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Case No. 9423-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOSEPH M. COSTANTINI, Plaintiff, v. GJP DEVELOPERS, INC., a Pennsylvania corporation and GARY J. PAPA, Defendants, and ST. THOMAS GROUP, LLC, a Delaware limited liability company and WILDWOOD MINI GOLF, LLC, a Delaware limited liability company, Nominal Defendants.	:	**C.A. No. 9423-VCN**

MEMORANDUM OPINION

Date Submitted: April 21, 2015
Date Decided: August 24, 2015

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NOBLE, Vice Chancellor

INTRODUCTION

Plaintiff and Defendants agreed to form a joint venture to operate a miniature golf course. The arrangement involved, among other commitments, Plaintiff's purchase of a delinquent note secured by two properties owned by Defendants and Defendants' contribution of one of those properties (on which the course would be developed) to a jointly-owned limited liability company ("LLC"). After the miniature golf course had operated for the 2013 season, Plaintiff learned that Defendants had not transferred the property to the LLC. The parties could not agree to resolve their dispute by filing a deed, meeting city licensing requirements, and finding an operator. The course did not open for the 2014 season.

Plaintiff seeks to hold Defendants to the terms of an early agreement that specifies consequences if the joint venture is not formed and funded by a certain date. Under that agreement, Plaintiff claims entitlement to a return of his contributions to the joint venture (including the amount to purchase the note) *and* payment of the full principal balance of the note (nearly five times the discounted price he paid for the note). In essence, Defendants, if unable to make the large payment, would lose both properties securing the note and owe an outstanding balance despite negotiating for the discounted price and operating the course. The Court sets forth its findings of fact and conclusions of law in this post-trial

memorandum opinion. For the reasons below, the Court concludes that equity supports honoring the expectations of the parties in forming their joint venture.

I. BACKGROUND

A. *The Parties and Properties*

Defendant Gary J. Papa ("Papa") is the sole owner of Defendant GJP Developers, Inc. ("GJP," and collectively with Papa, the "Defendants").[1] Throughout his career, Papa has constructed hundreds of houses and attended several closings.[2] Plaintiff Joseph Costantini ("Costantini") owns a construction business.[3] The would-be business partners attended the same church and went to the same gym.[4]

On February 11, 2009, GJP acquired 437 West Rio Grande Avenue ("437 Rio Grande") and 447 West Rio Grande Avenue ("447 Rio Grande"), properties in Wildwood, New Jersey, for $350,000 and $950,000, respectively.[5] To facilitate the purchase and development of the properties, GJP took out a $2,000,000 loan, secured by a mortgage on the two properties, from Penn Business Credit, LLC ("Penn Business").[6] To provide additional security, GJP also

[1] GJP is a Pennsylvania corporation.
[2] Trial Tr. vol. I, 113-14 (Papa).
[3] *Id.* at 175 (Costantini).
[4] *Id.* at 176 (Costantini).
[5] JX 1 (quitclaim deeds).
[6] *See* JX 4 at JMC 000010 (referring to the mortgage dated February 12, 2009); *see also* Trial Tr. vol. I, 13-14 (McCollom).

executed an Assignment of Rents & Leases with Penn Business, which granted GJP "a revocable license to collect all rents" from 437 Rio Grande "[s]o long as [GJP] is not in default" under the assignment or loan documents.[7] Penn Business later filed a foreclosure action, which ended in a judgment against Defendants and associated parties for $2,344,776.98.[8] The note was later assigned to Acquired Capital II, L.P. ("Acquired Capital").[9]

B. *The Joint Venture Arrangement*

In early 2013, Costantini struck up a conversation with Papa, learned about Papa's goal to develop a golf course in Wildwood, and expressed interest in partnering with Papa for that purpose.[10] In March, Papa proposed that Costantini become his partner by purchasing the outstanding (delinquent) note from Acquired Capital, which Papa had negotiated down to a price of $500,000.[11] The joint venture, broadly speaking, contemplated that Papa would contribute 447 Rio Grande, Costantini would buy and eventually satisfy the discounted note (and

[7] JX 2 at JMC 000002. The Assignment of Rents and Leases would become void upon satisfaction of the associated loans. For convenience, references to the note generally include the associated security documents.
[8] JX 3 (certified final judgment).
[9] JX 4 (Assignment of Collateral Mortgage Open-End Securing Future Advances).
[10] Trial Tr. vol. I, 176-77 (Costantini).
[11] *Id.* at 97-98 (Papa); *id.* at 177 (Costantini).

make other contributions to equal the value of 447 Rio Grande), and both would share the profits.[12]

The parties memorialized their joint venture arrangement in the Term Sheet dated March 25, 2013, and the Additional Term Sheet dated April 23, 2013 (collectively, the "Term Sheets").[13] Costantini's attorney, Daniel P. McCollom, Esquire ("McCollom"), drafted these documents.[14] The Term Sheet sets forth the parties' basic agreement to form the joint venture, "pursuant to which [Defendants] will contribute [447 Rio Grande[15]] to the Joint Venture and [Costantini[16]] will contribute (and/or forgive) the Note in exchange for interests in the Joint Venture."[17] It also specifies that "[i]f by June 30, 2013, the Joint Venture is not formed and funded," Costantini can "terminate the Joint Venture, in which case the Note shall be returned to [Costantini] and [447 Rio Grande] (subject to the

[12] *Id.* at 149-50 (Papa).
[13] Pretrial Stipulation and Order ("Stip.") ¶ 3; *see also* JX 11 (the "Term Sheet" or "TS"); JX 15 (the "Additional Term Sheet" or "ATS"). Citations to paragraphs of the Pretrial Stipulation and Order refer to the stipulated facts section.
[14] Stip. ¶ 3. McCollom also represented the joint venture's two entities "to a certain extent." Trial Tr. vol. I, 8 (McCollom).
[15] The Term Sheet addresses both 437 and 447 Rio Grande, but the parties have stipulated that only 447 Rio Grande was to be transferred as a capital contribution. Stip. ¶ 13; *see also* ATS ¶ 1. GJP held a one-year lease agreement with a tenant for the operation of the Tom Cat Restaurant on 437 Rio Grande. JX 22. The lease term ended on October 31, 2014.
[16] The Term Sheet refers to "Joseph M. Costantini or an entity owned by Joe." TS ¶ 1. The distinction is not necessary because Costantini acquired the note. Stip. ¶ 4.
[17] TS ¶ 2.

mortgages) will be returned to [Defendants]."[18] The consequences of such a decision are as follows:

