EFiled: Jul 30 2021 02:52PM EDT
Filing ID 66811443
Case Number 126,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROD GIESEKE, JAY BUTSON and DAN HOLLAND,	:	
Defendants-Below, Appellants,	:	
v.	:	No. 126, 2021
PEARL CITY ELEVATOR, INC.,	:	
Plaintiff-Below, Appellee,	:	On Appeal from the Court of Chancery of the State of Delaware
and	:	C.A. No. 2020-0419-JRS
ADKINS ENERGY, LLC,	:	
Nominal Defendant-Below.	:	

APPELLANTS' REPLY BRIEF

Dated: July 30, 2021

David A. Felice (#4090)
Bailey & Glasser, LLP
2961 Centerville Road, Suite 302
Wilmington, Delaware 19808
Telephone: (302) 504-6333
Facsimile: (302) 504-6334

Attorneys for Defendants-Below, Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

ARGUMENT

I. THE OPERATING AGREEMENT'S BOARD APPROVAL REQUIREMENT APPLIES TO PEARL CITY'S PROPOSED INTRA-MEMBER TRANSFERS

It is undisputed that the Adkins Board never approved the proposed private transfers at issue. It is also undisputed that Pearl City ("PCE") and its Governors flatly refused to submit its proposed private Transfers for Board approval. PCE opted instead to simply demand that the General Governors and Adkins recognize the Transfers.

But more was required. The Adkins Operating Agreement (the "Agreement") expressly states in five different places that any Transfer requires Board approval. (Opening Brief ("O.B.") at 24-25). The Court of Chancery erred when it created two different tracks for Transfers to become effective: one that required affirmative Board approval when it involved a purchase by a new Member, and the other involving intra-Member Transfers that merely had to grapple with the Board's "constrained," "limited," "tacit" or "passive" approval right. Two tracks when the Agreement only expressly contemplates one. Two tracks even though the limiting words the Court of Chancery attempts to attach to the word "approval" do not actually appear in the Agreement. And two tracks when, since 2011, the parties have been seeking and obtaining Board approval of all Transfers – including PCE for its recent intra-Member Transfers through FNC.

PCE makes four arguments in support of the Court of Chancery's holding, but none withstands scrutiny when this Court reviews the issues with the benefit of a *de novo* standard of review.

A. "To The Extent That" Language Does Not Create a Two-Track Approval Process, Nor Does it Grant the Court of Chancery Liberty to Qualify the Board's Express Right to Approve Transfers

PCE argues that the phrase "to the extent that" in Agreement § 12.1(ii) "indicates that the Agreement contemplates two separate procedures based on the membership status of the recipient." (PCE Answering Brief ("A.B.") at 25). PCE bases this argument on the notion that requiring Board approval for all proposed Transfers would "render Section 12.1(ii)'s 'to the extent that' language superfluous." *Id.* PCE is wrong. If the Agreement is interpreted properly – as requiring Board approval for all Transfers – § 12.1(ii) continues to have the effect that the parties intended. Namely, to the extent that the proposed transfer is to a non-Member, the prospective Transferring Member would first have to seek Board approval of the admission of the prospective transferee as a new Member, before seeking Board approval of the Transfer to that new Member. The Transferring Member need not seek Board approval to keep an existing Adkins Member a Member. Why two steps? A scenario could present itself where the Adkins Board approves the new Member, but cannot approve all the requested Transfers at once. That scenario is explicitly identified in both § 12.1 ("'first come, first served' basis") and in the Joinder

Agreement each new Member is required to execute:

> THAT ARTICLE 12 OF THE OPERATING AGREEMENT LIMITS THE NUMBER OF LLC UNITS THAT CAN BE TRANSFERRED BY ALL MEMBERS OF THE COMPANY IN ANY YEAR AND THAT SUCH RESTRICTIONS MAY SUBSTANTIALLY LIMIT THE ABILITY OF THE MEMBER TO LIQUIDATE THE UNDERSIGNED'S INVESTMENT IN THE COMPANY.

