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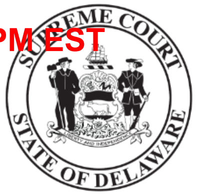

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS[1]

Despite Baldwin's unfounded assertions and newfound conspiracy theories, this is a straightforward breach of contract case resulting from Baldwin's refusal to repay monies he previously and unconditionally promised to repay to New Wood. Indeed, as recognized by the Superior Court, pursuant to New Wood's LLC Agreement, Baldwin—the former manager of New Wood—was entitled to advancement of his legal expenses until it was determined otherwise "by holders of a Majority of the then-outstanding Units"—ACR Winston Preferred Holdings, LLC ("ACR"). A15. That is exactly what happened on April 23, 2020, when ACR, an entity who is not a party to this action, determined that Baldwin was not entitled to indemnification. In his Answer, Baldwin did not contest that non-party ACR was permitted to make the decision. A121-22, ¶ 19.

Instead, Baldwin refused to recognize his contractual obligation to repay and claimed that New Wood (not ACR) breached the implied covenant of good faith and fair dealing because the Written Consent was not executed in "good faith." But, as the Superior Court correctly held, that assertion provided no basis to avoid the repayment obligation because: (1) New Wood did not actually make the challenged

[1] Capitalized, yet undefined terms, have the same meaning ascribed to them in the Superior Court's Order. *See* August 23, 2021 Order, Trans. ID 67089370, Addendum at 1-18 ("Order"). Appellant's Opening Brief is cited as Op. Br. _____. Emphasis added unless noted.

decision; and, (2) the implied covenant cannot be used to rewrite the unambiguous terms of an agreement contemplating exactly what happened here.

In short, as this Court has repeatedly held, the implied covenant does not provide a basis for sophisticated parties like Baldwin to secure additional contractual protections that were not secured at the bargaining table. That is particularly true where, as here, the party Baldwin claimed violated the implied covenant did not even make the decision at issue. Baldwin's efforts to muddy the waters on appeal through new arguments not raised below should be rejected, and the Superior Court's well-reason decision should be affirmed.

SUMMARY OF THE ARGUMENT

1. **Denied.** The Superior Court correctly held that Baldwin's counterclaim failed as a matter of law because New Wood was not the entity who executed the Written Consent. Baldwin's unfounded conspiracy theories raised for the first time on appeal should be rejected.[2]

2. **Denied.** The Superior Court correctly held that Baldwin's implied covenant of good faith and fair dealing counterclaim and affirmative defenses did not preclude judgment on the pleadings. The Superior Court fully addressed Baldwin's implied covenant counterclaim and affirmative defenses, and even considered the doctrine of necessary implication argument which was raised for the first time during oral argument on New Wood's motion for judgment on the pleadings. Baldwin cannot insert new unfounded allegations on appeal to change the well-reasoned decision of the Superior Court.

3. Separately, an additional ground exists to affirm. Baldwin's affidavit of defense was deficient as a matter of law, and this was preserved below.

[2] In his Opening Brief, Baldwin lists a number of reasons the Superior Court's decision was "erroneous." Op. Br. at 3. None of these arguments was raised in his brief filed in the Superior Court, and unsurprisingly, there is no record citation to support them. Pursuant to Supreme Court Rule 8, these arguments should be rejected as not properly preserved in the trial court.

STATEMENT OF FACTS

Notwithstanding the reality that Baldwin's Opening Brief is nearly twice as long as his Answering Brief below, the facts giving rise the Superior Court's decision and the instant appeal are largely undisputed and succinctly set forth in the Superior Court's well-reasoned decision. Order at 1-18. What follows is an overview of the pertinent facts supporting the Superior Court's decision.

I. The Parties.

New Wood is a limited liability company formed under the laws of the State of Delaware with its principal place of business in Boise, Idaho. A12, ¶ 2. New Wood has numerous members, including entities, trusts, and individuals. *Id.* Baldwin served as a Manager of New Wood commencing on September 13, 2013 and continuing until his resignation on August 24, 2016. A12, ¶ 3.

II. The LLC Agreement.

New Wood was formed on September 6, 2013 in Delaware. A13, ¶ 7. The Second Amended and Restated Limited Liability Company Agreement of New Wood was entered into by its Members on March 31, 2014 (as amended, the "LLC Agreement"). *Id.*

Pursuant to the LLC Agreement, New Wood is managed by its Board of Managers (the "Board"). A13, ¶ 8. Baldwin was a member of the Board. *Id.*

The LLC Agreement provides certain indemnification and advancement rights to its Managers. A13, ¶ 9.

