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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, Defendants Below-Appellants, v. ROBERT BREAULT, D.M.D., Plaintiff Below-Appellee.	No. 15, 2023 Case Below: Court of Chancery C.A. No. 2022-0410-JTL

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

INTRODUCTION[1]

In its opening brief, the Company established that the Court of Chancery clearly erred in finding that the February 14–15, 2022 emails between Dr. Breault and the Company's President and CEO, Kerry Straine gave rise to a "mutual written agreement" to terminate the parties' Service Agreement. The Company further demonstrated that the Service Agreement did not terminate until April 2022, when the Company responded to Dr. Breault's March 16, 2022 email (in which Dr. Breault erroneously assumed that the Service Agreement had been terminated on February 15 and requested transfer of his practice's financial information to his new bookkeeper). Specifically, in its April 2022 letter, the Company notified Dr. Breault that it was treating his email as a notice of termination under the Service Agreement's termination provision and that it was waiving the remainder of the 90-day notice period under that provision. Only then did the Service Agreement terminate giving rise to the Company's right to purchase Dr. Breault's Membership Units (*i.e.*, its "Call Right"), which it did. Accordingly, contrary to the Court of Chancery's decision, Dr. Breault is no longer a member of the Company.

[1] Capitalized, undefined terms, have the same meaning ascribed to them in Appellants' Opening Brief ("Op. Br. ___"). Dkt. 8. Citations to Appellee's Answering Brief are "Ans. Br. _____".

Dr. Breault's answering brief misses the mark, arguing first that the Company's appeal is moot because the Company complied with the Court of Chancery's order to produce the books and records that Dr. Breault demanded when he initiated this action. But that position disregards the reality that there is still an actual controversy between the parties concerning whether Dr. Breault is a member of the Company—an issue specifically considered and decided (incorrectly) by the Court of Chancery. Accordingly, the appeal is not moot.

There is also no merit to Dr. Breault's defense of the Court of Chancery's decision. At most, Dr. Breault's and Mr. Straine's February 14–15, 2022 email correspondence reflects their agreement to cooperate toward "unwind[ing]" the parties' relationship. Neither of their emails referenced the Service Agreement or its termination. The *only* time that issue was raised was in the proposed Redemption Agreement that Mr. Straine told Dr. Breault he would be sending (and that the Company's Vera Powell sent later in the day). *That* agreement contained an express provision for terminating the Service Agreement, among other items. Dr. Breault, however, never signed it. Accordingly, there was no "mutual written agreement" for the Service Agreement's termination because termination of the Service Agreement was conditioned on the occurrence of a subsequent event (execution of the Redemption Agreement).

Dr. Breault's challenge to the sufficiency of the Company's notice that it was exercising its Call Right under the LLC Agreement fares no better. The Company fully complied with the LLC Agreement's notice provision, Section 12.1, by giving notice to Dr. Breault both personally and via FedEx and did so in a timely fashion. Dr. Breault's arguments in opposition fall short.

Accordingly, the judgment of the Court of Chancery should be reversed and judgment entered in favor of the Company.

ARGUMENT

I. THE COMPANY'S APPEAL IS NOT MOOT

Dr. Breault is incorrect when he argues that the Company's appeal is moot. *See* Ans. Br. at 16–19. It is not. Although the Company complied with the Court of Chancery's order that it produce the books and records, the Company's appeal implicates an "actual controversy" that is "amenable to judicial resolution," specifically: whether Dr. Breault continues to be member of the Company. *See Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 582 (Del. 2002), *aff'd*, 818 A.2d 145 (Del. 2003). This is because, in addition to requiring the Company to produce the requested books and records, the Court of Chancery expressly concluded that Dr. Breault "remains a member of the Company." Op. ¶ 36.f. But he is not, and that determination affects the parties' substantial rights and interests moving forward.