(A0059) (all caps in original). Neither § 12.1 nor the Joinder Agreement says first come, first served for new Members only, or that the transfer limitations in Article 12 only apply to transfers to new Members. PCE never addresses either of these provisions in its answering brief. PCE's argument and the Court of Chancery's interpretation based on that argument create more inconsistencies than they allegedly solve.

Likewise, PCE does not address the express Board approval language in the "Treatment of Transferees" provision from Agreement Amendment No. 2. (O.B. 25). There, the parties agreed that the Board could only change allocations "on a prospective basis to take effect <u>for the Transfers submitted to the Board for approval</u> in the fiscal quarter following the fiscal quarter in which the Board approves the change in the method of allocation." (A0072) (emphasis added). Under PCE's theory and the Court of Chancery's holding, the Board is only constrained to change allocations on a prospective basis for Transfers to new Members, but has unrestricted authority to retroactively change allocations for intra-Member transferees. That

does not make good commercial sense and is not what the parties understood or intended when they amended the Agreement in 2017.

The Court of Chancery wrestled with the fact that § 12.1 contains the conjunctive "and," not the disjunctive "or." (Opinion 36-37). However, the Court of Chancery's two track approval process makes the "and" an "or." When properly construed, a conjunctive "and" means each part stands on equal footing. Under Section 12.1, "Before a Transferring Member may Transfer its Membership Interests [] to any person (including another Member [an intra-Member Transfer]), such Member must first (i) given written notice of such proposed Transfer to the Company . . . ." Under § 5.10, the Board of Governors controls what the Company does or does not do. This first clause of what is a long first sentence is connected to clause (ii) with an "and." Each has equal value, and clause (ii) does not in any way limit what the Board's responsibility is generally or specially with respect to clause (i). The Court of Chancery's interpretation of the words "to the extent that" effectively changes the conjunctive "and" to a disjunctive "or." Quite literally, despite the Agreement's express language, the Court of Chancery interprets the phrase "to the extent that" to require a separate and distinct approval track "implicitly reviewed under a different process." (Opinion 37). The Court of Chancery's 20-20 hindsight observation that "the drafters [c]ould simply have written something to the effect that 'all transfers require affirmative Board approval by simple majority vote'"

(*id.*) is not an invitation to re-write the parties' Agreement. What might be implicit in 2021 cannot contravene the express language contained in the Agreement as drafted in 2011.

More to the point, the drafters did attempt to make things clear in 2011. One of the five instances where the parties expressly stated that Transfers require Board approval is contained in § 12.1:

> Any Transfer of Membership Interests in accordance with this Operating Agreement shall become effective upon commencement of the Company's next fiscal quarter following the approval of such Transfer by the Board of Governors.

(A0048) (emphasis added). "Any Transfer" does not differentiate between Transfers to a new Member and intra-Member transfers. Even PCE correctly argued in its brief that "[t]he definition of 'Transfer' in the Agreement includes any 'sale,' including a private sale." (A.B. 10). That is exactly the point. "Any Transfer" includes PCE's private intra-Member Transfers, and the Transfers do not become effective under § 12.1 until the next fiscal quarter "following the approval of such Transfer by the Board of Governors." (*Id.*).

Against this backdrop, PCE cannot rely on four words to contradict five other express instances where the Agreement references Board approval of Transfers, and a ten-year history of sellers and purchasers seeking Board approval of intra-Member Transfers.

