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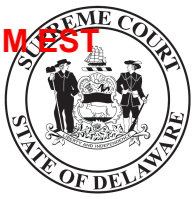

IN THE SUPREME COURT OF THE STATE OF DELAWARE

UNIVERSAL ENTERPRISE GROUP, L.P., 617 NORTH SALISBURY BOULEVARD, LLC, 176 FLATLANDS ROAD, LLC, 106 CEDAR STREET, LLC, 102 WEST CENTRAL AVENUE, LLC, 326 EAST DOVER STREET, LLC, 101 MAPLE AVENUE, LLC, 241 CYPRESS STREET, LLC, 28768 OCEAN GATEWAY HIGHWAY, LLC, 610 SNOW HILL ROAD, LLC, 5318 SNOW HILL ROAD, LLC, 302 MAPLE AVENUE, LLC, 177 OLD CAMDEN ROAD, LLC, 111 SOUTH WEST STREET, LLC, 1272 SOUTH GOVERNORS AVE, LLC, 505 BRIDGEVILLE HIGHWAY, LLC, 323 WEST STEIN HIGHWAY, LLC, 100 S. MAIN STREET, LLC, 1104 SOUTH STATE STREET, LLC, 133 SALISBURY ROAD, LLC, UNIVERSAL DELAWARE, INC., and DANIEL SINGH a/k/a/ DAMINDER S. BATRA,	*	No. 540-2013
Plaintiffs Below, Appellant,	*	On appeal from the Court of Chancery of the State of Delaware, C.A. No. 4948-VCL
v.	*	
DUNCAN PETROLEUM CORPORATION and ROBERT M. DUNCAN.	*	
Defendant Below, Appellee.	*	

APPELLANTS' REPLY BRIEF

/S/ JENNIFER L. DERING
Jennifer L. Dering (ID 4918)
ARCHER & GREINER, P.C.
300 Delaware Avenue, Suite 1370
Wilmington, DE 19801
Phone: 302-777-4350 /
Fax: 302-777-4352
jdering@archerlaw.com

Counsel for Charles R. Goldstein, Trustee, Plaintiff Below-Appellant

Alan S. Fellheimer, Esquire
FELLHEIMER & EICHEN LLP
Two Liberty Place
50 South 16th Street, Suite 3401
Philadelphia, PA 19102
Tel: (215) 253-6630
Fax: (215) 751-174

Date: January 7, 2014

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I. ARGUMENT[1]

A. Universal Properly Presented and Preserved the Defense of Unclean Hands in the Court Below

Duncan wrongly argues that Universal never presented the defense of unclean hands to the trial court and therefore waived the defense. Duncan's Response Brief ("Duncan's Resp. Br.") 20-22. Duncan's fallacious argument is based on an incorrect understanding of law and his blatant omission and mischaracterization of the record.

1. The doctrine of unclean hands, as a rule of public policy, ordinarily may not be waived.

The doctrine of unclean hands "is a rule of public policy to protect the public and the court against misuse by persons who, because of their conduct, have forfeited the right to have their claims considered." *Gallagher v. Holcomb & Salter*, 1991 WL 158969, at *4 (Del. Ch. August 16, 1991), *aff'd,* 692 A.2d 414 (Del. 1997). As this Court previously explained:

> When one [who] files a bill of complaint seeking to set the judicial machinery in operation and to obtain some remedy has violated conscience or good faith or other equitable principles in his conduct, then the doors of the Court of Equity should be forever shut against him. The Court should refuse to interfere on his behalf to acknowledge his right or to award him a remedy.

Bodley v. Jones, 59 A.2d 463, 469 (Del. 1947) (citations omitted). Because "[t]he

[1] Universal incorporates by reference the definitions of terms used in its Opening Brief ("Universal's Op. Br.").

