to be bound by the terms of the documents they created to facially satisfy Argentine regulators." (*Id*. at 87-88)(emphasis added).

IV. THE COURT DID NOT ERR IN CONCLUDING THAT APPELLEES PROVED THEIR AFFIRMATIVE DEFENSE OF FRAUDULENT INDUCEMENT

A. Question Presented

Did the court err as a matter of law in concluding that the May 4th Agreement was void (as opposed to voidable)?

Appellees' Response: No.

B. Standard and Scope of Review

Questions of law are reviewed *de novo*. (*Plummer,* 861 A.2d at 1242).

C. Argument

1. *The Court Concluded that the May 4th Agreement was Voidable and Declared Void By Appellees*

The court accurately cited the legal standard that contracts entered into through fraudulent representations are voidable, consistent with *Klaassen v. Allegro Dev. Corp.,* 106 A.3d 1035 (Del. 2014). (PTOM at 89-90). The court went on to consider the evidence presented and conclude that RAGG was fraudulently induced by Lynch to enter into a series of documents, including the May 4th Agreement. (*Id*. at 91-102). The court also implicitly concluded that the voidable May 4th Agreement was rendered void when RAGG elected to dispute Lynch's claim to ownership in

GBH and assert that the May 4th Agreement was unenforceable. (*Id*. at 73-78, 101-102).[3]

Notably, Lynch fails to appeal the court's determination that the subject agreements were independently void because Appellees had proven their affirmative defense of equitable estoppel. (*Id*. at 93-94). Accordingly, even if this Court were to find that the court erred in concluding that Appellee's proved their defense of fraudulent inducement because it erred in its findings that the May 4th Agreement was voidable (and elected by Appellees to be treated as void), the court's

[3] Even if this Court were to conclude that the court erred with respect to its discussion that the May 4th Agreement was void, such determination is of no practical consequence because Appellees' counterclaims and defenses constituted a plea for the court to recognize the agreement's invalidity (i.e. Appellees unquestionably elected, as was their choice, to contend that the agreement was unenforceable). *See Hegerty v. American Commonwealths Power Corp*., 163 A. 616, 619 (Del. Ch. 1932)(holding that a contract entered into through fraud is voidable and the defrauded party may elect to rescind the same and return parties to status quo (i.e. declare it void) or affirm the contract and sue for damages). Appellees did not sue Lynch for breach of contract.

determination that Televideo is the owner of the subject 65% membership interest in dispute will stand.

2. *Lynch Never Asserted the Defense of Acquiescence, and, Nevertheless, There is No Evidence of the Same*

The court did not err in failing to consider whether Appellees acquiesced to the May 4th Agreement because Lynch did not assert acquiescence as an affirmative defense in his compliant as required by Ct. Ch. R. 8(c) or mention the same in his pre- and post-trial briefs. (*See Martin v. Med-Dev Corp*., 2015 WL 6472597, at *15 (Del. Ch. Oct. 27, 2015)(holding that acquiescence is an affirmative defense)). This Court should decline to consider this defense because it was not preserved, and its assertion upon appeal is an improper effort to get this Court to consider the quasi-estoppel argument that Lynch improperly and unsuccessfully raised for the first time in his post-trial answering brief. (PTOM at 109-10)(*See In re Celera Corp. S'holder Litig*., 2012 WL 1020471, at *9 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part*, 59 A.3d 418 (Del. 2012)(reasoning that the equitable defense of acquiescence is a form of quasi-estoppel)).

Nevertheless, the factual findings of the court reflect that Appellees never acquiesced to the May 4th Agreement. Specifically, Lynch contends that Appellees failed to dispute Lynch's assertion of ownership in GBH for a thirteen-month period and that such delay constitutes acquiescence. This contention is inaccurate. RAGG

refused to agree to Lynch's attempt to hold his interests in GBH for ransom and rejected the demand of his trusted advisor (A-1383-1384), before filing documents to refute Lynch's claim to ownership (A-2102)(B-212-19, 220-29, 334) and commencing regulatory proceedings in Argentina regarding Lynch's unauthorized activity relating to GBH. (B-230-329).