B. *Chicago Bridge* Does Not Permit a Party to Correct Uncertainties Inherent with 50-50 Split Ownership and Board Control

PCE argues that the Court of Chancery's distinction between proposed Transfers to new Members and proposed intra-Member Transfers is necessary to "place the Agreement in its proper commercial context under *Chicago Bridge & Iron Co. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912 (Del. 2017) and its progeny." (A.B. 25). PCE laments that because the Board was split 50-50 (with three General Governors and three PCE Governors), requiring Board approval for all proposed Transfers would "hinder the possibility of expansion by allowing either faction to stonewall the other with *de facto* discretionary veto rights over all unit transfers." (A.B. 26) (quoting Opinion at 44). While PCE now finds this inconvenient, it is the bargain that the parties struck through the Agreement in 2011, and that bargain is neither unfair nor unusual. The same restrictions apply with equal force to both PCE and the General Members, and "*de facto* discretionary veto rights" are inherent in any company split 50-50.

Later in its answering brief, PCE concedes that this Court (and the Court of Chancery) cannot presume that a Governor would not act as an appropriate fiduciary. (A.B. 37). The Court of Chancery should not have allowed its interpretation of the Agreement to be affected by such a presumption. To the extent that a Governor might actually exercise discretionary authority in a faithless manner, the Court of Chancery can provide a remedy. (O.B. 27). PCE expressly agrees with this concept

because it argued in favor of it in its answering brief. (A.B. 37). PCE made a deliberate business decision in 2020 to no longer seek Board approval for private intra-Member Transfers. This Court should not now utilize *Chicago Bridge*'s "big picture" approach to interpret a 2011 agreement to placate PCE's 2020 business decisions.

Moreover, by attempting to erase the "*de facto* discretionary veto rights," the Court of Chancery merely created such veto rights for PCE. If the shoe were on the other foot and a new Member had purchased the incremental 56% from PCE,[1] the Court of Chancery's construct would have created a *de facto* veto for PCE.

C. All Members' Course of Performance, Including PCE's, Is Probative of the Parties' Intent that All Transfers Require Board Approval

PCE argues that the Court of Chancery properly ignored the parties' years of performance under the Agreement – during which PCE sought and obtained Board approval for intra-Member Transfers – because "extrinsic evidence may not be used to alter the plain meaning of a contract." (A.B. 26). PCE's reliance on the parol evidence rule is misplaced.

The parol evidence rule precludes the admission of evidence that would contradict or alter unambiguous contract terms. *Galantino v. Baffone*, 46 A.3d 1076, 1081 (Del. 2012). In this case, evidence of the parties' course of performance did

[1] Any Member that is not PCE is, by definition, a General Member.

not run afoul of the parol evidence rule because it was not introduced for the purpose of contradicting or altering any of the Agreement's terms. Instead, this evidence placed the Agreement in the proper commercial context. Even where a contract is unambiguous, the parol evidence rule does not preclude courts from considering evidence of a course of performance or trade usage. *See Specialty DX Hldgs., LLC v. Laboratory Corp. of Am.*, 2020 WL 5088077, at * 10 (Del. Super. Jan. 31, 2020) (stating that even though the word "promptly" in a contract appeared to be unambiguous, "in order to properly interpret the word 'promptly,' the Court must look to the parties' course of dealing, course of performance and the custom and usage."); *see also* Restatement (Second) Contracts § 202(4) ("Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement."); *id.* at cmt. a ("Scope of special rules. The rules in this Section are applicable to all manifestations of intention and all transactions. . . . They do not depend upon any determination that there is an ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings."); 12 Richard A. Lord, *Williston on Contracts* § 34:5 (4th ed. 2003).

Even if ambiguity is required to consider the Members' and PCE's course of

performance of seeking Board approval of intra-Member Transfers and the adoption of an Operational Manual and Summary that plainly state all Transfers require Board approval,[2] the Court of Chancery's interpretation of the words "Board approval" has, itself, introduced ambiguity. Under the Court of Chancery's interpretation, the words "Board approval" mean actual, affirmative Board approval when presented with a proposed new Member Transfer, but the same words mean "constrained," "limited," "tacit" or "passive" Board approval when presented with a proposed intra-Member Transfer. This Court can look to the undisputed and unvarying course of performance to conclude that all Transfers require Board approval.