Court is so jealous in guarding itself against such misuse," the Court may invoke the unclean hands doctrine *sua sponte* even if the defense is not expressly asserted. *Id*. Indeed, because "unclean hands is a rule of public policy, not strictly a defense that runs solely to the benefit of a litigant," the doctrine of unclean hands "ordinarily may not be waived." *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Del. Ct. of Chancery* §11.07[a], at 11-83, (2013) (*citing Bodley*, 59 A.2d at 469; and *Gallagher*, 1991 WL 158969).[2]

Thus, as a matter of law, the defense of unclean hands was not waived.

2. Universal properly presented the defense of unclean hands in the trial court.

From the inception of the matter, a major focus of the litigation was on Duncan's inequitable conduct. Universal alleged fraud against Duncan and invoked the defense of unclean hands as an affirmative defense to Duncan's counterclaim. A0124-0132, A1055-1056. Unable to escape the uncontroverted fact that Universal properly invoked the unclean hands defense, Duncan now seeks to distance himself from his own counterclaim, arguing that it did not form the

[2] This case is distinguishable from *Niehenke v. Right O Way Transportation, Inc.*, 1996 WL 74724 (Del. Ch. Feb. 13, 1996), on which Duncan erringly relies, where the court refused to hear re-argument or reopen the case because the defendants failed to raise the unclean hands issue at trial and apprise the court of the possible relevance of evidence of unclean hands. In this case, as stated in Section I.A.1., at 4-6, *infra*., the trial court was not only apprised of Universal's unclean hands defense to any equitable setoff (or even implied recoupment) claim as Universal not only pled unclean hands and introduced evidence of Duncan's inequitable conduct, the trial court accepted the admissible evidence submitted to ultimately determine that Duncan engaged in inequitable conduct. To suggest, as Duncan does, that the *Niehenke* case can have any applicability in this case is farcical.

basis of the recoupment order.[3] Duncan's Resp. Br. 21. Duncan's latest argument is inconsistent as it is contradicted by his own prior express assertion that he was "entitled to set-off pursuant to the Counterclaims" (Duncan's Answer to Verified Amended Complaint and Counterclaims, A0646) and that Universal's damages should be offset based on his counterclaim and the affirmative defense of setoff (Duncan's Post-Trial Answering Brief, B-0259). Further, although Duncan had never sought recoupment prior to or during trial and had argued, for the first time, during post-trial briefing, that he was entitled to setoff based on recoupment, the trial court held that recoupment had been tried with "implied consent," noting that the issue of whether Duncan could reduce a money judgment was asserted in Duncan's counterclaims and that "counterclaim would encompass the affirmative defense of recoupment."[4] A1788-A1789.

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[3] Duncan goes so far as to misrepresent the record and argue that he did not request judgment on his counterclaim. Duncan's Resp. Br. 28. After trial, Duncan, in his Post-Trial Answering Brief, requested that "judgment should be entered in Duncan Defendants' favor to the extent their counterclaim damages exceed any damages the Court awards to Plaintiffs." B-0260.

[4] There is no small irony in Duncan's current argument that Universal "waived" the defense of unclean hands because Universal did not use the words "unclean hands" in its post-trial briefing when, despite the fact that Duncan never used the word "recoupment" prior to or during trial of the matter, the trial court nevertheless held that the issue of "recoupment" had been tried with "implied consent." Even if, *arguendo*, Universal had not presented the defense of unclean hands (which it plainly did), then the trial court should, consistent with its determination that Duncan's recoupment defense was tried with Universal's implied consent, nonetheless have likewise properly applied the doctrine of unclean hands and determined that Universal's defense of unclean hands was correspondingly also tried by implied consent. Had the trial court conducted such even-handed balancing of the equitable interests, it only stands to reason that it would have properly rendered judgment in Universal's favor in light of the *inequitable conduct* it determined that Duncan subjected to Universal.

