



**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 CORRECTED OPENING BRIEF**

OF COUNSEL:

Chris L. Gilbert  
GILBERT PC  
100 Crescent Court, Suite 700  
Dallas, TX 75201  
214-613-1112 (tel)

Sean J. Bellew (#4072)  
BELLEW, LLC  
Red Clay Center at Little Falls  
2961 Centerville Road, Suite 302  
Wilmington, DE 19808  
610-585-5900 (tel)

*Attorneys for Defendant /  
Counterclaim-Plaintiff Below,  
Appellant Richard Baldwin*

Dated: November 12, 2021

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....iv

NATURE OF THE PROCEEDINGS ..... 1

SUMMARY OF THE ARGUMENT .....3

STATEMENT OF THE CASE.....5

    A.    The Underlying Litigation.....7

        1.    The Mississippi Federal Action ..... 7

        2.    The First Delaware Action.....8

        3.    The Mississippi State Action .....9

    B.    The Delaware Advancement Action .....10

        1.    The Basis for Seeking an Advancement .....11

    C.    The Claims, Defenses, and Rulings in This Case .....14

        1.    New Wood’s Claims Against Dr. Baldwin.....14

        2.    Dr. Baldwin’s Defenses and Counterclaims .....16

        3.    The Superior Court’s Decision .....17

ARGUMENT .....19

I.    DR. BALDWIN’S COUNTERCLAIM AGAINST NEW WOOD IS PROPER  
AND HE DID NOT “SUE THE WRONG ENTITY” .....19

    A.    Question Presented .....19

    B.    Scope of Review.....19

    C.    Merits of the Argument .....19

II.	A COVENANT AND TERM OF GOOD FAITH IS IMPLICIT IN SECTION 8.2 OF THE LLC AGREEMENT.....	24
A.	Question Presented.....	24
B.	Scope of Review.....	24
C.	Merits of the Argument.....	25
1.	The Superior Court Held That There Is No Implied Covenant of Good Faith and Fair Dealing.....	25
2.	Good Faith and Fair Dealing Under the Delaware Limited Liability Company Act .....	26
3.	An Implied Covenant of Good Faith Is Tethered to the Indemnity Provision in the LLC Agreement .....	28
4.	Refusing to Recognize an Implied Covenant of Good Faith Negates the Indemnity Provision Altogether.....	29
5.	A Covenant of Good Faith and Fair Dealing Fills a Gap and Addresses Unanticipated Developments.....	31
6.	Refusing to Recognize a Term of Good Faith Frustrates the Rights Under the LLC Agreement.....	32
7.	The Paper Record in Terms of “Good Faith” .....	34
8.	How Courts Have Construed Implied Covenants of Good Faith.....	37
9.	An Analogy Provides Further Guidance.....	40
10.	The Superior Court Never Addressed the Allegations in Dr. Baldwin’s Answer or Affirmative Defenses .....	41
	CONCLUSION.....	43

CERTIFICATES

ADDENDUM

**Dkt. 23:** Order granting Plaintiff / Counterclaim Defendant's Motion for Judgment on the Pleadings (filed Aug. 23, 2021)

**Dkt. 25:** Final Order and Judgment (filed Aug. 27, 2021)

## TABLE OF AUTHORITIES

### CASE LAW

<i>Bäcker v. Palisades Growth Cap. II, L.P.</i> , 246 A.3d 81 (Del. 2021).....	19
<i>Baldwin v. New Wood Resources, LLC</i> , C.A. No. 2019-0019-JRS (Del. Ch. filed Jan. 10, 2019) .....	10
<i>Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund</i> , 624 A.2d 1199 (Del. 1993).....	24
<i>Frank v. Wilson</i> , 32 A.2d 277 (Del. Ch. 1943) .....	6-7
<i>General Elec. Co. v. Joiner</i> , 522 U.S. 136 (1997) .....	40
<i>GMG Cap. Invs., LLC v. Athenian Venture Partners I, LP</i> , 36 A.3d 776 (Del. 2012).....	25
<i>Hathaway v. Bazany</i> , 507 F.3d 312 (5 <sup>th</sup> Cir. 2007) .....	40
<i>Huatuco v. Satellite Healthcare</i> , C.A. No. 8465-VCG, 2013 Del. Ch. LEXIS 298 (Del. Ch. Dec. 9, 2013).....	27
<i>In re Atlas Energy Res., LLC</i> , C.A. No. 4589-VCN, 2010 Del. Ch. LEXIS 216 (Del. Ch. Oct. 28, 2010) .....	27
<i>In re IT Grp., Inc.</i> , 448 F.3d 661 (3d Cir. 2006) .....	33