Section 8.2 of the LLC Agreement states:

Right to Indemnification. Subject to the limitations and conditions as provided in this Article 8, each Person who was or is made a party or is threatened to be made a party to or is involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitrative or investigative (hereinafter, a ***"Proceeding"***), or any appeal in such a Proceeding or any inquiry or investigation that could lead to such a Proceeding, by reason of the fact that it, or a Person of whom it is the legal representative, is or was a Member, Manager, Member of a Committee of the Board or an Officer, or while a Member, Manager or an Officer is or was serving at the request of the Company as a member, manager, director, officer, partner, venturer, proprietor, trustee, employee, agent or similar functionary of another foreign or domestic limited liability company, corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan or other Person (each, an ***"Indemnitee"***) shall be indemnified by the Company to the fullest extent permitted by the Act, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the Company to provide broader indemnification rights than said Act permitted the Company to provide prior to such amendment) against judgments, penalties (including excise and similar taxes and punitive damages), fines, settlements and reasonable expenses (including attorneys' fees) actually incurred by such Person in connection with such Proceeding, and indemnification under this Article 8 shall continue as to a Person who has ceased to serve in the capacity which initially entitled such Person to indemnity hereunder. **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 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 and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful**. The termination of any Proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the Person did not act 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 and, with respect to any criminal Proceeding, had reasonable cause to believe that his or her conduct was unlawful. **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)**. Notwithstanding anything to the contrary herein, "internal disputes" shall be excluded from the types of claims indemnified hereunder. For purposes of the preceding sentence, an "internal dispute" is defined exclusively as any proceeding commenced by any Atlas Member or one or more officers, directors, managers, partners, members or employees of any Atlas Member against any other Atlas Member or one or more other officers, directors, managers, partners, members or employees of such Atlas Member.

A13-15, ¶ 10.

Section 8.3 of the New Wood LLC Agreement states:

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.

A15, ¶ 11.

III. New Wood Advances Funds to Baldwin.

On February 9, 2018, Oak Creek Investments, LLC ("OCI"), a Member of New Wood managed by Baldwin, filed a Complaint in the United States District Court for the Northern District of Mississippi (the "Mississippi Federal Court Lawsuit") against Atlas FRM LLC d/b/a Atlas Holdings LLC, Andrew M. Bursky, Kurt Liebich, New Wood, WPV Holdco LLC, and Winston Plywood & Veneer LLC (collectively, the "Defendants"), alleging, among other things, 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, ¶ 12.

On May 17, 2018, the Defendants moved to dismiss the Mississippi Federal Court Lawsuit for lack of subject matter jurisdiction and filed a lawsuit against OCI and Baldwin in the Delaware Court of Chancery (the "Delaware Anticipatory Action"), asserting various claims against OCI and Baldwin for breach of fiduciary duty, breach of contract, and negligence, and seeking a declaratory judgment that OCI's allegations against the Defendants in the Mississippi Federal Court Lawsuit were false. A16-17, ¶ 13. The Delaware Anticipatory Action is captioned *Winston*

Plywood & Veneer LLC v. Oak Creek Investments, LLC, C.A. No. 2018-0350-JRS (Del. Ch.). *Id.*

On May 25, 2018, OCI dismissed the Mississippi Federal Court Lawsuit and re-filed its claims against the Defendants in the Circuit Court of Winston County, Mississippi (the "Mississippi State Court Lawsuit" and together with the Delaware Anticipatory Action and the Mississippi Federal Court Lawsuit, the "Lawsuits"). A17, ¶ 14.