Moreover, contrary to Duncan's argument, and unlike the case in *Wedderien v. Collins*, 937 A.2d 140, 2007 WL 3262148, at *4 (Del. 2007) (TABLE), Universal did not merely make "bare reference to unclean hands." Rather, the parties vigorously litigated, and Universal proved, the issue of Duncan's inequitable conduct and the trial court, after four days of trial testimony and hundreds of pages of deposition transcripts, expressly considered Duncan's inequitable conduct to determine that Duncan made knowing and intentional misrepresentations to and concealed information from Universal as well as the EPA.[5] A1090-A1092. Thereafter, in response to the trial court's directive to submit post-trial memorandum regarding Duncan's ability to setoff the unpaid balance of the Notes, Universal expressly argued that Duncan's inequitable conduct—which the trial court described in great detail in its Opinion—precluded Duncan from exercising the alleged right of setoff.[6] A1123-A1125.

Universal properly raised the defense of unclean hands to preclude Duncan from relying on the equitable defense of recoupment and the trial court erred by failing to consider Duncan's inequitable conduct in determining the availability

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[5] The trial court's determination of inequitable conduct by Duncan has **not** been appealed by any party.

[6] The other cases cited by Duncan are likewise inapposite and do not support a finding of waiver. Neither *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764 (Del. 2013), nor *Cahall v. Thomas*, 906 A.2d 24 (Del. 2006), involved the doctrine of unclean hands (which may ordinarily not be waived as discussed above in Section I.A.3.a) and, unlike this case, both of those cases involved issues on appeal that were **never** presented to the trial court.

and the application of the equitable defense of recoupment.

B. Duncan's Inequitable Conduct Precludes Duncan from Relying on the Equitable Defense of Recoupment

1. Because the defense of unclean hands was not waived, the *de novo* standard applies.

Contrary to Duncan's argument, as stated above, because the unclean hands maxim is a public policy that protects the integrity of a court of equity and a court of equity may invoke the unclean hands doctrine *sua sponte*, the unclean hands defense ordinarily may not be waived. Moreover, Universal pleaded unclean hands and presented significant evidence related to Duncan's inequitable conduct, the parties vigorously litigated the issue of Duncan's inequitable conduct, and the trial court ultimately determined that Duncan had engaged in inequitable conduct by misrepresenting facts to and concealing information from Universal.

Because the issue of unclean hands was properly presented and preserved in the trial court, the plain error standard **does not** apply. Rather, the trial court's formulation of the standard for allowing the defense of recoupment is a question of law, which this Court reviews *de novo*. *See General Motors Corp. v. Wolhar*, 686 A.2d 170, 172 (Del. 1996); and *Turner v. State*, 957 A.2d 565, 572 (Del. 2008).

2. The defense of unclean hands applies equally to a defendant brought into a court of equity.

In erroneously arguing that the defense of unclean hands does not apply to Duncan because Duncan "did not 'come into' equity, but rather was brought to a

court of equity by Universal's suit" (Duncan's Resp. Br. 25-27), Duncan simply ignores Delaware cases applying the defense of unclean hands to defendants brought into a court of equity. In *Turchi v. Salaman*, Media Partners, a defendant, cross-claimed against Salaman, a co-defendant, and sought equitable relief. *Turchi v. Salaman*, 1990 WL 27531, at *1 (Del. Ch. Mar. 14, 1990). The chancery court in *Turchi* denied Media Partners equitable relief based on Media Partner's own inequitable conduct. *Id.* at *8-9. Media Partners, like Duncan in this case, was "brought into" the Court of Chancery, yet the Court of Chancery applied the doctrine of unclean hands to deny equitable relief to Media Partners. *See id.*; *see also Cook v. Fusselman*, 300 A.2d 246, 251 (Del. Ch. 1972) (applying the doctrine of unclean hands to a defendant brought into the court of equity and denying the equitable relief requested by the defendant).