<i>Killian v. McCulloch</i> , 850 F. Supp. 1239 (E.D. Pa. 1994).....	33
<i>Klaassen v. Allegro Dev. Corp.</i> , 106 A.3d 1035 (Del. 2014).....	19
<i>Kuroda v. SPJS Holdings, L.L.C.</i> , 971 A.2d 872 (Del. Ch. 2009) .....	27-28
<i>Lagrone v. American Mortell Corp.</i> , C.A. No. 04C-10-116, 2008 Del. Super. LEXIS 321 (Del. Super. Sept. 4, 2008) .....	6
<i>Lawrence v. The Richman Grp. Cap. Corp.</i> , 358 F. Supp. 2d 29 (D. Conn. 2005).....	7
<i>Manturi v. V.J.V., Inc.</i> , 431 A.2d 859 (N.J. Super., App. Div., 1981).....	40
<i>Minner v. Am. Mortg. &amp; Guar. Co.</i> , 791 A.2d 826 (Del. Super. 2000) .....	40
<i>Oak Creek Investments, LLC v. Atlas Holdings LLC</i> , No. 1:18-cv-0023-SA-DAS (N.D. Miss., filed Feb. 9, 2018).....	6, 7, 8, 36-37
<i>Oak Creek Investments, LLC v. Atlas FRM LLC, d/b/a Atlas Holdings, LLC</i> , No. 2018-091-CVM (Miss. Cir. Ct., Winston Cnty., filed May 25, 2018).....	9
<i>Oak Creek Invs., LLC v. Atlas FRM LLC</i> , 307 So. 3d 503 (Miss. App. 2020) (en banc) .....	10

<i>Orloff v. Shulman</i> , 2005 Del. Ch. LEXIS 184, 2005 WL 3272355 (Del. Ch. Nov. 23, 2005).....	7
<i>Oxbow Carbon &amp; Minerals Hldgs. v. Crestview-Oxbow Acq., LLC</i> , 202 A.3d 482 (Del. 2010).....	27
<i>Sheehan v. AssuredPartners, Inc.</i> , C.A. No. 2019-0333-AML, 2020 Del. Ch. LEXIS 199 (Del. Ch. May 29, 2020).....	37-39
<i>Viterbo v. Dow Chem. Co.</i> , 826 F.2d 420, 424 (5 <sup>th</sup> Cir. 1987) .....	40
<i>Walsh v. White House Post Prods., LLC</i> , C.A. No. 2019-0419-KSJM, 2020 Del. Ch. LEXIS 105 (Del. Ch. Mar. 25, 2020) .....	27, 28
<i>W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC</i> , 12 A.3d 1128 (Del. 2010).....	24-25
<i>Winston Plywood &amp; Veneer LLC v. Oak Creek Investments, LLC</i> , C.A. No. 2018-0350-JRS (Del. Ch. filed May 17, 2018).....	8-9

## **STATUTES & RULES**

6 Del. C. § 18-101 <i>et seq.</i> .....	26
6 Del. C. § 18-1101(b).....	26
6 Del. C. § 18-1101(c) .....	26
6 Del. C. § 18-1101(e) .....	26

## OTHER AUTHORITIES

RICHARD F. BALDWIN, PLYWOOD AND VENEER-BASED PRODUCTS (The Donnell Grp. 2016) .....	5
RICHARD F. BALDWIN, MAXIMIZING FOREST RESOURCES FOR THE 21 <sup>ST</sup> CENTURY — NEW PROCESSES, PRODUCTS, AND STRATEGIES FOR A CHANGING WORLD (Miller Freeman Books 2000).....	5
RICHARD F. BALDWIN, OPERATIONS MANAGEMENT: IN THE FOREST PRODUCTS INDUSTRY (Backbeat Books 1985).....	5
RICHARD F. BALDWIN, PLYWOOD MANUFACTURING PRACTICES (Backbeat Books 1981).....	5
Thomas Earl Geu, <i>A Selective Overview of Agency, Good Faith and Delaware Entity Law</i> , 10 DEL. L. REV. 17 (2008).....	26-27



## NATURE OF THE PROCEEDINGS

New Wood Resources LLC (“New Wood”) is a Delaware limited liability company that was formed in September of 2013. (A126.) “New Wood operates a plywood and veneer manufacturing facility in Louisville, Mississippi known as Winston Plywood & Veneer LLC (‘WPV’).” (A126, underline added.) Richard F. Baldwin, Ph.D., was a Manager of New Wood from 2013 to 2016. (A12.)

Certain lawsuits arose by and between Dr. Baldwin, New Wood, and other entities in Mississippi federal court, Mississippi state court, and the Delaware Court of Chancery. Dr. Baldwin incurred costs and fees in those other lawsuits and was entitled to an advancement of his expenses under New Wood’s Second Amended and Restated Limited Liability Company Agreement (“LLC Agreement”).