On January 10, 2019, Baldwin and OCI filed a separate action in the Delaware Court of Chancery seeking advancement in connection with the Lawsuits (the "Advancement Action"). A17, ¶ 15. The Advancement Action is captioned *Baldwin v. New Wood Resources, LLC*, C.A. No. 2019-0019-JRS (Del. Ch.). *Id.*

As part of his Verified Complaint in the Advancement Action, Baldwin signed an undertaking promising to repay advanced funds if it was later determined he was not entitled to indemnification. A17, ¶ 16. He wrote: "I hereby undertake to repay all amounts so advanced if it shall ultimately be determined that I am not entitled to be indemnified in [the Delaware Anticipatory Action]." *Id.*

Stated differently, Baldwin's undertaking coupled with the LLC Agreement created a contractual promise to repay New Wood any advanced funds if it was later determined that Baldwin was not entitled in indemnification. A17, ¶ 17. To date,

New Wood has paid Baldwin $867,211.03. A18, ¶ 18. New Wood has no further advancement obligations related to the Delaware Anticipatory Action. *Id.*

IV. New Wood Members Conclude Baldwin is Not Entitled to Indemnification.

On March 27, 2020, the Court of Chancery in the Delaware Anticipatory Action granted judgment in Defendants' favor on the fraud, veil piercing, and conspiracy claims. Delaware Anticipatory Action, Dkt. 66. In so holding, the Court of Chancery stated that none of the statements cited "supports a reasonable inference that they were statements of material fact upon which any defendant might expect the plaintiff to rely." Delaware Anticipatory Action, Dkt. 71 at 12. Thereafter, on April 23, 2020, pursuant to Section 8.2(c) of the LLC Agreement, the holders of a Majority of the then-outstanding Units 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 New Wood, in connection with the matters at issue in the Lawsuits ("Written Consent"). A18, ¶ 19. In the Superior Court, Baldwin never disputed that ACR was entitled to make the decision. A121-22, ¶ 19. Instead, he affirmatively claimed that ACR "holds approximately 85.52% of New Wood's then-outstanding Units, entered into a written consent determining, without any explanation, that

Baldwin failed to act in good faith, and, therefore, was not entitled to indemnification." A134 ¶ 44.[3]

V. Litigation Ensues.

Notwithstanding the execution of the Written Consent in the exact manner contemplated by New Wood's LLC Agreement, Baldwin refused to repay the previously advanced funds. Accordingly, New Wood initiated litigation to recover the funds and demanded that Baldwin respond by affidavit of defense pursuant to 10 *Del. C.* § 3901. A11-A111.

Baldwin responded to the Complaint on January 20, 2021, and asserted counterclaims. In his Answer, Baldwin admitted that New Wood had paid him $867,211.03. A121, ¶ 18. Baldwin also did not dispute ACR was entitled to make the decision on indemnification. A121-22, ¶ 19. Rather, he affirmatively pled that ACR was the holder of the Majority of the then-outstanding Units of New Wood. A134, ¶ 44. Nonetheless, Baldwin took the position in his Counterclaims and his defenses that New Wood—a party who made no affirmative decision—breached the implied covenant of good faith and fair dealing and that provided a basis to avoid the unequivocal repayment obligation. And, despite the requirement to respond to

[3] In his Opening Brief at footnote 4, Baldwin hints that the Superior Court wrongly accepted that ACR was the majority member of New Wood. This Court should ignore that assertion when Baldwin never raised that argument below and affirmatively pled that ACR ***was*** the majority holder.

the Complaint with an affidavit of defense, Baldwin submitted a bare bones affidavit with no specificity. A140. While the Superior Court did not base its decision on deficiencies in the affidavit of defense, it did question whether the affidavit of defense was proper. A194-95 at 32-35.

Faced with Baldwin's refusal to abide by his contractual obligation to repay the previously advanced $867,211.03, New Wood moved for judgment on the pleadings. B1-B3. During the oral argument on New Wood's motion, Baldwin's counsel unequivocally admitted that New Wood did not make the decision that Baldwin was not entitled to indemnification:

> THE COURT: . . . New Wood isn't the person or the entity that made this determination that your client was not entitled to indemnification; correct?
>
> MR. FORCIER: Yes, that's correct.

A195 at 36:17-20.

And, despite raising conspiracy theories that New Wood somehow forced ACR to execute the consent, the Superior Court quickly recognized that this issue was never raised in the pleadings. A195 at 37-38. Nor were such theories raised in Baldwin's brief. B25-B52.