Dr. Breault argues that *Tyson* supports a finding of mootness here, but he is mistaken—*Tyson* is a much different case. There, Tyson sought to challenge certain factual findings that the Court of Chancery made in rejecting Tyson's attempt to back out of a planned merger with a competitor, IBP, Inc. ("IBP"), and in granting specific performance to IBP. *Tyson*, 809 A.2d at 579. Although the parties eventually agreed to go through with the merger, Tyson was concerned that IPB stockholders would use the Court of Chancery's findings to support a separate

federal court action in which the stockholders were asserting various claims directed to the merger. *Id*.

The problem, however, was that after the merger, IBP ceased to exist as a separate legal entity. *Id*. As a result, this Court properly found the Court of Chancery's findings to be unreviewable on mootness grounds because only Tyson had an interest in the controversy, with IPB "having been absorbed by Tyson" following the merger. *Id*. at 582. Accordingly, IPB had no "interest in, or standing to," defend Tyson's appeal. *Id*. With the parties "no longer hav[ing] adversarial existence," *id*., the Court declined to "review[ ] a moot controversy in which only one private party has an interest." *Id*. at 583.

Those peculiar circumstances are not present here. The Court of Chancery concluded that Dr. Breault "remains a member of the Company." Op. ¶ 36.f. That is a disputed issue that remains in "controversy" between the parties. With respect to that portion of the Court of Chancery's decision, the parties' interests are "real and adverse" notwithstanding the Company's voluntary compliance with the Court of Chancery's order to produce the requested books and records. *Tyson*, 809 A.2d at 582.

Consequently, this appeal is not moot—at least not entirely. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981) (recognizing that while "one issue in a case"

may become moot, there may be "other issues" that "have not become moot"); *Tyson Foods*, 809 A.2d at 583 (finding appeal to be partially moot and limiting its scope accordingly).

Not only that, it would be a waste of judicial resources to dismiss this appeal only to have the Company file a new action in order to resolve the controversy that was fully briefed below, was decided by the Court of Chancery, is now fully briefed on appeal and is currently before the Court.

II. THERE WAS NO "MUTUAL WRITTEN AGREEMENT" TO TERMINATE THE PARTIES' SERVICE AGREEMENT

In arguing that there was a "mutual written agreement" to terminate the Service Agreement as of February 15, 2022, Dr. Breault relies—as did the Court of Chancery—on the February 14–15, 2022 emails between Dr. Breault and Mr. Straine and what Dr. Breault characterizes as the parties' "subsequent conduct." *See* Ans. Br. at 20–26.

Dr. Breault, however, makes the same mistake as the Court of Chancery: he overlooks the fact that Mr. Straine conditioned his assent on Dr. Breault's execution of the proposed Redemption Agreement. In fact, the very terms of the Redemption Agreement confirm Mr. Straine's intent that subsequent action was required for termination. Specifically, Section 1.3 of the Redemption Agreement, had Dr. Breault signed it, would have terminated the Service Agreement effective February 28, 2022. *See* Redemption Agreement, A304, § 1.3. But Dr. Breault did *not* sign the Redemption Agreement, and so there was never a *mutual* written agreement to terminate the Service Agreement.

At most, the February 14–15, 2022 emails reflected Dr. Breault's and Mr. Straine's understanding that the parties' "relationship" would need to be "unwound." A301-A302. The specifics of the "unwinding," including the express termination of the Service Agreement, were left for another day as confirmed by the reality that the

Service Agreement was never mentioned—by anyone—in the February 14–15 correspondence.

Perhaps recognizing that the plain language of the February 14–15 emails does not accomplish his goal, Dr. Breault focuses on Mr. Straine's statement that he "accept[ed]" Dr. Breault's "decision." Ans. Br. at 8. But what was the "decision"? All that Dr. Breault expressed in his February 14, 2022 email was that he was declining to participate in the Potential Transaction by which the Company would acquire the non-clinical assets of certain dental practices, including Dr. Breault's Cromwell Family Dental. A302. Neither Dr. Breault nor Mr. Straine even mentioned the Service Agreement in their emails, let alone addressed its termination. Accordingly, there is no support for Dr. Breault's assertion that Mr. Straine's February 15, 2022 email "contains his acceptance of the termination of the Service Agreement." Ans. Br. at 23.

