EFiled: Dec 04 2023 04:57PM EST
Filing ID 71538119
Case Number 334,2023D

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. 334, 2023 Case Below: Superior Court of the State of Delaware C.A. No. N20C-10-231 SKR CCLD

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Dated: December 4, 2023

TABLE OF CONTENTS

Page

TABLE OF CITATIONS iii

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 4

A. The Relevant Parties And Non-Parties 4

B. The LLC Agreement 4

C. The Lawsuits And New Wood's Advancement 7

D. The Written Consent 10

E. Further Litigation Ensues 11

F. Discovery Confirmed Baldwin's Claims Are Meritless 13

G. The Superior Court Grants Summary Judgment For New Wood And Baldwin Appeals 14

ARGUMENT 17

I. SUMMARY JUDGMENT WAS PROPER BECAUSE BALDWIN PROVIDED NO FACTS TO REBUT THE PRESUMPTION THAT THE WRITTEN CONSENT WAS EXECUTED (AND RELIED ON) IN GOOD FAITH. 17

A. Question Presented 17

B. Scope of Review 17

C. Merits of Argument 17

1. Baldwin Is Bound By His Discovery Responses And He Waived Any Contrary Argument 19

2. Baldwin Identified No Evidence From Which A Reasonable Jury Could Find In His Favor 20

3. Baldwin's Other Arguments Are Unavailing 24

CONCLUSION 29

TABLE OF CITATIONS

Page(s)

CASES

Baldwin v. New Wood Res. LLC,
283 A.3d 1099 (Del. 2022) ..... *passim*

Bay Cap. Fin., L.L.C. v. Barnes & Noble Educ., Inc.,
2020 WL 1527784 (Del. Ch. Mar. 30, 2020), *aff'd*, 249 A.3d 800 (Del. 2021) (TABLE) 17

Boulden v. Albiorix, Inc.,
2013 WL 396254 (Del. Ch. Jan. 31, 2013) 20

Emerald P'rs v. Berlin,
726 A.2d 1215 (Del. 1999) 19

GMG Cap. Invs., LLC v. Athenian Venture P'rs I, L.P.,
36 A.3d 776 (Del. 2012) 17

Homestore, Inc. v. Tafeen,
888 A.2d 204 (Del. 2005) 27

Washington v. Perrine,
2021 WL 1664125 (Del. Super. Ct. Apr. 27, 2021) 18

NATURE OF PROCEEDINGS[1]

New Wood Resources LLC ("New Wood") received a written consent ("Written Consent"; A24-28) from its majority member—ACR Winston Preferred Holdings LLC ("ACR")—concluding Dr. Richard F. Baldwin ("Baldwin") was not entitled to indemnification under New Wood's LLC Agreement. Despite his written undertaking to repay monies advanced if such a determination was made, Baldwin refused to voluntarily repay when New Wood asked him to.

In October 2020, New Wood sued Baldwin to recover monies advanced, and Baldwin counterclaimed seeking declarations that: (1) he was entitled to certain fees associated with a Mississippi judgment "in an amount to be proved at trial"; (2) a "good faith determination" requirement was implied in LLC Agreement Section 8.2; and (3) the Written Consent "had been entered into 'in bad faith and in an attempt to improperly avoid New Wood's indemnification obligations.'" *Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1111 (Del. 2022); B47 ¶ 58.

New Wood obtained a judgment on the pleadings and Baldwin appealed. In that first appeal, this Court found "[a]lbeit in a disorganized fashion, Baldwin has sufficiently pleaded enough to create an issue of fact as to New Wood's good faith

[1] Unless noted: the Superior Court's July 31, 2023 opinion ("Opinion"; A1-36) defines capitalized terms; emphasis is added; and internal citations, footnotes, and quotations are omitted. Appellant's Opening Brief is cited as "OB [page]."

in discharging its obligations under Section 8.2 and to overcome New Wood's contention that it was merely presented with, and acted on, a facially valid consent obtained by ACR." *Baldwin*, 283 A.3d at 1123. The action was remanded with the comment: "[w]hether Baldwin is able to prove that New Wood breached the implied covenant of good faith and fair dealing is for another day." *Id.* at 1124.

Discovery confirmed there were no disputed facts from which a reasonable jury could find in Baldwin's favor. Indeed, Baldwin admitted he had no basis to assert the Written Consent was not executed in good faith. Accordingly, after briefing and oral argument, the Superior Court issued a 36-page opinion granting summary judgment for New Wood because "the record does not support a plausible finding of bad faith" sufficient to overcome the rebuttable presumption that all persons act honestly, properly, in good faith without fraud. Opinion at 2, 20 n.93, 21.