D. PCE Has No Real Rebuttal to the Absence of a Mechanism to Police Compliance with All of § 12.2

PCE argues that the Court of Chancery's interpretation preserves the Board's oversight obligation under § 12.2 for proposed intra-Member transfers, because even if Board approval is not required, the Board may request an opinion of counsel. (A.B. 28). The Opinion language PCE cites is misplaced and, if anything, underscores the policing gap left by the Court of Chancery's flawed attempt to

[2] PCE continues to misinterpret the probative value of the Operational Manual and Summary in an effort to defeat their application. (A.B. 27). Those documents were not introduced to contradict or amend the Agreement. Instead, those documents and evidence of their adoption by the full Board demonstrates PCE always understood Board approval was required for all Transfers. Otherwise, the PCE Governors would not have voted in favor of their adoption in 2018. To register as a Purchaser with FNC, and each time it made a purchase through FNC, PCE had to agree to be bound by the Operational Manual's terms. (O.B. 18-19; A0086).

harmonize "constrained," "limited," "tacit" or "passive" Board approval with the Board's obligations under § 12.2.

In the first instance, the Opinion citation upon which PCE relies was actually an explanation by the court as to why it disagreed with PCE's attempt to rely on the Latin definition of "i.e." or "id est" to distance itself from the plain language in § 5.2. (Opinion 44-45). However misplaced, the Opinion citation only references the Board's ability to receive or waive receipt of the opinion of counsel required under § 12.2. (Opinion 45-46). The required opinion of counsel only covers § 12.2(iv) through (viii). (A0048). PCE has no rebuttal to the undisputed fact that without the Board being able to approve (or disallow) a proposed intra-Member Transfer, there is no mechanism to police compliance with § 12.2(i) through (iii). It is unreasonable to conclude that sophisticated parties to the Agreement, both assisted by counsel in 2011, would leave such a compliance gap in § 12.2. There was no evidence that the parties or Locke Lord intended the void *ab initio* clause at the end of § 12.2 to serve as a substitute for the propriety of prudent Board decision-making following advance notice of any proposed Transfer.

For these reasons, the Court should reverse the Court of Chancery's Opinion on the Board approval requirement and direct that judgment be entered in Appellants' favor.

II. PCE FAILED TO SATISFY THE AGREEMENT'S PROCEDURAL REQUIREMENTS FOR MAKING THE PROPOSED TRANSFERS EFFECTIVE

While placed in the forefront in Appellants' opening brief, PCE failed to rebut (and indeed cannot explain) the blatant discrepancy between the plain language in Agreement § 12.1 and the Court of Chancery's holding as to the procedural requirements to Transfer Units. (O.B. 30-31). The words in §12.1 are as follows:

> Before a Transferring Member may Transfer its Membership Interest (including all associated LLC Units) to any Person (including another Member), such Member must first (i) give written notice of such proposed Transfer to the Company which notice shall describe the terms and conditions of the proposed Transfer (and, to the extent applicable, shall contain a copy of the proposed contract of sale) and shall be in the form of the Notice of Proposed Transfer included as Exhibit C hereto . . . .

(A0047) (emphasis added). On page 54 of its Opinion, the Court of Chancery holds as follows with respect to § 12.1:

> The Agreement unambiguously requires "written" notice of transfers to be submitted at a time chosen by the transferring Members.

See also Opinion 34. The two cannot be reconciled, and PCE does not even attempt to do so. This unrebutted and incontestable error warrants a reversal of the Court of Chancery's decision on the issue of the Agreement's procedural requirements.

Failing to take the bull by the horns, PCE instead turns its focus to ancillary arguments in an effort to salvage its ill-gotten victory. None of these issues rebut the error identified and, in any event, they do not change the plain meaning of §

12.1's procedural requirements.