Duncan wrongly relies upon *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518 (Del. Ch. 1998), for the proposition that unclean hands cannot be applied to the defenses of a defendant brought into equity. Duncan's Resp. Br. 25-26. The *Nakahara* case involved a defendant's invocation of an unclean hands defense to the relief sought by a plaintiff, not, as is the case here, the invocation of an unclean hands defense by a plaintiff to the defenses (unusually derived from counterclaims and impliedly applied in post-trial briefing) asserted by a defendant. *See Nakahara*, 718 A.2d at 524. Indeed, the *Nakahara* court did not hold (or even

address in *dicta*, for that matter) that the unclean hands doctrine cannot apply to the defenses of the defendant. *See Nakaraha, generally*. Notably absent in the *Nakahara* court's analysis of the application of the doctrine of unclean hands is the requirement that the doctrine be applied only against the party initiating the action. *See id.* at 523 (noting that in order for the doctrine to apply, i) "the improper conduct must related directly to the underlying litigation," ii) the "inequitable conduct must have an 'immediate and necessary' relation to the claims under which relief is sought," iii) the "inequitable behavior attributable to the unclean litigant[7] must be directed at, or be the concern of, an interested party (as opposed to any third party)," and iv) the absence of any countervailing public policy). Although Duncan provides no analysis of this four-part test, it is clear that its application would doom Duncan's implied recoupment defense as Duncan was the only proponent of that defense and his inequitable conduct otherwise fits each and every one of the four-part elements of applicability.

Likewise, Duncan's reliance upon the *Dawejko v. Grunewald*, 1988 WL 140225 (Del. Ch. Dec. 27, 1988), case is also misplaced. In *Dawejko*, the plaintiff sought to apply the unclean hands doctrine to preclude the defendants from attacking a provision of the deed at issue. *See Dawejko*, 1988 WL 140225, at *5,

[7] Duncan's argument—that the doctrine of unclean hands applies only to the party coming into the court of equity, *i.e.*, the plaintiff, and not to the party being brought into the court of equity, *i.e.*, the defendant—is belied by the fact that the Court of Chancery referred to "unclean litigant", not "unclean plaintiff" in connection with the application of the doctrine.

n.2. If the law in Delaware regarding the application of the unclean hands doctrine were as Duncan argues, the *Dawejko* court could have simply dismissed the unclean hands doctrine as being inapplicable to a defendant. However, the *Dawejko* court did not do so and instead refused to find unclean hands—not because the unclean hands doctrine cannot apply to a defendant brought into equity (as Duncan argues)—but because the *Dawejko* court found no evidence that the defendants engaged in inequitable conduct. *See id.*; *see also Needham v. Savini Corp.*, 2004 WL 550853 (Del. Ch. Mar. 18, 2004) (refusing to apply unclean hands to defendants because plaintiff did not state an independent claim of action against defendant for misrepresentation and *the defendant was not seeking to use the court's equitable powers* to do anything, not because unclean hands cannot apply to a defendant).[8] Unlike *Dawejko* and *Needham*, Duncan seeks to use the courts' equitable power to apply recoupment in a vacuum to reduce Universal's judgment of $1,497,429 without any unclean hands considerations even though the trial court

[8] Perhaps seeking support in number, rather than substance, Duncan cites two inapplicable cases that hold no precedential value and are inapposite. In *Behm v. Fireside Thrift Co.*, 76 Cal. Rptr. 849 (Cal. App. 1969), the California court refused to apply unclean hands to preclude the defendant's defense of mutual mistake because there was no evidence that the defendant engaged in inequitable conduct and, rather than seek reformation of the agreement, the defendant merely asserted the defense of mutual mistake, and therefore did not seek any relief in equity. *Behm*, 76 Cal. Rptr. at 853. Notably, the court did not outright reject the unclean hands doctrine as being inapplicable to a defendant brought into court, as Duncan wrongly argues. *Id. See also Merchants Indemnity Corp. v. Eggleston*, 179 A.2d 505 (N.J. 1962) (did not outright reject the unclean hands doctrine as being inapplicable to a defendant brought into court). Here, Duncan requested, and the trial court erroneously granted, the equitable relief of recoupment without consideration of Duncan's unclean hands arising out of his own inequitable conduct that he directed at Universal.

already expressly determined that Duncan engaged in inequitable conduct.

Thus, the fact that Duncan became a party to a suit initiated by Universal, is irrelevant to the issue of whether the unclean hands doctrine can be applied in defense of Duncan's recoupment defense.

