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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STRAINE DENTAL MANAGEMENT, LLC, STRAINE DM HOLDINGS, LLC and STRAINE DM INTER HOLDINGS, LLC,	No. 15, 2023
Defendants Below-Appellants,	Case Below: Court of Chancery C.A. No. 2022-0410-JTL
v.	
ROBERT BREAULT, D.M.D.,	
Plaintiff Below-Appellee.	

APPELLEE'S AMENDED ANSWERING BRIEF

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Dated: April 12, 2023

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NATURE OF PROCEEDINGS

This is a case in which the Plaintiff Below/Appellant, Robert Breault, D.M.D. ("Plaintiff" or "Dr. Breault"), as a member of Straine Dental Management ("Defendant" or "Company"),[1] sought the corporate books and records of The Company. It is undisputed that the member of an LLC has the right to examine its books and records for any proper purpose. The record below clearly establishes that the trial court correctly ruled that Plaintiff continued to be a member of the Company as it failed to buy-back his shares in the Company within the time period as set forth in the LLC Agreement, and therefore the Demand and Complaint for books and records was timely. The Company now seeks review from this Court.

At the time of the Demand and Complaint, Dr. Breault was and continues to be a member of the Company. The Company rejected the demand, and defended the action below, taking the position that it had repurchased Dr. Breault's Class B

[1] Upon information and belief, the legal entity referred to in the LLC Agreement under Section 1.1 "Name and Formation" was formed on February 24, 2017 under the name "Straine Dental Management, LLC." Based upon a search of the Delaware Division of Corporations website, a new limited liability company, Straine Dental Management, LLC was formed on November 8, 2021, and it appears that the legal entity that was formerly Straine Dental Management, LLC changed its name to Straine DM Holdings, LLC. Another entity, Straine DM Inter Holdings, LLC, was formed on January 14, 2022. Upon information and belief, it Plaintiff alleged that Straine DM Holdings, LLC may have been improperly converted, usurped, transferred, diluted and/or encumbered upon the creation, capitalization and/or operation of Straine Dental Management, LLC and/or Straine DM Inter Holdings, LLC. Straine DM Holdings, LLC and Straine DM Inter Holdings, LLC were dismissed by the Chancery Court prior to trial.

and Class D membership units, thus stripping Dr. Breault of his membership and his rights to inspect the Company's books and records. However, as proven in the court below, the Company did not exercise its repurchase right within the time period set forth in the LLC Agreement and Dr. Breault therefore remained a member of Company at all relevant times through the present.

On August 25, 2022, the Chancery Court held a trial on the books and records action. Following post-trial briefing by the parties the Chancery Court issued its Findings of Fact and Legal Rulings. In finding that Dr. Breault maintained his Units and membership in the Company, the Chancery Court primarily relied on an exchange of emails between Dr. Breault and the CEO and President of the Company, Kerry Straine, in mid-February 2022 and subsequent conduct by Dr. Breault and the Company which the Court determined was sufficient to show that the parties mutually agreed to terminate a services agreement and trigger the 15-day period in which the Company had to repurchase Dr. Breault's Units.

As explained below, the Chancery Court did not err in its determination that the mid-February email exchange and subsequent conduct of the parties constituted a meeting of the minds and mutual agreement to terminate the services agreement. The content of the emails was clear – Dr. Breault indicated he wanted to end the relationship and Kerry Straine unambiguously agreed. The parties then both acted

as if the services agreement was terminated – the Company ceased providing certain services that it was obligated to provide under the agreement, offering to refund the amount Dr. Breault had pre-paid for services provided under the agreement, and Dr. Breault independently contacting vendors to replace the services that the Company had been providing. Under these circumstances, the Chancery Court made the proper factual determination that the parties mutually agreed to terminate the services agreement in mid-February 2022.

The termination of the services agreement triggers a 15-day time period for the Company to exercise its right to repurchase a member's units of the Company. The Chancery Court properly under Delaware law gave the plain meaning to the relevant contracts and found that the Company had until March 2, 2022 to repurchase Dr. Breault's membership units. Because the Company did not attempt to do so until April 8, 2022, the attempted repurchase was untimely and ineffective.

Appellants thereafter produced the books and records sought in the Demand, as ordered by the Chancery Court. The appellants' compliance with the order moots their appeal. See *infra*, Section I.c.

On January 17, 2023, SDM filed a Notice of Appeal to the Supreme Court of Delaware and filed its Opening Brief on March 3, 2023.

This is Appellee's Answering Brief arguing that the Court should sustain the

trial court's decision that Dr. Breault was and continues to be a member of SDM.