Dr. Baldwin sought such fees and costs in the Delaware Court of Chancery and ultimately recovered \$541,664.99 for advancement costs and \$325,546.04 as indemnity for the fees and costs he incurred recovering them. New Wood brought this action to recover, or claw back, the amounts it paid for advancement and indemnification costs.

The Superior Court granted New Wood’s motion for judgment on the pleadings and ordered that “Baldwin shall repay the \$541,664.99 advanced to him.” Order at 18 (Addendum). As explained below, the Superior Court committed reversible error on two questions of law by finding that: (1) Dr. Baldwin’s

counterclaim is legally defective because he asserted the claim against New Wood, which the Court found to be the wrong party in interest; and (2) Dr. Baldwin's counterclaim and affirmative defenses are defective as a matter of law because there is no implicit covenant or term of good faith and fair dealing in the LLC Agreement on the indemnity requirements. As explained below, these holdings are in error and this Court should reverse.

## SUMMARY OF THE ARGUMENT

1. The Superior Court held that Dr. Baldwin's counterclaim fails as a matter of law because New Wood was not the correct party against which to assert the claim. Instead, the Court found, Dr. Baldwin should have joined Andrew Bursky as a third-party defendant because he was the one who signed the Written Consent of Certain Members of New Wood Resources LLC ("Written Consent") (A108-11) in which he found that Dr. Baldwin failed to "act in good faith" and failed to act "in a manner that he reasonably believed to be in or not opposed to the best interests of the Company," which nullified or quashed his right to indemnity.

The Superior Court ruling is erroneous for a number of reasons, including: (a) New Wood is the real party in interest; (b) New Wood directed Mr. Bursky to execute the Written Consent; (c) New Wood undoubtedly drafted the Written Consent; (d) New Wood is the entity that needed the Written Consent; (e) New Wood is the one that used the Written Consent; (f) New Wood is the one that benefitted from the Written Consent; (g) New Wood, by its actions, adopted and ratified the Written Consent; (h) New Wood is the one against whom Dr. Baldwin's counterclaim is properly directed; and (i) Dr. Baldwin has no legally cognizable claim against Mr. Bursky.

2. The indemnity provision in New Wood's LLC Agreement was dependent on a finding that Dr. Baldwin "acted in good faith and in a manner that

he or she reasonably believed to be in or not opposed to the best interests of the Company . . . .” (A53.) Dr. Baldwin’s affirmative defenses and counterclaim were based on his allegation that New Wood’s claw back claim in this case was based on a bad faith determination that he failed to meet this requirement for indemnity. The Superior Court held that there was no implied covenant or term of good faith and fair dealing in the indemnity provision of the LLC Agreement and rejected Dr. Baldwin’s arguments as a matter of law.

By its holding, the Superior Court effectively eliminated the indemnity provision from the LLC Agreement in its entirety because, without an implied covenant of good faith, the officers and directors of New Wood will be duty-bound to *always* seek to claw back any amounts paid to Managers or Members. Such a construction constitutes a clear error of law and must be reversed.

## STATEMENT OF THE CASE

“Dr. Baldwin is a renowned expert in the forest-products industry, including plywood manufacturing, and he has been installing major equipment in plywood mills since 1965.” (A126.) He has a depth of experience and knowledge in forest products and authored a recent textbook “used by several universities and forest-products companies for education and training.” (A126.)<sup>1</sup>

New Wood was formed on September 6, 2013, as a Delaware limited liability company with its principal place of business in Boise, Idaho. (A12-13.) New Wood acquired the WPV facility in Louisville, Mississippi, which had been dormant for years and was in need of repair. (A127.) Because of his “expertise and prior successful business ventures in the forest-products industry, Dr. Baldwin was chosen to oversee the revitalization of the WPV facility and was asked to invest in New Wood.” (A126.)

Prior to the completion of the revitalization of the WPV facility, it was decimated by an EF-4 tornado. (A127.) WPV received funding from the Federal Emergency Management Agency (“FEMA”) and Dr. Baldwin took the lead role on

---

<sup>1</sup> See RICHARD F. BALDWIN, PLYWOOD AND VENEER-BASED PRODUCTS (The Donnell Grp. 2016); see also RICHARD F. BALDWIN, MAXIMIZING FOREST RESOURCES FOR THE 21<sup>ST</sup> CENTURY — NEW PROCESSES, PRODUCTS, AND STRATEGIES FOR A CHANGING WORLD (Miller Freeman Books 2000); RICHARD F. BALDWIN, OPERATIONS MANAGEMENT: IN THE FOREST PRODUCTS INDUSTRY (Backbeat Books 1985); RICHARD F. BALDWIN, PLYWOOD MANUFACTURING PRACTICES (Backbeat Books 1981).

behalf of New Wood to bring the project out of ruins and transform it into a functioning and profitable plywood manufacturing facility. (A127.)