3. The doctrine of unclean hands applies to Duncan's equitable defense of recoupment.

As the trial court noted in its Order quoting 80 C.J.S. *Set-off and Counterclaim* § 2 (2013), "[r]ecoupment is a common-law, *equitable* doctrine that permits a defendant to assert a defensive claim aimed at reducing the amount of damages recoverable by a plaintiff." A1789 (emphasis added). Recoupment "is an affirmative cause of action that is distinct from a defense that merely attempts to defeat the plaintiff's cause of action by denial or avoidance. It is regarded as in the nature of a cross action, wherein defendant alleges that he or she has been injured by a breach by plaintiff of another part of the same contract on which the action is founded, and claims to stop, cut off, or keep back as much of plaintiff's damages as will satisfy the damages which have been sustained by defendant." 80 C.J.S. *Set-off and Counterclaim* § 2. Here, Duncan did not merely seek to defeat Universal's claim by denial or avoidance, but affirmatively sought to diminish Universal's recovery.

While Duncan wrongly attempts to distinguish *In re American Home Mortgage Holdings, Inc.*, 401 B.R. 653 (D. Del. 2009), based on factual

differences, Duncan does not and cannot dispute the legal principle espoused in the decision, namely, that unclean hands can operate to preclude the application of the equitable doctrine of recoupment. In *In re American Home*, the District Court for the District of Delaware held:

> Although the Bankruptcy Court did not base its holding on the doctrine of unclean hands, the Bankruptcy Court noted that, while Wells Fargo ultimately returned the funds, it did take two post-petition deductions to offset the overpayment, which violated the automatic stay. Wells Fargo admitted to these deductions, and the Court concludes that the Bankruptcy did not err in considering them, together with the evidence concerning the distinct nature of the transactions at issue here and the legal principles requiring recoupment to be narrowly applied, to conclude that the circumstances weighed against application of the equitable doctrine of recoupment.

Id. at 656. While the Bankruptcy Court noted, but did not rely on unclean hands to deny recoupment, the District Court held that it was proper for the Bankruptcy Court to consider evidence of unclean hands *together* with evidence of separate transaction, to deny recoupment. *Id.* The bottom line is that evidence of unclean hands can preclude the application of the equitable doctrine of recoupment.[9]

In an attempt to conflate the issue, Duncan mischaracterizes Universal's argument, accusing Universal of "graft[ing] a new 'element' on to the defense of recoupment" and improperly shifting the burden of proof as to Universal's unclean

[9] While disputing Universal's position, Duncan does **not identify any** Delaware court decision refusing to apply the defense of unclean hands to recoupment.

hands defense. Duncan's Resp. Br. 29, n.8. Contrary to this mischaracterization, Universal never argued that Duncan was required to *prove* that he had clean hands; rather, Universal merely argued that Duncan *must have* clean hands, which Universal successfully proved he did not have, as determined by the trial court.[10] Universal's Op. Br. 20. Further, the requirement of "clean hands" is simply reflective of the principle that the defense of recoupment, as an equitable doctrine, is itself susceptible to equitable defenses, inclusive of the defense of unclean hands. *See In re American Home Mortgage Holdings, Inc.*, 401 B.R. at 656; *accord Poskin v. TD Banknorth, N.A.*, 687 F. Supp. 2d 530, 563 (W.D. Pa. 2009) ("The maxim of 'unclean hands' may apply to defendant's equitable defense of recoupment insofar as that maxim applies to all requests for equitable relief.")

Further, although Duncan initially took the position that his request for recoupment was *equitable*,[11] in a complete reversal, Duncan now argues that his request for recoupment is *legal* and that the unclean hands doctrine, therefore, should not apply. Duncan's Resp. Br. 30. In taking his current position, Duncan misconstrues *USH Ventures v. Global Telesystems Grp., Inc.*, 796 A.2d 7 (Del.