SUMMARY OF ARGUMENT

1. The appeal is moot. The Chancery Court's only order was for Appellants to produce the books and records sought in the Demand. Appellants produced those documents and, therefore, the Court cannot grant them any practical relief. Delaware law is clear that where there is no actual controversy an appeal is moot. While Appellants may disagree with the Chancery Court's findings of fact and conclusions of law in reaching its decision on the sole issue below of whether the Company is obligated to produce its books and records, such disagreement does not constitute an actual controversy for review by the Supreme Court.

2. Denied. The Chancery Court did not err in concluding that the parties entered into a mutual written agreement to terminate the Services Agreement on February 15, 2022. Mutual assent to terminate a contract can be demonstrated not only by the language of the parties, but by all of the surrounding circumstances. Dr. Breault and Straine unambiguously agreed through their mid-February 2022 email exchange to terminate the Services Agreement and discharge their respective obligations thereunder. This is further demonstrated by the parties' conduct following the mid-February 2022 email communications where the Company ceased providing a number of services, Dr. Breault's independent efforts to contact vendors to replace the services provided by the Company pursuant to the Services

Agreement, and the acknowledgement in the Redemption Agreement that the parties had mutually agreed to terminate the Services Agreement. Neither party imposed an obligation on the other for termination of the Services Agreement, and Straine's hidden intent to require Dr. Breault's execution of the Redemption Agreement as a condition of termination of the Services Agreement is irrelevant a Court's inquiry and determination of whether there was a meeting of the minds.

3. Denied. The Company did not timely exercise its Call Right. Because the Chancery Court properly determined that the Services Agreement was terminated by mutual agreement on February 15, 2022, the 15-day triggering event provision of the LLC Agreement applies, and the Company failed to timely exercise its Call Right within that period. Regardless of whether the 15-day or 90-day time period operated to govern the Call Right, the Company did not properly notify Dr. Breault of its exercise of the Call Right as it did not send such notification by facsimile and/or registered or certified mail.

STATEMENT OF FACTS

Straine Dental Management, LLC was formed as a Delaware limited liability company and is governed by a Limited Liability Company Agreement dated June 20, 2017 (the "LLC Agreement").[2] The Company provides services related to dental practice growth management and dental practice sale strategies.[3] The founding members of SDM are Kerry K. Straine ("Straine") and Olivia D. McLeod.[4]

As reflected in Schedule A of the LLC Agreement, Dr. Breault is a Class B Member of SDM, holding 2 Class B Membership Units equal to a 2.139% share of SDM at a capital contribution of $20,000, and is also a Class D Member of SDM, holding 0.25 Class D Membership Units equal to a 0.267% share of SDM at a capital contribution of $2,500.[5] The LLC Agreement also identifies a series of triggering events upon which the Company has the right at its option to purchase all of a member's membership units (the "Call Right") within fifteen (15) days of discovering the triggering event.[6]

Dr. Breault is a practicing dentist and the President of Cromwell Family

[2] *See* generally, LLC Agreement, A.215-A.256.
[3] LLC Agreement at § 1.3, A.219.
[4] A.253.
[5] A.254-A.256.
[6] LLC Agreement at § 7.3, A.244.

Dental, P.C., in Cromwell, Connecticut (the "Practice").[7] On or about January 1, 2018, the Company and the Practice entered into a Services Agreement ("Services Agreement").[8] Pursuant to the Services Agreement, the Company would provide certain services for the day-to-day administration of the business aspects of CFD.[9]

Dr. Breault thereafter entered into a Letter of Intent with the Company regarding a potential transaction under which the Company would acquire the non-clinical assets of certain dental practices that Dr. Breault owned, including the Practice.[10]

Between 2019 and 2021 SDM, with the assistance of Dr. Breault, engaged in discussions with multiple financing sources for the Company's acquisition of the non-clinical assets of certain dental practices.[11] In the Fall of 2021, the Company determined to proceed with Morgan Stanley for an initial financing transaction (the "Financing Transaction").[12] Dr. Breault was informed in February 2022 that Morgan Stanley also would take some preferred equity in the Company.[13] Dr. Breault decided not to proceed with the transactions contemplated by the Letter of Intent and draft Asset Purchase Agreement because:

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[7] Ex. A, Post-Trial Findings of Fact and Conclusions of Law at ¶ 3.
[8] A.257-A.299.
[9] *Id.*
[10] A.31; *see also,* Ex. A at ¶ 7.
[11] A. 31; *see also*, Ex. A at ¶ 8.
[12] A.31.
[13] A.31.