VI. The Superior Court Enters Judgment in Favor of New Wood and Baldwin Appeals.

On August 23, 2021, the Superior Court entered judgment in New Wood's favor. Order at 1-18. In so holding, the Superior Court found that Baldwin sued the wrong entity for breaching the implied covenant, and even if New Wood was the proper defendant, his affirmative defenses and implied covenant of good faith and fair dealing counterclaim did not raise disputed issues of material fact to preclude entry of judgment on the pleadings. *Id.* at 13-18. On August 26, 2021, the Superior Court entered a Final Order and Judgment, which ordered Baldwin to repay New Wood the $541,664.99 advanced to him plus $9,505.12 in pre-judgment interest and post-judgment interest. *See* August 26, 2021 Final Order and Judgment, Trans. ID 67089370, Addendum at 1-3.

On September 22, 2021, Baldwin filed a Notice of Appeal in this Court appealing the Superior Court's August 23, 2021 Order.[4] Trans. ID 66955573. On November 12, 2021, Baldwin filed his corrected Opening Brief. Trans. ID 67089370.

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[4] In his Notice of Appeal, Baldwin incorrectly refers to the Court's August 23, 2021 Order as the "Order and Final Judgment." Oddly, Baldwin did not actually appeal the final judgment, rendering his appeal potentially defective because he did not actually appeal the final judgment within 30 days.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT NEW WOOD DID NOT EXECUTE THE CHALLENGED WRITTEN CONSENT, AND THEREFORE, WAS THE WRONG DEFENDANT.

A. QUESTION PRESENTED

Did the Superior Court properly find that Baldwin's Counterclaim and affirmative defenses do not raise disputed issues of material fact to preclude judgment on the pleadings when Baldwin failed to join the entity who executed the Written Consent?

B. SCOPE OF REVIEW

The Delaware Supreme Court reviews trial court rulings granting motions for judgment on the pleadings *de novo*. *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 925 (Del. 2017). "A motion for judgment on the pleadings may be granted only when no material issue of fact exists and the movant is entitled to judgment as a matter of law." *Id.*

C. MERITS OF THE ARGUMENT

It is undisputed in the pleadings that the Written Consent was executed "by holders of a Majority of the then-outstanding Units." A121-22, ¶ 19. Indeed, in his counterclaim, Baldwin alleged that ACR was the decision-maker with respect to the Written Consent, which it executed. A134-35, ¶¶ 45-46 ("ACR's determination in the Written Consent was not based on a good faith assessment of Dr. Baldwin's actions. . . . Instead, ACR sought to impermissibly avail itself to a procedural

mechanism in the LLC Agreement in an effort to avoid its indemnification obligations for Dr. Baldwin.""). And, during oral argument, Baldwin's counsel unequivocally admitted that New Wood did not make the decision to deny indemnification. A195 at 36:17-20. Yet, notwithstanding these undisputed facts, Baldwin opted to assert his implied covenant of good faith and fair dealing counterclaim against New Wood only. A135-38. Because of this, the Superior Court properly held that Baldwin's affirmative defenses and counterclaim failed at the outset because he named the wrong party in his counterclaim. A party cannot breach the implied covenant when it did not even make the challenged decision. *See, e.g.*, *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009) (noting that "to state a claim for breach of the implied covenant, [a claimant] 'must allege a specific implied contractual obligation, a breach of that obligation ***by the defendant***, and resulting damage to the plaintiff.'"); *SARN Energy LLC v. Tatra Defence Vehicle AS*, 2018 WL 5794599, at *7 (Del. Super. Ct. Nov. 5, 2018) (dismissing bad faith counterclaims because the defendant sought relief against the wrong party).

Nonetheless, on appeal, Baldwin argues that certain "facts" preclude entry of judgment on the pleadings. Op. Br. at 20-22. But, as evidenced by the lack of any citation to these "facts," they were never raised in Baldwin's pleadings or in his briefs below—a reality confirmed by the Superior Court during oral argument. A195 at 38:7-8. In short, Baldwin waived each of these arguments. *See Scion*

Breckenridge Managing Member, LLC v. ASB Allegiance Real Est. Fund, 68 A.3d 665, 678 (Del. 2013) ("Under Supreme Court Rule 8, a party may not raise new arguments on appeal."); *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (discussing waiver by failure to raise issues in briefs); *Kelly v. Fuqi Int'l, Inc.*, 2013 WL 135666, at *7 n.82 (Del. Ch. Jan. 2, 2013) (same); *Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, 2011 WL 6820362, at *3 n.15 (Del. Ch. Dec. 22, 2011) (same).