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[10] Universal argued that under Delaware law, "in order to rely on the equitable defense of recoupment, the party seeking recoupment (1) must have clean hands; and (2) must prove that the recoupment involves the same litigants, the same transaction or occurrence, similar relief sought, and is sought defensively, rather than as a basis for affirmative recovery." Universal's Op. Br. 20.

[11] In his Supplemental Post-Trial Brief, Duncan argued that "Recoupment is an equitable defense …." A1773.

Super. 2000). While the *USH Ventures* court noted that unclean hands "is generally inappropriate for legal remedies", it did so in the context of explaining the general shift *towards* allowing equitable defenses to apply legal claims, stating that "[f]ormal, impractical distinctions, however, should be set aside and the Superior Court now has and should have broad power to hear equitable defenses simply because the issues raised by the defenses are part of the heart and soul of modern litigation." *Id.* at 20.

Thus, the defense of recoupment (whether equitable or legal, as Duncan now argues), is susceptible to the doctrine of unclean hands and evidence of inequitable conduct may preclude the application of recoupment.

4. The trial court found that Duncan engaged in <u>inequitable conduct</u>.

Contrary to Duncan's characterization, this matter does not involve a simple breach of contract; rather, as the trial court determined, Duncan "knowingly made a series of false representations" and "failed to provide records or otherwise inform Universal about the conditions of the Properties because he wanted to induce Universal to buy."[12] A1090-1092. The trial court also determined that Duncan

[12] This case is distinguishable from *Merck & Co. v. SmithKline Beecham Pharm. Co.*, 1999 WL 669354 (Del. Ch. Aug. 5, 1999), *aff'd sub nom. Smithkline Beecham Pharm. Co. v. Merck & Co., Inc.*, 746 A.2d 277 (Del. 2000), *and aff'd*, 766 A.2d 442 (Del. 2000), a case cited by Duncan. In *Merck*, the Court of Chancery refused to apply unclean hands—not because the purported uncleanliness arose from a breach of contract—but because of the absence of offensive conduct sufficient to apply unclean hands. *See id.* at *51; *see also Sherwood, Inc. v. Cottman*

had made misrepresentations to the EPA and had been obstructionist. A1070-1071. While Duncan admits that the doctrine of unclean hands may apply to transgressions involving "some sort of fraud or sharp practice" (Duncan's Resp. Br. 31), Duncan completely ignores the multitudes of misrepresentations, omissions and concealments found by the trial court (A1090-1092) and instead asserts transparent and meritless excuses.

Without challenging or disputing the trial court's findings of fact and conclusions of law with respect to Duncan's misrepresentations, omissions and concealment, Duncan argues that unclean hands does not apply because the trial court "found no fraud in the parties' transaction." Duncan's Resp. Br. 32. This simplistic argument is not supported by case law. As previously explained, the offensive conduct need not rise to the level of fraud in order for the doctrine of unclean hands to apply. *See Turchi*, 1990 WL 27531, at *8-9 (finding unclean hands although the investor's misrepresentations were non-material, and therefore did not constitute fraud). Notably, Duncan neither mentions nor addresses the *Turchi* court's holding and does not present any countervailing case law.

Further, although Duncan attempts to escape the consequences of his inequitable conduct by arguing that "[t]he repentant sinner, especially where he has

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Transmission Systems, Inc., 1982 WL 17882, at *2 (Del. Ch. Apr. 15, 1982) (denying injunctive relief to plaintiff because of his unclean hands due to breach of contract).

been duly punished, is not unwelcome in equity," (Duncan's Resp. Br. 32), his argument is unavailing as he neither repented of his wrongdoing nor provided full redress for his wrongdoing in advance of the trial court's ruling. Under no credible definition can Duncan be characterized as a "repentant sinner."[13] To the contrary, the record below confirms that Duncan vehemently denied misrepresenting, omitting and concealing information to Universal (and the EPA) and required Universal to litigate the issue through trial. Indeed, even in his response brief, after the trial court made specific findings of fact regarding Duncan's series of misrepresentations, omissions and concealment, Duncan exhibits **no** remorse or sorrow for having misrepresented, omitted and concealed information. Rather, Duncan attempts to justify his wrongdoing by blaming the victim and arguing that the risk of his wrongdoing had been allocated contractually.