- The Letter of Intent and Asset Purchase Agreement were rife with discrepancies, changes, and inconsistencies;
- the Company would not address these problems or negotiate with Dr. Breault; and
- at the last minute, the Company removed Dr. Breault's clinical officer employment agreement.[14]

A. Termination of the Services Agreement

On February 14, 2022, Dr. Breault informed the Company that he would not be proceeding with a Letter of Intent and draft Asset Purchase Agreement.[15] This decision came followed discussions regarding the Financing Transaction between SDM and Morgan Stanley.[16] Specifically, Dr. Breault informed Straine that "I will not be able to execute on my APCA…I understand that things will need to get unwound and I will cooperate fully."[17] For clarity, Dr. Breault's reference was that he would be unable to execute on the draft Asset Purchase agreement and related transactions for reasons occasioned by the Company.[18]

On February 15, 2022, Straine responded to Dr. Breault: "I'm sorry to learn that you do not want to move forward with [the Company] and want to unwind the

[14] A.31-A.32.
[15] Ex. A at ¶ 9.
[16] A.64.
[17] A.64; A.301-302; Ex. A at ¶ 9.
[18] A.64.

relationship. ***I accept your decision.*** Vera [Powell, the Company's Director of Operations] will email you the mutual release agreement."[19] Powell sent Dr. Breault a draft Membership Unit Redemption and Mutual Release Agreement (providing for the redemption of Dr. Breault's membership units and release of all claims that the parties may have had against each other) the same day.[20] Notably, the draft Membership Unit Redemption and Mutual Release Agreement identifies an Effective Date of February 28, 2022 and a recital which states that the Service Agreement had been terminated by mutual agreement of the Company and the Practice.[21] The Membership Unit Redemption and Mutual Release Agreement covered more than just the termination of the Service Agreement and the Company's proposed terms therein to repurchase all of Dr. Breault's membership interests were never accepted.[22]

Based on the February 2022 correspondence and receipt of the Membership Unit Redemption and Mutual Release Agreement terminating the Services Agreement, Dr. Breault began reaching out to the vendors who provided services under the Service Agreement to inform them of what had transpired and facilitate transfer of services.[23] Specifically, with respect to Dental Intelligence, which was

[19] A.64; A.301; Ex. A at ¶ 10.
[20] A.64-65; A.301; A.303-308; Ex. A at ¶ 13.
[21] A.303; Ex. A at ¶ 13.
[22] A.303-308; Ex. A at ¶ 36(d).
[23] A.136-A.138; Ex. A at ¶ 15.

the analytics platform, the service was stopped before February ended, which came as a shock to Dr. Breault because he had paid for the service for February and he did not even receive the full month of services as it was shut down within a week of the mid-February email exchange.[24] On March 16, 2022 Dr. Breault requested the financial information for the Practice as the "services agreement [was] terminated."[25] On March 17, 2022, Dr. Breault, through his Connecticut counsel, sent a letter to the Company requesting the Practice's financial information, and the repurchase of Plaintiff's Class B and Class D Membership Units at their current value which is likely in excess of several million dollars in light of the Morgan Stanley financing transaction.[26]

B. The Demand

The Company did not respond to Dr. Breault's request, and on April 1, 2022 Dr. Breault, through counsel, demanded the Company's books and records pursuant to 6 Del. C. § 18-305 (the "Demand").[27].

On April 8, 2022, the Company sent notice to Dr. Breault that the Company was exercising its option to purchase Plaintiff's Class B and Class D Membership Units pursuant to the LLC Agreement.[28] The Company offered to purchase

[24] A.138-A.139; Ex. A at ¶ 14.
[25] A.309; Ex. A at ¶ 16.
[26] A.311-312.
[27] A.313-316; Ex. A at ¶ 18.
[28] A.317-319; Ex. A at ¶ 22.

Plaintiff's membership units for $9.00 (i.e., $1.00 per 0.25 Membership Units).[29]

By letter dated April 13, 2022, SDM's counsel responded to the Demand ("Response"), stating that all pertinent books and records had previously been transferred to Dr. Breault. SDM further stated that the Demand was moot because it was SDM's position that Dr. Breault was no longer a member of SDM pursuant to a Notice of Exercise of Option under Section 7.3 of the LLC Agreement.[30]

On April 14, 2022, Dr. Breault's counsel sent a reply to SDM's Response ("Reply"), responding to the Response and clarifying why Dr. Breault was still a member of SDM with a right to request SDM's books and records.[31] In the Reply, Dr. Breault advised SDM that he intends to promptly pursue all of his legal rights and remedies against the Company for all of his damages sustained by reason of the actions and inactions of the Company relative to promises made and broken by the Company.[32] Dr. Breault thereafter filed the Chancery Court action by Verified Complaint on May 10, 2022.[33]

C. The Chancery Court Decision

Following a one-day bench trial and post-trial briefing, the Chancery Court made the following relevant findings of fact and conclusions of law:

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[29] *Id.*
[30] A.319-367; Ex. A at ¶ 23.
[31] A.368-369; Ex. A at ¶ 24.
[32] *Id.*
[33] A.17-26.