It is improper for Baldwin to use his Opening Brief to assert new, unfounded facts and conspiracy theories which were not considered by the Superior Court—particularly his allegations suggesting that New Wood, its counsel, and Mr. Burksy were conspiring together to claw back Baldwin's advancement. While on a motion for judgment on the pleadings, a court may draw all ***reasonable*** factual inferences in favor of the non-moving party, the court may not "blindly accept conclusory allegations unsupported by specific facts, nor . . . draw unreasonable inferences in the [nonmovant's] favor." *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) (citation omitted); *Sycamore P'rs Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 761639, at *4 (Del. Super. Ct. Feb. 26, 2021). To avoid judgment on the pleadings, Baldwin needed to plead these facts. As confirmed by the Superior Court, he did not. Order at 13-18; A195 at 38:7-8.

Furthermore, Baldwin misunderstands the record by suggesting that there is a

contention that Mr. Bursky should have been named in Baldwin's counterclaim. Mr. Bursky only signed the Written Consent ***on behalf of ACR***, who was the holder of a Majority of the then-outstanding Units. A111. Baldwin is correct that there is no legal basis to join Mr. Bursky as a defendant, when the entity that purportedly issued the Written Consent improperly was ACR. Baldwin's argument on appeal seems to contradict what he alleged in his counterclaim. *See* A134-35, ¶¶ 45-46 ("ACR's determination in the Written Consent was not based on a good faith assessment of Dr. Baldwin's actions. . . . Instead, ACR sought to impermissibly avail itself to a procedural mechanism in the LLC Agreement in an effort to avoid its indemnification obligations for Dr. Baldwin.""). Baldwin cannot use this appeal to backtrack what he alleged in his counterclaim and affirmative defenses.

And, while Baldwin argues that there would have been no reason to join any other party because he was seeking a declaratory judgment against New Wood, that argument is unhelpful. The declaratory judgment sought by Baldwin is that he did not need to repay funds ***because*** New Wood acted in bad faith by denying him indemnification. But Baldwin admitted that New Wood did not make the decision denying him indemnification. A121-22. The Superior Court correctly recognized this distinction. If New Wood took no action, it cannot be liable.

For these well-founded reasons, this Court should affirm the Superior Court's decision that Baldwin's affirmative defenses and counterclaim fail because New

Wood is not the entity who executed the Written Consent.

II. THE SUPERIOR COURT CORRECTLY HELD THAT BALDWIN'S IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING COUNTERCLAIM AND AFFIRMATIVE DEFENSES DID NOT PRECLUDE JUDGMENT ON THE PLEADINGS.

A. QUESTION PRESENTED

Did the Superior Court properly find that Baldwin's implied covenant of good faith and fair dealing Counterclaim and affirmative defenses did not raise disputed issues of material fact to preclude judgment on the pleadings when the implied covenant advanced by Baldwin would create a free-floating obligation of good faith that is not tethered to any unanticipated gap in the LLC Agreement?

B. SCOPE OF REVIEW

The Delaware Supreme Court reviews trial court rulings granting motions for judgment on the pleadings *de novo*. *Chi. Bridge & Iron Co. N.V.*, 166 A.3d at 925. "A motion for judgment on the pleadings may be granted only when no material issue of fact exists and the movant is entitled to judgment as a matter of law." *Id.* "[J]udgment on the pleadings . . . is a proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact." *Id.* (citation omitted).

C. MERITS OF THE ARGUMENT

As this Court has recognized, it is black letter law that "[t]he implied covenant of good faith and fair dealing involves a 'cautious enterprise,' inferring contractual terms to handle developments or contractual gaps that the asserting party pleads

neither party anticipated." *Nemec*, 991 A.2d at 1125. "[O]ne generally cannot base a claim for breach of the implied covenant on conduct authorized by the agreement." *Id.* at 1125-26 (citation omitted). The Court "will only imply contract terms when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected." *Id.* at 1126. "When conducting this analysis, we must assess the parties' reasonable expectations at the time of contracting and not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal." *Id.* (footnote omitted) "Parties have a right to enter into good and bad contracts, the law enforces both." *Id.* "[T]he implied covenant is only rarely invoked successfully." *Kuroda*, 971 A.2d at 888.