Not only is Duncan **not** a "repentant sinner," Duncan does not and cannot describe any "punishment" that he sustained as a result of redressing his inequitable conduct.[14] Duncan's self-serving and unjustifiably generous assertion—that he redressed his inequitable conduct by agreeing to provide

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[13] The Merriam-Webster dictionary defines "sinner" as "someone who has done something wrong according to religious or moral law" and "repent" as "to feel or show that you are sorry for something bad or wrong that you did and that you want to do what is right." *See* http://www.merriam-webster.com/dictionary/sinner and http://www.merriam-webster.com/dictionary/repent, respectively.

[14] Indeed, Duncan filed proofs of claims in the UMI Bankruptcy for the entire outstanding debt on the Notes. A1338-1628. In the proofs of claims, Duncan reserved the right of recoupment.

Universal the right to set-off against the Notes any expenses associated with his misrepresentations, omissions, and concealments—is fallacious. As the Notes themselves expressly confirm, the right to set-off against the Notes is a non-exclusive discretionary remedy belonging solely to Universal that Universal was within its right not to elect set-off in favor of any and all other available remedies, inclusive of the remedy of damages. A0253-0339. Duncan cannot impose such setoff remedy upon Universal, nor is Universal obligated to exercise its non-exclusive discretionary set-off remedy. Moreover, and contrary to Duncan's assertion that he "affirmatively [sought] to *eliminate inequities in the first instance* by providing in advance for full redress for his own errors," Duncan abjectly fails to mention that when Universal stated its intent to "commence [the remedial] work immediately and exercise its rights of setoff and deduction against the Notes for all costs of completing such work," Duncan not only denied any wrongdoing, but also *refused to allow Universal to set-off any expenses*. AR001-005.

Moreover, Duncan's fallacious "no harm, no foul" argument—that had Universal availed itself of its contractual rights to setoff damages for breach of the Agreement against the Notes, then Universal "would be in the same position with respect to its contractual damages and outstanding debt on the Notes as exists as a result of the Court of Chancery's recoupment order" (Duncan's Resp. Br. 34)—has been previously rejected. In *Nakahara*, the plaintiffs made a similar fallacious

argument, asserting that their actions did not in any way harm the defendant. *See Nakahara*, 739 A.2d at 794. The Court of Chancery rejected that argument, holding that "[e]quity does not reward those who act inequitably, even if it can be said that no tangible injury resulted." *Id.* at 794. *See also Portnoy v. Cryo-Cell Intern., Inc.*, 940 A.2d 43, 81 n.206 (Del. Ch. 2008), (holding that harm "is not strictly required for the doctrine of unclean hands to bar relief").

Put simply, Duncan's *unconscionable* gain argument is wrong and his attempt to avoid application of the unclean hands doctrine by arguing that it "cannot be utilized to benefit its proponent where the result would be unconscionable" (Duncan's Resp. Br. 35), is unavailing. In *Saltar v. Wilson*, 1978 WL 176028 (Del. Ch. July 19, 1978), the case cited by Duncan, the court refused to apply unclean hands to preclude the remedy of specific performance of a contract for the sale of real estate. *Saltar*, 1978 WL at *1. Unlike *Saltar*, which involved a gain as a result of the transfer of real property, the equitable remedy at issue in this case is recoupment, which involves the alleged gain as a result of the transfer of money.[15] Money is fungible and is by nature different from real or personal property. *See U.S. v. Sperry Corp.*, 493 U.S. 52, 62 n. 9 (1989) ("Unlike real or personal property, money is fungible"). In terms of position, Universal

[15] The case cited in *Saltar* for the proposition that a court will not deny a party a remedy, even if he has unclean hands, if to do so would permit an unconscionable gain to the other party, also involved personal property, not money. *See Appon v. Belle Isle Corp.,* 46 A.2d 749 (Del. Ch. 1946) (involving a request to invalidate a voting trust).