First, PCE conflates Appellants' knowledge of the Purchase Offer (one of two initiatives PCE undertook starting in March 2020, the other being the Exchange Offer), with the actual private intra-Member purchases it undertook between February and May 2020. (A.B. 30). The Purchase Offer initiative and PCE's actual purchases are two separate things. Appellants knew of the Purchase Offer initiative and PCE's purchase of 863 Units through FNC. Appellants did not know of PCE's purchase of 6,475 Units through private, intra-Member Transfers until after they were sued. To be clear, for nine years – from 2011 through 2020 – PCE and the General Members' ownership stakes remained at 50-50. Beginning in February 2020, PCE only disclosed its purchase of 863 Units it acquired through FNC (which were presented for and received Board approval). PCE made the conscious and deliberate decision to withhold disclosure of its run-up to the 56% through its private acquisition of the other 6,475 Units until after PCE sued Appellants. (A0338-9; A0763-4 (Tr.176:12-180:7); A0842 (Tr.489:-490:5)). Likewise, PCE does not offer any explanation for the fact that § 12.1 required notice by the Transferring Member, not the purchasing party. (O.B. 32). A proposed new Member purchaser is not yet bound by the Agreement. That is why the parties placed the notice obligation on the proposed Transferring Member. There is no record evidence that any Transferring Member provided notice at any time. Only PCE's notice after it sued Appellants.

Second, PCE attempts to excuse its failure by arguing that the Agreement does not require it to provide advance notice – and, instead, requires only "written notice," no matter how delayed. As set forth above, § 12.1 unambiguously requires that "[b]efore" any proposed Transfer, the Member "must first (i) give written notice of such proposed Transfer to the Company." (A0047). The word "advance" is not the only word in the English language that connotes that something has to be done beforehand. Even Foley testified that the word "proposed" in Adkins' Exhibit C Notice of Proposed Transfer means "before" the actual transfer. (A0821). Section 12.1 and Adkins' form of Notice of Proposed Transfer provide sufficient indicia of the parties' intent that the Board should receive notice of a proposed Transfer before the Transfer is consummated.

In an effort to disclaim the plain meaning of the words "first," "before," and "proposed," PCE and the Court of Chancery assert that the use of these words "simply demonstrate[s] that such written notice must be given to Adkins ***before*** the 'proposed transfer' becomes effective at the beginning of the next fiscal quarter." (A.B. 32) (citing Opinion 53) (emphasis in original). They both have jumped out of the frying pan and into the fire. It is undisputed that PCE undertook at least one but most likely two private intra-Member purchases in February 2020. (A0470). Adkins' next fiscal quarter started March 1, 2020. Even under the Court of Chancery's flawed interpretation of § 12.1's procedural requirements, PCE was

required to provide the Company with written notice of those private purchases ***before*** March 1, 2020. By failing to follow the Agreement's procedural requirements, PCE created the very same problem it now claims cannot be undone – namely, the "draconian (and *in personam*) remedy" of potentially undoing transfers that were consummated without notice to Adkins or the Board. (A.B. 33).

Third, PCE argues that even if the Agreement does require advance notice, and even if PCE failed to comply with the Agreement's requirements, that Appellants "still would not be entitled to the draconian (and *in personam*) remedy they seek." (A.B. 33). Initially, it is PCE that seeks declaratory relief as to the effectiveness of the intra-Member Transfers for purposes of the ownership percentages needed for Board expansion. PCE bears the burden of proof, not Appellants. Contrary to PCE's hyperbole, there is nothing "draconian" about enforcing the terms of the Agreement. PCE and the proposed Transferring Members (all of whom are, of course, Adkins Members) all agreed to those terms. Agreement § 12.2 gave express notice to PCE and all of the proposed Transferring Members that "[a]ny purported issuance or Transfer which would otherwise violate the requirements of Section 12.2 shall be void and of no effect." (A0048). PCE does not get to back into the effectiveness issue being decided in its favor as a "reward" for its knowing violations of the Agreement and breaches of its fiduciary duty of disclosure. The Court of Chancery and this Court can declare that because PCE did

not comply with the Agreement's terms, including obtaining Board approval, PCE merely holds an economic interest in the 6,475 Units acquired through the private sales, not the associated membership rights. PCE would need to follow the Agreement's requirements, including seeking Board approval for the effectiveness of the private Transfers, before it can exercise or benefit from the membership rights belonging to those 6,475 Units.