This is a straightforward breach of contract action and the Superior Court correctly entered judgment in New Wood's favor because Baldwin's counterclaim and affirmative defenses did not raise disputed issues of material fact to preclude judgment on the pleadings. Indeed, as set forth in the pleadings, New Wood's LLC Agreement expressly contemplated exactly what happened—a majority of New Wood's unitholders determined that Baldwin was not entitled to indemnification. A18, ¶ 19. Baldwin acknowledged that reality in the undertaking he signed promising to repay advanced funds "if it shall be ultimately determined that I am not entitled to be indemnified in this lawsuit." A93. As the Superior Court held, Baldwin

cannot use the implied covenant to rewrite how the decision concerning indemnification is made. Order at 15.

Relying on bizarre analogies and little case law in support of his arguments, Baldwin attempts to use this appeal to over-complicate the straightforward issues in this case. For example, the analogy that Baldwin proffers in subsection 9 of his argument (Op. Br. at 40-41) contradicts his implied covenant argument. Indeed, the New Wood LLC Agreement expressly contemplated that a majority of New Wood's unitholders must make a determination regarding whether or not Baldwin was entitled to indemnification. A13-15, ¶ 10. Unlike Baldwin's reference to the Supreme Court rules setting forth the specific requirements for briefing, the LLC Agreement does not require anything further from the New Wood unitholders apart from this specific indemnification decision. Indeed, Baldwin cites to nothing in the LLC Agreement (because there is nothing) requiring the unitholders to provide an explanation as to "why" and "how" they came to their decision. Baldwin accepted these terms in the undertaking he signed promising to repay advanced funds "if it shall be ultimately determined that I am not entitled to be indemnified in this lawsuit." A93. The implied covenant "cannot properly be applied to give the plaintiffs contractual protections that they failed to secure for themselves." *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 816 (Del. 2013) (internal quotation marks omitted). Baldwin cannot use the implied covenant to rewrite how the decision

concerning indemnification is made, or to add additional requirements to the decision-making process, simply because he wished he had secured additional protections at the bargaining table.

Baldwin's proposed paradigm in subsection 4 of his argument (Op. Br. 29-30) and argument that the implied covenant and the doctrine of necessary implication is somehow tethered to the indemnity provision (*id.* at 28-30, 32-34) is likewise without merit. Indeed, the only issue in this case is whether Baldwin breached the Agreement by failing to reimburse New Wood for the indemnified funds after a majority of the unitholders issued the Written Consent, pursuant to the LLC Agreement. After briefing, oral argument, and subsequent briefing, the Superior Court issued a well-reasoned decision entering judgment in New Wood's favor and finding that Baldwin's counterclaim and affirmative defenses did not raise any disputed facts to preclude judgment on the pleadings. Order at 13-18. Baldwin's proposed paradigm inserts unfounded assertions and incorrect facts (*inter alia*, that Mr. Bursky is a unitholder) that are completely irrelevant to the present dispute. Regardless, Baldwin is incorrect that the indemnity provision is "eliminated" if this Court does not find that the implied covenant is "embodied" in the indemnity provision. Indeed, as the Superior Court held, Section 8.2 is a valid provision and there are no contractual "gaps" that needs to be filled. *3M Co. v. Neology, Inc.*, 2019 WL 2714832, at *10 (Del. Super. Ct. June 28, 2019); Order at 14.

Additionally, Baldwin's argument concerning the Limited Liability Act and cases cited in support thereof are inapposite. For example, in *Huatuco v. Satellite Healthcare*, 2013 WL 6460898, at *1 (Del. Ch. Dec. 9, 2013), *aff'd,* 93 A.3d 654 (Del. 2014) (TABLE), the implied covenant was not even at-issue and the Delaware Court of Chancery actually upheld the parties' bargained-for agreement. Similarly, the Court of Chancery rejected, in the LLC context, the implied covenant argument finding that "[t]here is thus no gap, no room, and no need for the implied covenant." *Walsh v. White House Post Prods., LLC*, 2020 WL 1492543, at *8 (Del. Ch. Mar. 25, 2020); *see also Kuroda*, 971 A.2d at 888 (dismissing implied covenant claim).

Also, in *In re Atlas Energy Resources, LLC Unitholder Litigation*, 2010 WL 4273122, at *13 (Del. Ch. Oct. 28, 2010), the Court of Chancery rejected the plaintiff's implied covenant arguments in the LLC context stating "where the parties have contractually agreed to eliminate fiduciary duties, they may not invoke the implied covenant as a back door through which such duties may be reimposed after the fact." The court explained further "[t]hat Defendants would rely upon the provision is not 'reasonably unanticipated,' and Plaintiffs cannot invoke the implied covenant to override these provisions." *Id.* This is precisely what Baldwin is attempting to do here—use the implied covenant to rewrite an agreement that no longer suits him.

