EFiled: Oct 13 2014 05:02PM EDT
Filing ID 56187740
Case Number 394,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONNA F. MILLER, Plaintiff Below, Appellant, v. NATIONAL LAND PARTNERS, LLC, *et al.* Defendants Below, Appellees.	:	No. 394, 2014 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 7977-VCG

APPELLEE NATIONAL LAND PARTNERS, LLC'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS APPEAL

COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.

Nicholas J. Brannick (No. 5721)
Michael F. Bonkowski (No. 2219)
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
Phone: (302) 651-2006

Counsel for Appellee, National Land Partners, LLC

Dated: October 13, 2014

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

Plaintiff Donna F. Miller ("Plaintiff") initiated this action in the Court of Chancery (the "Trial Court") by filing her complaint (the "Initial Complaint") on October 24, 2012. The Initial Complaint sought: (Count I) declaratory judgment regarding the meaning of a management agreement among defendants National Land Partners, L.L.C. ("NLP"), Leon Hunter Wilson ("Wilson") and Hunter Company of West Virginia ("HCWV", together with Wilson, the "Hunter Defendants", and with NLP and Wilson, the "Defendants"); (Count II) relief under the Delaware Uniform Fraudulent Transfer Act; and (Count III) imposition of a constructive trust. The Defendants answered on November 30, 2012.

Pursuant to a January 8, 2013 scheduling order, the parties agreed to a schedule for filing dispositive motions regarding the issues of contract interpretation and standing. (B489-91). On April 1, 2013, NLP filed its Opening Brief in Support of its Motion for Partial Summary Judgment (the "NLP Summary Judgment Motion") (A30-57; B492-732), which the Hunter Defendants joined. On April 2, 2013, Plaintiff filed her Opening Brief in Support of Her Motion for Summary Judgment and Declaratory Judgment (A58-81). On May 1, 2013, NLP (A124-67) and the Hunter Defendants (A82-123), respectively, filed their opposition to Plaintiff's motion for summary judgment and Plaintiff filed her opposition to the NLP Summary Judgment Motion (A168-87). On May 16, 2013,

NLP filed a reply in support of the NLP Summary Judgment Motion (B747-68) (the "NLP Summary Judgment Reply"), which the Hunter Defendants joined, and Plaintiff filed a reply in support of her motion for summary judgment (A227-40).

Plaintiff filed her amended complaint (the "Amended Complaint") on May 28, 2013. (A241-54). By the Amended Complaint, Plaintiff purported to pursue Count I (seeking declaratory judgment) as a derivative action as a stockholder of HCWV, and not individually. *Compare* (A29.8) *with* (A249-50).

On July 31, 2013, the Trial Court denied the dispositive motions, including the NLP Summary Judgment Motion, concluded that a trial was necessary on Count I (declaratory judgment), and deferred ruling on the additional counts until after trial, if necessary. (B829-31 at 61:8-63:9) (the "Transcript Ruling").

On August 22, 2013, the Trial Court entered an amended stipulated case scheduling order (the "Amended Scheduling Order") (B834-40). Defendants answered the Amended Complaint on August 26, 2013. (A307-24; A325-45).

On October 31, 2013, Plaintiff moved to compel NLP's response to certain discovery requests ((A346-54) (the "Motion to Compel")), which NLP opposed (B841-92). On November 19, 2013, the Trial Court denied the Motion to Compel based on the limitations on discovery set forth in the Amended Scheduling Order. *See* (A667-68 at 13:10-14:13).

On November 20 and December 4, 2013, the parties submitted pre-trial

briefs and reply briefs, respectively. *See*, (A355-443; A462-76). The trial began on December 18, 2013 and resumed on February 4, 2013. On December 20, 2013, a joint pre-trial stipulation was entered by the Trial Court (A482-501). On March 5, 2014 and March 19, 2014 the parties submitted post-trial briefs and reply briefs, respectively, closing the record before the Trial Court. *See*, *generally*, A502-602.

On June 11, 2014, the Trial Court issued its opinion (the "Opinion" or "Op.") ruling in favor of Defendants on Count I and directing the parties to inform it of any additional matters remaining to be addressed and settle an order. On June 24, 2014, NLP submitted a proposed order (the "Proposed Order") that dismissed Count I in full and declared Counts II and III to be moot (B893-98). On June 26, 2014, counsel for Plaintiff submitted a letter to the Trial Court stating that "Plaintiff does not object to the form of order submitted by Defendants." (B899). On June 26, 2014, the Trial Court entered a final order (the "Order") that, *inter alia*, dismissed all counts of the Amended Complaint. (B901-04).

On July 25, 2014, Plaintiff filed her Notice of Appeal from the Order and the Opinion (D.I. 1). On August 11, 2014, NLP timely filed its notice of cross-appeal from the Transcript Ruling denying the NLP Summary Judgment Motion (D.I. 12). On September 17, 2014, Plaintiff filed a Corrected Opening Brief (the "Opening Brief" or "OB") (D.I. 17). This is Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross Appeal.

SUMMARY OF ARGUMENT

A. Cross-Appeal

1. NLP appeals from the Trial Court's determination that Plaintiff has individual standing to pursue Count I of the Amended Complaint and denial of the NLP Summary Judgment Motion. Count I of the Amended Complaint seeks declaratory relief regarding the Agreements (defined herein). Plaintiff is neither a party to the Agreements nor a third-party beneficiary thereof and lacks any legal interest in the Agreements. Plaintiff lacks derivative standing to pursue Count I because she was not a stockholder of HCWV at any time relevant to her claims. Plaintiff's Amended Complaint asserts only derivative standing to pursue Count I as an alleged stockholder of HCWV. Despite the foregoing, the Trial Court found that Plaintiff had "equitable standing," individually, to pursue Count I due to her marital interest in proceeds from the Agreements and denied the NLP Summary Judgment Motion.

B. Appeal

1. Denied. Plaintiff did not fairly present the issue of Section 4.3 of the Agreements at trial and waived the issue after trial by agreeing to entry of the Proposed Order without informing the Trial Court that she considered the issue of Section 4.3 unresolved. Moreover, Plaintiff asserts an interpretation of Section 4.3 that is inconsistent with the language of the Agreements, the limited trial testimony

on the issue (substantially all of which was elicited by NLP from its own witnesses) and the standard definition of a "guaranty."

2. Denied. The Trial Court properly credited the testimony of Patten and Murray, its decision is supported by evidence not challenged by Plaintiff and Plaintiff's attempt to reshape settled Delaware law regarding fact witness testimony is not well-founded.

3. Denied. The Trial Court did not abuse its discretion in enforcing the terms of a stipulation limiting discovery and the Plaintiff was not prejudiced as the discovery sought was irrelevant to the issues to be presented at trial.

STATEMENT OF FACTS

A. The Relationship Among the Defendants, Generally

Plaintiff and Wilson formed HCWV, a West Virginia corporation in the 1990s. Wilson is HCWV's President and tends to all of its business operations. *See* Op. at 3. Prior to forming HCWV, Plaintiff and Wilson were employed by a company owned by Harry S. Patten ("Patten"), who established NLP. *Id*. at 5 & n. 11-12. Beginning in 2000, Wilson managed real estate development projects for NLP in West Virginia. *Id.* at 4. Patten is the CEO and president of American Land Partners, Inc., which is the sole member and manager of NLP. *Id.* at 4 & n. 8. Alan Murray ("Murray") is NLP's CFO and is also an officer of entities affiliated with NLP. *Id.* at 4 & nn. 8-10. Murray is also the scrivener of the agreements at issue in this litigation. *Id.* at 20.

Projects undertaken between NLP and HCWV involve developing tracts of land for residential building and the sale of the timber harvested from those tracts. Op. at 5. The land is acquired and held by WV Hunter, LLC, a wholly-owned NLP subsidiary. *Id.* Neither the Hunter Defendants nor Plaintiff has any interest in NLP or WV Hunter, LLC. *Id.* at 6 & n. 18.