Baldwin appealed in September 2023 (A2). For the below reasons, the Court should affirm the Opinion.

SUMMARY OF ARGUMENT

1. **Admitted**. Appellee agrees summary judgment is an important tool for the Superior Court that, among other things, conserves judicial resources for cases that require a jury to resolve a genuine issue of material fact.

2. **Denied**. The Superior Court correctly granted summary judgment for New Wood because there is no evidence from which a reasonable juror could find in Baldwin's favor, and the LLC Agreement does not allow a Court (or jury) to decide whether Baldwin is entitled to indemnification. Appellant misstates what the Superior Court had decided below. New Wood did not have to prove it acted in good faith. Nor did the Superior Court have to find New Wood affirmatively acted in good faith to grant summary judgment in its favor. Instead, Baldwin had to rebut the presumption that New Wood acted in good faith—e.g., by showing the decision at issue was made in bad faith. But Baldwin adduced no such evidence. Moreover, rebutting the presumption of good faith does not require, as Appellant repeatedly suggests, any inquiry into Baldwin's mental state. The Superior Court did not err in granting summary judgment for New Wood, so the Opinion should be affirmed.

STATEMENT OF FACTS

A. The Relevant Parties And Non-Parties

New Wood is a Delaware limited liability company with its principal place of business in Boise, Idaho. Opinion at 2-3. Baldwin served as a member of New Wood's Board of Managers from September 2013 to August 2016. *Id.* at 3. New Wood runs a plywood and veneer manufacturing facility in Mississippi known as Winston Plywood & Veneer LLC ("WPV"). *Id.* New Wood controls WPV through its wholly owned subsidiary WPV Holdco LLC ("Holdco"). *Id*. ACR was the majority holder of New Wood Units at the relevant time, holding about 85.52% of New Wood's then-outstanding Units. *Id*. Andrew Bursky ("Bursky") was President of ACR. *Id*. Kurt Liebich ("Liebich") is the former CEO of WPV and served on New Wood's Board of Managers. *Id*.; A126 at 55:1-9.

B. The LLC Agreement

Under its LLC Agreement, New Wood is managed by its Board of Managers. A49 § 7.1. Relevant here, the LLC Agreement provides certain indemnification and advancement rights to its Managers. A59-60 §§ 8.2-8.3.

Section 8.3 governs Baldwin's advancement rights, and provides:

> ***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

A60 § 8.3. The highlighted language shows Baldwin had a right to advancement "without any determination" about his "ultimate entitlement to indemnification." But, to obtain advancement, Baldwin had to promise to repay the funds advanced if it was ultimately decided he was not entitled to indemnification.

Section 8.2 governs indemnification, and provides:

> ***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 amended, only to the extent that such amended 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.

A59-60 § 8.2. The highlighted language makes clear no person is entitled to indemnification without the finding required by Section 8.2, made in a manner contemplated by Section 8.2(a)-(c). Unlike the corporate context, there is no default statutory indemnification right under the LLC Act. So Baldwin's indemnification rights are contractual, and the parties were free to impose limitations. As the Superior Court recognized:

> the Court cannot make an independent determination regarding whether [Baldwin] acted in good faith. The LLC Agreement does not permit it. Delaware law does not permit it.

Opinion at 27.

C. The Lawsuits And New Wood's Advancement

In February 2018, Baldwin, as manager of OCI, filed a complaint in the United States District Court for the Northern District of Mississippi ("Mississippi Federal Action") against Atlas FRM LLC d/b/a Atlas Holdings LLC, Bursky, Liebich, New Wood, Holdco, and WPV, 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 between Baldwin and Winston Plywood and investments made by Baldwin in New Wood and Holdco. *See* B84-129.

The defendants in the Mississippi Federal Action, including New Wood, moved to dismiss the Mississippi Action for lack of subject matter jurisdiction and sued OCI and Baldwin in the Delaware Court of Chancery, asserting various claims against OCI and Baldwin, including a declaration that OCI's allegations against the defendants in Mississippi were false. B40 ¶ 21; *see also Winston Plywood & Veneer LLC v. Oak Creek Invs., LLC*, C.A. No. 2018-0350-NAC (Del. Ch.) ("Delaware Plenary Action").

In May 2018, OCI re-filed its claims against the Mississippi Federal Action defendants in the Circuit Court of Winston County, Mississippi ("Mississippi State Action"; together with the Mississippi Federal Action and Delaware Plenary Action, "Lawsuits"). B40 ¶ 22.