Lynch further contends that GBH's 2017 tax return demonstrates acquiescence because RAGG signed the same in 2018 after he became aware that Lynch was claiming actual owner in GBH because the return indicates that Lynch held a 65% membership interest. (OB at 46-47). This tax return does not reflect acquiescence because it accurately reflected that in calendar year 2017, before Lynch made his ransom demand and declared to RAGG his assertion of ownership, that Lynch was holding membership interests in GBH in his name and with the understanding that RAGG was the true owner as reflected in the Counterdocument.

V. THE COURT'S FACTUAL FINDINGS WERE SUPPORTED BY EVIDENCE AND THE PRODUCT OF A LOGICAL, DEDUCTIVE PROCESS

A. Question Presented

Did the court err in several of its factual findings because they were unsupported or contradicted by the record?

Appellees' Response: No.

B. Standard and Scope of Review

Findings of fact are subject to the deferential 'clearly erroneous' standard of review upon appeal. (*CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016)). The deferential standard applies not only to historical facts that are based upon credibility determinations, but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts. *Id*. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. (*Id.).* Factual determinations that turn on credibility assessments by the trial judge are entitled to "enhanced" deference. (*See Genger*, 26 A.3d at 190).

C. Argument

The court engaged in a careful analysis of the record and its factual determinations turned on historical facts deduced from documentation and testimony, with appropriate credibility determinations made as necessary.

The court had the opportunity to observe ten live witnesses at trial and view the video deposition testimony of two additional witnesses. While Lynch has argued that this case should have been resolved by looking no further than the language of certain transactional documentation, the court recognized that there are cases such as this one where the language of written agreements are but a small piece of a more complex picture and that all relevant evidence must viewed together to truly understand the parties' intent and agreement. (*See Kotler v. Shipman Assocs., LLC*, 2019 WL 4025634, at *17 (Del. Ch. Aug. 21, 2019); *Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d at 1230).

1. *The Court Did Not Exceed Its Jurisdiction*

Contrary to Lynch's assertion, the court did not exceed its jurisdiction with respect to its discussion that IMC was structured similarly to GBH in that Lynch held ownership interests in IMC in his name only while such interest was truly owned by RAGG. Specifically, the court stated in a footnote:

> Gonzalez permitted Lynch to hold 5% of IMC in name only, that Lynch never paid valuable consideration for that interest, and that the parties never intended for Lynch to be the true owner of that interest. I find that

> Lynch held 5% of IMC for Gonzalez's benefit and pursuant to a similar agreement under which he had 65% of Belleville. (PTOM at 18-19 n.68).

The court analyzed the prior course of dealing between the parties with respect to IMC because it was relevant to understand their course of dealing and agreement of the parties with respect to GBH. The subject footnote was not intended to be a holding with precedential value regarding the ownership of IMC, a non-party. This is reflected in the fact that the footnote appears in the section of the PTMO captioned "Background" versus in the "Analysis" and "Conclusions" sections. If it is determined that the footnote can be reasonably read as opining as to the ownership of IMC, the footnote is dictum without precedential value.

2. *Appellees Never Admitted that Lynch was Sold Ownership in GBH, Rather They Admitted to Executing "Sham" Documents*

The purported admissions against Appellees' interests referenced by Lynch are grounded on a false premise, rejected by the court, that the documentation signed by RAGG was intended to be enforceable and reflected a mutual intent to sell Lynch actual ownership in GBH. In reality, the record demonstrated that Lynch fraudulently induced RAGG and his agents to execute a series of documents under false pretenses as to legal reasons for and effect of the same. The court recognized that there was a reasonable justification for RAGG, Morelia and others to sign documentation that at first blush appears inconsistent with Appellees' position as to

the ownership of GBH. (A-1146-47, 1315, 1352-53, 1526, 1646, 1658, 1684, 1706, 1829, 2093). Appellees did not shy away from the truth that they executed documentation that reflects on its face that Lynch was an owner of GBH, and the court was moved by this truthful testimony because it dovetailed with other evidence that together demonstrates there was never an intent to sell Lynch actual ownership in GBH.

3. *The Record Supports the Court's Determination that the May 4th Agreement was the Product of Fraudulent Inducement*

Contrary to Lynch's assertion, the record reflects that he never believed that RAGG intended to transfer to him actual ownership in GBH and Lynch repeatedly assured RAGG and Morelia, before and after execution of the May 4th Agreement, that the ownership in GBH would not change and that the Counterdocument protected RAGG's interests. (*Id*. at 1130, 1305-07, 1310, 1319, 1322, 1329, 1331-33, 1336-37, 1341, 1358-59).