B. The Agreements Between the Defendants

Mr. Patten testified that, while he prefers to conduct business deals based on a handshake and perform those agreements based on mutual trust between the

parties, he has acceded to the use of written contracts to memorialize his business deals. Op. at 6 & nn. 20-22; [Tr. 35:24-36:12; 44:7-11; 74:21-75:2; 105:14-24].[1] NLP and the Hunter Defendants have entered into several land development agreements. *See, generally*, Op. at 7-8 and Figure I.[2]

Of particular importance to this proceeding is the Project Addendum, entered into by Defendants in October of 2002. (B12-31). The Project Addendum was a new form of agreement between NLP and its partners under which Patten anticipated making NLP's partners equity owners of NLP prior to taking NLP public. *See* Op. at 16 & n. 48; [Tr. 122:2-10; 268:4-13]. Ultimately NLP and its partners abandoned the Project Addendum form of agreement and reverted back to the management agreement form, such as the 2003 Agreement. *Id.* at 17 & nn. 52-53 [Tr. 136:15-137:1; 279:16-280:1; 283:19-22]. Critically, NLP and the Hunter Defendants intended the 2003 Agreement replacing the Project Addendum to contain the same substantive terms as the Project Addendum. *See* Op. at 18-19 &

[1] In light of the extensive reliance on the trial transcript in both the Opinion and this brief, the full trial transcript is provided at B905-1138 and B1139-1423. To avoid confusion, references to the trial transcript will be placed in brackets and noted as "[Tr. ___]".

[2] These agreements are: (i) an agreement dated July 17, 2000 and effective as of July 17, 2000 (B1-11); (ii) an agreement dated January 15, 2002 and effective as of September 26, 2001 (A609-23) (the "2002 Agreement"); (iii) a Project Addendum dated October 15, 2002 and effective as of October 15, 2002 (B12-31) (the "Project Addendum"); (iv) a management agreement dated April 14, 2003 and effective as of October 15, 2002 (A624-33) (the "2003 Agreement"); and (v) a management agreement dated December 3, 2004 and effective as of November 3, 2004 (A635-44) (the "2004 Agreement" and together with the 2003 Agreement, the "Agreements").

nn. 53-56; [Tr. 138:18-139:3; 279:21-280:1; 283:19-22]. As the Trial Court observed, the Ashton Woods project—the largest project undertaken by the Defendants (*see* [Tr. 472:14-473:20])—was already underway when the Project Addendum was replaced with the 2003 Agreement. *See* Op. at 18, 36.

Each agreement governs the project or projects undertaken by the Defendants that are reflected in schedules attached to that agreement. For instance, the Project Addendum governed the Ashton Woods project in accordance with a schedule to the Project Addendum. *See* Op. at 8; (B32-53). When the Project Addendum was terminated, a schedule was created for the Ashton Woods project under the 2003 Agreement. *See* Op. at 8; (B54-56).

Initially NLP and HCWV divided profits and losses equally. Op. at 9. *See, also*, (B6). However, NLP had always sought a return of 25% of gross sales on its projects and certain of HCWV's projects did not generate that return. Op. at 9 at n. 27; [Tr. 39:1-23]; (B738 at ¶ 12). As a result, in 2002, NLP and HCWV agreed that going forward NLP would receive a preferential profit of 12.5% of gross sales (the "Preferential Profit"). Op. at 9 & nn. 29-30; [Tr. 263:10-19]; (B738 at ¶ 12). After NLP received its Preferential Profit, HCWV received all remaining profits and absorbed any losses. Op. at 10 & n. 31; (B738 at ¶ 12).

This agreement is reflected in the 2002 Agreement, Section 6.2 of which provides, in relevant part:

> Profit participation by [NLP] and [HCWV] shall be as follows: [NLP] shall receive a profit participation equal to 10% of gross lot sales and 12.5% of gross timber proceeds. [HCWV] shall receive all remaining Net Profit. In the event that the amount of [NLP] profit participation calculated in accordance with the preceding formula exceeds the total Net Profit, then [HCWV] shall receive no profit participation **and shall be liable to [NLP] for any shortfall amount**.

See (A614-15) (emphasis supplied). *See also* Op. at 10 & n. 32.

The language stating that HCWV was "liable to [NLP] for any shortfall amount" could give rise to negative manager fees (the "Negative Manager Fees"), or "fees incurred by HCWV when a project fails to generate sufficient gross sales to satisfy National Land Partners' [P]referential [P]rofit." Op. at 10. The phrase "**and shall be liable to [NLP] for any shortfall amount**" is referred to both in the Opinion and herein as the "Shortfall Language".

The Project Addendum contained not only the Shortfall Language, but also language (italicized below) immediately after the Shortfall Language that was relevant only to the relationship structure between the Defendants contemplated by the Project Addendum. That provision provided, in relevant part:

> [NLP] shall receive a profit participation equal to 12.5% of gross lot sales, 12.5% of the first $3 million of gross timber proceeds and 42.5% of the gross timber proceeds in excess of $3 million In the event that the amount of [NLP] profit participation calculated in accordance with the preceding formula exceeds the total Net Profit, then [HCWV] shall receive no profit participation **and shall be liable to [NLP] for any shortfall amount**. *All profit participation in [NLP] shall be allocated among the Class 1 Members of [NLP] and [HCWV] shall have no interest in such amounts.*

See Op. at 16 & n. 49; (B22-23 at § 6.2) (emphasis supplied).

Section 6.2 of the 2003 Agreement, which replaced the Project Addendum, does not contain the Shortfall Language or the succeeding sentence from the Project Addendum.[3] The 2004 Agreement, intended to apply to new projects undertaken by the Defendants, also does not contain the Shortfall Language. *See* (A640 at § 6.2). *See also* Op. at 20.

The Defendants assert, and the Trial Court found, that the Shortfall Language was inadvertently removed from the 2003 Agreement when the last sentence of Section 6.2 of the Project Addendum was deleted and that this error carried over into the 2004 Agreement. *See* Op. at 35-36.

C. The Divorce Proceeding Between Plaintiff and Wilson in West Virginia

Plaintiff and Wilson separated on May 31, 2005 and Plaintiff petitioned for divorce before the Family Court for Berkeley County, West Virginia (the "Family Court") on June 1, 2005. *See* Op. at 23 & n. 75 (citation omitted); (A685). Wilson advanced Plaintiff $4,317,737.62 prior to September 11, 2008 as an equitable distribution of marital property. (A686).

On November 21, 2008, the Family Court entered an order (the "Divorce Order") that, among other things, directed Wilson to pay Plaintiff $4,914,582.50

[3] That provision provides, in relevant part:

> [NLP] shall receive a profit participation equal to 12.5% of gross lot sales, 12.5% of the first $3 million of gross timber proceeds and 42.5% of the gross timber proceeds in excess of $3 million In the event that the amount of [NLP] profit participation calculated in accordance with the preceding formula exceeds the total Net Profit, then [HCWV] shall receive no profit participation.

See (A629 at § 6.2). *See also* Op. at 18-19.

on account of manager fees purportedly earned by HCWV before May 31, 2005. *See* (A695). The Family Court also directed that Wilson was to "**have exclusive ownership and possession of 100% of the shares of [HCWV] stock**." *Id.* (emphasis supplied).

Wilson appealed the Divorce Order to the Circuit Court of Berkeley County, West Virginia (the "Circuit Court") as to the amount awarded to Plaintiff and the issue of "enterprise goodwill". *See* (B467-88). Plaintiff did not appeal any portion of the Divorce Order. On March 25, 2009, the Circuit Court reversed the Divorce Order (the "Circuit Court Order") on both issues appealed by Wilson, found that Wilson had over-compensated Plaintiff, and directed Plaintiff to reimburse Wilson the $894,286.00. *See* (B487). The Circuit Court also directed that Wilson would "**have in equitable distribution the exclusive ownership of … the shares of stock of HCWV**." (B486) (emphasis supplied).