On January 10, 2019, Baldwin and OCI filed a separate action in the Delaware Court of Chancery seeking advancement in connection with the Lawsuits. B41 ¶ 29; *see also Baldwin v. New Wood Res., LLC*, C.A. No. 2019-0019-JRS (Del. Ch.)

("Advancement Action"). "Baldwin and OCI sought advancement for the fees incurred in the Delaware Plenary Action, and fees and interest incurred in litigating the Advancement Action (the "fees on fees")." Opinion at 9. As part of the Verified Complaint in the Advancement Action, Baldwin signed an undertaking promising to repay advanced funds if it was ultimately decided that he was not entitled to indemnification. B131 ("I [Baldwin] 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 Plenary Action]."). Baldwin's undertaking together with the LLC Agreement created a contractual obligation to repay New Wood any funds advanced to Baldwin if it was later decided he was not entitled to indemnification.

"Thereafter, in May 2019, … Baldwin moved for partial summary judgment in the Advancement Action." Opinion at 9. The Court ultimately decided Baldwin was entitled to advancement of litigation expenses:

> The precise ruling by [the] Court of Chancery was issued in October 2019. It ordered New Wood to pay: 75% ($269,881.61) of the advancement costs sought for [Baldwin's] and OCI's costs and expenses incurred in defending the Delaware Plenary Action through September 17, 2019; $17,726.97 in pre-judgment interest; and 75% ($214,459.49) of the fees on fees [Baldwin] and OCI incurred in bringing the Advancement Action.

Id. at 10. After New Wood made certain payments, there was a dispute over other payments. *Id*. The Court ultimately entered a judgment against New Wood, that New Wood later paid. *Id*. at 12-13, 34.

D. The Written Consent

In March 2020, the Court of Chancery in the Delaware Plenary Action granted judgment for the defendants on the fraud, veil piercing and conspiracy claims. *See* B133-35. In so holding, the Court of Chancery said 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." B148. Later, "New Wood sought a determination as to whether ... Baldwin and OCI were entitled to indemnification under Section 8.2." Opinion at 11.

In April 2020, per LLC Agreement Section 8.2(c), the holders of a majority of the then-outstanding units of New Wood determined that Baldwin failed to act in good faith and in a manner 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. A25-27. That Written Consent provided (in part) that:

> [T]he undersigned Members, constituting a Majority of the currently outstanding Units (determined without regard to Members that are party to the Lawsuits), (i) are familiar with and have had sufficient time to consider the performance, conduct and behavior of Baldwin prior to his resignation, (ii) are familiar with and have had sufficient time to consider the allegations and claims made by the parties to the Lawsuits, and (iii) have determined that Baldwin failed to act in good faith and in a manner that he reasonably believed to be in or not opposed to the best interests of the Company with respect to the matters at issue in the Lawsuits.

B157. There is no dispute that the determination was made as required by the LLC Agreement. Still, Baldwin refused to repay the advanced funds. Opinion at 12.

E. Further Litigation Ensues

In October 2020, New Wood began the below action in the Delaware Superior Court to recover funds advanced to Baldwin—enforcing the facially valid Written Consent delivered by ACR. *See* B1-10; A23. New Wood later amended its complaint to reflect the then-current amount it looked to claw back. *See* B11-21; A22.

In response to New Wood's claims, Baldwin counterclaimed seeking declarations that: (1) he was entitled to certain fees associated with a Mississippi judgment "in an amount to be proved at trial"; (2) a "good faith determination" requirement was implied in LLC Agreement Section 8.2; and (3) the Written Consent "had been entered into 'in bad faith and in an attempt to improperly avoid New Wood's indemnification obligations.'" *Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1111 (Del. 2022); B47 ¶ 58. New Wood moved for judgment on the pleadings on both its breach of contract claim and Baldwin's declaratory judgment counterclaim. *See* B50-52. Following briefing and oral argument (*see* A17-19 at D.I. 12, 16, 19-20), the Court found for New Wood and ordered Baldwin to repay $541,664.99 of the total funds advanced to him. B53-55.