Finally, PCE turns to its newly-minted post-trial argument: substantial compliance. (A.B. 32). The Court should not ponder long on PCE's substantial compliance argument for three main reasons. First, PCE did not assert substantial performance as a basis for relief in its Complaint, the Pre-Trial Order or its Pre-Trial Brief. As a result, this legal and factual argument could not be raised for the first time post-trial. *Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397, at *15 (Del. Ch. May 23, 2008). Second, the very case PCE relied upon to support its new post-trial argument below – *Gildor v. Optical Sols., Inc.* – actually held that substantial compliance is only available when literal compliance is not possible. 2006 WL 4782348, at *7 (Del. Ch. June 5, 2006) ("When literal compliance is not possible, [substantial compliance] is a sensible rule"). Here, literal compliance with the procedural and substantive requirements set forth in the Agreement was possible. PCE simply chose to ignore them. (A0732-3 (Tr.51:17-53:11)).

The case PCE used to replace *Gildor – Jefferson Chem. Co. v. Mobay Chem.*

Co. – addressed the alleged forfeiture of a patent after the plaintiff committed a technical mistake by erroneously dismissing litigation rather than simply staying it. *Jefferson*, 267 A.2d 635, 637 (Del. Ch. 1970). Those specific and compelling facts, which drove the equitable finding in *Jefferson*, are not present here.

For these reasons, the Court should reverse the Court of Chancery's Opinion pertaining to § 12.1's procedural requirements and direct that judgment be entered in Appellants' favor.

III. PCE FAILED TO SATISFY THE AGREEMENT'S SUBSTANTIVE REQUIREMENTS FOR MAKING THE PROPOSED TRANSFERS EFFECTIVE

It is undisputed that under Agreement § 12.2, a proposed Transfer does not become effective until an opinion of counsel, "satisfactory in form and substance to the Board and counsel for the Company," is delivered to the Board. (A0048-49) (emphasis added). It is also undisputed that PCE did not deliver any opinions of counsel to the Board before demanding Board expansion or before filing its Complaint. As identified below, PCE did not respond to Appellants' ripeness arguments or attempt to distinguish the caselaw standing for the proposition that the "PC Opinions" were inadmissible for their substance. Instead, PCE merely recycles excuses for its failure to timely or substantively discharge its obligations under § 12.2.

A. PCE Does Not Argue that Its Complaint Was Ripe When Filed

PCE never submitted substantive opinions of counsel to the Board or the Company for their review. Rahn's August 10, 2020 letter was a settlement demand in the litigation. Furthermore, it is undisputed that PCE never presented its PC Opinions for Board or Company approval; they simply demanded acknowledgement. *See infra*, p.22; (A0388-9). On this record, it cannot be contested that PCE's Complaint was not ripe when filed in May 2020. (O.B. 34). PCE does not and cannot contest this conclusion. Additionally, PCE did not respond

to the analogous authority emanating from this Court's precedent addressing advance notice bylaws. (O.B. 35). Either one of these uncontested bases is sufficient to reverse the Court of Chancery's Opinion.

B. PCE's Misplaced Merits Response

PCE initially contends that Appellants' challenges to the substance of PCE's "PC Opinions" should be disregarded under some estoppel or waiver theory. (A.B. 35). Initially, PCE only raised a waiver argument below, and the Court of Chancery refused to find a waiver. The estoppel argument is new in this appeal. In any event, the arguments lack merit. First, § 12.2's substantive requirements are not Appellants' alone to waive. Appellants lack a simple majority of the Board, and the opinion of counsel must also be satisfactory to both the Board and Company counsel. Second, the Agreement contains an express anti-waiver provision. (A0054 § 16.8). Third, there was no relinquishment by Appellants. Special meetings were called, but the PCE Governors refused to participate. Appellants' counsel asked for summary judgment briefing from the Court of Chancery, but the court did not grant it. Finally, Appellants testified that since the proposed special meetings, they learned facts through discovery demonstrating PCE's misguided efforts that would lead them to vote against the proposed private Transfers now. (A0760 (Tr.163:1-21); A0771 (Tr.205:1-206:9); A0842- (Tr.492:15-493:11)). Absent affirmative action by the Board or the court, people are allowed to change their minds given

discovery of new facts.