Findings of Fact

- Straine's identification of the refund amount [in Straine's February 15, 2022 email] only makes sense if Straine understood that the Services Agreement was terminated by mutual agreement of February 15, 2022.[34]
- In his email, Straine also said that "[u]pon execution of the mutual release agreement, [the Company] will pay you the total redemption price of $22,500."[35] Straine thus contemplated that the draft Membership Unit Redemption and Mutual Release Agreement would cover additional issues beyond documenting the agreed-upon termination of the Services Agreement, including the redemption of Dr. Breault (the "Disputed Units").[36]
- The recital [in the draft Membership Unit Redemption and Mutual Release Agreement] provides additional evidence that the Services Agreement had terminated by mutual agreement on February 15, 2022.[37]
- The draft Membership Unit Redemption and Mutual Release Agreement provides an "Effective Date" of February 28, 2022…[and] also provide[s] for a refund of prepaid services, consistent with the termination of the

[34] Ex. A at ¶ 11
[35] *Id*. at ¶ 12.
[36] *Id.*
[37] *Id*. at ¶ 13(a).

Services Agreement by mutual agreement on February 15.[38] The draft agreement provides additional evidence that the Services Agreement had terminated by mutual agreement on February 15, 2022.[39]

- The Company's decision to cut off Breault's access to the [Dental Intelligence] dashboard provides additional evidence that the Services Agreement had terminated by mutual agreement on February 15.[40]
- During the second half of February 2022, Breault reached out to vendors to replace the services that the Company had been providing.[41] His efforts provide additional evidence that the Services Agreement had terminated by mutual agreement on February 15.[42]

Operative Legal Principles and Conclusions of Law

- The Company discovered the Triggering Event on February 15, 2022, when Straine agreed to a termination of the Services Agreement.[43]
- Under the plain language of the Fifteen-Day Provision, the time to exercise the Call Right ran on March 2, 2022.[44]
- The Company did not purport to exercise the Call Right until April 8,

[38] Id. at ¶13(b).
[39] *Id.*
[40] *Id.* at ¶ 14.
[41] *Id.* at ¶ 15.
[42] *Id.*
[43] *Id.* at ¶ 31.
[44] *Id.* at ¶ 32.

2022.[45]

- Because the Company exercised the Call Right after the [15-day] exercise period expired, the attempted exercise of the Call Right was ineffective.[46]
- The email exchange [on February 14, and 15] is clear.[47] After the email exchange, both sides acted as if the Services Agreement had terminated on February 15.[48]
- Breault's March 16 email which stated that the Services Agreement had been terminated…was confirmatory and described the state of affairs that had existed since February 15.[49]
- By terminating the Services Agreement, the parties terminated the Company's obligation to provide services to the Practice.[50] The draft Membership Unit Redemption and Mutual Release Agreement covered a wider array of relationships between Breault and the Company.[51] As the title indicates, it also covered the redemption of the Disputed Units and included a mutual release of claims.[52] The failure to reach agreement on the terms of the Membership Unit Redemption and Mutual Release Agreement

[45] *Id.* at ¶ 33.
[46] *Id.* at ¶ 34.
[47] *Id.* at ¶ 36(b).
[48] *Id.*
[49] *Id.* at ¶ 36(c).
[50] *Id.* at ¶ 36(d).
[51] *Id.*
[52] *Id.*

does not mean that the parties had not agreed to terminate the Services Agreement.[53] Neither side imposed any conditions on the termination of the Services Agreement.[54] Instead, Breault and Straine reached agreement on terminating the Services Agreement.[55]

- The Company did not validly exercise the Call Right in a timely fashion.[56] The Call Right lapsed and can no longer be exercised.[57]
- Dr. Breault remained a member of the Company at the time he made the Demand and at the time the Complaint was filed.[58] He continues to be a member of the Company to this day.[59]
- Within five days, the Company will produce the documents sought in the Demand.[60]

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[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at ¶ 37.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id. at* ¶ 40.