Baldwin appealed and argued, among other things, that a "good faith determination" requirement was implied in LLC Agreement Section 8.2 by the

implied covenant of good faith and fair dealing. *Baldwin*, 283 A.3d at 1114. The Supreme Court agreed "with Baldwin's assertion that the LLC Agreement contains an implied obligation requiring that the indemnification determination be made in good faith." *Id.* at 1118. The Supreme Court further concluded Baldwin "[a]lbeit in a disorganized fashion ... has sufficiently pleaded enough to create an issue of fact as to New Wood's good faith in discharging its obligations under Section 8.2 and to overcome New Wood's contention that it was merely presented with, and acted on, a facially valid consent obtained by ACR." *Id.* at 1123. Accordingly, the Supreme Court reversed and remanded—given the deferential pleading standard appliable on a motion for judgment on the pleadings—and stated:

> Whether Baldwin is able to prove that New Wood breached the implied covenant of good faith and fair dealing is for another day. ***Given that Baldwin has not yet had an opportunity to take discovery and given that at this stage of the pleadings all reasonable factual inferences must be drawn in his favor as the non-moving party***, we conclude that the judgment of the Superior Court granting New Wood's motion for judgment on the pleadings should be [reversed].

Id. at 1124 (emphasis added).

Put differently, the theory the Supreme Court remanded required Baldwin to prove that New Wood—not ACR (a member) or Bursky (who signed the Written Consent on behalf of ACR)—breached the implied covenant of good faith and fair dealing by enforcing the facially valid Written Consent delivered by ACR.

Essentially, Baldwin had to prove: (1) the Written Consent was a sham; and (2) New Wood knew it. *See* Opinion at 21-27.

F. Discovery Confirmed Baldwin's Claims Are Meritless

Following remand, the parties engaged in discovery, and New Wood sought discovery about Baldwin's assertion that the Written Consent was not executed in good faith, as alleged in counterclaim Paragraphs 45 and 47. New Wood served interrogatories on Baldwin asking the basis for his belief that the Written Consent was not executed in good faith. B168. Baldwin responded:

> Baldwin objects to this Interrogatory to the extent that discovery is ongoing, and therefore ... Baldwin is presently unable to identify "each and every" fact demonstrating Plaintiff's bad faith conduct. * * * By way of further answer, on August 10, 2020 the Court of Chancery held a final hearing on the issue of ... Baldwin's right to indemnification (Trans. ID No. 65892843), and on August 26, 2020 the Court issued its final Order (Trans. ID No. 65876728), which in combination with its prior Order [sic] awarded ... Baldwin the combined sum of $867,211.03. During the entirety of these proceedings, and including during the oral argument of August 10, Plaintiff never disclosed to the Court of Chancery its purported "resolution" of April 23, 2020 that ... Baldwin had been acting in "bad faith" and was never entitled to indemnification or advancement at all. Moreover, Plaintiff raised the argument in this Court that its resolution was never subject to any "good faith" standard, an argument that the Delaware Supreme Court squarely rejected in its written opinion of August 16, 2022.

B177. Notably, Baldwin's response says ***nothing*** about the Written Consent or ACR's determinations in it. So, during deposition, New Wood asked if Baldwin had

"any basis to assert that Mr. Bursky didn't execute that written consent that's referred to here in good faith," to which Baldwin responded that he has "no idea what Mr. Bursky did." B203-04 at 73:20-74:4. Baldwin also testified he had no basis to contest one way or the other whether the Written Consent was executed in good faith. B204 at 74:6-12. Worse, Baldwin could not answer basic questions about the counterclaims he filed:

> Q. As you sit here today, is it your contention that the April 23, 2020, written consent was not executed in good faith?
>
> A. I have no answer for that question.

B231 at 183:19-22. In short, Baldwin freely admitted he had nothing to support his assertion that the Written Consent was executed in bad faith, and he did not explain in discovery (or otherwise) why New Wood could not rely on an otherwise facially valid written consent.

G. The Superior Court Grants Summary Judgment For New Wood And Baldwin Appeals

Given Baldwin's admission that he had no evidence to support his claim, New Wood moved for summary judgment in April 2023. A6 at D.I. 60. New Wood's opening brief explained that Baldwin should be bound by his discovery responses and his testimony about the lack of support for his claims. B73-78. Baldwin never addressed these arguments in his Opposition. *See* B480-98.

New Wood also detailed the evidence about ACR's decision about indemnification. *See* B75-79. As the Opinion says:

> Bursky [explained how] ACR carefully assessed the track record of [Baldwin's] behavior pre- and post-exit from WPV, and ACR assessed [Baldwin's] claims in the multiple lawsuits between the relevant parties[and f]rom that assessment, ACR determined in the Written Consent that [Baldwin] did not act in good faith and was not entitled to indemnification.