Next, PCE contends that it complied with the Agreement by providing the PC Opinions to the Board on August 10, 2020, approximately two and a half months after making its initial demand for acknowledgement and filing its Complaint. PCE first argues that "the PC Opinions were not delivered too late" (PCE Br. at 36), because this merely meant that the Board expansion became effective as of September 1, 2020, after repeated "demands" by PCE that Appellants "recognize the transfers and appointment of Daly [as the seventh Governor]." (A.B. 36). Demands are different than submitting the proposed private Transfers for Board approval – which PCE refused to do. (A038-9; A0734 (Tr.58:20-59:8) (Ramsel testifying that the PCE Governors refused to attend the two special meetings); (Tr.430:5-12; 434:8-15) (Foley testifying that PCE did not seek Board approval of the private Transfers at the August 10, 2020 meeting and that it is PCE's and the PCE Governors' understanding that transfers do not need Board approval, only Board acknowledgment)). Board approval requests were never made, only demands for acknowledgement. Therefore, Appellants and the Board were incapable of "blithely deny[ing]" requests that were never made.

PCE takes a stilted view of Appellants' "pocket approval" scenario and analyses it as a "pocket veto." (A.B. 37). PCE argues that "[i]t is improper to assume that the Pearl City Governors would not act as appropriate fiduciaries." (*Id.*). This

is, of course, the exact opposite of what PCE argues regarding Board approval and the alleged *de facto* discretionary veto. The double standard proposed by PCE finds no support in the Agreement or the law.

C. The "Substance" of the PC Opinions Was Inadmissible

Section 12.2 states that no proposed transfer may occur unless, *inter alia*, an opinion of counsel is delivered "satisfactory in form and substance to the Board and counsel for the Company." (A0048) (emphasis added). If, as PCE contends, the Court of Chancery considered only the facts that the PC Opinions "exist and say what they say (true or not)", then the most that the Court of Chancery could have found was that the opinions were satisfactory in form (*i.e.*, they were from an attorney or law firm, and purported to address the required subjects). However, the Court of Chancery did not limit its consideration to the form of the PC Opinions; instead, it erroneously proceeded to consider the substance of the opinions, finding by a preponderance of the evidence that "the PC Opinions satisfied Section 12.2." (Opinion 60).

Even assuming, for purposes of argument, that the Court of Chancery had the authority to substitute its own judgment for the judgment of Adkins' Board,[3] it could not possibly determine whether the PC Opinions were satisfactory in substance without first considering whether the statements therein were true. Whether and to

[3] O.B. 36.

what extent the PC Opinions opined on the substance of all five issues in § 12.2(iv) through (viii) is an acceptance of the PCE Opinions for the truth of the matters asserted therein. That was a clear factual error and an erroneous legal conclusion based on a misinterpretation of Rule 801.

PCE did not and cannot distinguish the applicability of Appellants' cited precedent. (O.B. 38-39). Moreover, PCE did not cite any precedent of its own for the proposition that the Court could consider the PC Opinions and make a preponderance of the evidence finding. Instead, PCE parrots what the Court of Chancery used to buttress its factual finding – that Appellants could not identify post-trial what was wrong with the PC Opinions. Appellants did identify sufficient bases why a prudent fiduciary might question the PC Opinions (A1003-7 (Tr.79:1-83:15 (discussing several); A1027 (Tr.103:10-23) (discussing an additional issue not passed on below)).