ARGUMENT

I. THE APPEAL IS MOOT.

a. Question Presented

Does an actual controversy exist for review by this Court when Appellants complied with the order of the Chancery Court directing the Company to produce the books and records sought in the Demand?

b. Scope of Review

Whether a party has standing to appeal is a question of law that this Court reviews de novo.[61]

c. Merits of Argument

The primary function of an appellate court is to exercise its power of review over actual controversies that remain adversarial following a trial courts' decisions.[62] In the absence of an actual controversy, an appellate court will consider the subject matter of the appeal moot.[63] A controversy may become moot either because a party has lost standing to assert its merits or because the dispute is

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[61] *See El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1256 (Del. 2016) ("Whether a party has standing is a question of law that it subject to de novo review." (citing *Schoon v. Smith*, 953 A.2d 196, 200 (Del. 2007))); *Off. of the Comm'r, Del. Alcoholic Beverage Control v. Appeals Comm'n, Del. Alcoholic Beverage Control*, 116 A.3d 1221, 1226 (Del. 2015) ("We review questions of law, including whether a party has standing, de novo." (citing *Broadmeadow Inv., LLC v. Del. Health Res. Bd.*, 56 A.3d 1057, 1059 (Del. 2012))).

[62] *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 582 (Del. 2002) (citing *General Motors Corp. v. New Castle County*, 701 A.2d 819, 823 (Del. 1997)).

[63] *Tyson Foods*, 809 A.2 D at 582.

no longer amendable to judicial resolution.[64] The controversy "must be between parties whose interests are real and adverse."[65]

The *Tyson Foods* decision is an apt example. In *Tyson*, the plaintiff appealed from the Chancery Court's refusal to vacate its prior orders for "specific performance of a merger agreement and approv[al of] the settlement of related shareholder claims."[66] Prior to appealing, the plaintiff consummated the merger and paid the disgruntled shareholders[67]– but, the plaintiff nonetheless sought "review of certain of the trial court's factual findings in the post-trial opinion" because of their potential collateral effect in a federal lawsuit.[68]

This Court refused because no actual, adversarial controversy remained for it to review.[69] The plaintiff complied with the trial court's prior orders and "for this Court to opine on the rulings contained in the post-trial opinion …would require the Court to engage in reviewing a moot controversy in which only one private party has an interest."[70]

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[64] *Tyson Foods*, 809 A.2d at 582 (citing *General Motors Corp.*, 701 A.2d at 823).
[65] *Tyson Foods*, 809 A.2d at 582 (quoting *Rollins International, Inc. v. International Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973)).
[66] *Tyson Foods*, 809 A.2d at 577.
[67] *Tyson Foods*, 809 A.2d at 581.
[68] *Tyson Foods*, 809 A.2d at 582.
[69] *Tyson Foods*, 809 A.2d at 582.
[70] *Tyson Foods*, 809 A.2d at 583; *see Gen. Motors Corp. v. New Castle Cnty.*, 701 A.2d 819, 823 (Del. 1997) ("[a]lthough there may have been a justiciable controversy at the time the litigation was commenced, the action will be dismissed if that controversy ceases to exist").

Here, too, the appellants' own actions deprive the Court of any actual, adversarial controversy to resolve. The complaint in this matter sought a determination by the Chancery Court of whether The Company was obligated to produce the books and records sought in the Demand. After making its factual determinations and conclusions of law, the Chancery Court ordered that the Company produce the books and records. As admitted by Appellants in their opening brief, the Company produced those books and records.

Appellants argue that the appeal is not moot because of the collateral consequences that attach to the Court of Chancery's decision.[71] In particular, Appellants seek review of the Chancery Court's factual findings in the post-trial opinion because, Appellants argue, it bears on Dr. Breault's continued membership in the Company.[72]

However, as in *Tyson Foods*, such argument does not justify departure from this Court's jurisprudence on mootness. First, the Company produced the books and records sought in the Demand, thus acknowledging Dr. Breault's standing as a member of the Company to seek and receive those books and records. Second, the Company complied with the Chancery Court's order regarding the sole issue of whether Dr. Breault was entitled to those books and records, thus there is nothing for this Court to review as there is no dispute amenable to judicial resolution.

[71] Appellants' Op. Brief at p. 27.
[72] Appellants' Op. Brief at p. 27.

Finally, this Court's ruling on the post-trial findings of fact would require the Court to engage in reviewing a moot controversy in which only one private party has an interest – i.e., this appeal does not fall within the mootness exception of issues otherwise evading judicial review or implicating an important public policy concern.[73]

Accordingly, no actual controversy exists and the appeal is therefore moot.

[73] *Tyson Foods*, 809 A.2d at 582 (citing *Appeal of Infotechnology, Inc.*, 582 A.2d 215, 218 (Del. 1990); *McDermott Inc. v. Lewis*, 531 A.2d 206, 211 (Del. 1987).