Oak Creek Investments LLC (“OCI”) invested in New Wood and was a Member with 128,833 Series A Preferred Units. (A66.) Dr. Baldwin was the manager of OCI, making him a derivative Member of New Wood. (A16; A130; A175.) Dr. Baldwin was also a Manager of New Wood. (A12.)

All that changed on August 24, 2016, when Dr. Baldwin was terminated from his position as the President and General Manager of WPV by Andrew Bursky and Kurt Liebich:

21. Acting in their individual and representative capacities, Defendants Bursky’s and Liebich’s willful and bad-faith conduct, as well as the conduct of others, reached a climax on August 24, 2016 when, just weeks before the [WPV] mill was set to begin operations, with no prior notice, with no plausible rationale or reason, with no regard for OCI’s significant investment in NWR and WPV, and with no consideration for Dr. Baldwin’s efforts leading the mill to startup, or his superior knowledge of constructing and operating a plywood mill, Dr. Baldwin was summarily terminated from his role as President and General Manager of WPV.

*Oak Creek Invs., LLC v. Atlas Holdings LLC*, No. 1:18-cv-0023, Plf.’s Compl. ¶ 21 (N.D. Miss. Feb. 9, 2018) (ECF No. 1).<sup>2</sup>

---

<sup>2</sup> “[P]leadings and transcripts are part of the official court record and are subject to judicial notice.” *Lagrone v. American Mortell Corp.*, C.A. No. 04C-10-116, 2008 Del. Super. LEXIS 321, at \*13 & n.24 (Del. Super. Sept. 4, 2008) (citing: *Frank v. Wilson*, 32 A.2d 277, 280 (Del. Ch. 1943) (taking judicial notice of court record in companion

## **A. The Underlying Litigation**

Three underlying lawsuits preceded the litigation by which Dr. Baldwin sought an advancement of funds under the terms and conditions of the LLC Agreement: (1) the “Mississippi Federal Action”; (2) the “First Delaware Action”; and (3) the “Mississippi State Action.” Dr. Baldwin and OCI then sought to recover their attorney’s fees and costs incurred defending against the First Delaware Action in the “Delaware Advancement Action.” And it was the amounts New Wood ultimately paid to Dr. Baldwin and OCI through the Delaware Advancement Action that gave rise to New Wood’s claims in this case for a claw back of the fees it had been ordered to pay.

### **1. The Mississippi Federal Action**

On February 9, 2018, OCI filed an action in the Northern District of Mississippi. (**A16**); *Oak Creek Invs., LLC v. Atlas Holdings LLC*, No. 1:18-cv-0023-SA-DAS (N.D. Miss., filed Feb. 9, 2018). OCI is a Member of New Wood and Dr. Baldwin is the Managing Member of OCI. (**A16**.) The lawsuit was brought against six defendants, including New Wood and Mr. Bursky: (1) Atlas Holdings LLC; (2)

---

litigation on a motion to dismiss related complaint); *Orloff v. Shulman*, 2005 Del. Ch. LEXIS 184, 2005 WL 3272355, at \*12 (Del. Ch. Nov. 23, 2005) (court considered pleadings in companion bankruptcy litigation which contradicted pleading filed in the Chancery litigation); *Lawrence v. The Richman Grp. Cap. Corp.*, 358 F. Supp. 2d 29, 35 n.5 (D. Conn. 2005) (court may take judicial notice of “prior pleadings, orders judgments and other items appearing in the Court's records of prior litigation . . .”).

New Wood; (3) WPV; (4) WPV Holdco LLC (“Holdco”); (5) Andrew M. Bursky; (6) Kurt Liebich, and (7) Does 1-5. (A16.)

OCI asserted claims for “breach of contract, fraud and fraudulent inducement, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, declaratory judgments relating to alleged improper dilution of OCI’s equity interests and veil-piercing, arising out of, among other things, a Management Services Agreement by and between Baldwin and Winston Plywood and investments by Baldwin in New Wood and Holdco.” (A16.) As the block quote from Plaintiff’s Complaint in the Mississippi Federal Action suggests, *supra* at 4, the basis for the claims in that lawsuit arose out of and related to the termination of Dr. Baldwin as the President and General Manager of WPV.

On May 17, 2018, Defendants moved to dismiss the Mississippi Federal Action based on a lack of subject matter jurisdiction. (A16.) On May 25, 2018, OCI filed a Notice of Dismissal Without Prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), which was automatic given that none of the Defendants had filed an answer to the complaint. *Oak Creek*, No. 1:18-cv-0023, Notice of Dismissal Without Prejudice (N.D. Miss. May 25, 2018) (ECF No. 23).