> 5. In the event [Costantini] makes the termination election, [Defendants] will have 45 days from the date of the termination election to pay off the Note for the sum of (a) $650,000; plus (b) any other monies advanced by [Costantini] to the Joint Venture plus (c) interest on all monies advanced by [Costantini] (including the original $500,000 to acquire the Note) at the rate of 10% per annum from the date of the advances.
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> 6. If [Defendants] do[] not pay off the loan in full within such 45-day period, then the payoff for the Note shall increase to the principal balance of the Note as of the date hereof (approximately $800,000), plus the amounts set forth in Sections 5(b) and 5(c) above, plus other amounts that may be due under the Note and Mortgage. [Defendants] acknowledge[] that the Note is valid and is currently in default and that [Costantini] may take any and all actions authorized under law to collect the Note.[19]

In the words of McCollom, the Additional Term Sheet "'clarifie[s]'" the provisions of the Term Sheet.[20] It begins by recognizing the agreement reached in the Term Sheet and observes that the parties "have determined to proceed with the development of the real Property in accordance with the terms of this [Additional]

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[18] TS ¶ 4.

[19] TS ¶¶ 5-6. The $800,000 is handwritten into an underlined space. Costantini argues that the principal balance should be $2,344,776.98. Defendants respond that the balance as of October 2012 was $952,000. Defs. GJP Developers, Inc., and Gary J. Papa's Pretrial Answering Br. ("Defs.' Pretrial Answering Br.") 6. Papa suggests that the discrepancy arises from negotiations. *See, e.g.*, Trial Tr. vol. I, 91-93, 97, 120 (Papa). McCollom's understanding was that $800,000 "was the amount that [Costantini] thought was . . . fair for him for advancing the money, [and] that this is what he was looking for if the venture didn't proceed . . . ." *Id.* at 42 (McCollom). Papa seemingly had this understanding as well. *Id.* at 92-94, 120.

[20] Trial Tr. vol. I, 56 (McCollom).

Term Sheet."[21] Costantini had already purchased the note from Acquired Capital, and he was to advance $250,000 to Defendants and contribute $500,000 for construction of the course.[22] The parties agreed to create St. Thomas Group, LLC ("St. Thomas LLC") to hold 447 Rio Grande and Wildwood Mini Golf, LLC ("Wildwood LLC") to operate the business.[23] Costantini and Defendants were to make their respective contributions and receive equal interests in the LLCs,[24] although the LLC agreements define the parties as "Members" at the outset.[25] The Additional Term Sheet also speaks of dissolution (whether to be elaborated upon in the LLC agreements or according to specified procedures available after seven years)[26] and commits the parties to executing LLC agreements to formalize their

[21] ATS ¶¶ 1, 3-4.
[22] ATS ¶¶ 2, 5-6. The parties later agreed that Costantini could meet the construction contribution through in-kind services. Stip. ¶ 10.
[23] ATS ¶¶ 7-8. St. Thomas LLC and Wildwood LLC are Delaware LLCs.
[24] ATS ¶ 7 (contemplating the parties' contributions and providing that they will have fifty-fifty interests in St. Thomas LLC); ATS ¶ 9(h) ("Upon transfer of [447 Rio Grande] into the Company and execution of the LLC agreement, [Costantini] agrees to mark the Note and Mortgage paid in full, it being agreed that amounts owed to him by [Defendants] will be converted to a 50% interest in the Company . . . ."); *see also* Wildwood LLC Agreement § 3.1 ("[E]ach Member shall contribute the property set forth opposite such Member's name on Schedule A to this Agreement and shall receive in return the LLC Interest . . . indicated on Schedule A."); St. Thomas LLC Agreement § 3.1 (same); TS ¶ 2 ("[Defendants] will contribute the Property . . . and [Costantini] will contribute . . . the Note in exchange for interests in the Joint Venture.").
[25] *See* JX 8 ("Wildwood LLC Agreement") at JMC 000224 & § 1.5(k); JX 9 ("St. Thomas LLC Agreement") at JMC 000246 & § 1.5(k).
[26] Paragraph 9(c) of the Additional Term Sheet refers to dissolution provisions in paragraph 9(g) but could have been intended to refer to paragraph 9(f). *See* Trial

agreement. Notably, Section 7.3 of the LLC agreements offers a procedure to resolve a fundamental impasse through a buyout of the terminating member's interest or a liquidation of the LLCs.[27] The parties have stipulated, however, that "[t]he entire joint venture agreement is embodied in the Term Sheet[s]."[28]

C. *The Implementation of the Joint Venture*

Costantini paid $500,000 to have the note assigned to St. Thomas LLC,[29] paid $250,000 to GJP Builders, and satisfied his construction commitment through payments and in-kind services.[30] Papa is adamant that he signed a deed for 447 Rio Grande, in the presence of McCollom's paralegal, Sherri Beattie

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Tr. vol. I, 70-71 (McCollom). Paragraph 9(f) addresses dissolution squarely but "after the seventh anniversary of the opening of the golf course." ATS ¶ 9(f). Paragraph 9(g) generally involves executing LLC agreements "containing the foregoing terms." ATS ¶ 9(g).

[27] Wildwood LLC Agreement § 7.3; St. Thomas LLC Agreement § 7.3.

[28] Stip. ¶ 3.

[29] Stip. ¶ 4; JX 10.

[30] Papa appears to question whether Costantini contributed his $500,000 for construction. *See, e.g.*, Defs. GJP Developers, Inc.'s and Gary J. Papa's Post Trial Mem. ("Defs.' Post Trial Mem.") 10 ("Indeed, the grand total of Plaintiff's in-kind contributions of $69,144.11 shown on JX-38 added to the $1,162,289.61 in payments shown on JX-39 total $1,231,433.72 which is *less* than his $1,250,000 required contribution."). Costantini has not been completely consistent. *See, e.g.*, Stip. § V (asking for $3,594,776.98 plus interest); Pl.'s Post-Trial Mem. of Law ("Pl.'s Post-Trial Mem.") 1 ("[H]e is now owed $3,907,066.59, plus interest."). Many figures have been presented in the briefing and at trial, but Costantini at least has proved, by a preponderance of the evidence, that he has met his $1.25 million overall funding commitment. *See* Stip. ¶¶ 4-10; Trial Tr. vol. I, 104 (Papa) ("Q. And you also testified at your deposition that in your own opinion the value of [Costantini's] services met the $500,000 requirement. A. That's correct."); *id.* at 188-89 (Costantini) (referring to JX 36 to substantiate a bill of $130,000 for in-kind services).