receiving $1,497,429 and owing Duncan $7,692,375.06, resulting in a net debt of $6,194,946.06 (if recoupment is denied), is the same as Universal not receiving any money from Duncan and instead owing Duncan $6,194,946.06 (if recoupment is granted). Similarly and correspondingly, the "value" of the judgment for breach of contract in the amount of $1,497,429, and any imposed setoff in the amount of $1,497,429 under the Notes (a remedy not elected by Universal and vehemently opposed by Duncan throughout the litigation, save only post-trial motion practice)—is precisely the *same*. The alleged "gain" Duncan claims would inure to Universal is not the value of the two different and distinct remedies, but rather arises from Duncan's faulty and speculative perception of its impact on him in light of the Universal bankruptcy and whatever those ongoing proceedings may have on him. None of those concerns relates to the application of either of those two different and distinct remedies in this case, however. In the end, it is clear that Duncan's fallacious argument wrongfully and illogically conflates the elective, non-exclusive contractual note setoff right (that belonged solely to Universal) with his separate and distinct equitable recoupment claim which the trial court determined was impliedly asserted by Duncan in this case. Thus, a denial of recoupment will not result in any gain, let alone an unconscionable gain, to Universal and the doctrine of unclean hands may be utilized to deny recoupment.

Similarly, Duncan's attempt to shift blame on victim Universal is also

unavailing. In determining whether to invoke the defense of unclean hands, the trial court was required to focus solely on Duncan's conduct—not whatsoever on Universal's conduct. *See SmithKline Beecham Pharm. Co. v. Merck*, 766 A.2d 442, 449 (Del. 2000) (*quoting Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806 (1945)). What Universal did or could have done is irrelevant to the issue of whether Duncan engaged in inequitable conduct sufficient to apply the doctrine of unclean hands.

The inescapable fact, as determined by the trial court and only now accepted by Duncan, is that Duncan knowingly and intentionally misrepresented and omitted material information regarding not only the lengthy history of problems with state and federal environmental regulatory agencies, but also the ongoing environmental problems at the Properties, despite Universal's express request for information and despite numerous opportunities to disclosure accurate information. Duncan knowingly and intentionally misrepresented and withheld information because he had disregarded and breached his responsibility to operate the Properties in conformance with state and federal environmental regulations and because he wanted to divest himself of the Properties by inducing Universal to buy the Properties at a price most advantageous to him. Such conduct evidences "sharp practices" by Duncan abhorrent to the law and sufficient to warrant denial of Duncan's request for equitable relief in the form of recoupment.

II. CONCLUSION

Universal properly presented and preserved the defense of unclean hands to Duncan's equitable relief of recoupment and the defense of unclean hands was not waived. The defense of unclean hands applies to Duncan's equitable relief of recoupment and in light of the trial court's express findings of inequitable conduct by Duncan, the trial court therefore erred by granting Duncan the equitable relief of recoupment to nullify the award of $1,497,429 to Universal.

Thus, Universal respectfully requests that this Court **reverse** and vacate the Order of the trial court permitting Duncan to rely on recoupment and entering judgment in favor of Universal on Count VI in the amount of $0, and **remand** this case to the trial court with instructions to deny the equitable relief of recoupment based on the doctrine of unclean hands and to enter judgment in favor of Universal in the amount of $1,497,429 on Count VI.

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Jennifer L. Dering (No. 4918)
ARCHER & GREINER
A PROFESSIONAL CORPORATION
300 Delaware Avenue
Suite 1370
Wilmington, DE 19801
Phone: 302-777-4350
Fax: 302-777-4352
jdering@archerlaw.com
Counsel for Charles R. Goldstein, Trustee, Plaintiff Below - Appellant

Alan S. Fellheimer, Esquire
FELLHEIMER & EICHEN LLP
Two Liberty Place
50 South 16th Street, Suite 3401
Philadelphia, PA 19102
Tel: (215) 253-6630
Fax: (215) 751-1744

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