Plaintiff appealed the decision of the Circuit Court Order to the West Virginia Supreme Court solely with regard to the amount she was ordered to refund to Wilson and the issue of "enterprise goodwill." *See, Wilson v. Wilson*, 706 S.E.2d 354, 360 (W. Va. 2010). Plaintiff did not appeal the Circuit Court's holding that Wilson was to own 100% of HCWV. The West Virginia Supreme Court affirmed the Circuit Court Order regarding the issue of "enterprise goodwill." *Id.* at 366-67. However, it reversed the Circuit Court's calculation of

the portion of manager fees to which Plaintiff was entitled and remanded to the Family Court "for the sole purpose of determining an accurate value of [HCWV's] manager fees at the time of the parties' May 31, 2005 separation". *Id.* at 376.

D. Plaintiff's Ownership Interest in HCWV

The various West Virginia courts assumed that Plaintiff still owned her interest in HCWV in 2008. *See, e.g.,* (A687 at ¶ 17; B469); *Wilson*, 706 S.E.2d at 372. Yet Plaintiff appears has conceded that she is no longer a stockholder of HCWV. *See* (A29.2 at ¶7; A242 at ¶ 7 ("Donna Miller was formerly married to Defendant Hunter Wilson. The parties each **owned** fifty percent (50%) of the shares of [HCWV].")) (emphasis supplied). Discovery in this litigation yielded stock certificates establishing that Plaintiff transferred her interest in HCWV to Wilson on December 17, 2004 (*see* B761-22), and established that the only other known stock certificate for HCWV, signed by Plaintiff, shows Wilson as the sole stockholder of HCWV (*see B*718). Additionally, the Divorce Order and Circuit Court Order directed Plaintiff to relinquish her interest in HCWV and Plaintiff never appealed either provision.

ARGUMENT IN SUPPORT OF CROSS-APPEAL[4]

I. FINDING THAT PLAINTIFF HAD EQUITABLE STANDING TO PURSUE COUNT I OF THE AMENDED COMPLAINT AND DENYING NLP SUMMARY JUDGMENT WAS ERROR

1. QUESTION PRESENTED

Whether the Trial Court erred in denying the NLP Summary Judgment Motion and holding that Plaintiff had equitable standing to pursue Count I of the Amended Complaint seeking declaratory relief regarding the 2004 Agreement.

NLP preserved the issue of Plaintiff's standing to pursue Count I in the NLP Summary Judgment Motion (B492-732), NLP Summary Judgment Reply (B747-68) and argument made at the July 31, 2013 hearing (B769-833).

2. SCOPE OF REVIEW

A trial court's decision regarding a question of standing is a question of law and is reviewed *de novo* by this Court.[5] This Court also reviews denial of a motion for summary judgment *de novo*.[6]

3. MERITS OF ARGUMENT

Plaintiff lacks standing to seek declaratory judgment regarding the Agreements because she is neither a party, nor an intended third-party beneficiary

[4] NLP believes the Opinion and Order should be affirmed and presents this cross-appeal only in the alternative.

[5] *See Rosenbloom v. Esso Virgin Islands, Inc.*, 766 A.2d 451, 458 (Del. 2000); *Schoon v. Smith*, 953 A.2d 196, 200 (Del. 2008).

[6] *See, Solomon v. Pathe Comm'ns Corp.*, 672 A.2d 35, 38 (Del. 1996); *Bagwell v. Prince*, 683 A.2d 58, 1996 WL 470723, at *2 (Del. Aug. 9, 1996).

thereof. *See* (B508-18). Whether Plaintiff is pursuing Count I individually, as set forth in the Initial Complaint (A29.8-29.9), or derivatively as a purported stockholder of HCWV (which she is not), as set forth in the Amended Complaint (A250), she lacks standing to seek declaratory relief regarding the Agreements.

In the Transcript Ruling, the Trial Court correctly concluded that Plaintiff is no longer a stockholder of HCWV (*see* B820 at 52:13-14; B824 at 56:15-16) but held that "the West Virginia court has given her a right to receive from [HCWV] whatever portion of the management fees are ultimately determined to have been earned during the period of the marriage or whatever the order is" and this gave Plaintiff "a sufficient property interest in the [Agreements] and [their] fruits to allow her to bring a declaratory judgment action." (B824 at 56:15-24). The Trial Court held that it did not need to address whether Plaintiff had standing to bring Count I derivatively because she had "standing based on … at least [an] equitable property interest that the[] West Virginia courts have awarded in the distribution of the management fees." (B829 at 61:2-9; B831 at 63:14-17). This was error.

A. The Delaware Declaratory Judgment Act Requires a Party to Have a Right or Legal Interest in the Subject of the Claim and Plaintiff Has No Right or Interest in the Agreements

To obtain relief under the Delaware Declaratory Judgment Act,[7] a party must establish that she has rights or a legal interest in the subject of the

[7] 10 Del. C. §§ 6501 *et seq.*

controversy.[8] In order to have an interest sufficient to have standing to seek declaratory judgment regarding the Agreements, Plaintiff must have standing either as a party to the Agreements, as a third-party beneficiary or derivatively as a stockholder of HCWV. Plaintiff has no direct interest in the Agreements, as she is not a party to them. *See* (A624-33; A635-44). *See also* Op. at 39 (Plaintiff "was not a party to the agreements at issue"). Nor is Plaintiff a third-party beneficiary under the Agreements or a stockholder of HCWV.

(1) There Are No Intended Third-Party Beneficiaries to the Agreements

Non-parties to a contract have no rights under that contract unless it was the intention of the parties to the contract to confer a benefit on that non-party.[9] "In order for a party to qualify as a third party beneficiary, the contracting parties must

[8] *N. Am. Phillips Corp. v. Aetna Cas. & Sur. Co.*, 565 A.2d 956, 961 (Del. Super. 1989) ("(1) it must be a controversy involving the rights or legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claims; (3) the controversy must be between parties where interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial declaration.").

[9] *See Insituform of N. Am., Inc. v. Chandler*, 534 A.2d 257, 268 (Del. Ch. 1987) ("Analysis of the standing issue begins with recognition of the general rule that strangers to a contract ordinarily acquire no rights under it unless it is the intention of the promisee to confer a benefit upon such third party."); *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4054231 at *18 (Del. Ch. Nov. 9, 2007). ("demonstrating that a party is a third-party beneficiary requires proof of three elements: (1) an intent between the contracting parties to benefit a third party through the contract; (2) an intent that the benefit serve as a gift or in satisfaction of a preexisting obligation to the third party; and (3) a showing that benefiting the third party was a material aspect to the parties agreeing to contract.")

have intended to confer a benefit to that party."[10] The mere fact that a third-party may derive a benefit from performance of the parties under the contract does not render that party a third-party beneficiary.[11]

Section 10.13 of each of the Agreements provides that the "[a]greement is for the sole benefit of the parties and nothing herein, express or implied, shall give or be construed to give to any person or entity, other than the parties, any legal or equitable rights hereunder." *See* (A633; A644). This provision precludes Plaintiff from asserting status as a third-party beneficiary of the Agreements.[12]

Plaintiff asserted that she was an intended third-party beneficiary of the Agreements as an officer, director and stockholder of HCWV. *See* (B628). Merely claiming to have a particular status is insufficient to establish standing.[13]

---

[10] *See Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531, 534 (Del. Super. 1990); *Empire Fire & Marine Insur. Co. v. Miller*, 2012 WL 1151030 at * 5 (Del. Comm. Pl. Apr. 5, 2012) (same).

[11] *Insituform of N. Am., Inc.*, 534 A.2d at 269 ("If, however, it was not the promisee's intention to confer direct benefits upon a third person, but rather such third party happens to benefit from the performance of the promise either coincidentally or indirectly, then such third party beneficiary will be held to have no enforceable rights under the contract.").

[12] *See Empire Fire & Marine Insur. Co.*, 2012 WL 1151031 at *5 (party lacked standing where contract contained clear provision disclaiming intent to confer benefit on third parties); *Galvagna v. Marty Miller Constr., Inc.*, 1997 WL 720463 at *3 (Del. Super. Sep. 19, 1997) (owner of property not an intended third-party beneficiary to contract between general contractor and subcontractor where contract excluded third-party beneficiaries).

[13] *Delmar News, Inc.*, 584 A.2d at 534 ("stating a legal conclusion, falls far short of establishing that [a third-party] was an intended beneficiary of the insurance contract"); *Metcap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989 at *7 (Del. Ch. May 16, 2007) (dismissing claim where party claiming third-party beneficiary status failed to allege facts demonstrating that both parties to contract intended claimant as beneficiary).