Opinion at 21-22. The Opinion also explained how there was "no evidence that New Wood had any knowledge leading New Wood to doubt ACR's determination that [Baldwin] failed to act in good faith." *Id.* at 25-26.

Accordingly, based on the evidence adduced in discovery, the Superior Court granted summary judgment for New Wood. In so holding, the Superior Court found:

> Even assuming that ... Baldwin's interpretation of Section 8.2 is correct, ACR's considerations underlying the Written Consent do not amount to bad faith ... While one could argue negligence from these facts, or that ACR was just plain wrong in its assessment, no reasonable jury could find bad faith from them ... It should be emphasized that at this stage of the proceedings discovery is complete and the record is set ... There is no evidence presented from the record to suggest that ACR executed the Written Consent with furtive design or ill will.

Id. at 22-23. The Superior Court further concluded that "[e]ven assuming *arguendo* that ACR's actions rose to the level of bad faith, there is no evidence that New Wood colluded with, or had any knowledge of, ACR's actions" sufficient to show New Wood did anything besides act on a facially valid written consent. *Id.* at 25-26. And

while the Superior Court acknowledged Baldwin repeatedly claimed he had acted in good faith, it concluded that, under the LLC Agreement as drafted, "the Court cannot make an independent determination regarding whether ... Baldwin acted in good faith." *Id.* at 27.

Having rejected all of Baldwin's arguments, the Superior Court ordered Baldwin to "repay the $541,664.99 advanced to him, together with applicable prejudgment interest." *Id.* at 36. Baldwin appealed. While his appeal focuses on the discovery record below, nowhere does Baldwin address his own discovery responses or admissions. *See* OB at 12 (acknowledging the parties "engaged in ... discovery ... includ[ing] written discovery," but not addressing his own responses). Nor does Baldwin appear to challenge the Superior Court's determination that "the Court cannot make an independent determination regarding whether ... Baldwin acted in good faith." *See* OB at 14. In fact, as he did below, Baldwin includes pages of argument about how New Wood acted in bad faith with very little—if any—record citations supporting his assertions. *See, e.g.,* OB at 18-19 (alleging factual disputes with no citation to anything); *id.* at 19-20 (citing no evidence).

ARGUMENT

I. SUMMARY JUDGMENT WAS PROPER BECAUSE BALDWIN PROVIDED NO FACTS TO REBUT THE PRESUMPTION THAT THE WRITTEN CONSENT WAS EXECUTED (AND RELIED ON) IN GOOD FAITH.

A. Question Presented

Did the trial court correctly grant summary judgment for New Wood when Baldwin adduced no evidence of bad faith. *See* Opinion at 25 ("Baldwin has presented no *evidence* of bad faith by ACR or New Wood with respect to executing and acting on the Written Consent.").

B. Scope of Review

This Court reviews the Superior Court's grant of summary judgment *de novo*, "to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." *GMG Cap. Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (citation omitted).

C. Merits of Argument

"Summary judgment serves to 'avoid a useless trial.'" *Bay Cap. Fin., L.L.C. v. Barnes & Noble Educ., Inc.*, 2020 WL 1527784, at *9 (Del. Ch. Mar. 30, 2020), aff'd, 249 A.3d 800 (Del. 2021) (TABLE). It "should, when possible, be encouraged for it should result in a prompt, expeditious and economical ending of lawsuits." *Id.*

Granting summary judgment for New Wood was proper here. As explained below, Baldwin withdrew the part of his counterclaim seeking "attorneys' fees and costs he incurred in domesticating the [Advancement Action judgment in] Mississippi," and this Court already resolved the question about the existence of an implicit term in the LLC Agreement. *See* Opinion at 19. "Therefore, the only remaining issue to decide with respect to the Counterclaim is whether New Wood acted on the Written Consent in bad faith." *Id*.

To avoid summary judgment, Baldwin had to present sufficient evidence of New Wood's bad faith for his implied covenant claim to survive summary judgment. *See* Opinion at 26 (citing *KE Prop. Mgmt. Inc. v. 275 Madison Mgmt. Corp.*, 1993 WL 285900, at *9 (Del. Ch. July 27, 1993) (noting on summary judgment that party asserting bad faith must overcome the presumption of good faith and "must introduce competent evidence which, if true, would rebut the presumption or summary judgment will be granted against it")). The Superior Court correctly granted summary judgment for New Wood because Baldwin failed to rebut the presumption that New Wood acted in good faith. Baldwin relies largely on his own speculation when arguing to rebut the good-faith presumption. Such speculation is insufficient. Baldwin's "failure to demonstrate [a core requirement of his claim] cannot mean that Defendant must prove its absence at trial." *See Washington v. Perrine*, 2021 WL 1664125, at *2 (Del. Super. Ct. Apr. 27, 2021).