II. THERE WAS A MUTUAL WRITTEN AGREEMENT TO TERMINATE THE SDM SERVICE AGREEMENT ON FEBRUARY 15, 2022, EVIDENCED BY SUBSEQUENT CONDUCT OF THE PARTIES.

a. Question Presented

Did Dr. Breault and The Company reach a mutual written agreement to terminate the Services Agreement through their mid-February email communications and evidenced by their subsequent conduct including the cessation of services provided by the Company, the offer to refund the pre-payment of the services, Dr. Breault's independent efforts to replace the terminated services, and the acknowledgement that the Services Agreement was terminated in the recitals of the Membership Unit Redemption and Mutual Release? This question was raised below (A.38) and considered by the Court of Chancer (¶¶ 9-16, 31, 36).

b. Scope of Review

Determining the intent of the parties is a question of fact.[74] Factual conclusions by the Court of Chancery are reviewed to determine whether they are clearly erroneous and not supported by the credible and sufficient evidence in the record.[75]

[74] *Del. Bay Surgical Servs., P.A. v. Swier*, 900 A.2d 646, 650 (Del. 2006).
[75] *Sloan v. Segal*, 2010 Del. LEXIS 209 at *15 (Del. 2010) (citing *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 217 (Del. 2005); *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

A trial court's factual findings are afforded a high level of deference and will not be disturbed unless such conclusions are the product of clear error.[76] Factual findings are not clearly erroneous "if they are 'sufficiently supported by the record and are the product of an orderly and logical deductive process.'"[77] "The factual findings of a trial judge can be based upon physical evidence, documentary evidence, testimonial evidence, or inferences from those sources jointly or severally."[78] "That deferential standard applies not only to historical facts that are based on upon credibility determinations but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts."[79] "When there are two permissible view of the evidence, the factfinder's choice between them cannot be clearly erroneous."[80]

c. Merits of Argument

The Chancery Court correctly found that the parties mutually agreed to terminate the Services Agreement based on their mid-February 2022 email

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[76] *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015) (additional citations omitted).

[77] *Bäcker v. Palisades Crowth Capital II, L.P.*, 246 A.3d 81, 95 (Del. 2021) (quoting *Biolase, Inc. v. Oracle P'rs*, 97 A.3d 1029, 1035 (Del. 2014) and *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999)).

[78] *Bäcker*, 246 A.3d at 95 (quoting *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000)).

[79] *Bäcker*, 246 A.3d at 95 (quoting *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016)).

[80] *Bäcker*, 246 A.3d at 95 (quoting *RBC Cap. Mkts., LLC*, 129 A.3d 849 (quoting *Bank of N.Y. Mellon Tr. Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011)).

communications, the draft Membership Unit Redemption and Mutual Release Agreement, and the conduct of the parties following the exchange of these communications and documents.

i. The parties mutually agreed to terminate the Services Agreement

Just as in the making of the contract, so in the negotiation for its abrogation or termination, there must be a meeting of the minds of the parties in respect to the proposition that it shall be cancelled.[81] Mutual recission, also known as an "agreement of recission," occurs where each party agrees to discharge all of the other party's remaining duties of performance under an existing contract.[82]

To "mutually agree," the parties must at a minimum achieve a meeting of the minds.[83] In order for there to be an agreement, the parties must have a distinct intention common to both and without doubt or difference.[84]

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[81] *Josloff v. Falbourn*, 125 A. 349, 350 (Del. 1924).

[82] *See*, 29 Williston on Contracts § 73:15 (4th ed. 2017) ("Elements of recission; oral rescission").

[83] *See generally*, 14 Williston on Contracts § 3.2 (4th ed. 2020) ("A binding mutual understanding or so-called "meeting of the minds" (consensus ad idem) sufficient to establish a contract requires no formality or express language regarding every detail of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances."). *See also*, *Eagle Force Hldgs., LLC v. Campbell*, 187 A. 3d 1209, 1212 (Del. 2018) ("One of the first things first-year law students learn in their basic contracts course is that, in general, 'the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.' In other words, there must be a 'meeting of the minds' that there is a contract supported by consideration." (Internal quotation marks and citation omitted)).

[84] *Gleason v. Ney*, 1981 WL 88231, at *1 (Del. Ch. Aug. 25, 1981).

The February 14, 2022 email from Dr. Breault read with the February 15, 2022 email from Kerry Straine, make it crystal clear that there was a mutual agreement between Dr. Breault and SDM, through Kerry Straine, that the Service Agreement was terminated as of February 15, 2022. The February 15, 2022 email from Kerry Straine not only contains his acceptance of the termination of the Service Agreement, but also the amount of refund for the prepaid services, in the amount of $4,950.00.