("Beattie"), sometime after receiving a May 13 email from McCollom.[31] In relevant part, the email states:

> [Beattie], my real estate paralegal will send you a deed for the property to transfer it into St. Thomas Group LLC (447 Rio Grande Ave). Unfortunately we have not discovered any method to transfer the real estate into the LLC without paying realty transfer tax. We have been advised that the cost will be 1%. We will continue to look for ways to reduce/eliminate the tax.[32]

McCollom does not recall sending this email[33] and does not believe that he intended to assume responsibility for the deed.[34] There are no records of a deed prepared or executed around that time.[35] Papa did not pay any costs associated

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[31] *See, e.g.*, Trial Tr. vol. I, 107-09, 152 (Papa) (recounting his signing of the deed).
[32] JX 16 (email to "Joe and Gary").
[33] Trial Tr. vol. I, 34 (McCollom).
[34] *See id.* at 72 (McCollom) ("It was a mistake for me to say that because I am not licensed in New Jersey. Sherri is not licensed. . . . , so we could not have prepared the deed.").
[35] *Id.* at 35, 73 (McCollom) ("[B]ecause my recollection is not 100 percent, . . . I went back in and checked my electronic record, [and] there is no record of a deed being prepared."); *id.* at 225-26 (Beattie). Beattie explained, "I looked back through my emails. I also looked back on the document management system . . . . There was no deed, there was no transfer tax – the only thing – my only role was preparing the assignment of the mortgage and ordering title searches." *Id.* at 225 (Beattie). Papa also could not provide independent records confirming that he went in to sign the deed. *See id.* at 109-11 (Papa).

Nonetheless, Papa does not back down from his testimony. He adds that the May 13 email supports his expectation that McCollom would take care of the filing. Defs.' Post Trial Mem. 13 ("Papa reasonably relied on McCollom's assumption of the duty to prepare the documents and Papa executed them. . . . Papa reasonably expected that the deed would be recorded by or through McCollom as the 'purchaser's' attorney just as purchasers record all of the deeds for their acquired properties.").

with a filing.[36] On or around June 24, the parties executed operating agreements for St. Thomas LLC and Wildwood LLC.[37] Those agreements had an effective date of on or around March 25, 2013, the date "of the filing of the certificate[s] of formation."[38] Papa told Costantini before opening day that he had "taken care of everything," which Costantini assumed to mean that the property had been transferred.[39]

Wildwood Miniature Golf Course opened on July 20, 2013, and operated until the close of the 2013 season.[40] City officials attended the course's grand opening.[41] Although it was not a major issue at trial, Papa managed the day-to-day operations of the course.[42] He paid Costantini half (or at least a portion[43]) of the

[36] The non-payment is not disputed, although the parties disagree on the amount such costs would have been. There are circumstances where there would be no realty transfer tax. *See* Trial Tr. vol. I, 273-74 (Cannito). It is also possible that the transaction would not have accrued income taxes for GJP. *Id.* at 285-86 (Ritchie). Regardless, in reaching its decision the Court need not determine the precise amounts that would have been due, if any.

[37] The signature pages for the Wildwood LLC Agreement and the St. Thomas LLC Agreement record a fax date of June 24. Papa apparently sent this signed page, with Costantini's signature also appearing, to McCollom on that date. Trial Tr. vol. I, 53 (McCollom).

[38] *Id.* at 8, 10 (McCollom); *see also* Wildwood LLC Agreement § 1.1; St. Thomas LLC Agreement § 1.1.

[39] Trial Tr. vol. I, 180-81 (Costantini).

[40] Stip. ¶¶ 11-12.

[41] Trial Tr. vol. I, 103 (Papa).

[42] *See, e.g.*, *id.* at 194 (Costantini).

[43] *Id.* at 191 (Costantini). There is some dispute about whether the profits were shared equally, but the evidence on this point was not developed at trial.

profits from the business on a weekly basis.[44] After the close of the season, around late October or November, the two fell into conflict over Costantini's construction expenses, including a bill from a concrete company.[45] The parties turned to McCollom for help when they could not communicate, although McCollom could not have been a neutral party.[46]

D. *The Recording Dispute and the Litigation*

The disagreement over expenses led Costantini to discover, probably in November, that 447 Rio Grande had not been transferred to St. Thomas LLC.[47] Papa claims that he, too, did not know of this reality until late 2013 or early 2014.[48] Papa had not (and still has not) paid any realty transfer fees, mansion taxes, or taxes for a property sale or cancellation of debt income related to the transfer.[49] Costantini purported to elect to terminate the joint venture through a letter from his

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[44] *Id.* at 148-49 (Papa); *see also* JX 23 at GJP-000006-16. The Court notes that the business appeared to have operated on a cash basis, and the parties' accounting and tax reporting efforts left much to be desired. *See*, *e.g.*, Trial Tr. vol. I, 221 (Costantini); Trial Tr. vol. II, at 369-70, 377-78 (Papa).

[45] Trial Tr. vol. I, 28-29 (McCollom); *id.* at 153-55 (Papa); *id.* at 181-82 (Costantini).

[46] *See id.* at 154-55 (Papa); *id.* at 183 (Costantini); Trial Tr. vol. II, 303 (Stewart); *id.* at 366 (Papa). The Additional Term Sheet, however, states that the parties "agree to mediate such disagreement [on material matters for the LLCs] *with the attorney and accountant for the Company*." ATS ¶ 9(c) (emphasis added).

[47] Trial Tr. vol. I, 28-30 (McCollom); *id.* at 185 (Costantini).

[48] *Id.* at 170 (Papa) (answering that he became aware of the non-filing in "December, January").

[49] *See supra* note 36.

lawyer to Papa's lawyer dated January 21, 2014.[50] Papa did not make the payment according to paragraph five of the Term Sheet, and after forty-five days, Costantini filed the pending action.[51]

There is conflicting testimony about whether Papa offered to fix the problem by recording the deed to 447 Rio Grande before or after this action was filed on March 7, 2014.[52] The weight of the evidence is that Papa, through counsel, learned

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[50] JX 19 at JMC 000026 ("[M]y client has decided to terminate the joint venture and pursue his legal remedies. We are nonetheless willing to propose an amicable resolution before we proceed with protracted litigation and foreclosure against both properties . . . ."). The letter concludes with a request that Defendants' counsel "confirm whether [his] client would like to negotiate more detailed terms under this general framework no later than the end of business on Thursday, January 23rd." *Id.* at JMC 000027. Papa characterizes this letter as "a negotiation letter between Pennsylvania attorneys" rather than a valid termination notice. Defs.' Pretrial Answering Br. 2.

