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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD BALDWIN, Defendant / Counterclaim-Plaintiff Below, Appellant, v. NEW WOOD RESOURCES LLC, Plaintiff / Counterclaim-Defendant Below, Appellee.	No. 303, 2021 Court Below: Superior Court of the State of Delaware C.A. No. N20C-10-231 AML CCLD

APPELLANT'S REPLY BRIEF

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Dated: December 23, 2021

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SUMMARY OF THE ARGUMENT

3. Denied. The issue presented in Section III of Appellee New Wood Resources LLC's ("New Wood") Answering Brief does not provide a basis for affirming the Superior Court's rulings because: (a) New Wood did not file a cross-appeal and the issue is not properly presented in this Court; and (b) Appellant Richard Baldwin's ("Dr. Baldwin") affidavit of defense is sufficient under 10 *Del. C.* 3901.

ARGUMENT

Appellant Dr. Baldwin submits this reply brief to address certain points raised by New Wood in its Answering Brief, as well as the new issue raised by New Wood in Section III of its brief.

I. DR. BALDWIN'S COUNTERCLAIM AGAINST NEW WOOD IS PROPER AND HE DID NOT "SUE THE WRONG ENTITY"

New Wood argues that the first issue is not properly presented because the "facts" Dr. Baldwin cites in support of this argument are not facts of record and therefore the issue has been waived. This argument misses the point.

First, the Written Consent of Certain Members of New Wood Resources LLC ("Written Consent") dated April 23, 2020, is of record. (**A108-11**.). And from that document and others, all the facts and inferences that support the first argument on appeal can be drawn.

Second, the document is titled "Written Consent of Certain Members ***of*** New Wood Resources LLC," meaning that the document was generated on behalf of and for the benefit of New Wood. (**A108**.) The document is signed by Andrew Bursky ("Bursky") as one of the "Members ***of*** New Wood Resources LLC . . . ." (**A108**.) The document speaks for itself, it is a "New Wood document," and Bursky was simply signing the documents on behalf of the majority unitholder ***of*** New Wood.

As a result, all the points on pages 21 to 23 of Dr. Baldwin's Opening Brief are drawn from documents of record. These are not facts that need to be established through deposition testimony or any other type of record evidence. Indeed, this matter was decided on a motion for judgment on the pleadings, meaning there were no depositions by which to develop a fuller record on this issue. To the extent a fuller record should have been developed on the issue through discovery, this is another reason why judgment on the pleadings should not have been entered.

But as the record stands, all reasonable inferences establish that the Written Consent was generated on behalf of and for the benefit of New Wood, New Wood is the true party in interest, New Wood is the one seeking to claw back what New Wood paid to Dr. Baldwin as indemnification, and Bursky did no more than simply sign the Written Consent on behalf of the majority unitholder of New Wood. These are facts and legal inferences on which the record evidence provides an abundant foundation and no other record evidence is necessary. New Wood's argument that these points have been waived is baseless.

II. A COVENANT AND TERM OF GOOD FAITH IS IMPLICIT IN SECTION 8.2 OF THE LLC AGREEMENT

In its Answering Brief, New Wood purports to address the point made in Section II.C.4 of Dr. Baldwin's Opening Brief, which is that refusing to read a good faith requirement into Section 8.2 of New Wood's Second Amended and Restated Limited Liability Company Agreement ("LLC Agreement") effectively extricates the indemnity provision from the LLC Agreement altogether. The reason New Wood can only give passing reference to this argument is that it is unassailable.

Again, New Wood's officers and directors are and will continue to be — unless the Superior Court's ruling is overturned by this Court — duty bound to issue a finding of bad faith by any Manager or Member who is provided with indemnity, and then claw back the amount paid as indemnity. And, if the Superior Court's ruling is allowed to stand, the Manager or Member will have absolutely no recourse, even though: (a) they never acted in bad faith, (b) they never failed to act in New Wood's best interest; and (c) New Wood acted in bad faith when if alleged that the Manager or Member allegedly acted in bad faith. As it stands now, the Superior Court has eliminated the right to indemnity from the New Wood LLC Agreement.

This is not how the indemnity provision in the LLC Agreement was intended and it is not how it should be construed. Rather, the only legally viable construction is that an implicit covenant of good faith and fair dealing is embodied in Section 8.2

of the LLC Agreement for determining whether a Manager or Member acted in good faith and is entitled to indemnity.

III. DR. BALDWIN'S AFFIDAVIT OF DEFENSE WAS SUFFICIENT UNDER 10 *DEL. C.* 3901

A. Question Presented

Is the sufficiency of Dr. Baldwin's affidavit under 10 *Del. C.* 3901 an issue properly before this Court given that New Wood did not file a cross-appeal under Supreme Court Rule 6?