Dr. Breault is also mistaken when he suggests that the Company is relying on Mr. Straine's "unexpressed subjective intention" regarding the Service Agreement's termination. *Id*. at 24. Mr. Straine plainly expressed—in writing—his expectation that termination would be accomplished through Dr. Breault's execution of the proposed Redemption Agreement. He did so by advising Dr. Breault in his February 15, 2022 email that Ms. Powell would be sending him a "mutual release agreement"

(*i.e.*, the proposed Redemption Agreement), and that "[u]pon execution of the mutual release agreement" the Company would pay to Dr. Breault the total redemption price of $22,500 for his Membership Units, plus "$4,950.00 for your prepaid final month of services." A301. That agreement, which Ms. Powell sent to Dr. Breault later that same day, contained a specific provision, Section 1.3, for terminating the Service Agreement (as well as all "Other Agreements" between the parties). This was the first time the Service Agreement's termination was ever mentioned and is the only writing containing the "terms or conditions upon which the [termination was] to be predicated." *Josloff v. Falbourn*, 125 A. 349, 350 (Del. 1924).

What all of this shows is that while Mr. Straine may have "accept[ed]" Dr. Breault's decision not to proceed with the Potential Transaction, he made it clear that in order to "unwind the relationship"—including termination of the Service Agreement—Dr. Breault needed to execute the proposed Redemption Agreement. That never happened. In no sense can there be said to have been a mutual written agreement at the time of their email exchange.

Nor can subsequent conduct change this reality. Like the Court of Chancery did, Dr. Breault cites a recital in the proposed Redemption Agreement stating that the parties "ha[ve] mutually agreed to terminate the Servic[e] Agreement," but he

misreads that provision entirely. Ans. Br. at 24; Op. ¶ 13.a.; A303. According to Dr. Breault, the recital is a recognition that the parties had *already* agreed to terminate the Service Agreement in "mid-February." Ans. Br. at 24. But as explained in the Company's opening brief, the recital *assumed execution of the Redemption Agreement*, including Section 1.3, which again specifically provided for the Service Agreement's *actual* termination. Op. Br. at 21. In other words, *had both parties signed the Redemption Agreement*, it would have accurately reflected that they had "mutually agreed to terminate the Service Agreement." But they did not, so there was no mutual agreement. Dr. Breault's contrary interpretation is untenable. *See also Urdan v. WR Cap. P'rs, LLC*, 2019 WL 3891720, at *13 (Del. Ch. Aug. 19, 2019), *aff'd*, 244 A.3d 668 (Del. 2020) ("[R]ecitals are not substantive provisions of an agreement . . . .").

Finally, Dr. Breault argues that the "conduct of the parties further supports the conclusion that the Service Agreement was terminated on February 15, 2022." Ans. Br. at 24. Specifically, Dr. Breault claims that Section 1.3 of the proposed Redemption Agreement "contemplated a refund of the prepaid fees" in conjunction with termination of the Service Agreement and that the Company stopped provided services, including Cromwell Family Dental's analytics dashboard, "immediately, or as soon as practically possible," after February 15. *Id*.

As an initial matter, Dr. Breault is incorrect when he asserts that the proposed Redemption Agreement addressed prepaid service fees. The only payment that the Redemption Agreement contemplated was $22,500 for return of Dr. Breault's "Capital Contributions." *See* A304, §§ 1.2, 1.3.

As for any cessation of services, that was, as explained in the Company's opening brief, consistent with Mr. Straine's assumption that Dr. Breault would be signing the Redemption Agreement, thereby terminating the Service Agreement. Op. Br. at 23. But, again, he did not; and none of the "conduct" or "surrounding circumstances" referenced by Dr. Breault or the Court of Chancery can change the fact that there was no "mutual written agreement" to terminate the Service Agreement as of February 15, 2022.