Officers, directors and stockholders lack standing to directly pursue the interests of a corporation under a contract by dint of their position or title.[14]

(2) As a Matter of Law and Equity, Plaintiff Lacks Derivative Standing to Seek Declaratory Relief Regarding the Agreements

As a matter of law, Plaintiff is not a stockholder of HCWV under the West Virginia Business Corporation Act, as she is neither "a person in whose name shares are registered in the records" of HCWV nor a "beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation."[15]

Moreover, "equity regards as done that which ought to be done."[16] Even if Plaintiff had not already transferred her interest in HCWV to Wilson before their separation, she was directed by both the Family Court and the Circuit Court to transfer that interest and she never appealed that provision of either order.[17]

---

[14] *See Orban v. Field*, 1993 WL 547187 at *9 (Del. Ch. Dec. 30, 1993) ("[t]he idea of shareholders having directly enforceable rights as third party beneficiaries to corporate contracts is, I think, one that should be resisted. One of the consequences of the limited liability that shareholders enjoy is that the law treats corporations as legal persons not simply agents for shareholders."); *U.S. Borax & Chem. Corp.*, 1981 WL 404963 at*5 (Del. Super. Jun. 23, 1981) ("A stockholder as such is not entitled to third-party beneficiary status.") (citation omitted);[14] *Insituform of N. Am.*, 534 A.2d at 269-70 (incumbent directors of company not intended third-party beneficiaries to voting agreement among shareholders).

[15] *See* W. VA. CODE § 31D-1-150(21).

[16] *Fischer v. Fischer*, 864 A.2d 98, 108 (Del. Ch. 2005); *Freeman v. Fabiniak*, 1985 WL 11583 at *8 (Del. Ch. Aug. 15, 1985).

[17] Plaintiff only appealed the Circuit Court Order with regard to the issue of the enterprise goodwill of HCWV and the management fees; she did not appeal the provision requiring her to turn over her interest in HCWV to Wilson. *See* B467-88 It is well-settled law that "when only a

Because she was no longer a stockholder of HCWV at the time she filed either the Initial Complaint or the Amended Complaint—or in 2008 when the transfers she complains of occurred (*see* A29.5 at ¶ 23; A245 at ¶ 23)—Plaintiff lacked standing to seek declaratory relief regarding the Agreements derivatively.[18]

B. The Trial Court Erred in Holding that Plaintiff Had Individual Standing to Seek Declaratory Relief After She Amended Her Complaint to Assert Only Derivative Standing

When Plaintiff filed her Amended Complaint, she abandoned her effort to assert Count I individually, and sought to assert it derivatively as a stockholder of HCWV. *Compare* (A29.8 ("Donna Miller respectfully requests that this Honorable Court….")) *with* (A250 ("Donna Miller derivatively on behalf of Hunter Company of West Virginia….")). Plaintiff filed the Amended Complaint prior to the July 31, 2013 hearing. The Trial Court was aware of this change, and

---

portion of a judgment is appealed the reversal of the portion of the judgment from which the appeal has been taken has no effect upon the other portions." 5 C.J.S. *Appeal & Error* § 1106 (2013) (citations omitted). *See also Scharf v. Edgcomb Corp.*, 864 A.2d 909, 915 (Del. 2004) (finding that lower court holdings not appealed become the "law of th[e] case").

The West Virginia Supreme Court only reversed the Circuit Court Order ***in part***, specifically with regard to the issue of the calculation of management fees, and only remanded to the Family Court for the "sole purpose of determining an accurate value of [HCWV's] manager fees at the time of the parties' May 31, 2005 separation." *Wilson*, 706 S.E.2d at 376. Un-reversed portions of a judgment remain intact. *See, e.g., Cowgill v. Raymark Indus., Inc.*, 832 F.2d 798, 802 (3d Cir. 1987) ("When a court of appeals reverses a judgment and remands for further consideration of a particular issue, leaving other determinations of the trial court intact, the unreversed determinations of the trial court normally continue to work an estoppel.").

[18] *See* Del. R. Ch. 23.1(a) (must be stockholder at time of transaction complained of); *Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984) ("a derivative shareholder must not only be a stockholder at the time of the alleged wrong and at time of commencement of suit but that he must also maintain shareholder status throughout the litigation").

that NLP believed that she had abandoned any assertion of individual standing, but proceeded to rule that Plaintiff had equitable standing individually. *See* (B816-20 at 48:6-52:12). This was perhaps based on the statement by counsel for Plaintiff that the Amended Complaint "says [Plaintiff] brings this action individually and derivatively. It's right in the first sentence after the caption." (B816 at 48:14-17). It is clear on the face of the Amended Complaint, however, that Plaintiff only asserted Count I derivatively, and that Counts II and III were being pursued in her individual capacity. *See* (A250-53). The Trial Court erred in finding that Plaintiff has individual standing to pursue Count I after she clearly amended her complaint to render Count I solely a derivative claim.[19]

C. The Trial Court Erred in Finding that Plaintiff had "Equitable Standing" to Pursue Count I of the Amended Complaint

The Trial Court expressly declined to determine whether Plaintiff had derivative standing as a stockholder (or former stockholder) of HCWV to pursue Count I of the Amended Complaint. *See* (B831 at 63:15-17 ("It's immaterial whether there's also standing derivatively because I found there's individual standing.")). Rather, the Trial Court held that Plaintiff had standing as a matter of

[19] *See* 60 C.J.S. *Motions and Orders* § 55 (2014) ("An order must conform to the case as made out by the pleadings and be consistent with the relief prayed for.") (citations omitted). *Cf. Gibson v. Car Zone*, 2011 WL 3568258, at *3 (Del. Super. May 3, 2011), *aff'd* 31 A.3d 76 (Del. 2011) ("it is a plaintiff's duty to plead his or her claims, and … it is not the duty of defense counsel or the court to do so"); *Fernandez v. Murphy*, 1982 WL 318025, at *1 (Del. Ct. Com. Pl. Nov. 5, 1982) ("Although the plaintiff proved damages in excess of $900.00, plaintiff's claim will be limited by the sum demanded in the Complaint.").

equity due to her interest in manager fees earned by Wilson under the Agreements as part of the equitable distribution of marital property. *See* (B824 at 56:15-24).

This Court has recognized equitable standing in only limited circumstances.[20] The equitable standing doctrine exists "to prevent a complete failure of justice on behalf of the corporation."[21] This standard is not met where a party who shares the interest of the party seeking equitable standing is capable of advancing the claims at issue.[22] Wilson shared Plaintiff's interest in HCWV not transferring money to NLP that it did not owe, and the Trial Court rejected Plaintiff's theory that Wilson was engaged in a "nefarious" plot to cause HCWV "to pay millions of dollars … to [NLP] that it did not actually owe, and that Wilson knew it did not actually owe, in order to spite her or obstruct her ability to collect at equitable distribution." Op. at 37. Thus, there is no injustice that justifies extending equitable standing to Plaintiff to pursue Count I of the Amended Complaint.

Furthermore, in *Schoon*, this Court recognized that "[j]udicially created equitable doctrines may be extended so long as the extension is consistent with the

[20] *See Schoon*, 953 A.2d at 201-04 (discussing basis for recognizing standing of shareholders to bring derivative suits).

[21] *Id.* at 208.

[22] *Id.* at 208-09. *See, also, Boulden v. Albiorix, Inc.*, 2013 WL 396254, at *17 (Del. Ch. Feb. 7, 2013) (declining to expand equitable standing where another party with standing could pursue the claims).

principles of equity."[23] A fundamental principle of equity is that "equity follows the law."[24] The extension of equitable standing to a litigant, such as Plaintiff, to pursue an action regarding a contract to which she is neither a party nor an intended third-party beneficiary upends a bedrock principle of Delaware law: the freedom to contract. "When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract."[25]

The right to be bound by a contract necessarily encompasses the right to determine who the parties to, and third-party beneficiaries of, that contract are, and who may intercede to enforce or interpret the terms of that contract.[26] In sum, the Trial Court's extension of "equitable standing" to Plaintiff to pursue claims regarding the Agreements—to which she is neither a party nor an intended third-

---

[23] 953 A.2d at 205 (citing 1 Pomeroy's Equity Jurisprudence §60 (5th ed. 1941)).