The sole case that Baldwin cites to where the Court of Chancery found that

the implied covenant survived a motion to dismiss was *Sheehan v. AssuredPartners, Inc.*, 2020 WL 2838575, at *11 (Del. Ch. May 29, 2020). *See* Op. Br. at 37-40. However, that case is inapposite as the plaintiffs, unlike Baldwin, actually named the proper defendant and sufficient facts to survive the motion to dismiss.[5] Here, Baldwin merely asserted conclusory allegations that New Wood breach an implied covenant when another entity executed the challenged Written Consent. The Superior Court correctly found that he failed to assert any disputed material facts which would preclude judgment on the pleadings in New Wood's favor.[6]

Furthermore, Baldwin incorrectly asserts that the Superior Court failed to address his affirmative defenses.[7] Indeed, as Baldwin acknowledges in his Opening Brief, the Superior Court expressly stated that Baldwin's affirmative defenses do not raise any disputed issues of material fact to preclude judgment on the pleadings. Op. Br. at 41. Baldwin fails to cite to any case law stating that the Superior Court must discuss *ad nauseam* each of his affirmative defenses—especially when it had already

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[5] Important to the Court's decision in *Sheehan* was the statement that "the Sheehans must prove at trial that AP Virginia exercised its discretion in bad faith." 2020 WL 2838575, at *11. Here, it is undisputed that New Wood—the actual named counterclaim-defendant—exercised no discretion and took no affirmative action.

[6] Baldwin's argument is also nonsensical and would deprive the majority holders of New Wood's Units the ability to make the indemnification decision because a decision finding no indemnification would automatically be challenged by unhappy claimants like Baldwin. Endless litigation over an indemnification decision is plainly not what anyone intended.

[7] Notably, there is not a single record citation in Baldwin's Opening Brief concerning where this argument was preserved below. Op. Br. 41-42.

found that Baldwin's claims fail at the outset because he failed to join the proper party and that his affirmative defenses fail to raise any disputed facts. Indeed, available law indicates that the boilerplate defenses asserted by Baldwin provide no basis to avoid a dispositive motion. *Cypress Assocs., LLC v. Sunnyside Cogeneration Assocs. Project*, 2007 WL 148754, at *2 (Del. Ch. Jan. 17, 2007) (holding that defendant's answer and unspecific affirmative defense that plaintiff unreasonably withheld consent to a contractual amendment "does not plead facts sufficient to withstand a Rule 12(c) motion"); *GreenStar IH Rep, LLC v. Tutor Perini Corp.*, 2017 WL 5035567, at *8 (Del. Ch. Oct. 31, 2017) ("The rhythmic incantation of multiple affirmative defenses, each revealed in a single sentence, cannot, alone, defeat an otherwise well-supported motion for judgment on the pleadings."), *aff'd*, 186 A.3d 799 (Del. 2018) (TABLE).

And, if this Court wants to go further, Baldwin's arguments still fail. Baldwin's first affirmative defense is essentially identical to his implied covenant of good faith and fair dealing claim. A124; A135-37. Baldwin's second affirmative defense likewise fails because the court is not required "to accept as true conclusory allegations without specific supporting factual allegations." *Page v. Oath Inc.*, 2021 WL 528472, at *2 (Del. Super. Ct. Feb. 11, 2021) (internal quotation marks omitted). Regardless, whether Baldwin believes he acted in good faith does not raise a disputed fact as to whether Baldwin breached his agreement with New Wood.

Lastly, Baldwin's third affirmative defense regarding offset was actually addressed in Baldwin's favor when the Superior Court held that Baldwin was not contractually obligated to reimburse the "fees on fees" incurred in the Advancement Action. Order at 12. Moreover, the Superior Court even went above and beyond its obligations by addressing Baldwin's doctrine of necessary implication argument, which he addressed for the first time at oral argument on New Wood's motion for judgment on the pleadings. A193 at 28-31. The Superior Court also went so far as to order the parties to submit additional briefing on this new argument to ensure that Baldwin's claims were fully heard. A197 at 43:12-23. To suggest that the Superior Court took shortcuts in addressing Baldwin's arguments is mistaken.