III. DR. BREAULT IS NO LONGER A MEMBER OF THE COMPANY BECAUSE THE COMPANY TIMELY EXERCISED ITS RIGHT TO PURCHASE HIS MEMBERSHIP UNITS

In concluding that the Company did not timely exercise its right to purchase Dr. Breault's Membership Units, the Court of Chancery relied solely on its finding that there was a "mutual written agreement" to terminate the Service Agreement as of February 15, 2022. Op. ¶ 34. As discussed previously and in more detail in the Company's opening brief, that finding is clearly erroneous.

Dr. Breault nevertheless contends that even if the Service Agreement did not terminate as of February 15, 2022, the Company still failed properly to exercise its Call Right. Dr. Breault first argues that the Company was required to provide him notice within "fifteen (15) days" of his March 16, 2022 email asserting that the Service Agreement had terminated on February 15 and requiring transfer of his practice's financial information to his new bookkeeper. Ans. Br. at 27. That argument, however, incorrectly assumes that Dr. Breault's March 16, 2022 email was a "Triggering Event." It was not.

As fully discussed in the Company's opening brief, the "Triggering Event" did not occur until the Company sent its April 8, 2022 letter notifying Dr. Breault that it was treating his March 16, 2022 email as written notice of termination under Section 7.2 of the Service Agreement and waiving what remained of the 90-day

notice period. *See* Op. Br. at 25. Dr. Breault acknowledged at trial that he received the letter no later than April 20, 2022. A164/76:7–77:16 (Breault). The Service Agreement thereupon terminated, giving rise to a "Triggering Event."[2]

Citing Section 12.1 of the LLC Agreement (A251), Dr. Breault responds that the Company's notice was nevertheless defective because it was not sent by "facsimile" or "registered or certified mail." Ans. Br. at 29–30 (citation omitted). That argument is easily rejected. *First*, Section 12.1 states that "facsimile" and "registered or certified mail" are among the methods of delivery that "shall be deemed … sufficien[t]," *i.e.*, they are prima facie evidence of notice. A251; *see, e.g., Commonwealth v. Rodriguez*, 37 N.E.3d 611, 616 n.12 (Mass. 2015) (citing statute providing that notice by mail "shall be deemed a sufficient notice" such that proof of service of notice by mail "shall be prima facie evidence thereof"). Section 12.1 does not *require* either of those methods to be used nor preclude the use of other methods like delivery by FedEx as here (along with email).

[2] Dr. Breault further suggests in a footnote that the "Triggering Event" was February 28, 2022, which was the anticipated effective date of the proposed Redemption Agreement. *See* Ans. Br. at 28 n. 93. Again, however, the proposed Redemption Agreement was never executed, so there is no merit to Dr. Breault's assertion that this was the "latest" point at which the Service Agreement could be considered to have been terminated.

Second, Dr. Breault fails to mention in his brief that he conceded at trial that he also received notice *personally*, when his neighbor gave the notice to him:

> Q. And one method by which you received it is on or around April 18 or 20th, your neighbor, who happened to live in your prior home, gave it to you; right?
>
> A. Correct.

A164/76:17–21 (Breault). Delivery "personally" is one of the methods listed in Section 12.1 of the LLC Agreement.

Finally, Dr. Breault acknowledged at trial that he received the Company's letter by April 20, 2022:

> Q. Okay. And let's get something straight here. You actually received this at some point, yes?
>
> A. Yes, I eventually received it.
>
> * * *
>
> Q. And so it's undisputed -- and I just want to make sure that we're clear on this -- one, you received it on or around April 18 or 20th, and your lawyers also received it right around that same time, yes?
>
> A. Yes, shortly after I sent it to my attorney for safekeeping.

A164/76:13–16, 77:6–12.

Accordingly, there is no support for Dr. Breault's assertion that he did not properly receive notice of the Company's exercise of its right to purchase his

Membership Units. And the Company's exercise of that right means that Dr. Breault is no longer a member.

CONCLUSION

For these reasons, as well as those discussed in the Company's opening brief, the Court of Chancery's ruling should be reversed and judgment entered in favor of the Company.

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