[24] *In re Am. Int'l Group, Inc.*, 965 A.2d 763, 812 (Del. Ch. 2009). *Accord Del. Trust Co. v. Partial*, 517 A.2d 259, 262 (Del. Ch. 1986). *See also In re Rich*, 2004 WL 1366978, at *3 (Del. Ch. Jun. 15, 2004) ("Petitioners' … argument[], … that the Court should exercise its traditional equitable powers to hear this case, ignore[s] a fundamental maxim of equity: equity follows the law.").

[25] *Libeau v. Fox*, 880 A.2d 1049, 1056 (Del. Ch. 2005) *aff'd in relevant part* 892 A.2d 1068, 1071 (Del. 2006) (holding that statutory right to partition is trumped by contract waiving that right).

[26] *Cf. Shuba v. United Svcs. Auto. Ass'n*, 77 A.3d 945, 949-50 (Del. 2013) (holding that in order for party prosecuting wrongful death action to obtain coverage under insurance policy, decedent must have been a named insured).

party beneficiary—leaves no limiting principle by which any outsider can be precluded from meddling in the affairs of contract parties.

Because Plaintiff lacks "equitable standing" to pursue Count I of the Amended Complaint, she is not a third-party beneficiary of the Agreements and she lacks derivative standing to pursue Count I, the Trial Court should have granted the NLP Summary Judgment Motion and dismissed Count I.

ARGUMENT IN OPPOSITION TO APPELLANT'S OPENING BRIEF

I. PLAINTIFF DID NOT FAIRLY PRESENT THE ISSUE OF SECTION 4.3 OF THE AGREEMENTS AT TRIAL, WAIVED THE ISSUE AFTER TRIAL, AND ADVANCES AN IMPLAUSIBLE INTERPRETATION OF THE AGREEMENTS AND THE CONCEPT OF A "GUARANTY"

1. QUESTION PRESENTED

Whether the Trial Court committed reversible error by not declaring the rights of the parties pursuant to Section 4.3 of the Agreements as demanded in Count I of the Initial Complaint and Amended Complaint and dismissing all of Plaintiff's claims as being moot.

This Court should affirm, both because (a) Plaintiff did not fairly present and then waived this issue below and (b) Plaintiff's argument regarding Section 4.3 of the Agreements is not colorable.

2. STANDARD OF REVIEW

This Court will only review issues "fairly presented" below.[27] It is well-settled that issues not raised in an opening brief are waived.[28] This Court reviews questions of contract interpretation *de novo*.[29]

---

[27] *See* Sup. Ct. R. 8.

[28] *See, e.g., Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) ("[t]he failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal"). *Accord, Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999); *Bagwell*, 1996 WL 470723, at *1.

[29] *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396 (Del. 2010).

3. MERITS OF OPPOSITION

Plaintiff did not raise the issue of Section 4.3 of the Agreements in either of her pre-trial submissions and did nothing to advance the issue at trial. Indeed, Plaintiff did not fully brief the issue she now raises on appeal until her final reply brief, to which Defendants had no opportunity to respond. Moreover, when asked by the Trial Court to inform it of any remaining issues to be addressed, Plaintiff did not raise the issue of Section 4.3 of the Agreements; rather, she consented to entry of the Proposed Order effectuating the Opinion. Finally, Plaintiff's argument regarding Section 4.3 is facially implausible and should be rejected if this Court is inclined to reach the merits.

A. Plaintiff Failed to Fairly Present and Then Waived the Issue of Section 4.3 of the Agreements Below

(1) Plaintiff Did Not "Fairly Present" the Issue of Section 4.3 of the Agreements Either in Her Pre-Trial Briefing or at Trial

Plaintiff asserts that she "preserved" the issue of the meaning of Section 4.3 of the Agreements and cites to her pre-trial briefing. *See* OB at 7 (citing A416-432, A462-76). That is not true. Plaintiff **never** mentioned Section 4.3 in her opening pre-trial brief (A416-32) and sought no relief regarding Section 4.3 in her request for judgment. *See* (A430-31). Nor did Plaintiff address Section 4.3 of the Agreements in her pre-trial reply brief (A462-76) and, there again, her request for judgment ignored Section 4.3 of the Agreements. *See* (A474-75).

Plaintiff directs this Court to no testimony regarding Section 4.3 from the transcript, because Plaintiff did nothing to advance the issue of Section 4.3 at trial. Indeed, the only relevant testimony elicited by Plaintiff regarding Section 4.3—in which Murray stated that there has never been a "Guaranteed Project Obligation" under any of the Agreements—supports Defendants' position regarding the application and interpretation of Section 4.3. *See* [Tr. 362:4-16].

Plaintiff's only reference to Section 4.3 in her closing argument (A541-58) simply asserted that it had been changed between the Project Addendum and the 2003 Agreement. *See* (A556). Only in her closing reply, to which Defendants had no opportunity to respond, did Plaintiff raise the argument she presents before this Court regarding Section 4.3. *See* (A592-93).

There was no reason for the Trial Court to address Section 4.3 because Plaintiff had done nothing to present the issue at trial. Supreme Court Rule 8 provides that: "Only questions **fairly presented** to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[30] Dropping an issue into a pre-trial stipulation and then ignoring it until a closing reply falls short of having "fairly presented" an issue and is more akin to trial by ambush. Moreover, if a party can "fairly present" an issue by placing it in a pre-trial order

[30] Sup. Ct. R. 8 (emphasis supplied).

and then ignoring it, Rule 8 is no more than an invitation to pepper the record with ancillary issues in the hope of having an issue to appeal if a party loses at trial.

(2) Plaintiff Waived the Issue of Section 4.3 of the Agreements Post-Trial

In the Opinion, the Trial Court directed the parties to "confer and inform [the Court] what, if any, issues remain in this matter, and submit an appropriate form of Order consistent" with the Decision. Op. at 41-42. Defendants submitted the Proposed Order which provided, in part, that Count I of Plaintiff's Complaint would be dismissed in *toto*. *See* (B893-98); *see, also* (A603). Plaintiff consented to entry of the Proposed Order by letter to the Trial Court, stating: "While Plaintiff is disappointed with the Court's ruling, Plaintiff does not object to the form of order submitted by Defendants." *See* (B899). By consenting to the Proposed Order, and conceding that no other issues remained, Plaintiff waived her right to pursue the issue of Section 4.3 of the Agreements on appeal.[31]

B. Plaintiff's Argument Regarding Section 4.3 of the Agreements is Inconsistent With the Agreements, Trial Testimony and Any Recognized Understanding of the Concept of a Guaranty

Plaintiff's asserts that the Negative Manager Fees (*i.e.* the inability of HCWV to pay the Preferential Profit) fits within the definition of a "Guaranteed Project Obligation" under Section 4.3 of the Management Agreements (*see, infra*)

[31] *See* Sup. Ct. R. 8. *Cf. In re Infinity Broad. Corp. S'holder Litig.*, 802 A.2d 285, 289 (Del. 2002) ("This Court generally will not address the merits of any issue not presented to the trial court….").

and, therefore, HCWV was liable for only half of any Negative Manager Fees. *See* OB at 11. Plaintiff treats as gainsaid that the Negative Manager Fees are a "guaranty" and therefore fall within Section 4.3 of the Management Agreements. Her entire explanation for why this is so consists of one tautological sentence: "After reformation of [Section] 6.2, the 'guarantee' to NLP by [HCWV] is such an 'obligation.'" OB at 10.

At trial, Wilson described NLP as acting "more like a bank," and explained that the Preferential Profit (*i.e.* the fixed 12.5% of gross sales) that gave rise to Negative Manager Fees was "a guaranteed rate of return on [NLP's] investment." Op. at 11 & n. 33; [Tr: 116:20-24; 119:9-22]. The Trial Court adopted the Defendants' concept of Negative Manager Fees as, essentially, a fixed rate of return. *See id.* at 10-11 ("Negative Manager Fees, in other words, are those fees incurred by HCWV when a project fails to generate sufficient gross sales to satisfy National Land Partners' preferential profit."); *see, also id.* at 35 (finding that the parties intended HCWV to be liable for Negative Manager Fees).