## **2. The First Delaware Action**

On May 17, 2018, the Defendants in the Mississippi Federal Action filed suit against Dr. Baldwin and OCI in the Delaware Court of Chancery. *Winston Plywood*



*& Veneer LLC v. Oak Creek Invs., LLC*, C.A. No. 2018-0350-JRS (Del. Ch. filed May 17, 2018). (A16.) The Plaintiffs in the First Delaware Action (also referred to as the *Delaware Plenary Action* and the *Delaware Anticipatory Action*) asserted claims against Dr. Baldwin and OCI for breach of fiduciary duty, breach of contract, and negligence, seeking a declaratory judgment that the claims against them as Defendants in the Mississippi Federal Action were baseless.

On March 25, 2019, Dr. Baldwin and OCI filed their Answer and Counterclaims in the First Delaware Action. (A130.) On January 23, 2020, New Wood, Holdco, and WPV voluntarily dismissed their claims in the First Delaware Action, which left Dr. Baldwin and OCI's counterclaims extant in that case. (A131.) "On March 27, 2020, the Court of Chancery granted judgment in OCI and Baldwin's favor in the Delaware Plenary Action," Order ¶ 2, at 5 (**Addendum**), meaning, Dr. Baldwin and OCI prevailed on the claims against them in the First Delaware Action. On September 16, 2020, the Court of Chancery entered a stipulated order temporarily staying the counterclaims. (A131.)

### **3. The Mississippi State Action**

On May 25, 2018, OCI filed a lawsuit against the same Defendants as in the Mississippi Federal Action in Mississippi state court. *Oak Creek Invs., LLC v. Atlas FRM LLC, d/b/a Atlas Holdings, LLC*, No. 2018-091-CVM (Miss. Cir. Ct., Winston Cnty., filed May 25, 2018). (A17; A144.) The Defendants in the Mississippi State

Action moved to dismiss based on Mississippi’s “first-filed-rule” — the First Delaware Action being filed on May 17, 2018, barred the Mississippi State Action filed on May 25, 2018 — and on forum non conveniens.

On February 22, 2019, the Mississippi Circuit Court dismissed the case “based on Mississippi’s ‘first-filed rule’ and the doctrine of forum non conveniens . . . .” *Oak Creek Invs., LLC v. Atlas FRM LLC*, 307 So. 3d 503 (Miss. App. 2020) (en banc). OCI appealed and the en banc Court of Appeals reversed, finding that the “circuit court erred by dismissing this case without requiring the Winston parties to file a written stipulation [on the tolling of the statute of limitations] pursuant to section 11-11-3(4)(b).” 307 So. 3d at 508.

#### **B. The Delaware Advancement Action**

On January 10, 2019, Dr. Baldwin and OCI filed suit in the Court of Chancery against New Wood, WPV, and Holdco. *Baldwin v. New Wood Resources, LLC*, C.A. No. 2019-0019-JRS, Verif. Compl. for Advancement (Del. Ch. filed Jan. 10, 2019) (**A142-64**). Dr. Baldwin and OCI sought recovery in the Delaware Advancement Action for: (1) in Count I, an advancement for their attorney’s fees and costs defending against the claims in the First Delaware Action; and (2) in Count II, their fees and costs bringing the Delaware Advancement Action, or so-called “fees-on-fees.” (**A160-64**.)

Dr. Baldwin and OCI moved for partial summary judgment against New Wood and the Court of Chancery granted the motion by Order filed October 14, 2019. (A199-202.) By that Order, the Court of Chancery (Vice Chancellor Joseph R. Slight III) directed New Wood to pay: (1) \$269,881.61 as 75% of the advancement costs sought for Dr. Baldwin and OCI's costs and expenses defending against the First Delaware Action; and (2) \$214,459.49 as 75% of the fees-on-fees costs they incurred bringing the Delaware Advancement Action. (A200-01.)

Ten months later, on a Court of Chancery Rule 88 motion, Vice Chancellor Slight further awarded Dr. Baldwin and OCI: (1) \$254,056.41 in advancement costs; and (2) \$111,086.55 for their fees-on-fees. (A166-67.) These Orders resulted in the "total advancement amount ordered was \$541,664.99, and the total indemnification ordered was \$325,546.04." Order ¶ 3, at 6 (Addendum).<sup>3</sup>

### **1. The Basis for Seeking an Advancement**

Section 8.2 of the LLC Agreement for New Wood provides a right of indemnification for Members and Managers under certain circumstances. For example, if a Member or Manager is sued as a result of or based on his or her position

---

<sup>3</sup> Recovering the funds from New Wood was challenging: "New Wood only complied with its obligation [to pay these funds] after: (i) the Court of Chancery entered an order compelling New Wood to advance those fees; (ii) the Judgment was entered against New Wood; (iii) the Judgment was domesticated in Mississippi; and (vi) Dr. Baldwin pursued discovery to investigate New Wood's claim of insolvency." (A133.)

in New Wood, the Member or Manager is entitled to indemnity for the costs and fees incurred in that lawsuit. (A52-53.) Such indemnification, however, is conditioned upon a finding that the Member or Manager acted in good faith:

Notwithstanding anything to the contrary in this Section 8.2, no Person shall be entitled to indemnification hereunder unless it is found (in the manner described below in this Section 8.2) that, with respect to the matter for which such Person seeks indemnification, such Person acted [1] in good faith and [2] in a manner that he or she reasonably believed to be in or not opposed to the best interests of the Company and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful.