1. Baldwin Is Bound By His Discovery Responses And He Waived Any Contrary Argument

Baldwin spends pages of his Opening Brief advancing speculative theories about how the Written Consent was executed in bad faith. But ***none*** of those theories was advanced by Baldwin in response to discovery, so this Court should simply reject them out-of-hand. In fact, in response to New Wood's interrogatories on this issue, Baldwin identified no fact surrounding the creation of the Written Consent or New Wood's reliance on it—instead complaining that "[New Wood] never disclosed to the Court of Chancery its purported 'resolution' of April 23, 2020 [*i.e.*, the Written Consent] that … Baldwin had been acting in 'bad faith' and was never entitled to indemnification or advancement at all." B177.

Below, New Wood argued that Baldwin was bound by these responses. B74 (citing *Itron, Inc. v. Consert Inc.*, 109 A.3d 583, 590–91 (Del. Ch. 2015) ("Interrogatory responses are supposed to be accurate.... A statement in an interrogatory response therefore carries considerable dignity and is something on which an opposing party and the court reasonably can rely."); *BAE Sys. Info & Elec. Sys. Integration Inc. v. Lockheed Martin Corp.*, 2011 WL 2716020, at * 3 (Del. Ch. June 1, 2011) (finding that a party is "constrained to the factual universe identified by th[e interrogatory] responses when it presents its case.")). Baldwin never responded to his argument, so he waived any opposition. *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are [] waived."); *see also*

Boulden v. Albiorix, Inc., 2013 WL 396254, at *5 (Del. Ch. Jan. 31, 2013), as revised (Feb. 7, 2013) (holding that a party "conceded [an] argument" by failing to respond directly in briefing). Accordingly, as the Superior Court found, Baldwin is stuck with his discovery responses—none of which say anything about the circumstances surrounding the execution of the Written Consent. Opinion at 24 ("The contents of [Baldwin's interrogatory] answer do not rise to a showing of bad faith by ACR or New Wood."). For this reason alone, the Opinion should be affirmed.

2. Baldwin Identified No Evidence From Which A Reasonable Jury Could Find In His Favor

Moreover, leaving aside Baldwin's binding discovery responses, Baldwin simply adduced no facts in discovery from which a reasonable jury could find in his favor. As recognized by the Superior Court, this warrants summary judgment.

On appeal, Baldwin repeatedly argues that "[t]he testimony of [Bursky and Liebich] comes nowhere close to supporting summary judgment on the issue of whether New Wood made a good faith determination that Baldwin acted in bad faith." OB at 29. This assertion confirms that Baldwin misunderstands that he, as the claimant, is the party required to show bad faith.

Indeed, as explained by the Superior Court:

> It is well established that Delaware law presumes a person acts in good faith. So to prove a breach of the implied covenant of good faith and fair dealing, Baldwin must demonstrate that New Wood acted in bad faith ... The term 'bad faith' is not simply bad [judgment] or negligence, but

> rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

Opinion at 20-21 (citing cases). While Baldwin repeatedly claims (both here and below) that New Wood "failed to cite any facts upon which the Written Consent is based and instead offered only conclusory and irrelevant statements concerning job performance and unrelated litigation" (*id.* at 20) that is not enough because it is Baldwin's burden (not New Wood's) to "'rebut the presumption' of good faith; otherwise, summary judgment for New Wood is proper." *Id*. at 21. In fact, there is no requirement that New Wood affirmatively prove that it engaged in a "good faith process designed to impartially assess the conduct of ... Baldwin" or that the determination "must be based on objective facts determined in a fair process" as alleged by Baldwin. Rather, to avoid summary judgment, ***Baldwin must show*** both that: (1) the Written Consent was a sham; and (2) New Wood knew it. This, of course, aligns with how this Court allocated the burdens in the first appeal. *See Baldwin*, 283 A.3d at 1118 ("The party asserting the implied covenant has the burden of proving 'that the other party has acted arbitrarily or unreasonably.'"). Because Baldwin has no facts showing either, the trial court was correct to enter summary judgment.

First, there is simply no evidence that either ACR or New Wood's actions are bad faith. Opinion at 21-25. Baldwin freely admitted that he had no basis to contend that the Written Consent was not executed in good faith:

> Q. As you sit here today, do you have any basis to assert that Mr. Bursky didn't execute that written consent that's referred to here in good faith?
>
> A. I have no idea what Mr. Bursky did.
>
> Q. Okay. So you have no basis to contest one way or the other whether that written consent was not executed in good faith, do you?
>
> A. I have no basis to answer that question.