Plaintiff's mantra, before the Trial Court and on appeal, is that the "plain language" of the Agreements must prevail. *See* OB at 9; (A546; A591). Here, the plain language of the Agreements refutes Plaintiff's position. Section 4.3.1 of the Agreements defines the term "Guaranteed Project Obligations" as:

> (1) any obligations incurred in connection with the acquisition, development or operation of a Scheduled Property or Project,

> regardless of whether such obligations arise before or after the closing of the Project or Scheduled Property, which the Manager or the Company have guaranteed or otherwise contractually undertaken to repay from assets other than assets or revenues of the Project or Scheduled Property and (2) funding for the Scheduled Properties or Project provided by the Company. (A626, A637).

This language cannot be read to mean the Preferential Profit or Negative Manager Fees, which are: (1) not incurred with the acquisition, development or operation of a Scheduled Property" but incurred when properties are sold (Op. at 10); (2) incurred *only* by the Manager under Section 6.2 of the Agreements,[32] not "the Manager *or* the Company"[33] (A629; A640); (3) not "guaranteed" under any recognized definition of that term (*see infra*); (4) part of the Agreements themselves, rendering the reference to other contracts in Section 4.3.1 ("otherwise contractually undertaken") necessarily exclusive of the Preferential Profit; and (5) not "funding for the Scheduled Properties or Project provided by the Company".

Moreover, the only testimony regarding the meaning of Section 4.3.1 elicited at trial was that of Murray, who explained that a guaranteed project

[32] As properly reformed by the Trial Court, Section 6.2 provides, in relevant part, that "In the event that the amount of Company profit participation calculated in accordance with the proceeding formula exceeds the total Net Profit, then **Manager** shall receive no compensation based on profit participation and shall be liable to Company for any shortfall amount." *See* (A604-605) (emphasis supplied). It is this language that gives rise to the obligation of HCWV to satisfy Negative Manager Fees. *See* Op. at 10.

[33] The "Company" is defined as either NLP or "all single member limited liability entities formed by Company, in which it or an affiliate is sole member, for the purpose of owning real property and doing business with Manager." *See* (A628,; A635). In this instance, the term "Company" means either NLP or WV Hunter LLC, the entity created by NLP to engage in projects with HCWV. *See* Op. at 5 & n. 15.

obligation is an obligation owed to a **third-party**, such as a road contractor, or an obligation incurred by WV Hunter, LLC as a result of funds advanced to it by NLP. *See* [Tr. 271:14-272:15]. Murray testified, both on direct and cross-examination, that there has never been a "guaranteed project obligation" on any project among the Defendants. *See* [Tr. 273:14-17; 284:9-12; 295:22-296:1; 362:4-16]. Plaintiff cites no testimony to support her position.

Furthermore, the Preferential Profit cannot be a "guaranteed" obligation of HCWV under any recognized definition of the term "guaranty". A guaranty is:

> A promise to answer for the payment of some debt, or the performance of some duty, in case of the failure **of another who is liable in the first instance**; a **collateral undertaking** by one person to be answerable for the payment of some debt or performance of some duty or contract for another person who stands first bound to pay or perform.[34]

Neither the Preferential Profit nor Negative Manager Fees are a "guaranty"; they are **direct contractual obligations of HCWV** under the Agreements. *See* [Tr. 273:5-13; 283:23-284:8; 295:6-21]. The fact that Wilson colloquially described the Preferential Profit as a "guaranteed rate of return" does not render it a "Guaranteed Project Obligation" by mere use of the term "guaranteed." Wilson described the Preferential Profit as a fixed rate of return to NLP. The Trial Court recognized it as such. Thus, having adopted the Defendants' understanding of the

[34] *See* BLACK'S LAW DICTIONARY 821 (10th ed. 2014) (emphasis supplied).

Preferential Profit and Negative Manager Fees, the Trial Court concluded that "[it] need not address the parties' arguments as to Section 4.3…." Op. at 41, n. 124.

Finally, Section 4.3.2 of the Agreements provides that:

> In the event Guaranteed Project Obligations cannot be satisfied out of Project revenues, Manager shall bear responsibility for one half of all such Guaranteed Project Obligations. **Manager's share shall be guaranteed by Principal. Such guarantee by Principal is evidenced by the execution of this Management Agreement, and such other separate form of guarantee as may be reasonably required by the Company.** (A626, A637) (emphasis supplied).[35]

As indicated above, a Guaranteed Project Obligation is an obligation that is **guaranteed by Wilson**. *See* (A626 & A637 at § 4.3.2). NLP has never considered either the Preferential Profit or the Negative Manager Fees to be guaranteed by Wilson personally and, therefore, neither is a Guaranteed Project Obligation. *See* [Tr. 273:5-13; 282:24-284:12; 295:18-21].

Plaintiff's interpretation of Section 4.3 of the Agreements is inconsistent with the terms of the Agreements, the trial testimony and any recognized definition of a guaranty and, therefore, this Court should reject that interpretation, and AFFIRM the Opinion and Order.

[35] Plaintiff dropped the bold language from the Opening Brief without indicating that she had done so. *See* OB at 10.

II. THE TRIAL COURT PROPERLY CREDITED THE TESTIMONY OF MURRAY AND PATTEN, ITS DECISION WAS SUPPORTED BY EVIDENCE NOT CHALLENGED BY PLAINTIFF, AND PLAINTIFF'S ATTEMPT TO CRAFT NEW LAW IS IMPROPER

1. QUESTION PRESENTED

Whether the Trial Court abused its discretion by concluding that testimony of witnesses on behalf of NLP satisfied the clear and convincing standard when such testimony was based on conjecture.

The Trial Court did not abuse its discretion. Its findings were determinations of witness credibility that should not be disturbed on appeal, and the argument advanced by Plaintiff is without precedent and contrary to the Delaware Rules of Evidence ("D.R.E.") and settled Delaware law.

2. STANDARD OF REVIEW

A trial court's determinations regarding questions such as whether a scrivener's error occurred is "fact dominated" and, as such, is given substantial deference.[36] This Court will not set aside a trial court's findings unless they are clearly erroneous or are not the product of a logical and deductive process.[37] The Court will affirm the lower court's determinations, even if it would not have come to the same conclusions, so long as they are supported by the record.[38] Where

[36] *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993).

[37] *Cede*, 634 A.2d at 360; *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

[38] *Int'l Telecharge, Inc. v. Bomarko, Inc*, 766 A.2d 437, 439 (Del. 2000).

factual findings relate to credibility of live testimony, the findings will be affirmed.[39] Questions of law are reviewed *de novo.*[40] Findings of historical fact are subject to the deferential "clearly erroneous" standard of review.[41]

3. MERITS OF OPPOSITION

A. The Trial Court's Conclusion That A Scriveners Error Occurred Is Supported By The Record And Is The Product Of A Logical And Deductive Process

The Trial Court's decision to credit the testimony of Hunter Wilson and Harry Patten—who were the actual parties to the Agreements at issue and who actually participated in the meetings and negotiations regarding the Agreements' terms—is entitled to deference. Op. at 22-23, 37, 39, 40-41.[42]

Plaintiff argues that this Court should find reversible error and that there is no evidence of a scrivener's error on which the Court could have based its ruling because: (a) Murray testified he had no specific recollection of how he received instructions to recast the Project Addendum into the 2003 Agreement, and (b) Patten testified he had no specific recollection of the call or conversation in which the instructions to recast the Project Addendum into the 2003 Agreement were transmitted to Murray. OB at 19-27. However, Murray testified: "[t]he

[39] *Levitt*, 287 A.2d at 673.

[40] *Cede*, 634 A.2d at 360.