Appellants' argument that Strain, in his mind, conditioned the termination of the Services Agreement on the executed Redemption Agreement[85] cannot be relied on to show there was no meeting of the minds regarding the Services Agreement. For an agreement an overt manifestation of assent is important, and the unexpressed subjective intention of a party is therefore not relevant.[86] Additionally, the Redemption Agreement states in a recital that the parties had **mutually agreed** to terminate the Services Agreement. There was nothing in the parties' mid-February communications or in the Redemption Agreement that imposed any conditions on the termination of the Service Agreement.

[85] *See* Appellants' Opening Brief at page 19.
[86] *Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066, 1070 (Del. 1997). *See also*, 14 Williston on Contracts § 4.1 ("[I]t was long ago settled that secret, subjective intent is immaterial, so that mutual assent is to be judged only by overt acts and words rather than by the hidden, subjective or secret intention of the parties.").

The Chancery Court therefore properly made the factual determination that the parties mutually agreed to terminate the Services Agreement based on their mid-February email communications.

ii. The conduct of the parties following their communications shows that both Dr. Breault and the Company believed the Services Agreement was terminated.

The conduct of the parties further supports the conclusion that the Service Agreement was terminated on February 15, 2022. When determining whether both parties have agreed to mutually rescind the contract, the court examines not only the language of the parties, but to all of the surrounding circumstances.[87]

The Company sent a written Redemption Agreement to Dr. Breault, indicating that the Service Agreement was terminated effective February 28, 2022. That Redemption Agreement also contemplated a refund of the prepaid fees, even though there was a typo which indicated the refund was in the amount of $22,500.00, not the correct amount of $4,950.00.

Additionally, there was evidence that all the services that SDM was providing were terminated immediately, or as soon as practically possible, after the termination of the Agreement on February 15, 2022. In particular, there was undisputed testimony that the Dental Intelligence dashboard service was

[87] *See*, 29 Williston on Contracts § 73:15 (4th ed. 2017) ("Elements of recission; oral rescission").

terminated immediately. There was also testimony and exhibits that the payroll and accounting services were terminated in the following month.

The Company argues that this wrap-up of services results in the conclusion that the Agreement was not terminated until the end of March in 2022. However, that some services continued into March 2022 does not support a finding that there was not mutual assent.

Section 7.3 of the Service Agreement specifically provides that any obligations that accrue during the Service Agreement continue even after termination.[88] That is what occurred here. There was obviously a prepayment of $4,950.00 that was made during the term of the Service Agreement, prior to February 15, 2022. The obligation to perform these services, even though prepaid, accrued when the payment was made prior to the termination of the Service Agreement. However, according to the plain terms of the Service Agreement, the obligation to perform, since it accrued prior to the termination of the Agreement, survived the termination of the Agreement.

Under the circumstances, the inescapable conclusion is that the Services Agreement was mutually terminated in writing on February 15, 2022, and that the

[88] *See*, Section 7.3(a) of the Service Agreement, at A.244 ("[u]pon termination of this Agreement as herein provided, neither Party shall have any further obligations under this Agreement, except for: (a) obligations accruing prior to the date of termination, including without limitation payment of the amounts set forth in ARTICLE VI relating to periods prior to the termination of this Agreement…").

actions and conduct of the parties confirmed this. The Chancery Court did not err in so reaching this factual conclusion.

III. SDM FAILED TO TIMELY AND PROPERLY EXERCISE ITS CALL RIGHT.

a. Question Presented

Did The Company timely and properly exercised its Call Right within 15 days of the termination of the Services Agreement when it attempted to repurchase Dr. Breault's membership units by letter sent via FedEx and email on April 8, 2022? This question was raised below (A.38, A.66-70) and considered by the Court of Chancery (Op. ¶¶ 28-37).

b. Scope of Review

Questions of law and contractual interpretation, including the interpretation of LLC agreements, are reviewed *de novo*.[89]

c. Merits of Argument

Pursuant to Section 7.3(c) of the LLC Agreement, the Company could exercise its right to purchase Plaintiff's membership units by providing written notice to Dr. Breault within fifteen (15) days of the Practice ceasing to be a client of the Company.[90] The Company failed to provide notice to Dr. Breault in accordance with the LLC Agreement within fifteen (15) days – i.e., by March 2, 2022 – in compliance with the LLC Agreement.

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[89] *In re Shorenstien Hays-Nederlander Theaters LLC Appeals*, 213 A.3d 39, 56 (Del. 2019) (internal citations omitted).
[90] LLC Agreement at Section 7.3(c), A.244.