The court fairly concluded that Lynch's professed reasons for including Section 2.05 in the May 4th Agreement were incredible. (PTOM at 63). Lynch testified that he included Section 2.05 to avoid litigation, while the court noted that it was he that commenced litigation. (*Id*. at 63)(A-894, 898). Lynch also testified that Section 2.05 was necessary to protect against RAGG using forged documents against him and the court determined that the same was unbelievable and that the

logical conclusion was that the section was included by Lynch to serve as an insurance policy for his scheme. (PTOM at 63).

During trial, RAGG was cross-examined specifically with respect to Section 2.05 and explained: "[i]t is like the other ones. He created it, I signed it . . . If my attorney, my employee, says he needs me to sign these papers for him, I signed for him. I cannot be reading everything that each attorney presents to me . . . I signed this because he needed me to sign it." (A-1341).

Although there is no express testimony in the record in which a witness stated that Section 2.05 was is furtherance of a joint scheme and intended as a "sham," the court appropriately deduced the same from the record. RAGG did explicitly testify that he was only willing to execute documents addressing ownership in GBH because he had comfort that the Counterdocument reflected to the true ownership of the company and would protect his interests. (*Id*. at 1310).

4. *The Court Had Factual Support for its Findings Regarding Certifications That Address Ownership of GBH*

The court noted -- "Gonzalez and Morelia executed JX 37 because Lynch informed them that this was needed to comply with Argentine law and assured Gonzalez that there would be a counterdocument." (PTOM at 34-35). In view of the agreement that Lynch would hold the 65% in name only, JX-37's certification that

Lynch was the owner of 65% of Belleville Holdings was "correct" as the court noted. (PTOM at 35)(A-1118, 1146-47, 1305, 1349-53).

Indeed, at the time JX-37 was prepared, it was accurate because the Counterdocument indicated that Lynch held interests in GBH in name only and for the ultimate benefit of RAGG and that the interests would be returned upon request. Further, at the time JX-37 was prepared, no request had been made for Lynch to return the GBH interests to Televideo's name and, thus, the certification was accurate and consistent with the understanding and intent of the parties regarding the ownership of GBH.

Lynch also argues that the court made inaccurate factual findings regarding JX-7. He asserts that contrary to the court's conclusion, Morelia testified that she received JX-7 in 2007. (OB at 52). In fact, Morelia testified that the document was not signed until December 31, 2008. (A-1117-18). Further, Morelia indicated that before December 31, 2008, she had not received any documentation reflecting that there was a transfer of ownership in GBH to Lynch. (*Id*.).

The court concluded: "Gonzalez credibly testified that, aside from signing JX-7 at Lynch's discretion, he had no involvement with its preparation or filing." (PTOM at 27). The court also cited to testimony that supports its conclusion that "Lynch drafted and filed JX-7 in the context of the final Hadad acquisition and

presented it to Gonzalez under the guise that it was needed to carry out the final steps of that transaction." (*Id*.).

The record reflects that RAGG and Morelia credibly testified that they were unaware Lynch had prepared or recorded any documentation, naming himself as an owner of GBH, before December 31, 2008. The record further reflects that Appellees credibly believed that any documentation reflecting that Lynch was an owner of GBH was in furtherance of a "sham" transaction and that the parties had no intent that the same would be enforceable with respect to the actual ownership in GBH.

5. *The Court's Conclusions Regarding the Counterdocument are Supported by the Record*

The court made credibility determinations regarding what transpired with respect to the Counterdocument, beginning with noting that there is an email in the record that unequivocally demonstrates that Lynch promised RAGG he would sign the Counterdocument as part of a set of documents that included the FPA and SPA. (A-531-1532)(PTOM at 45).

After evaluating Lynch's credibility and hearing his testimony as well as RAGG's testimony, the court reached a reasonable conclusion that RAGG signed the Counterdocument and that Lynch took it with him to Argentina under the guise that he would have his wife sign it there. (PTOM at 46, 49). Further evidence indicated that RAGG did in fact sign the Counterdocument. Morelia testified as

follows concerning the October 2009 email: "I just printed the attachments, and have my father sign them." (A-1154). Other non-party, disinterested witnesses testified that they saw an executed copy of the Counterdocument in Argentina, although they could not recall whose signatures appeared on the copy. (A-1366-74, 1406-09).