Even if the issue were properly presented to this Court, was Dr. Baldwin's affidavit sufficient under 10 *Del. C.* 3901?

B. Scope of Review

The Superior Court did not rule on the sufficiency of Dr. Baldwin's affidavit under 10 *Del. C.* 3901, meaning there is no lower court ruling to which a scope of review can be applied. The question of the sufficiency of Dr. Baldwin's affidavit under 10 *Del. C.* 3901 presents a legal question, although the answer to that question is dependent on certain facts discussed below.

C. Merits of the Argument

1. This Issue Is Not Properly Before the Court

New Wood did not file a cross-appeal, as it could have and should have if it intended to present this issue for review under Supreme Court Rule 6. It chose not to do so and now simply argues that this Court can affirm on other grounds not addressed below.

This Court has held, as New Wood quotes, that the Court can "rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court." *Unitrin, Inc. v. Am. Gen. Corp*., 651 A.2d 1361, 1390 (Del. 1995). But this Court has also declined to review issues without having the benefit of the lower court's ruling on the issue. This is how the appellate process works — lower courts make decisions on issues, which can then be appealed and subject to review by this Court applying the appropriate standard and scope of review.

For example, in *Sierra Club Citizens Coalition, Inc. v. Tidewater Env't Servs., Inc*., 51 A.3d 463 (Del. 2012), various issues were presented on appeal and cross-appeal. This Court addressed some of the issues, but declined to address an issue presented on cross-appeal because the Superior Court had not addressed it:

> TESI presented this issue to us via cross appeal, but we decline to resolve it without the benefit of the Superior Court's opinion on the issue. The Superior Court judge decided that the facility counted as a manufacturing use, and therefore, did not reach this issue.

51 A.3d at 468; *see also Unitrin*, 651 A.2d 1361, 1390 (Del. 1995) (declining to address an issue because "[t]he Court of Chancery should have the opportunity to address those alternative breach of duty arguments in the first instance.").

The same result is appropriate on the issue raised by New Wood in Section III of its Answering Brief. The Superior Court did not make a ruling on this issue, no cross-appeal was taken from the lower court's inaction, this Court does not have the

benefit of the Superior Court's opinion on the issue, and the issue is not properly presented for review.

2. Dr. Baldwin's Affidavit Is Sufficient

Even if this issue were properly presented for review, Dr. Baldwin's affidavit is sufficient under 10 *Del. C.* 3901 for three reasons.

First, Dr. Baldwin's affidavit does what it is supposed to do under 10 *Del. C.* 3901 — it identifies the specific nature and character of his defenses to the claims against him and the factual bases therefore, as well as his affirmative defenses and counterclaim. Dr. Baldwin does that by attesting to the fact that: (a) he has defenses to the claims in New Wood's Amended Complaint, Dr. Baldwin Aff. ¶ 2 (**A140**); (b) those defenses are set forth in his Answer, Affirmative Defenses, and Counterclaim to the Amended Complaint, *id*. ¶ 3; (c) he attests to the truth and correctness of these statements to the best of his knowledge, information, and belief, *id*.; and (d) he does so under penalty of perjury, *id.*

Again, the affidavit does what it is supposed to do. It references and effectively incorporates by reference a document that is 27 pages long (**A112-38**), has 25 paragraphs of answers to the allegations in the Amended Complaint (**A112-23**), has three affirmative defenses (**A124**), and has 58 paragraphs of allegations in support of his counterclaim (**A125-38**). Substantively, the affidavit is no different than it would be had Dr. Baldwin or his attorney block copied the entirety of the

Answer, Affirmative Defenses, and Counterclaim and included Dr. Baldwin's signature line at the bottom.

To deem Dr. Baldwin's affidavit insufficient as a matter of law, as New Wood argues, would be to place form over substance. New Wood and the Superior Court were provided with the substance of the defenses Dr. Baldwin was raising to the claims that were asserted against him. No more is required under 10 *Del. C.* 3901 and the Superior Court properly declined to rule on this issue:

> We approve this evolution [of 10 *Del. C.* 3901] in light of the significant change which has occurred in ruling on pleadings; nowadays courts look with disfavor on the loss of substantive rights resulting from a technical error in pleadings, if correction will not seriously prejudice another party.
>
> We hold that an amendment to the affidavit of defense should have been permitted because the defect in the affidavit is purely technical in nature, plaintiff had been informed in the answer as to the nature of the affirmative defense, and no unfair surprise or prejudice will result to plaintiff from the amendment.