[51] Trial Tr. vol. I, 188 (Costantini).

[52] *See, e.g.*, *id.* at 33 (McCollom) ("Q. Did [Patrick Stewart, Esquire ("Stewart"), Papa's Pennsylvania attorney], on behalf of his client, ever say 'Okay, we'll record the deed'? A. No."); *id.* at 146 (Papa) (stating that he was willing to record as of January 21); *id.* at 170-73 (Papa) ("Q. . . . . When I asked you so you didn't offer to record the deed until you were sued in Delaware, you first said yes and then you said 'and a few times before that.' A. I don't believe so."). Stewart testified as follows:

> During the conference call with Mr. McCollom, there was a discussion that the reason that they hadn't recorded the deed or the deed had not been recorded was because there was a concern about taxes. And I said, "Well, I don't think there's a concern about taxes. If there is a tax due, then my client will pay the tax. So let's just record the deed."

Trial Tr. vol. II, 302-03 (Stewart). McCollom told a different story:

> As [Costantini's counsel for the termination effort] indicated, I don't recall Mr. Stewart coming out and saying, "No, [Papa] is not going to pay that," but Mr. Stewart's response . . . was he seemed to be always

that Costantini was not interested in a belated filing and took the position, at least until Costantini filed suit, that recording the deed was McCollom's responsibility.[53] Papa even offered to buy Costantini's interest.[54] There was nothing stopping Papa from recording a deed on his own.[55] Papa eventually had a proper deed prepared in April 2014,[56] but he has not transferred 447 Rio Grande to St. Thomas LLC. Nor has he paid Costantini amounts purportedly due under the Term Sheets.

On April 7, 2014, the Court granted the parties' Stipulation and [Proposed] Status Quo Order, which allowed for an "independent manager[] to operate the

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> putting it back, "[McCollom], it's your responsibility. Here's the May 16th email. You need to take care of this."

Id. at 398-99 (McCollom); *see also id.* at 342-43 (Stewart) (reflecting an understanding that "Mr. Papa had retained Mr. McCollom").

[53] It is likely that Papa's counsel generally discussed the possibility of filing a deed and had that idea rejected. *See*, *e.g.*, Trial Tr. vol. II, 301 (Stewart) (explaining that, in December, an attorney for Costantini said that "he didn't think [recording the deed] was going to be possible any more"). Papa was at risk of a great loss, and McCollom's email appeared to help his case (or at least generate confusion). These circumstances could reasonably explain the origins of the unhelpful posturing that contributed to the stalemate (and the inconsistent testimony).

[54] *Id.* at 339 (Stewart).

[55] Stewart admitted this much during cross examination:

> Q. What was stopping [Papa] from recording the deed?
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> A. The fact that when we offered to do it that they rejected that offer and said[,] "We're not going to let you record the deed."
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> Q. You're missing my point. Was there some injunction in place that would prevent you from recording the deed?
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> A. No.

Id. at 336 (Stewart).

[56] Trial Tr. vol. I, 174 (Papa).

miniature golf course for the 2014 season."[57] Among its other conditions, the stipulation required Papa to place one half of the rent from the restaurant on 437 Rio Grande in escrow pending a final decision in this action.[58] Papa made efforts to ready the course for the 2014 season, including preparing the grounds for a bathroom facility, procuring architectural drawings, and turning on the course's fountains.[59] Unfortunately, the selected operator declined to serve, and the parties could not agree on an alternative operator.[60] Furthermore, the parties were unable to cooperate to install a permanent bathroom facility, a requirement for a permanent operating license from the City of Wildwood.[61] The course did not operate during the 2014 season.

II. CONTENTIONS

Although Costantini originally brought nine counts in his complaint, his claims have been narrowed to those for declaratory relief that (1) he is the sole member of St. Thomas LLC, (2) St. Thomas LLC owns the note on property owned by Papa, and (3) he properly terminated the joint venture pursuant to the

[57] Stipulation and [Proposed] Status Quo Order ¶ 1.
[58] *Id.* ¶ 2.
[59] Trial Tr. vol. I, 161-65 (Papa).
[60] *Id.* at 164-65 (Papa); *id.* at 202-03 (Costantini); *see also* JX 26 (unexecuted management services agreement).
[61] Trial Tr. vol. I, 161-63 (Papa); *id.* at 204 (Costantini).

Term Sheets.[62] Moreover, he requests monetary relief pursuant to the Term Sheets. His basic argument is that the Term Sheets, through unambiguous language, gave him the rights to terminate the joint venture if it was not satisfactorily formed and funded by June 2013 and to collect a certain payment after termination. Thus, because Papa did not contribute 447 Rio Grande, Costantini became entitled to $3,907,066.59 (or $3,594,776.98) plus interest after forty-five days.[63] Furthermore, because the LLC agreements' plain language conditions Defendants' membership interests on the contribution of 447 Rio Grande, Costantini would be the sole member of St. Thomas LLC. Finally, because GJP has defaulted under the note, Costantini claims that he (or St. Thomas LLC) "is entitled to all the rents, profits, and issues of 437 Rio Grande."[64]

Costantini relies on a strict interpretation of the parties' agreements, emphasizing that equity cannot protect Papa, given a self-serving failure to fulfill "his single obligation under the contract,"[65] whether at the outset of their joint venture or immediately upon discovery of the failure to record. Rather than

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[62] Stip. § V (statement of relief sought); Pl.'s Post-Trial Mem. 11-12. There was a question about judicial dissolution through a receiver, Stip. § III, but that issue was not framed in trial.

[63] The first figure represents a principal balance of $2,344,776.98 on the note and Costantini's purported expenditures of $1,562,289.61. *See* Pl.'s Post-Trial Mem. 8-9 & n.25, 12. The second figure appeared in Section V of the Pretrial Stipulation and Order.

[64] Pl.'s Pretrial Answering Br. 18.

[65] Pl.'s Post-Trial Mem. 10.

causing a windfall, Costantini argues, finding in his favor will prevent Defendants from reaping benefits from their own breach. Alternatively, if the express language of the Term Sheets does not dictate the outcome of this dispute, Costantini asserts he was entitled to terminate the joint venture because Defendants' breach was material under the factors set forth in the Restatement (Second) of Contracts.