B203-04 at 73:20-74:4 (objections omitted); *see also* B231 at 183:19-22.

And Bursky— the individual who signed the Written Consent on behalf of ACR—testified both to his bases for executing it and to his belief that it was proper. A154 at 167:8-168:13 (testifying about "everything that [Bursky] did personally to assure yourself that the written consent ... was accurate."); A166 at 215:10-217:13 (testifying, among other things, that the Written Consent contents were true at the time of execution). While Baldwin may disagree with the decision or the facts on which it is based, that is not enough under Delaware law to prove bad faith. Opinion at 22-23.

Second, there is no "evidence to support the contention that New Wood acted in bad faith when it relied on ACR's Written Consent. Mr. Liebich, former CEO of

WPV and New Wood's 30(b)(6) witness, testified that ACR made the determination that Baldwin failed to act in good faith, and New Wood acted based on that determination." *Id.* at 23. No evidence suggested that New Wood had any reason to doubt ACR's determination. *Id.* at 26. Indeed, "Mr. Liebich, New Wood's 30(b)(6) witness, stated at his deposition: 'The determination that [Baldwin] acted in bad faith was made by our majority member, ACR.' Mr. Liebich further stated that '[t]he finding of bad faith was made by, as I said earlier, ACR.... [T]he [de]termination [sic] of bad faith pursuant to Section 8.2 in the LLC [A]greement was made by ACR. That's where that determination was made.'" *Id.* at 26; *see also* A286-92. Mr. Liebich also testified that he was not involved in the decision-making process, and, as recognized by the Superior Court, his testimony is unrebutted. Opinion at 26. In fact, at no point did Baldwin ever put forth any evidence showing how New Wood's reliance on the facially valid Written Consent could be bad faith under Delaware law. *Id.* at 23. "The LLC Agreement does not contain a provision permitting New Wood to reassess ACR's determination in the Written Consent." *Id.* at 27 n.124. Accordingly, Baldwin needed to "present evidence of New Wood's bad faith for his implied covenant claim to survive summary judgment." *Id.* at 26. But Baldwin adduced no evidence to rebut the reality that New Wood acted on a facially valid written consent. Accordingly, the Superior Court correctly granted summary judgment for New Wood.

Simply put "[w]hile ... Baldwin [] presented multiple conclusory arguments that ACR and New Wood acted in bad faith, ... Baldwin [] presented no evidence of bad faith by ACR or New Wood with respect to executing and acting on the Written Consent. Absent that anchoring evidence of bad faith related to the Written Consent, ... Baldwin's claim cannot withstand summary judgment." *Id.* at 25.

3. Baldwin's Other Arguments Are Unavailing

Finally, Baldwin presents a litany of arguments suggesting that the decision to deny him indemnification was somehow improper. For example, he argues that New Wood "cannot show that ... Baldwin engaged in bad faith conduct by successfully defending himself against claims that were ultimately dismissed." OB at 18. He also contends that "[t]he timing of the Written Consent indicates that New Wood failed to act in good faith." *Id.* at 19. And, finally, he argues that "[t]he fact that New Wood refused to present the Written Consent in the Court of Chancery, when New Wood's theory of the case is that this document is a complete defense to its indemnification and advancement obligations, demonstrates that New Wood has never acted in good faith on the issue of the Written Consent." *Id.* at 22. All these assertions—most of which are based on speculation—were correctly rejected by the Superior Court. *See, e.g.*, Opinion at 24 (quoting Baldwin's interrogatory response related to the failure to disclose the Written Consent to the Court of Chancery and

explaining that "[t]he contents of the above answer do not rise to a showing of bad faith by ACR or New Wood").

First, it does not matter whether Baldwin engaged in bad faith conduct. *See* OB at 18 (advocating that Baldwin somehow acted in good faith). What matters is whether the Written Consent was (or was not) executed in good faith. This is because the LLC Agreement, as drafted, does not allow the Court to make "an independent determination regarding whether … Baldwin acted in good faith." Opinion at 27. Indeed, unlike Section 145(d) of the DGCL, the LLC Agreement does not allow for an independent determination on indemnification. *Id*. at 27-29. "If the Court injected itself into Section 8.2's good faith determination, the Court would nullify the explicit language of other LLC Agreement sections." *Id*. at 29. "[I]t would be a stark deviation from this jurisdiction's adherence to freedom of contract principles if the Court were to override the clear terms of the LLC Agreement and exercise judicial review of ... Baldwin's actions." *Id*. at 30. So, contrary to Baldwin's assertions, neither this Court nor the Superior Court can consider whether "Baldwin engaged in bad faith conduct." OB at 18. This is particularly true now, because Baldwin did not challenge the Superior Court's contract interpretation on appeal. *See* OB at 14.