In the crucial October 2009 email, Lynch stated he "urgently need[ed]" certain documents signed, and he identified them by number: 2, 3, 4, and 5. (A-1351). In the email, Lynch noted the urgency in getting these documents executed, but further states "I insist that this should be signed tomorrow." (*Id*.). The court properly interpreted "this" to constitute the full set of eight documents attached to the email, including the Counterdocument, and concluded that RAGG had signed them when he next met with Lynch.

Great deference must be accorded to the court's credibility determinations regarding the truthfulness of the witness testimony and there is nothing suggesting that the court committed clear error in concluding that virtually nothing said by Lynch in his trial testimony could be believed. (*Eagle Force Hldgs., LLC v. Campbell*, 2019 WL 4072124, at *13 (Del. Ch. Aug. 29, 2019)(citing *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1221 (Del. 2012))).

6. *The Court Correctly Concluded That Documents Were Crafted by Lynch to Bolster the Sham Transaction*

The court noted that Lynch sent RAGG an addendum in February 2010, which reflected that there were open terms regarding the purported transfers of interests in GBH to Lynch, and determined that these "loose ends" were indicative that there was no intent and agreement to transfer actual ownership to Lynch in 2007 as Lynch had asserted. (PTOM at 52). Lynch posits that the court misconstrued the addendum and cites to a single page from the fifty-six-page document as evidence of the same, when the court specifically cited to a different page that demonstrates the validity of its determination. (A-1601).

Lynch further contends that the parties' failure to execute a counterdocument along with the addendum and "complement" in 2010 necessitates a conclusion that RAGG agreed to eliminate the Counterdocument. The court disagreed with this contention, determining instead that the "absence of a Counterdocument from the February [2010] documents supports Gonzalez's position that the Counterdocument was [already] executed as expected and stored for safekeeping." (PTOM at 52).

7. *The Court Did Not Err in Concluding that RAGG Relied Upon Misrepresentations of Lynch in Signing the Restructuring Agreements*

The court noted RAGG's testimony that the regular practice was for Lynch to briefly summarize what he was asking me to sign relating to GBH before I executed

it. (PTOM at 22-23)(A-1306, A-1307, A-1358). Lynch seeks to fault the court for relying upon this testimony as to the general practice regarding the execution of documents versus pointing to testimony as to what was specifically discussed and relied upon by RAGG before he signed each particular document. Lynch's argument that the court erred in relying upon course of conduct in its fact-finding fails for several reasons. First, the court did not err in relying upon testimony regarding the parties' regular course of conduct with respect to a series of documents that were executed in connection with the purported transfer of ownership to Lynch. (*See Eagle Force Hldgs., LLC*, 187 A.3d at 1230 ("… the court may consider evidence of the parties' prior or contemporaneous agreements and negotiations in evaluating whether the parties intended to be bound by the agreement.")). Second, the court concluded that RAGG's reasonable belief that there was a signed Counterdocument protecting his ownership in GBH colored his approach to all documents that were thereafter presented to him by Lynch because RAGG believed that he was protected by the Counterdocument. (PTOM 34-36). Finally, there was in fact testimony regarding exchanges with Lynch that occurred at the time of execution of certain documents. For example, Morelia testified that she executed JX-37 because Lynch informed her that it was needed to comply with Argentine law and assured her that a Counterdocument would be executed. (*Id*. at 34-35).

Lynch further argues that the court erred in stating: "Lynch presented the May 4 Agreement to Gonzalez as another fake document he needed to sign to paper the transfer. In particular, he presented it as protecting Belleville in the event regulators found the Counterdocument." (*Id*. at 100). Lynch is incorrect in claiming that there is no witness testimony to support this finding. Lynch's own testimony supports the court finding: "The May 3rd Agreement was for any issues to present before any public organization or, better said, any regulatory body or regulator because clause 2.05 has issues [this references the May 4th Agreement] neither one of the parties would like the regulator to ask about them, although we knew that nothing had been signed. But in order to avoid any inconvenience or uncomfortable questioning, on behalf of the regulators, we asked – or, rather, we agreed to do two." (A-1054-55). Lynch's own testimony evidenced that he presented the May 4th Agreement to RAGG under the guise that it was necessary to protect him if regulators came calling because the May 3rd Agreement would need to be presented to them.