Defendants argue that "equity and law require"[66] that 447 Rio Grande be transferred to St. Thomas LLC, the note be deemed satisfied, and the LLCs be unwound pursuant to the LLC agreements.[67] They contend that failing to record the deed was not a material breach of the Term Sheets because Papa signed the deed at McCollom's office and later offered to transfer the property to St. Thomas LLC.[68] They emphasize that Papa and Costantini operated the golf course and

[66] Defs.' Post Trial Mem. 2.

[67] The LLC agreements generally provide for liquidation, followed by distribution to creditors and members. Wildwood LLC Agreement § 5.2; St. Thomas LLC Agreement § 5.2. There also was something of an argument that Costantini needed to invoke an alternative dispute resolution process before filing suit. Defs.' Post Trial Mem. 8 (citing article VII of the LLC agreements).

[68] Presumably, they argue that there was no material breach of the LLC agreements as well. *See* Defs.' Pretrial Answering Br. 6 ("[T]here has been no material breach sufficient to ignore the intent of the parties as clarified in the additional term sheet, executed in the LLC operating agreements, and put into effect in the operation of the golf course in 2013.").

Defendants argue for actual damages in the alternative. Their position, though, is that Costantini suffered no damages. Defs.' Post Trial Mem. 9-10.

shared profits from the 2013 season,[69] and that Papa treated St. Thomas LLC as the owner of the land. In other words, the joint venture and the LLCs were formed, Defendants became members,[70] and Costantini would need to follow the dissolution procedures in the Additional Term Sheet (and the LLC agreements).[71] Defendants argue that Costantini is in the wrong for refusing recordation, failing to satisfy the note, and preventing 2014 operations. They posit that Costantini is refusing to allow Papa to record the deed so as to effect a "'land grab'"[72] for both 437 and 447 Rio Grande. Defendants urge the Court to consider the equities and avoid granting Costantini a windfall—they even ask for attorneys' fees. They add that the rent from 437 Rio Grande should not remain in escrow because Costantini's only interest in that property is in the form of collateral for payment of the note.

The dispute boils down to (1) what agreement governs, (2) whether Papa's actions were sufficient to satisfy that agreement, and, if not, (3) what remedy is

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[69] This is said to be "'a conclusive election, in effect waiving the right to assert that the breach discharged any obligation to perform.'" Defs.' GJP Developers, Inc., and Gary J. Papa's Pretrial Br. 15 (quoting 14 Richard A. Lord, *Williston on Contracts* § 43:15 (4th ed. 2014)).

[70] Defendants observe that one need not make a contribution to become a member of an LLC under Delaware's LLC Act. *See* 6 *Del. C.* § 18-301(d).

[71] This would mean that the Term Sheet's provisions are not the proper measure of damages. Additionally, Defendants emphasize that Papa's efforts resulted in "the heavily discounted purchase of the note and mortgage" at $500,000. Defs.' Post Trial Mem. 9.

[72] *E.g.*, *id.*

appropriate. Such a remedy might account for whether Costantini bears any responsibility for not allowing the recording or for 2014 operations and what should become of the escrowed rent from 437 Rio Grande.

III. ANALYSIS

Delaware's Declaratory Judgment Act authorizes the Court to "determine[] any question of construction or validity arising under . . . [a] contract," and a person who is interested or affected by such contracts "may . . . obtain a declaration of rights, status or other legal relations thereunder."[73] In an action for a declaratory judgment, the "better view" is that the plaintiff generally bears the burden of persuasion.[74] Similarly, a breach of contract claim requires that a plaintiff show "the existence of a contract, the breach of an obligation imposed by that contract, and resulting damages to the plaintiff."[75] For Costantini to prevail, he must establish, by a preponderance of the evidence, that he is entitled to his declaratory and monetary relief.[76]

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[73] 10 *Del. C.* § 6502. The Court need not dwell on the issue of justiciability because the parties do not dispute the issue and it is clear that there is an actual controversy regarding how to sever the business relationship between the parties.
[74] *Rhone-Poulenc v. GAF Chems.*, 1993 WL 125512, at *3 (Del. Ch. Apr. 8, 1993).
[75] *In re Mobilactive Media, LLC*, 2013 WL 297950, at *14 (Del. Ch. Jan. 25, 2013) (internal quotation marks omitted).
[76] *See Estate of Osborn ex rel. Osborn v. Kemp*, 2009 WL 2586783, at *4 (Del. Ch. Aug. 20, 2009) (citing *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 834 n.112 (Del. Ch. 2007)), *aff'd*, 991 A.2d 1153 (Del. 2010).

A. *The Governing Agreement*

The parties have chosen to litigate based on the language of the Term Sheets.[77] Costantini directs the Court to the plain language of the Term Sheet regarding his termination rights and remedies for Defendants' alleged breach.[78] Defendants reject an isolated reading of the Term Sheet, contending that the joint venture (including the LLCs) was formed and that the Additional Term Sheet "adds the specificity that negates [Costantini's] argument."[79]

The Court seeks to honor the "shared intent" of contracting parties, based on the objective meaning of the words they chose.[80] If a contract is unambiguous, its plain meaning governs.[81] In construing a contract, "a court must interpret contractual provisions in a manner that would give effect to every term of the

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[77] *See* Stip. ¶ 3. There is some complication because Defendants base certain arguments on the LLC agreements, which are discussed in the Additional Term Sheet. The Court is not persuaded that the LLC agreements govern the dispute (or supersede the Term Sheets), in large part because of the parties' stipulation, their anchoring the debate in the text of the Term Sheets, and the fact that the LLC agreements do not address the consequences of failing to form and fund the joint venture. Defendants essentially argue that the parties have progressed beyond the Term Sheets with the formed LLCs and shared profits, but the Court's initial concern is to answer foundational questions about the joint venture, as "embodied" in the Term Sheets. The parties' sharing of profits from operations does not require application of the LLC agreements.

[78] Costantini refers to the "Term Sheets" collectively, but the remedy he seeks to invoke comes directly from the Term Sheet.

[79] Defs.' Pretrial Answering Br. 4.

[80] *In re Mobilactive Media*, 2013 WL 297950, at *15.