Lastly, Baldwin's assertions in subsections 5 and 7 of his argument (Op. Br. 33-37) are just as conclusory as those in his Counterclaim and/or unfounded and were not asserted in the Superior Court pleadings. As discussed above, these assertions should not be considered by this Court. *See Nemec*, 991 A.2d at 1125; *Page*, 2021 WL 528472, at *2. Accordingly, New Wood respectfully requests that the Court affirm the Superior Court's decision.

III. ADDITIONAL GROUNDS EXIST TO AFFIRM.

A. QUESTION PRESENTED

May this Court affirm the Superior Court's decision based on grounds preserved below, not resolved by the Superior Court's decision? B21-B23; B65-B67; A190, at 17:20-18:23.

B. SCOPE OF REVIEW

The Delaware Supreme Court "may affirm on the basis of a different rationale than that which was articulated by the trial court" and "may 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) (citing *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 647 (Del. 1993)); *see also Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 333 n.7 (Del. 2012) (considering separate basis for summary judgment not relied on by the trial court where that basis "was fairly presented to the trial judge").

C. MERITS OF THE ARGUMENT

Finally, even if the Court disagrees with the Superior Court's analysis with respect to Baldwin's counterclaim and affirmative defenses, there is an additional reason that the judgment should be affirmed. Indeed, this Court "may affirm on the basis of a different rationale than that which was articulated by the trial court" and "may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court." *Unitrin*, 651 A.2d at 1390 (citing *Standard Distrib. Co.*, 630 A.2d

at 647); *see also Riverbend Cmty., LLC*, 55 A.3d at 333 n.7 (considering separate basis for summary judgment not relied on by the trial court where that basis "was fairly presented to the trial judge").

Specifically, the judgment can be affirmed because Baldwin's affidavit of defense was deficient under Delaware law. *See Homemakers Loan & Consumer Disc. Co. v. Petrovich*, 1982 WL 533642, at *2 (Del. Super. Ct. Aug. 31, 1982) ("The defendant's affidavit must, with specificity, 'state facts on which the alleged defense is based so that the court can judge whether, if proved, such facts would constitute a defense . . . .'"). New Wood plainly preserved this argument in the Superior Court. B21-B23; B65-B67; A190, at 17:20-18:23. While the Superior Court did not resolve this argument below, Baldwin's affidavit of defense was deficient. The affidavit of defense merely states "I believe in good faith that I have defenses to the Amended Complaint in this action. 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 the Amended Complaint." A140. As New Wood argued in support of its Motion for Judgment on the Pleadings, Baldwin's affidavit alleges no specific facts supporting a viable defense. B21-B23; B65-B67. Indeed, Baldwin's affidavit merely cites to his Answer, Affirmative Defenses, and Counterclaim and does not address the specific allegations in the Complaint. A140.

While the Superior Court did not issue an express ruling on the sufficiency of

Baldwin's affidavit of defense in its August 23, 2021 ruling, it acknowledged the affidavit's deficiency during oral argument on New Wood's Motion for Judgment on the Pleadings:

> COURT: I'm not sure this is the same as JA or the other cases that have dealt with incorporating an answer, Mr. Forcier. And I – I'm not one to typically stand on technicalities, but on the other hand the case law says that 3901 is strictly interpreted. And there's a good body of case law that says what is and what is not acceptable under 3901. I don't see anything in this affidavit swearing to the truth of the facts contained in the answer, affirmative defenses and counterclaims.

A195, at 35:3-13.

As the Superior Court recognized during oral argument, Baldwin's argument that his affidavit of defense is sufficient because it incorporates by reference his Answer, Affirmative Defenses and Counterclaim fails. *See also id.* ("I read it as saying the facts in support of my defense are in the answer and I swear that the facts in support of my defense are in the answer, but not that I swear that the facts in support of the defense are true."). Accordingly, even if this Court disagrees with the Superior Court's analysis with respect to Baldwin's counterclaim and affirmative defenses, this Court should nonetheless affirm the Superior Court's ruling because Baldwin's affidavit of defense was deficient under Delaware law.

CONCLUSION

For the reasons set forth above, New Wood respectfully requests that the Court affirm the Superior Court's decision entering judgment in favor of New Wood.

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