Although the Company purports to have sent notice via email and FedEx, the notice was purportedly sent on April 8, 2022 (outside of the 15-day period – whether by Dr. Breault's alleged Triggering Date of February 15, 2022 or the Company's alleged Triggering Date of March 16, 2022), and in any event such notice did not comply with Section 12.1 of the LLC Agreement. On April 12, 2022 a purported notice and a check for nine dollars ($9.00) was sent to Dr. Breault's former residence via FedEx, and delivered on April 14, 2022 well outside of the 15-day period calculated from either Triggering Date.[91]

As demonstrated above and determined by the Chancery Court, the termination of the Service Agreement, and therefore the cessation of the Practice's relationship as a client of the Company, i.e. the Triggering Event, occurred on February 15, 2022. Under Section 7.3(c) of the LLC Agreement, SDM had 15 days – until March 2, 2022 – to send notice of its exercise of rights to purchase Dr. Breault's Membership Units.[92][93] It failed to do so and the Chancery Court properly found that because of the Company's failure to timely exercise its Call Right Dr. Breault remains a member of the Company.

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[91] The notice was also delivered to the Practice on April 18, 2022.

[92] *See*, LLC Agreement at Section 7.3(c), A.244.

[93] At the latest, the "Triggering Event" was February 28, 2022, the effective date of the termination of the Services Agreement, and provision of services by the Company. Using that date, the Notice was required to be sent by March 15, 2022. The Company failed to send a notice compliant with the LLC Agreement by that date as well.

However, even if Dr. Breault's March 16, 2022 email is construed to constitute a triggering event permitting the Company 90 days to exercise its Call Right, the Company never provided proper notice to Dr. Breault of its exercise its rights to purchase Dr. Breault's Membership Units.

The Company purports to have notified Dr. Breault that the Company was exercising its right to purchase Dr. Breault's Membership Units by letter sent on April 13, 2022.[94] The Company alleges that the exercise of the right was pursuant to Section 7.3 of the LLC Agreement.[95]

The LLC Agreement contains a specific provision regarding notices, which states in pertinent part:

> Any notice, demand, or communication required or permitted to be given by any provision of this Agreement shall be deemed to have been sufficiently given or served for all purposes if delivered personally to the party or to an executive officer of the party to whom the same is directed, if sent by ***facsimile***, with receipt confirmed by telephone, or if sent by ***registered or certified mail***, postage and charges prepaid, addressed to the Member's, Board of Managers or the Company's address, as appropriate, as set forth in this Agreement or as notified by such Member or Board of Managers.[96]

Here, the notice was sent via FedEx and email. However the LLC plainly requires that any notice must be sent via facsimile with telephonic confirmation, or

[94] *See*, A.54.
[95] *Id.*
[96] LLC Agreement at ¶12.1, A.251 (emphasis added).

registered or certified mail, postage and charges prepaid.

When construing and interpreting an LLC agreement, a court applies the same principles that are used when construing and interpreting other contracts.[97] Delaware adheres to the objective theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party.[98] When interpreting a contract, the court will give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions.[99] If a writing is plain and clear on its face, *i.e.*, its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent.[100] A court applying Delaware law will construe the contract in accordance with that plain meaning and will not resort to extrinsic evidence to determine the parties' intentions.[101]

Because the Company failed to send the April 8, 2022 letter purportedly giving notice of its exercise to purchase Dr. Breault's Membership Units in the

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[97] *Godden v. Franco,* 2018 Del. Ch. LEXIS 283, 2018 WL 3998431, at *8 (Del. Ch. Aug. 21, 2018).
[98] *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014).
[99] *GMG Capital Invs., LLC v. Athenian Venture P'rs I*, 36 A.3d 776, 779 (Del. 2019).
[100] *City Inv. Co. Liquid Tr. v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993).
[101] *BLG Hldgs. LLC v. exXco LFG Hldg., LLC*, 41 A.3d 410, 414 (Del. 2012).

manner set forth in Section 7.3 of the LLC Agreement, the purported notice cannot operate to terminate Dr. Breault's membership in the Company.[102]

[102] *See*, *TravelCenters of Am. LLC v. Brog*, 2008 Del. Ch. LEXIS 183, at *11 (Del. Ch. Dec. 5, 2008) (holding that a notice that failed to comply with the LLC's operating agreement was "invalid and insufficient…and therefore [of] no force or effect"). The Court in *Brog*, found that the provision at issue required proper notice as a condition to nominating a person for election as a director. *Id.*

CONCLUSION

For the above reasons, this the Court should dismiss the appeal as moot or in the alternative affirm the Chancery Court's Findings of Fact and Conclusions of Law.

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