(A53.)

Section 8.3 of the LLC Agreement provides an additional requirement, specifically that an advancement of such fees and costs will be made prior to the ultimate resolution of the underlying lawsuit and without any determination of such entitlement to indemnification, but only if the Member or Manager agrees to repay the advanced funds if it is ultimately determined that he or she was not so entitled.

Section 8.3 provides in full:

**8.3 *Advance Payment.*** The right to indemnification conferred in this Article 8 shall include the right to be paid or reimbursed by the Company the reasonable expenses incurred by a Person of the type entitled to be indemnified under Section 8.2 who was, is or is threatened to be made a named defendant or respondent in a Proceeding in advance of the final disposition of the Proceeding and without any determination as to the Person's ultimate entitlement to indemnification; provided, however, that the, payment of such expenses incurred by any such

Person in advance of the final disposition of a Proceeding shall be made only upon delivery to the Company of a written affirmation by such Person of its good faith belief that it has met the standard of conduct necessary for indemnification under this Article 8 and a written undertaking, by or on behalf of such Person, to repay all amounts so advanced if it shall ultimately be determined that such indemnified Person is not entitled to be indemnified under this Article 8 or otherwise.

**(A53.)**

As a Member and Manager of New Wood, Dr. Baldwin sought indemnity under Section 8.2 of the LLC Agreement for the fees and costs incurred in the First Delaware Action. Because New Wood declined Dr. Baldwin and OCI's demand for indemnification, they were required to file the Delaware Advancement Action and were ultimately awarded advancement and indemnity fees and costs by Vice Chancellor Slight's Orders granting their Motion for Partial Summary Judgment and Rule 88 Motion.

To meet the requirement of Section 8.3 of the LLC Agreement that Dr. Baldwin and OCI provide a written affirmation for the advancement, Dr. Baldwin issued a letter on his own behalf and one on behalf of OCI whereby they agreed "to repay all amounts so advanced if it shall ultimately be determined that [I am / OCI is] not entitled to be indemnified in this lawsuit." **(A93-94.)**

## **C. The Claims, Defenses, and Rulings in This Case**

### **1. New Wood's Claims Against Dr. Baldwin**

To challenge the fact that Dr. Baldwin and OCI were entitled to indemnification for an advancement under Section 8.2 of the LLC Agreement — the standard being whether they acted “in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the Company” — New Wood had three options under Section 8.2 of the LLC Agreement:

The finding of the standard of conduct required above shall be made (a) by a majority vote of all of the Managers who are not parties to such Proceeding even though less than a quorum or (b) if there are no such Managers, or if such Managers so direct, by independent legal counsel in a written opinion or (c) by holders of a Majority of the then-outstanding Units (determined without regard to any Members that are parties to such Proceeding).

**(A53.)**

New Wood opted for the third route and on April 23, 2020, Andrew Bursky, as the President of ACR Winston Preferred Holdings LLC (“ACR Winston”), executed a Written Consent of Certain Members of New Wood Resources LLC (“Written Consent”). **(A108-11.)** In that Written Consent, Mr. Bursky attests:

RESOLVED, that undersigned, constituting a Majority of the currently outstanding Units (determined without regard to Members that are party to the Lawsuits), have determined that Baldwin failed to act in good faith and in a manner that he reasonably believed to be in or not opposed to the best interests of the Company, in connection with the matters at issue in the Lawsuits.

Written Consent of Certain Members of New Wood Resources LLC at 3 (A110).

New Wood alleges in this case that it paid Dr. Baldwin \$867,211.03, as indemnification for its obligation to make an advancement. (A18.) Dr. Baldwin acknowledge this payment and admits this allegation. (A121.) New Wood further alleges that it requested that Dr. Baldwin repay the advanced monies and that he declined to do so (A18), which Dr. Baldwin also admits. (A122.) New Wood asserts that this constitutes a breach of contract (A18), which Dr. Baldwin denies. (A122.)

In support of its breach-of-contract claim, New Wood alleges in its Amended Complaint that Dr. Baldwin “failed to act in good faith and in a manner that he reasonably believed to be in or not opposed to the best interests of New Wood . . . .” (A18.) This allegation is based on, and quotes verbatim from, the Written Consent by Mr. Bursky of ACR Winston.