8. *The Court Correctly Concluded That the "Purchase Price" for the Interests in GBH Purportedly Transferred to Lynch Was Arbitrary*

The court determined that the "purchase price" included in the FPA and SPA was an arbitrary figure because the same was never discussed or negotiated, but rather unilaterally pulled by Lynch from the outstanding debt incurred by GBH in acquiring IMC. (PTOM at 40, 43-44). The court correctly concluded that the parties

never negotiated or even discussed the price to be paid for the alleged sale of a multi-million-dollar asset is evidence that there was no intent for form a binding agreement. (*Id*.)

RAGG testified that there were no negotiations pertaining to the purchase price. (A-1322, 1336). Further, Lynch was unable to point to any "contemporaneous contract, communication, or other document evidencing the alleged agreement or sale between Gonzalez and Lynch for the 65% transfer." (PTOM at 24).

Lynch argues that even if the price he purportedly paid for interests in GBH was arbitrary it nevertheless represented "fair value" because RAGG agreed to the same in an arm's length transaction and cites to *DFC Global Corp. v. Muirfield Value Partners, L.P.,* 172 A.3d 346, 369 (Del. 2017) in support of this contention. This citation is off-point because the holding from *DFC Global Corp.* is grounded on the subject sale involving an arm's length transaction between a willing seller and buyer whereas the record in this matter unequivocally demonstrates that RAGG had no intent to sell an ownership interest in GBH to Lynch, but rather to transfer such interests into his lawyer's name without the exchange of any consideration and for the purpose of retaining ownership while complying with Argentine regulations. There was no arm's length transaction through which RAGG willing sold GBH membership interests to Lynch for valuable consideration.

9. *The Parties Did Manifest an Intent to Paper a "Sham" Transaction*

The court correctly determined that RAGG and Lynch agreed to enter into a "sham" transaction, perpetuated and maintained through a series of agreements conceived and masterminded by Lynch, which Lynch advised RAGG would comply with Argentine law, while allowing RAGG to remain the sole owner of GBH. Lynch argues that the fact a signed copy of the Counterdocument could not be produced is compelling evidence that it was never signed. The court appropriately disagreed and concluded that the Counterdocument was intended to reflect the true agreement of the parties, that Lynch had promised RAGG that he would sign the Counterdocument, and that Lynch hid or destroyed the copy of the Counterdocument executed by RAGG when Lynch came into physical possession of the same during an audit. (PTOM at 99).

10. *The Record Reflects that RAGG Relied Upon the Legal Advice and Expertise of Lynch in Entering Into the Subject Transactions*

The court made clear that the legality of the "sham" structure under Argentine law, which was conceived by Lynch, is irrelevant to resolution of the parties' claims. (*Id*. at 119 n.510). Nevertheless, the court noted that it was relevant for purposes of deciphering the intent of the parties to acknowledge that Lynch was RAGG's lawyer, Lynch conceived the "sham" transactions, and that Lynch encouraged RAGG to enter into the same under the guise of being sound legal advice while all along Lynch

was one step ahead of RAGG and intended to utilize such agreements as the foundation to defraud RAGG and place him in a legally tenuous position that could be exploited. (*Id*. at 120, 23).

While certain witnesses expressed skepticism as to whether the "sham" transaction cooked up by Lynch would have achieved the purpose Lynch had expressed to RAGG of comporting with Argentine law and allowing RAGG to retain ownership (A-1404), the effectiveness of the documents in achieving such purpose was irrelevant for the court's determination that RAGG reasonably believed the pretextual reasons given by Lynch, his trusted lawyer, and relied upon them in executing the agreements.

11. *The Record Reflects That It Was Widely Known that RAGG Had Exclusive Control Over and Ownership of GBH*

As Lynch notes, the court concluded that as late as "February 2018, other advisors and employees of Belleville and its subsidiaries – including Lynch's subordinates – understood the same: Gonzalez, as Belleville's owner, controlled, directed, and financed the Belleville's family's operations." (PTOM at 20). In fact, the court relied upon the testimony of multiple witnesses, including uninterested third parties Mses. Curutchet and Casaleggio, who uniformly testified that they understood that GBH was owned and controlled by RAGG and not Lynch. (A-1279-80, 1292, 1308-11, 1366-68, 1398-99, 1400).