[41] *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

[42] *Levitt*, 287 A.2d at 673.

information that [he] used to draft the [2003 Agreement] was the information that was in the [P]roject [A]ddendum" ([Tr. 293:16-18]; *see, also* (B744 at ¶ 30)) and that "[n]o one told [him] not to include [the Shortfall Language]. It should have been there" ([Tr. 296:20-297:16; *see also id.* at Tr. 254:21-255:2 (Murray describing how he used previous agreements as templates) and Tr. 279:21-280:1]). Wilson likewise testified that his understanding was that the 2003 Agreement was to be just like the Project Addendum retyped in a different format. [Tr. 138:22-139:3 ("[a]ll we did was change [the] form of documents."); Tr. 153:3-11 ("the deal was the same as the deal had always been since October of '02.")].

Murray also testified that he received general instructions from Patten regarding contracts between NLP and HCWV and then worked out the details with Wilson. *See* Op. at 7 & n. 24; [Tr. 254:1-14]. Murray testified that when he drafted contracts between NLP and HCWV, he used the previous contract and cut and pasted to create the new document. *See* Op. at 20 & nn. 62-63; [Tr. 254:23-255:2; 287:8-13; 293:16-18; 297:1-4; 297:12-16]. Thus, Murray provided testimony regarding the practice and procedure at NLP in drafting contracts. The D.R.E. clearly contemplate that such testimony is admissible and probative.[43]

[43] *See* D.R.E. 406 ("Evidence of … the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the … organization on a particular occasion was in conformity with the … routine practice."). *Cf. Johnson* v. *Cook Inc.* 327 Fed. Appx. 661, 664 (7th Cir. 2009) (applying Federal Rule of Evidence 406, holding that human resource manager's testimony regarding practice of rejecting

Murray's testimony—that he prepared contracts by using a previous form and cutting and pasting—is evidence of the manner in which NLP's contracts were prepared, and the Trial Court appropriately credited that testimony. From that testimony, both Murray and the Trial Court drew the reasonable inference that Murray over-deleted when converting the Project Addendum into the 2003 Agreement, mistakenly removing the Shortfall Language. *See* Op. at 20 & n. 62 [Tr. 287:8-13; 293:16-18]; Op. at 35 ("I find that it [the Shortfall Language] was inadvertently removed when Murray intentionally deleted a sentence that appeared in the Project Addendum—following the shortfall language—from the [2003 Agreement], which was then used as a template for the [2004 Agreement].").

Thus, the Trial Court had sufficient evidence from which to make a finding that the Shortfall Language missing from the 2003 Agreement was intended by the contracting parties to be a part of that agreement. Op. at 7 & n. 24; 20 & n. 62-64; 35, 36-37 & n. 115. At bottom, Plaintiff is claiming that the Trial Court should have disbelieved Wilson's, Patten's and Murray's testimony. That is a credibility determination based on testimony that the Trial Court, as the finder of fact, was entitled to make and that this Court should approve on review.[44] Op. at 22-23, 37,

---

applications was admissible, even if manager could not remember plaintiff's specific application).

[44] *Levitt*, 287 A.2d at 673; *Alabama By-Products v. Neal*, 588 A.2d 255, 259 (Del. 1991); *In re the Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 39, n. 12 (Del. 2006 ("At bottom, the appellants are claiming that the Chancellor should have disbelieved Eisner's testimony. That is a

39, 40-41 (finding appellee testimony credible). No modification of the settled Delaware law reflected in *Levitt* and its progeny is appropriate here.[45]

B. Plaintiff Ignores DRE 602 and Conflates Admissibility With Credibility

Noticeably absent form Plaintiff's argument regarding the Trial Court's determination as to the credibility of Murray and Patten is any mention of the D.R.E. Instead, Plaintiff relies upon a string of disparate authority in an effort to fabricate what she contends is a viable legal basis for her appeal. At its essence, Plaintiff's argument is that a trial court should never credit the testimony of a witness whose memory is deficient as to specifics or who draws reasonable inferences from the evidence. *See* OB at 15. To arrive at this conclusion, one must ignore D.R.E. 602, 701 and 702.

D.R.E. 602, addresses the admissibility of lay witness testimony, stating:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

---

credibility determination based on testimony that the Chancellor, as the finder of fact, was entitled to make and that this Court will approve on review.").

[45] *See Shuba*, 77 A.3d at 949 ("It is well-established ... that once an issue of law has been settled by a decision of this Court, 'it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside ... and [it] should be followed except for urgent reasons and upon clear manifestation of error.'") (quoting *White v. Liberty Ins. Corp.*, 975 A.2d 786, 790-91 (Del. 2009)).

Delaware case law is contrary to Plaintiff's suggested *per se* rule that lack of memory should preclude consideration of witness testimony. Lack of memory does not preclude the admission of testimony, as Plaintiff essentially argues; rather, it merely goes to the weight of the evidence, which is a matter for the trier of fact.[46] Nor will Delaware Courts assume that a gap in a witness' memory means the witness is not credible.[47]

There is no dispute that Murray and Patten[48] were involved in the process of creating the Agreements (*see* Op. at 6-7) and it would have been clear error to have precluded their testimony simply because they lacked specific recollection of

[46] *Fensterer v. State*, 509 A.2d 1106, 1109-10 (Del. 1986) ("a witness's mere lack of memory as to a particular fact may go only to the weight of that evidence"). Courts interpreting Federal Rule of Evidence, on which D.R.E. 602 is modeled, have held similarly. *See, e.g., Johnson v. Cook Inc.*, 327 Fed. Appx. 661, 664 (7th Cir. 2009) *cert. denied* 558 U.S. 1155 (2010) (rejecting argument that human resources manager lacked personal knowledge where could not remember specific application); *Clayton v. Eli Lilly & Co.*, 421 F. Supp. 2d 77, 81 (D. D.C. 2006) ("the reliability of … memory goes to the weight of the evidence …. and accordingly constitute a matter for the jury to decide"); *Hartford Fire Ins. Co. v. Taylor*, 903 F. Supp. 2d 623, 643-44 (D. N.D. Ill 2012) (finding that it would be error **not** to allow jury to consider testimony despite potential gaps in witness' memory) (emphasis added); *Barto v. Armstrong World Indus., Inc.*, 923 F. Supp. 1442, 1445-46 (D. N.M. 1996) ("that [witness] did not express himself in terms of absolute certainty does not invalidate his testimony").

[47] *See Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1057-58 (Del. Ch. 2004) *aff'd sub nom. Black v. Hollinger Int'l Inc.*, 872 A.2d 559 (Del. 2005) and *judgment entered sub nom.*, 2004 WL 5322715 (Del. Ch. Mar. 4, 2004) (relying on witness testimony the Court found credible despite "gaps in memory and other flaws attributable to human imperfection" and finding that it gave further "credence" to other consistent testimony).

[48] The notion that Patten's testimony should be disregarded because Murray refreshed Patten's recollection is also spurious. *See Clayton*, 421 F.Supp.2d at 81 (witness whose memory was refreshed by counsel for plaintiff not inadmissible for lack of personal knowledge).

events that occurred over a decade ago.[49]

Plaintiff's argument conflates admissibility and credibility. If, as Delaware courts have found, a witness's memory defects do not preclude the trier of fact from considering that witness's testimony, then to argue that it is error to give weight to such testimony argues that the trier of fact must engage in an act of futility: to hear evidence that it must then immediately ignore. This Court should not give credence to this wasteful contention. Moreover, the implausibility of this proposition is apparent in the context of scrivener's error, as it is axiomatic that such an *error* was not intentional at the time it was made. Thus, witnesses will most likely never be able to testify as to present knowledge of the mistake at the time of drafting. This does not eviscerate the probative value of testimony from relevant witnesses regarding the circumstances and parties' intent, and Plaintiff has not submitted any authority to support that contention.

C. Plaintiff Waived Challenge to the Trial Court's Consideration of the Testimony of Murray and Patten Because She Knew of Their Memory Lapses and Failed to Seek to Exclude The Testimony

Plaintiff knew well before the trial that Mr. Murray had no specific recollection regarding various matters that had occurred over a decade before trial through his deposition testimony. *See* OB at 19; (A679 at [Tr. 343:9-16; A472-

[49] *See Hartford Fire Ins. Co.*, 903 F.Supp.2d at 644-45 ("In this case, the issue of Taylor's credibility must go to a jury. It would be a mistake to confuse his purported lack of memory with a lack of involvement in the incident."). *Accord, Johnson*, 327 Fed. Appx. at 664.