In that Written Consent, Mr. Bursky does not cite or identify a single act, omission, or fact that would or could support such a finding of bad faith and it is nothing more than a procedural outline of the litigation followed by a recitation of the words contained in the LLC Agreement to support New Wood’s efforts to claw back the funds provided as an advancement. (A108-11.) Because there is no actual or factual basis for such an allegation, Dr. Baldwin responded to it as follows:

[T]he Written Consent was entered into in bad faith in an attempt to avoid New Wood’s obligation to indemnify Dr. Baldwin. By way of further response, Dr. Baldwin’s good faith actions are evidenced by the

fact that on January 23, 2020, New Wood, together with other parties, voluntarily dismissed its affirmative claims in the Delaware Action.

**(A121-22.)**

Based on the allegations and responses in the pleadings, one of the questions below turned on: (a) whether Dr. Baldwin and OCI in the Mississippi State Action and then the First Delaware Action acted in good faith and in a manner that they reasonably believed to be in or not opposed to the best interests of the New Wood; or (b) whether New Wood acted in bad faith when it issued the Written Consent and demanded repayment of the money that had been advanced. As explained below, these questions cannot be answered by way of the bare pleadings, questions of fact are presented, and judgment on the pleadings was improperly granted.

## **2. Dr. Baldwin's Defenses and Counterclaims**

In response to New Wood's Amended Complaint, Dr. Baldwin filed an Answer with affirmative defenses and a counterclaim. **(A112-28.)** The Answer admitted some of New Wood's allegations, denied others, and made affirmative allegations to others, such as that "the Written Consent was entered into in bad faith in an attempt to avoid New Wood's obligation to indemnify Dr. Baldwin." **(A121.)**

Dr. Baldwin also asserted three affirmative defenses. His first is based on the fact that the "LLC Agreement requires any finding [of his bad faith] be made in good faith, and the Written Consent was entered into in a bad faith attempt to avoid New Wood's indemnification obligations." **(A124.)** The second is that Dr. Baldwin, at



all relevant times, acted “in good faith and in a manner that he reasonably believed to be in or not opposed to the best interests of New Wood.” (A124.)

In his counterclaim, Dr. Baldwin seeks a declaratory judgment that: (1) New Wood is required to pay the fees and costs incurred in domesticating the Court of Chancery’s judgment for advancement fees and indemnification in the Mississippi Circuit Court, as well as the costs of discovery in that action; (2) Section 8.2 of the LLC Agreement contains an implicit term that any determination of a right to indemnification must be made in good faith; and (3) the Written Consent by Mr. Bursky of ACR Winston was made in bad faith. (A137.)

### **3. The Superior Court’s Decision**

On August 23, 2021, The Honorable Abigail M. LeGrow issued an Order in which she entered judgment on the pleadings in favor of New Wood and ordered that “Baldwin shall repay the \$541,664.99 advanced to him.” Order at 18 (Addendum). The Court rejected Dr. Baldwin’s arguments and found in New Wood’s favor based on the following: (1) Section 8.2 of the LLC Agreement provides that Dr. Baldwin was not entitled to indemnification if a majority of New Wood unitholders determined that he failed to act in good faith or in a manner he believed to be in New Wood’s best interests; (2) Dr. Baldwin signed the guarantee to repay New Wood if it were determined that he was not entitled to indemnification for the First Delaware Action; and (3) the Written Consent by Mr. Bursky found that

Dr. Baldwin failed to act in good faith and failed act in a way that he believed to be in New Wood's best interests. Order ¶ 11, at 11-12 (**Addendum**).

The Court rejected New Wood's claim for the \$325,546.04 paid for fees-on-fees, however, finding that:

Sections 8.2 and 8.3 do not authorize claw-back of amounts paid out for indemnification, even if New Wood paid these amounts before any "good faith or best interests" determination. Rather, Sections 8.2 and 8.3 establish the standard that governs when indemnification must be paid. In short, Baldwin is not contractually obliged to reimburse New Wood the \$325,546.04 paid as indemnification for the Advancement Action.

Order ¶ 12, at 12 (**Addendum**).

The Court rejected Dr. Baldwin's affirmative defenses and counterclaim and held that they did not present questions of fact that precluded the entry of judgment on the pleadings. Order ¶¶ 13-19, at 13-18. The bases and rationale for the Court's rulings on Dr. Baldwin's arguments are discussed in greater detail below.

## ARGUMENT

### **I. DR. BALDWIN’S COUNTERCLAIM AGAINST NEW WOOD IS PROPER AND HE DID NOT “SUE THE WRONG ENTITY”**

#### **A. Question Presented**

Is Dr. Baldwin’s counterclaim asserted against New Wood proper given that New Wood adopted the Written Consent, submitted the Written consent, and is the “entity in interest” in this dispute, or is the counterclaim legally defective because Dr. Baldwin should have joined Mr. Bursky as a third-party defendant as the individual who signed the Written Consent? The issue was preserved for appeal. *See* Order ¶ 13, at 13 (**Addendum**), **A125-38, A187, A189, A191-93, A195**.