Donahue v. Ridge Homes, 390 A.2d 413, 414 (Del. 1978); *see also Doughty-McKenna Family Trust v. Doughty*, No. K20C-07-007, 2021 Del. Super. LEXIS 147, at *4 (Del. Super. Feb. 19, 2021) ("The affidavit [of defense] need not be a repeat of

the Respondent's answer, but it does need to be an affirmation of the Respondent that she has a legal defense to the action . . . ." (internal quotations omitted)).[1]

Second, this matter was not resolved based on a complaint and an answer without any affidavit of defenses, as many cases are. There was a substantial and extensive legal history behind this case, as outlined in Dr. Baldwin's Opening Brief — there have been four related actions, one in federal court in Mississippi, one in state court in Mississippi, and two in the Court of Chancery. As this Court has recognized, at a certain point in time the requirements of 10 Del. C. 3901 are no longer relevant:

> The second issue on appeal is whether Superior Court committed legal error in entering a money judgment against appellants upon lender's affidavit of demand and notwithstanding borrowers' affidavit of defense. While plaintiff's original Complaint lacked as an exhibit the bond on which the Complaint was based, appellants by Answer and discovery admitted execution and delivery of the bond; and more than 18 months before plaintiff's motion was heard, a copy of the instrument was filed with the Prothonotary. Further, judgment was not taken by default but was only entered after extensive discovery and a prior partial summary judgment proceeding which disposed of all issues raised by appellants' affidavit of defense. Hence, the requirements of 10 *Del. C.* § 3901 ceased to be applicable.

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[1] *See also Homemakers Loan & Consumer Disc. Co. v. Petrovitch*, No. 80L-JL-26, 1982 Del. Super. LEXIS 846, at *7 (Del. Super. Aug. 31, 1982) ("[T]he modern trend has been to liberalize the rules of pleading so as to avoid harsh situations in which parties lose substantive rights because of purely technical errors that do not seriously prejudice their opponents. Thus, it has been held that where no surprise or unfair prejudice to the opposing party would result, defendants should be permitted to amend their affidavits of defense even where the filing deadline has passed.").

Berg v. Liberty Fed. Sav. & Loan Assoc., 428 A.2d 347, 350 (Del. 1981).

Likewise, New Wood filed an Answer to Defendant / Counterclaim Plaintiff's Counterclaim, which contains answers to all 58 paragraphs and includes an affirmative defense. (**A169-83**.) The substance of Dr. Baldwin's affidavit of defense was fully disclosed in this case and there have been no "surprises."

Third, case law is directly on point. In *J.A. Montgomery, Inc. v. Marks Mobile Homes, Inc*., 254 A.2d 853 (Del. Super. 1969), the plaintiff challenged the sufficiency of the defendant's affidavit of defense. The Court began by noting that simply referring to the defenses as set forth in the answer would not be sufficient because 10 *Del. C.* 3901 requires a sworn statement. In rejecting the plaintiff's challenge, the Superior Court outlined the proper legal analysis for assessing the sufficiency of a sworn affidavit of defense:

> If an affidavit merely referred to another document as the location of statements concerning the nature and character of a defense, said statements would not be sworn to and the affidavit would fail.
>
> Here, however, paragraph 4 of the affidavit states:
>
> > "The facts contained in the foregoing Answer are true and correct according to his (affiant's) personal knowledge."
>
> Thus the facts constituting the defense contained in the answer were not only referred to in the affidavit, but were sworn to in the affidavit as correct. By so referring to and swearing to the facts set out in the answer, the affidavit stands as if said facts were actually recited in the affidavit and it is therefore sufficient.

J.A. Montgomery, 254 A.2d at 856.

Dr. Baldwin's affidavit of defense does exactly what the affidavit of defense in *J.A. Montgomery* did and was found to be sufficient. Dr. Baldwin identifies his defenses as those in his Answer, Affirmative Defenses, and Counterclaim and he attests under penalty of perjury that this is true and correct to the best of his knowledge, information, and belief:

> 2. I believe in good faith that I have defenses to the Amended Complaint in this action.
>
> 3. To the best of my knowledge, information and belief, the factual basis for the defenses are as stated in the Answer, Affirmative Defenses and Counterclaim to Amended Complaint.
>
> I declare under penalty of perjury under the laws of the State of Delaware that the foregoing is true and correct to the best of my knowledge, information and belief.

Aff. of Def. Pursuant to 10 Del. C. 3901 and 10 Del. C. 3927 (**A140**).

Under *J.A. Montgomery* and the other case law cited above, Dr. Baldwin's affidavit of defense is sufficient and this issue does not provide a basis to affirm the Superior Court's decision.[2]

[2] Lastly, and as a procedural point, judgment on the pleadings is not the correct procedural mechanism by which to challenge the sufficiency of an affidavit of defense. Rather, a default judgment is proper procedure for challenging a deficient affidavit of defense. *See* 10 *Del. C.* 3901(d).

CONCLUSION

For the reasons set forth above, this Court should reverse the Superior Court's August 23, 2021, Order and the Final Order and Judgment based thereon dated August 27, 2021.

Respectfully submitted,

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