Second, the timing of the Written Consent proves nothing because Baldwin offers no explanation or authority to support his argument. It is immaterial whether Baldwin prevailed in the Delaware Plenary Action, because an affirmative

determination is needed before anyone (including Baldwin) is entitled to indemnification. So, unlike in corporate law, it is immaterial whether Baldwin prevailed on the Delaware Plenary Action.

In fact, contrary to Baldwin's speculative assertions about the "timing," the timing of ACR's Written Consent is logical. Baldwin, through his company, OCI, pursued several claims against New Wood that courts across the country have found meritless. Baldwin's conduct required New Wood to seek a declaration in the Delaware Court of Chancery that Baldwin's claims were baseless. B368-71 (Count VII seeking declaratory judgment). Rather than drop the claims subject to that declaration, Baldwin pressed them and ultimately lost when the Court of Chancery entered judgment against OCI on its fraud, conspiracy, and veil piercing claims. B133-35. That development, in part, led ACR to execute the Written Consent. B377-80 (supplemental interrogatory response); *see also* B396 ("The decision by Andrew M. Bursky, in his capacity as president of ACR Winston Preferred Holdings LLC, to execute the Written Consent was made based upon ... (2) the discovery record and Court rulings in the plenary Delaware Chancery Court Action[.]").

ACR's decision was later supported by the Court of Chancery's questioning of Baldwin's mental ability and litigation tactics. *See, e.g.*, B415 ("During his depositions ... Baldwin seemed possibly disoriented and struggled or outright refused to answer questions about the nature of this lawsuit."); B419 ("Frankly, I am

concerned about ... Baldwin's ability to testify reliably and accurately. Total failures of recollection may render a witness 'unavailable' within the meaning of the evidentiary rules ... and so it may impair OCI's ability to put on its case."); B417 (providing answers such as "I don't recall" or the like "[w]hen given in the context of general background questions seeking to uncover baselines facts ... are susceptible to an inference of gamesmanship"). So, the available evidence—which was unrebutted by Baldwin—established that ACR made a legitimate decision that Baldwin's defense of the Court of Chancery claims (seeking a declaration on the baseless nature of the claims Baldwin was pursuing on behalf of his company) was not done in good faith and was not in the best interests of New Wood. Simply put, Baldwin's insistence on pressing baseless claims was part of the reason ACR executed the Written Consent.

Third, the Superior Court correctly concluded New Wood's decision not to raise the Written Consent in the Advancement Action was not evidence of bad faith. Opinion at 24-25. "Bad faith requires 'conduct [] motivated by a culpable mental state' that is 'driven by an improper purpose.' These tactical decisions do not establish the 'conscious doing of a wrong because of dishonest purpose or moral obliquity.'" *Id.* at 24. This is particularly true because there would have been no reason to disclose the Written Consent to the Court of Chancery given that advancement and indemnification are separate and distinct rights. *Homestore, Inc.*

v. Tafeen, 888 A.2d 204, 212 (Del. 2005). That New Wood chose to litigate its indemnification claims separate from the advancement claims is evidence of nothing and not evidence from which a reasonable jury could find bad faith. Opinion at 25. It is not the role of a jury to second-guess tactical litigation decisions.[2]

[2] For this same reason, Baldwin's unsupported assertion that "New Wood never acted in [good faith] because it never understood or believed that it had an obligation to do so" (OB at 23) should be rejected. Tactical litigation decisions are not evidence of bad faith conduct. Order at 24 (citing *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 n.16 (Del. 1993) (citing *Bad Faith*, Black's Law Dictionary (5th ed. 1983))).

CONCLUSION

After Baldwin's first appeal, he had a chance to engage in discovery to support his "disorganized" claims. He squandered the opportunity and did not adduce sufficient, non-speculative evidence from which a reasonable jury could find in his favor. Speculation about litigation tactics, timing or motivations is not enough to avoid summary judgment. Baldwin needed to prove ***facts*** supporting his claim and, by his own admission, he has none. The Opinion should be affirmed.

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Dated: December 4, 2023

Words: 6,872 of 10,000