#### **B. Scope of Review**

The Superior Court’s finding on the first question involves a question of law. “This Court reviews questions of law *de novo*.” *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94 (Del. 2021) (quoting *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043 (Del. 2014)).

#### **C. Merits of the Argument**

The Superior Court began its analysis with Dr. Baldwin’s counterclaim. The Court held that it was legally defective because it was lodged against New Wood, whereas the Written Consent had been signed by Mr. Bursky of ACR Winston.

Order ¶ 13, at 13 (**Addendum**). In other words, the Court found that Dr. Baldwin had sued the wrong entity and that his counterclaim was therefore legally defective:

Baldwin's Counterclaim and affirmative defenses do not preclude judgment on the pleadings because Baldwin has not pleaded a cognizable counterclaim. Baldwin's argument fails at the outset because it is undisputed that New Wood did not make the indemnity decision; rather, the majority of New Woods' unitholders [Mr. Bursky of ACR Winston] made the decision, as provided for in the LLC Agreement. New Wood cannot be said to have breached the implied covenant of good faith and fair dealing when the challenged decision was made by a non-party to this action.

Order ¶ 13, at 13 (**Addendum**).

The Court below is correct that Mr. Bursky of ACR Winston signed the Written Consent by which he found that Dr. Baldwin failed to act in good faith and failed to act in a way that he believed was in or not opposed to New Wood's best interests. (**A110**.) And it is presumably true that Mr. Bursky signed that document as New Wood's majority unitholder — without regard to the parties to the lawsuit — as opposed to as an officer or director of the company.<sup>4</sup>

But that is not the end of the inquiry as to whether Mr. Bursky is an indispensable or even a proper party to this lawsuit. Although no discovery is

---

<sup>4</sup> Contrary to his assertion, neither Mr. Bursky nor ACR Winston is listed on Schedule I — Series A Preferred Units to the LLC Agreement. (**A66-68**.) With no discovery, this is an assertion that the Superior Court apparently accepted as true.

available given that judgment was entered on the pleadings, certain facts are not and cannot be disputed.

First, it cannot be disputed that Mr. Bursky executed the Written Consent at the behest and direction of New Wood / New Wood's counsel. New Wood saw that it needed such a document to support its breach-of-contract claim against Dr. Baldwin and it undertook to get what it needed. Second, it is also a given that Mr. Bursky did not draft the Written Consent and that it was drafted by New Wood's attorneys — New Wood's attorneys knew precisely what the document needed to say and they drafted it to say just that.

Third, New Wood needed the Written Consent in the Superior Court to establish a basis for its claw back of the money it paid as an advancement and paid as indemnity for Dr. Baldwin's fees-on-fees. This was New Wood's fight, not Mr. Bursky's fight, and Mr. Bursky's only involvement was as the alleged majority unitholder of New Wood, excluding the parties to the lawsuits.

Fourth, New Wood is the beneficiary of the Written Consent. Meaning, New Wood knew that it needed the Written Consent to claw back the funds that it had paid to Dr. Baldwin, New Wood's counsel drafted the document in April of 2020 for Mr. Bursky to sign, and New Wood attached the document to its Complaint and Amended Complaint in support of its claim for breach of contract against Dr. Baldwin. Joining Mr. Bursky in this lawsuit would sever no purpose whatsoever

and the only real party in interest is New Wood: *New Wood* is the party that paid Dr. Baldwin the funds he sought in the Delaware Advancement Action, *New Wood* orchestrated and drafted the Written Consent, *New Wood* is the entity that attached the document to *its* pleadings in this case, and *New Wood* did so to recovery *its* funds that *it* paid to Dr. Baldwin under Section 8.2 of the LLC Agreement. New Wood adopted and ratified the Written Consent as its own by what it did and Mr. Bursky was no more than a pawn in New Wood's litigation strategy.

Lastly, but most importantly, there would be absolutely no legal basis for Dr. Baldwin to join Mr. Bursky as a third-party defendant. Dr. Baldwin is seeking a declaratory judgment *as against New Wood* in terms of his entitlement to the advancement costs and indemnity. (A125-38.) Mr. Bursky has no "skin in this game" and the dispute is between Dr. Baldwin and New Wood.

Indeed, had Dr. Baldwin joined Mr. Bursky as a third-party defendant, he undoubtedly would have moved for dismissal and would have been properly dismissed. On hindsight, Dr. Baldwin's counsel cannot conceive of any valid claim against Mr. Bursky, aside from a potential libel claim for the baseless assertion that Dr. Baldwin failed to act in good faith and failed to act in a way that he reasonably believed to be in, or at least not opposed to, the best interests of New Wood.

The most Mr. Bursky is in this case is a marginal witness. He is not and was not a proper party to the lawsuit and the Superior Court provides no basis as to how