[81] *E.g.*, *Energy P'rs, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *13 (Del. Ch. Oct. 11, 2006).

instrument and reconcile all provisions of the instrument when read as a whole."[82] When parties to one contract adopt another contract, the new contract governs "to the extent that the new contract is inconsistent with the old contract or if the parties expressly agreed that the new contract would supersede the old one."[83]

No party has argued that the Additional Term Sheet superseded the Term Sheet, and the parties have stipulated that the entire agreement with respect to the joint venture is contained within the Term Sheets. The objective, plain meaning interpretation of Sections 4 through 6 of the Term Sheet is that if Defendants do not "form *and* fund" the joint venture, Costantini can exercise termination rights (which could lead to a monetary recovery of at least $1.55 million). The Additional Term Sheet "clarifies" the parties' agreement on the joint venture. By its plain language, the Additional Term Sheet governs how the parties will "proceed with the development of the real Property"[84] and execute LLC agreements,[85] among other tasks. The Additional Term Sheet requires Papa to contribute 447 Rio Grande for St. Thomas LLC to hold "in accordance with" its LLC agreement[86] and specifies provisions on dispute resolution and dissolution to

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[82] *Id.*
[83] *Country Life Homes, Inc. v. Shaffer*, 2007 WL 333075, at *5 (Del. Ch. Jan. 31, 2007).
[84] ATS ¶ 4.
[85] ATS ¶ 9.
[86] ATS ¶ 7.

be included in the LLC agreements. It does not profess to cover what happens if the joint venture is not formed and funded by June 30, 2013.[87]

Defendants argue that the Additional Term Sheet secures their interests in the LLCs and certain rights associated with dissolution. At least one provision could be read to give the parties "a 50% LLC Interest in St. Thomas Group LLC" even before they made their contributions to St. Thomas LLC.[88] A later provision, though, expressly provides that "amounts owed to [Costantini] by [Defendants] will be converted to a 50% interest in the Company."[89] LLCs were formed and perhaps Defendants literally became members of the LLCs because they were defined as such. Regardless, the analysis of whether the joint venture was formed and funded would seem to come first, and applying the LLC agreements would raise questions that the parties have not asked the Court to resolve.[90] Given the parties' stipulation, the ability for the Term Sheets to coexist, and the Term Sheet's

[87] Neither Papa nor Costantini made his full contribution by the June 30 deadline in the Term Sheet. *See* Trial Tr. vol. I, 195-96 (Costantini). Nonetheless, the requirement arguably applied only to Papa, *see id.* at 219 (Costantini), any failure by Costantini pales in comparison to Papa's failure, and the parties have not suggested that the Term Sheet became ineffective at that point.

[88] *See* ATS ¶ 7.

[89] ATS ¶ 9(h). The "Company" is not used for one consistent meaning. For the purposes of determining who owns the note, however, it suffices that the reference here is to St. Thomas LLC.

[90] For example, the Court is not certain whether Wildwood LLC received funding independently of St. Thomas LLC and whether it is significant that the St. Thomas LLC Agreement was signed without identifying Defendants' membership interest percentages.

language on point, the Court finds that the Term Sheet continues to apply and provide the critical language for the pending dispute.

B. *Sufficiency of Performance*

Defendants do not deny that they have breached the letter of the Term Sheets—their argument, rather, is that there has been no material or intentional breach. Costantini does not initially rely on a material breach to arrive at his desired remedy,[91] but he submits that Defendants' breach was material if necessary for a finding that he properly terminated the joint venture. "[A] valid contract will be enforced unless the contract violates public policy or positive law, or unless a party's non-performance is excused."[92] A prior material breach by one's counterparty is an excuse for non-performance.[93]

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[91] He first argues that since the agreement allows termination for a failure to make a contribution, he could terminate for non-performance.

[92] *In re Appraisal of Metromedia Int'l Gp., Inc.*, 971 A.2d 893, 900 (Del. Ch. 2009).

[93] *In re Mobilactive Media*, 2013 WL 297950, at *13. Whether a breach is material is a context-specific analysis that can be informed by factors such as:

> (a) [T]he extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; [and] (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. (quoting Restatement (Second) of Contracts § 241 (1981) (emphases omitted)).

The facts for deciding the breach issue are undisputed and simple. Papa was supposed to transfer 447 Rio Grande "[u]pon receipt of $250,000 [from Costantini] on April 23, 2013," according to the Additional Term Sheet.[94] Costantini made this payment on April 23.[95] Papa has yet to record the deed. The Term Sheet gave Costantini the right to terminate the joint venture if it were not formed and funded by June 30.

Defendants raise this Court's decision in *In re Mobileactive Media* to argue that their breach was not material because (as relevant) they believed they had complied and also offered to cure their breach. This argument is not helpful for a couple of reasons. First, a non-material breach by Defendants would prevent Costantini from citing the breach to terminate performance, not prevent him from enforcing a valid contract right. The Court has no reason to find that the contribution and time-limited termination provisions of the Term Sheets were unconscionable or unenforceable.[96] Whether the remedy provisions are enforceable is a more difficult question that is addressed in the next section. Put simply, Costantini properly terminated the joint venture through his letter of

[94] ATS ¶ 7.
[95] Stip. ¶ 5.
[96] The Court might be persuaded that the provisions were unenforceable if Costantini had sought to terminate the joint venture on July 1 and Papa had an appointment to sign the deed the next day, for one. That is not the case here, and the Court will not draw a bright line based on hypothetical facts.

Furthermore, the record does not convince the Court that any actual offer by Papa supersedes Costantini's contract rights.

January 21. There might have been some room for settlement negotiations regarding a remedy, but the letter plainly conveyed the message that Costantini "decided to terminate the joint venture."[97] Costantini did not have to initiate a dispute resolution process pursuant to paragraph 9(c) of the Additional Term Sheet—paragraph 9 sets out terms "that the LLC Agreements . . . shall contain,"[98] not a process for resolving disagreements about initial formation and funding of the joint venture under the Term Sheets.[99]

Second, though less important, *In re Mobileactive Media* is distinguishable on its facts. For example, both business partners in that case only contributed $46,500 of their $75,000 initial obligations, and the plaintiff "continu[ed] to accept the benefits of the contract."[100] The parties' agreement here required Defendants to *file* the deed to fund the joint venture (and for interests in the LLCs), and Papa entirely failed to make this contribution. He was (at least) mistaken in his vehement assertions that he signed the deed, and the record on offers to cure this failure is not as clear as he states. Costantini had not known about the failure to record while the course operated and did not take advantage of Papa's efforts or

[97] *See supra* note 50.
[98] ATS ¶ 9. Moreover, as noted above, McCollom could not have been a neutral mediator, and there is some confusion about the dissolution provision reference in paragraph 9(c).
[99] This addresses the quandary *supra*, in note 67.
[100] *In re Mobilactive Media*, 2013 WL 297950, at *13-14.

the business thereafter.[101] In sum, Defendants breached the Term Sheets and Costantini was entitled to terminate the joint venture as he did.