However, the presumption that Appellants had to rebut the PC Opinions is flawed. PCE never identified the authors of the three letters as fact or expert witnesses – for trial or otherwise. PCE never identified any of the three PC Opinions as opinions of testifying experts. The three authors were never called to testify at trial and were not subject to cross-examination at any time. And, as identified above, when PCE sought to introduce the three PC Opinions, PCE agreed that the letters were not being introduced for the truth of the matters asserted therein. (A0733-4

(Tr.54:3-58:4)). When measured against this record, it was improper to substantively penalize Appellants for allegedly failing to adequately rebut the substance of the PC Opinions.

For these reasons, the Court should reverse the Court of Chancery's Opinion pertaining to § 12.2's substantive requirements and direct that judgment be entered in Appellants' favor.

IV. THE COURT OF CHANCERY ERRED IN REJECTING APPELLANTS' UNCLEAN HANDS DEFENSE

PCE only places glancing blows to Appellants' argument and, on two occasions, fails to contest arguments at all. Moreover, PCE attempts to contest an argument (PCE's hiring of a broker) that Appellants did not even assert in this appeal. As set forth below, the three arguments Appellants did present to this Court (in the alternative to the reversals requested above) each have merit and serve as sufficient bases to vacate the Court of Chancery's Opinion.

First, PCE does not contest that the Court of Chancery failed to adjudicate Appellants' argument that PCE breached its duty of disclosure when it failed to disclose to both the proposed Transferring Members and the balance of the minority Members its run-up to the 6,475 Units it purported to acquire through private, intra-Member Transfers. (O.B. 41, 42). Instead, PCE attempts to defend the Opinion by arguing the 277 Units PCE acquired through FNC that PCE did not report to the proposed Transferring Members were de minimis. (A.B. 41). PCE does not attempt to defend the clear factual error committed by the court in finding that the 277 Units were not reflected on the Company's register. They were. (O.B. 41). As identified above, while Appellants were and the minority Members could have been (pure speculation) aware of PCE's Purchase Offer, no one knew the extent to which PCE had privately purchased Units through intra-Member Transfers – not even the Transferring Members. *See supra*, p.15; (A0100-77). As evidence by its own board

meeting minutes, PCE wanted everything to remain confidential, especially when it resolved to sue Adkins as early as May 6, 2020. (A1033-5; A0741 (Tr.86:15-87:7); A1036-7). PCE did not seek Board approval because it was confidentially gearing up to sue – not because Board approval was not required or because it would have been futile to do so. . This is bad faith because it robbed the minority Members of any chance to deploy their own capital to stave-off a change of control at the 56% ownership threshold.

Second, PCE misapprehends Appellants' coercion argument. It is irrelevant that Members were not obligated to sell and could offer any price on FNC. (A.B. 41-42). The focus of this defense is on PCE's actions. PCE offered a higher price to its cooperative members/"patrons" and a lower price to all the other minority General Members. (O.B. 43-44). Couple this with PCE's: (i) false market marker on FNC and (ii) failure to candidly disclose its ownership positions, and the process was coercive to the extent PCE attempted to maintain a depressed Unit price while it worked to clandestinely acquire an additional 6% of Adkins' Units during the COVID pandemic.

CONCLUSION

For the reasons set forth herein, and in Appellants' Opening Brief, Appellants respectfully request that this Court reverse the Court of Chancery's declaratory judgment in PCE's favor and remand to the Court of Chancery with instructions to enter judgment in their favor. Alternatively, the Court should vacate the denial of Appellants' unclean hands defense and remand the matter for further proceedings.

Dated: July 30, 2021

/s/ David A. Felice

David A. Felice (#4090)
Bailey & Glasser, LLP
2961 Centerville Road, Suite 302
Wilmington, Delaware 19808
Telephone: (302) 504-6333
Facsimile: (302) 504-6334

Attorneys for Defendants-Below, Appellants