VI. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT LYNCH LITIGATED IN BAD FAITH AND SHIFTING ATTORNEYS' FEES

A. Question Presented

Did the court abuse its discretion in concluding that Lynch litigated in bad faith, warranting a shift of Appellees' legal fees to him?

Appellees' Response: No.

B. Standard and Scope of Review

Appellant cites to the incorrect standard applicable to its question presented.[4] A court's decision to award of fees as an exception to the American Rule, as well as its distinct determination as to the amount of the fees shifted, are each discretionary determinations that are reviewed upon appeal for abuse of discretion. (*Kaung v. Cole Nat. Corp*., 884 A.2d 500, 506 (Del. 2005); *Chrysler Corp. v. Dann*, 223 A.2d 384, 389 (Del. 1966)).

The essence of judicial discretion is the exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action; and where a court has not exceeded the bounds of reason in view of the circumstances, and has not so ignored recognized rules of law or practice, so as to produce injustice, its legal discretion has not been abused; for the question is not whether the reviewing court

[4] Appellant contends that *de novo* and/or clear error standards of review apply to this question. (OB at 61).

agrees with the court below, but rather whether it believes that the judicial mind in view of the relevant rules of law and upon due consideration of the facts of the case could reasonably have reached the conclusion of which complaint is made. (*Pitts v. White*, 109 A.2d 786, 788 (1954)).

C. Argument

The purpose of the "bad faith" exception to the American Rule is to deter abusive litigation and protect the integrity of the judicial process. (*Kaung v. Cole Nat. Corp*., 884 A.2d 500 (Del. 2005)). The court's determination to shift fees was grounded on the reality exposed at trial that Lynch hatched a scheme to deceive regulatory authorities, advised RAGG to enter into the same and then drafted and/or directed the drafting of "sham" documents that were signed by RAGG, all while representing to RAGG that his ownership interest in GBH would remain unchanged. (PTOM at 126). Lynch later sought to hold RAGG hostage, utilizing as leverage the legal predicament that he led him into. (*Id*. at 126). Finally, once RAGG refused to pay ransom, Lynch filed suit in Delaware falsely claiming that he was an owner and the sole manager of GBH. (*Id*. at 127).

The court was moved by the fact that at multiple points throughout the litigation Lynch pursued his claims and defenses in bad faith and pushed his false narrative. For example, when Appellees asserted counterclaims and affirmative defenses that accused Lynch of fraudulent conduct relating to the precise transaction

through which he based his claims, Lynch sought to use the statutory framework of 6 *Del. C.* § 18-110 as a shield to block the court from considering evidence that would demonstrate the true intent of the parties with respect to the "sham" transactions and expose Lynch as a fraud. (*Id*. at 127-28). After the court refused to dismiss Appellees defenses and counterclaims, and it was clear that evidence damning to Lynch's case was going to flow at trial, Lynch falsely testified in furtherance of his scheme and in an effort to explain away the problematic evidence. (*Id*.). The court determined that nearly of all Lynch's testimony was deceitful. (*Id*. at 48-49). The court did take Lynch at his word that he had blatantly lied to RAGG about his promise to sign the Counterdocument and used the promise as bait. (*Id*. at 47 n. 218, 48). The court was so taken by the untruthful testimony of Lynch that it concluded he engaged in "reprehensible conduct" and rightfully viewed itself as having been deceived by him in an effort designed to use the court as a pawn to complete his fraudulent scheme. (*Id*. at 122, 123, 128).

Lynch's bad faith continued post-trial, when after arguing throughout the litigation that his core claim was grounded upon 6 *Del. C.* § 18-110 he abandoned his claim to managerial control over GBH and most of his affirmative defenses. (*Id*. at 128).

The courts findings of bad faith are well-grounded.

CONCLUSION

For all of the foregoing reasons, the decision of the court below should be affirmed in all respects challenged in this appeal.

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Dated: January 29, 2021

CERTIFICATE OF SERVICE

I, William E. Gamgort, hereby certify that on January 29, 2021, a true and correct copy of the attached ***Corrected Appellees/Defendants-Below Answering Brief*** was filed and served via File & Serve Xpress upon the following counsel of record:

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