C. *Remedies*

The parties essentially have framed a binary approach to remedies: Costantini either recovers nearly $4 million plus interest (almost certainly encompassing the two properties) or ends up as if Papa had done nothing wrong at all. This is a court of equity, with limits on the remedies it can award.[102] A fundamental principle of equity is that "equity regards that as done which in good conscience ought to be done."[103] Furthermore, the freedom of contract is not absolute.[104]

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[101] Defendants cite Williston on Contracts to argue that a party cannot terminate performance based on its counterparty's material breach if, "with knowledge of the facts, [it] either performs or indicates a willingness to do so, despite the breach, or insists that the defaulting party continue to render future performance." Defs.' Pretrial Answering Br. 15 (internal quotation marks omitted). The profit sharing is significant in terms of injury, as discussed *infra*, but Papa's failure to record the deed was discovered after the 2013 season ended.

[102] *See, e.g.*, *Fontana v. Julian*, 1978 WL 4980, at *2-3 (Del. Ch. Oct. 4, 1978) ("[A]lthough compensatory damages may be allowed as incidental to other relief, . . . exemplary or punitive damages cannot be awarded in a suit in equity . . . ."). Defendants criticize Costantini's choice of forum as a tactic "to avoid jury scrutiny," Defs.' Pretrial Answering Br. 7, but there is no basis to find impropriety.

[103] *Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983).

[104] *See supra* note 92 and accompanying text. While Costantini is not wrong to cite authority emphasizing the Court's respect for private ordering, *e.g.*, *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *4-5 (Del. Ch. June 21, 2012), the Court cannot ignore issues such as public policy and the equitable nature of its jurisdiction.

In a transaction with facts as muddled as these, binary options rarely capture an "equitable" result. Papa's remedy could entail unnecessary transaction costs, lead to a financially undesirable liquidation sale,[105] and ignore private ordering in favor of one whose conduct contributed significantly to this litigation. On the other hand, equity will not permit Costantini to extract around $4 million (including title to 437 and 447 Rio Grande) for his investment of approximately $1.25 million (meant to approximate the value of 447 Rio Grande) after the course operated for a season. A fairer solution compensates Costantini according to the parties' Term Sheet, as the parties reasonably understood their deal.

The big picture is that the parties should be compensated for their investments: Costantini gets his money back and Papa retains title to his encumbered land. Costantini has not squarely addressed the interface between membership and ownership, and the part of his request for declaratory relief relating to St. Thomas LLC is denied. The Court modifies the note, as set forth below, and confirms that it belongs to Costantini, personally. The remedy fashioned here is imperfect and likely incomplete—the Court has not seen a balance sheet for either of the LLCs and has insufficient basis to decide how their

[105] The parties appear to agree that they do not want to remain in a joint venture. *See, e.g.*, Defs.' Pretrial Answering Br. 9 ("It is clear that these two co-members cannot co-exist. The LLC should be dissolved . . . ."); Trial Tr. vol. I, 205 (Costantini) ("I do not want to be a partner with Mr. Papa because of all the things he had done . . . .").

dissolution should proceed.[106] A logical approach would be for all monies traceable to Costantini's contributions to be returned to Costantini in partial satisfaction of the note.[107] All other monies could then be split fifty-fifty. Perhaps the parties can work out the details and may fashion a remedy that better suits their needs. Nevertheless, the Court's remedy, at least as a starting point, requires further discussion of the facts.

Papa is "emphatic[]" that he signed the deed.[108] Yet his testimony about meeting Beattie and signing the deed was not credible.[109] There are two main ways of reading the facts. The first is that with all the documents that the parties signed and McCollom's email, Papa believed he signed the deed (and could rely on McCollom to handle the next steps) but was mistaken. The facts that Papa

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[106] Defendants have argued for dissolution pursuant to the LLC agreements, but there are real questions about whether they had any positive capital account balances.

[107] Some funds might go first to pay liquidation expenses or creditors.

[108] Trial Tr. vol. I, 110 (Papa) ("I signed the deed emphatically. . . . [Beattie] stamped it, and that was it.").

[109] For example, at a deposition, Papa described Beattie, whom he had seen "maybe half a dozen times" as "'hav[ing] you know, shoulder length hair, shorter hair, you know, relatively, you know, thin, not thin thin, but not heavy.'" *Id.* at 111-12 (Papa). At trial, he defended this answer by explaining, "I did the best I could with my analysis of what she looked like. . . . I mean, she can walk in today or tomorrow, and she might have gained 50 pounds or lost 50 pounds, I don't know." *Id.* at 112 (Papa). He also recalled Beattie saying, "'How ya doing, Gar,'" on the day he went in to sign the deed. *Id.* at 152 (Papa). Beattie, in contrast, testified that she would "absolutely not" refer to Papa with "that type of familiarity." *Id.* at 224-26 (Beattie). She stated that she had never met Papa and that her "only contact" with him would have been through email correspondence, around March 2013, about taxes after a title search. *Id.* at 224, 226 (Beattie).

operated the course for the 2013 season, paid some taxes for which he hoped to be reimbursed,[110] and made efforts to open the course for the 2014 season support this interpretation. Of course, the persuasiveness of Papa's claimed ability to rely on McCollom decreased as time passed. If this dispute arose from a misunderstanding, and Papa was told that Costantini did not want the deed recorded early in the negotiations,[111] the equitable grounds for enforcing the Term Sheet to its fullest extent for Papa's failure to fund the joint venture would lose support.

The second reading is that Papa was not fully honest when he told Costantini that he had taken care of everything (Costantini's statement to that effect has not been rebutted[112]) or when he testified in Court.[113] It makes little sense that Papa would not file the deed (saving his properties from foreclosure) but would run the course for a season and begin preparing for the next as if he had filed—although there is some noise about whether Papa believed Costantini was responsible for

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[110] *Id.* at 143 (Papa).

[111] As discussed, questions of who offered to do what and when are not easily answered. *See supra* notes 52-53 and accompanying text.

[112] For example, Costantini asserts, "Mr. Papa was not forthright in his failure to contribute his contributions. He lied to Mr. Costantini." Pl.'s Pretrial Answering Br. 12. Defendants' position on the issue perhaps is best illustrated by the following statement: "Plaintiff's attorney assumed responsibility for the preparation of the transfer documents . . . . Papa consistently testified that he went to McCollom's office and signed the deed." Defs.' Post Trial Mem. 5.

[113] This could be seen as two possibilities—that Papa knew what he had done all along or that he was mistaken at first but began to lie in attempt to avoid liability.

transfer costs. Regardless, Papa has experience with real estate closings. He seemed to have expected to pay a 1% transfer tax, which he did not pay. He did not, even months later, ask why he had not been contacted for a payment or ask for confirmation that the deed was recorded. Above all, Papa's testimony about signing the deed was incredible. If Papa lied to Costantini (or the Court), there would be very little room for equity to protect him against Costantini's high damages request. The facts could support either conclusion, and the Court simply observes that Papa was wrong to maintain that he signed a deed.[114]

Fortunately, the economics of the deal are comparatively straightforward and offer a principled way to understand what the parties had at stake in their joint venture. Again, Papa was responsible for contributing 447 Rio Grande.[115] Costantini was to buy the associated note for $500,000; advance $250,000 to Defendants; and contribute an additional $500,000. Costantini had no real exposure—his outlays were more than covered by the value of the mortgaged property. Papa, too, had much to gain from Costantini's satisfying the delinquent note. The Term Sheet provides that, after forty-five days, Costantini is entitled to

[114] Needless to say, equity does not support finding that St. Thomas LLC was the equitable owner of 447 Rio Grande.

[115] To the extent that there is debate about the transfer costs, it would seem that Papa's responsibility to contribute 447 Rio Grande to St. Thomas LLC included paying the costs to accomplish that goal. The Term Sheets do not contradict this assumption.

"approximately" $800,000,[116] plus "any other monies advanced . . . to the Joint Venture," "interest on all monies advanced" (including the amount advanced for the note),[117] and any other amounts due under the note as "payoff for the Note."[118]

Taking these components in order, the Court finds Costantini contributed $500,000 for the note, and the balance should be increased by $300,000 as written. Awarding Costantini an extra $150,000 upon his termination election, and another $150,000 for failure to pay off the note within forty-five days, does not approximate actual harm.[119] Nonetheless, the parties agreed to $800,000 by the plain language of the contract, and $800,000 is the best indication of the agreement the parties believed they were making.[120] Additionally, the circumstances do not counsel against this award.[121] Next, Costantini demonstrated at trial that he

[116] TS ¶ 6.
[117] TS ¶ 5.
[118] TS ¶¶ 5-6.
[119] Costantini expected to own a functioning miniature golf course and earn proceeds; his expectations were met in substance during the 2013 season.
[120] There was a suggestion that Papa was disingenuous in reporting the balance of the note, *see* Trial Tr. vol. I, 92-102 (Papa), but Costantini was induced to do the deal with the expectation of an approximately $800,000 principal balance on the note. McCollom even understood that $800,000 was what Costantini was expecting "if the venture didn't proceed." *See supra* note 19. The precise balance on the note Costantini was agreeing to satisfy (when it was secured by the underlying land) does not seem crucial.
[121] Papa negotiated the purchase price down to $500,000, but his private ordering and inexplicable testimony require that Costantini not bear the burden of the failed recording.

Furthermore, enforcing the agreement at $800,000 avoids a concern about granting Costantini an award that essentially is punitive to Papa. With this

advanced at least another $750,000 to the joint venture.[122] The Court does not add the $500,000 paid for the note to the "other monies advanced" because "other" should have meaning, the phrase follows an amount sufficient to cover the price Costantini paid for the note, and a subsequent reference to "all monies" expressly includes the note purchase price.[123] The Court is not aware of additional amounts due under the note not already addressed by its rejection of the $2.3 million figure. Finally, the parties agreed to a 10% annual interest rate from the dates of the advances (presumably to cover opportunity costs of the investment). This interest rate applies to "all monies advanced." In sum, Papa must pay off the note for

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equitable and contract-based remedy, Papa is not being unjustly enriched, and the Court is not creating a slippery slope that hinders mortgage foreclosures.

On another note, Defendants' criticism of Costantini's rejection of offers to file the deed, disagreement about 2014 operations, and litigation tactics does not convince the Court to deny Costantini a remedy. It is understandable that the parties no longer wish to own LLCs jointly, that they failed to reach an agreement about facilities and operators, *see* Trial Tr. vol. I, 202, 204 (Costantini), and that Costantini might seek to protect his rights through legal action. A less confrontational approach could have yielded better results, but the Court does not have a basis to find impropriety or to find a violation of the Status Quo Order.

[122] A total of $792,289.61 results from adding $250,000 wired on April 23; a $92,289.61 check deposited on June 10; $230,000 wired on June 25; a $50,000 check deposited on July 27; a $40,000 check delivered on August 8; and $130,000 of in-kind services mentioned at trial. Stip. ¶¶ 5-10; Trial Tr. vol. I, 188-89 (Costantini). As Papa points out, Costantini's exhibits reflect $731,433.72. Defs.' Post Trial Mem. 10. Costantini has at least carried his burden of proving $750,000 in advances (beyond the note purchase price). *See supra* note 30 and accompanying text.

[123] *See* TS ¶¶ 5-6. In addition to contravening the language of the contract, Costantini's request to require Papa to pay off the "balance" of the note and then pay him for the amount he spent to buy the note would double count the recovery.

Costantini's contributions of approximately $1.25 million plus 10% interest from the dates of the advances, and an additional $300,000, with 10% interest accruing from the dates when the $150,000 payments become due.[124] A sixty-day window for Defendants to obtain financing before Costantini may take action to enforce the note is appropriate in the context of this case and the passage of time.

As a final issue, the Assignment of Rents & Leases, which creates another security interest, facially allows Costantini to collect all rent from 437 Rio Grande while the note is in default (although no payments would have been due had Papa properly filed the deed). The Status Quo Order shall be vacated, but Costantini has the right to collect rent from 437 Rio Grande pursuant to the Assignment of Rents & Leases until Defendants' obligations in the revised amount of the note are paid off. The payments should be applied to reduce Defendants' obligations under the note.

IV. CONCLUSION

For the reasons discussed above, the Court finds that Defendants breached the joint venture agreement with Costantini and that equity supports an award for which Costantini fairly bargained.

[124] The Term Sheet is not clear about the interest to be applied to the additional $300,000, because the $300,000 sum was not "advanced," but 10% is consistent and reflects the parties' shared understanding of a fair interest rate. The obligation to pay the first $150,000 accrued upon termination of the joint venture, January 21, and the second $150,000 accrued after forty-five days.

Counsel are requested to confer and to submit an implementing form of order.