73]). Plaintiff also knew that Patten had no specific recollection regarding his conversations with Wilson in Bermuda twelve years before the trial. *See* (A675-76 at [Tr. 60:21-61:1]). If Plaintiff believed that the testimony of Murray and Patten regarding the drafting of the Agreements or the negotiations in Bermuda was so unreliable as to justify its preclusion for lack of personal knowledge, Plaintiff's remedy was to file a motion *in limine* to preclude that testimony or to object on their direct examination.[50] Plaintiff did neither. Instead, Plaintiff willingly allowed Murray and Patten to testify, which was a wasteful exercise if Plaintiff's novel proposition regarding the weight to be given their testimony is accepted.

D. The Extension of *Oxendine* to Fact Witness Testimony Is Inappropriate and Renders D.R.E. 701 Superfluous

Plaintiff asks this Court to extend its decision in *Oxendine v. State*[51] to Murray and Patten—effectively seeking to eviscerate D.R.E. 701 regarding lay witness testimony, and instead require all fact witnesses, lay and expert alike, to satisfy the evidentiary standard required of expert witnesses under D.R.E. 702.

D.R.E. 701, the only applicable rule of evidence here, addresses lay testimony, and provides:

---

[50] *See* D.R.E. 103(a)(1). *See also Yankanwich v. Wharton*, 460 A.2d 1326, 1329 (Del. 1983) (although witness was not identified in discovery, counsel only objected as to qualification as expert, thereby waiving objection as to prior identification); *Johnson v. State*, 983 A.2d 904, 926 (Del. 2009) (finding that claim of error on appeal waived where no *in limine* request to exclude witness testimony and no request for curative instruction).

[51] 528 A.2d 870 (Del. 1985).

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) **not based on scientific, technical or other specialized knowledge within the scope of Rule 702**.[52]

All of the cases cited by Plaintiff discuss medical expert testimony, which is controlled by D.R.E. 702.[53] The *Oxendine* decision,[54] and all of the subsequent case law cited by Plaintiff,[55] involved the testimony of **medical experts**, who are required to testify to a "reasonable medical probability" or a "reasonable medical certainty".[56] Plaintiff points to no authority that would justify requiring lay fact testimony to rise to a level equivalent to "reasonable medical probability" or

---

[52] D.R.E. 701 (emphasis supplied).

[53] D.R.E. 702 provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

[54] *Oxendine v. State*, 528 A.2d 870 (Del. 1985).

[55] *See* OB at 16-17. Four cases cited by Plaintiff as applying *Oxendine* with regard to witness credibility cite it for propositions unrelated to the credibility of expert witnesses. *See Watson v. State*, 986 A.2d 1165, 2010 WL 376882 at *3, n. 15 (Del. 2010) (citing *Oxendine* for proposition that opening and closing statements are not evidence); *Banther v. State*, 977 A.2d 870, 884, n.24 (Del. 2009) (finding that expert testimony that included uncertainty as to time of death was "evidence to support a theory of criminal liability"); *Johnson v. State*, 1991 WL 28889 at *2 (Del. Feb. 21, 1991) (citing *Oxendine* for proposition that victim testimony regarding subjective belief of weapon, without physical manifestation, is sufficient for criminal offense); *United States v. Foghorn*, 2006 WL 4017477, at *10 (D.N.M. Oct. 20, 2006) (distinguishing *Oxendine* and citing for causation standard for murder charge).

[56] *See* OB at 16-17 and cases cited therein.

"reasonable medical certainty." Instead, she merely claims that this court should do so because of the unspecified "unique circumstances of this case." OB at 16. NLP is aware of no "unique circumstances" in this case that might justify ignoring D.R.E. 701's applicability here. The witnesses' testimony that is challenged by Plaintiff, read in context, falls squarely with the purview of D.R.E. 701, is rationally based on the perception of the witness, is helpful to a clear understanding of the perception of the witness testimony or the determination of a fact in issue and is not based on scientific, technical or other specialized knowledge. It is therefore is evidence that a trier of fact should, and in this case properly did, consider in rendering its decision.

E. The Weight of the Evidence Supports Both Murray's and Patten's Testimony and the Judgment Against Plaintiff

Plaintiff focuses on Murray and Patten's testimony regarding the issues of the scrivener's error and what happened on the trip to Bermuda with respect to the formation of the Project Addendum, to the exclusion of both the relief sought at trial—reformation of the Agreements to reflect the intent of the parties—and all of the other evidence—testimonial and circumstantial—on which the Trial Court relied in making its findings and supporting its Opinion.

As the Trial Court recognized, Defendants assert that the Agreements did not accurately reflect the agreement between the parties. *See* Op. at 35. The question before the Court was one of the Defendants' **intent**, not simply whether

there was a scrivener's error. *See* Op. at 34. The existence of a scrivener's error is simply one piece of evidence in support of reformation, not a dispositive finding.[57] Here, far more than just the testimony of Murray and Patten support the Trial Court's finding that the Agreements did not reflect the intention of the Defendants.

First, there is the testimony of Wilson, a party to the Agreements and whom the Trial Court found to be more credible than Plaintiff. *See* Op. at 41 ("To be clear, to the extent I must resolve discrepancies between Miller's testimony, on one hand, and that of Wilson, Murray and Patten, on the other, I find the latter three to be credible."). As detailed above, Wilson testified that the Agreements did not reflect the intent of the Defendants, which was that HCWV was obligated to pay NLP in the event Negative Manager Fees arose. *See* Op. 36-37 & n.115; [Tr. 148:4-7; 163:11-16]. Indeed, Mr. Wilson acknowledged that the Shortfall Language, while not in the Agreements, was intended to be there, though he could not say how it came to be excluded because he did not draft the Agreements. *See* Op. at 20 & n. 64; [Tr. 153:3-11]. Plaintiff has not challenged Wilson's testimony on appeal and that alone is sufficient cause for this Court to Affirm.

Second, the Trial Court relied on circumstantial evidence in rendering its

[57] *See Amstel Assoc., L.L.C. v. Brinsfield-Cavall Assoc.*, 2002 WL 1009457, at *5, n. 13 (Del. Ch. May 9, 2002) ("[T]he party seeking to reform the contract must present clear and convincing evidence that the written agreement as executed does not reflect the parties' true intent. Evidence of a scrivener's error is, however, an important evidentiary component of that showing.") (citation omitted).

opinion: Specifically, the Trial Court noted that the Project Addendum contains the "Shortfall Language" and was the governing document when the parties commenced the Ashton Woods project, which was the largest project HCWV had ever done. *See* Op. at 18 & n.54; 36 & nn. 113-14; [Tr. 138:22-139:3; 472:14-473:20]; (B22-23). The 2003 Agreement replaced the Project Addendum and lacked the "Shortfall Language," but the Ashton Woods project continued under the 2003 Agreement. *See* Op. at 18. Notably, the Trial Court found that it was not believable that the Defendants would have changed the structure of that deal mid-stream through the 2003 Agreement, as suggested by Plaintiff. *See* Op. at 36 (holding that "**Defendants credibly and clearly demonstrated at trial that they did not intend to change the terms of their arrangement between the Project Addendum and the later management agreements**" and relying on Wilson's testimony that "Any negotiation or anything that was done with this deal was done with Harry in July of '02, the year before. We already had the deal running. We weren't going to change horses in the middle of the road."); [Tr. 138:22-139:3].

Likewise, the court noted that there were financial statements introduced at trial and supported by testimony, which showed that the Defendants accounted for Negative Manager Fees on a monthly basis at times long-before the Plaintiff and Wilson became embroiled in their epic divorce proceeding. *See* Op. at 28-29 & nn. 93-96; (B57-466); [Tr. 206:13-22; 306:17-311:24; 317:10-14; 336:13-24].

Plaintiff does not challenge any of the foregoing evidence supporting the judgment on appeal (indeed, she generally ignores it). This circumstantial evidence may properly be given equal weight by the Trial Court as that given to testimony.[58] The Trial Court properly relied upon this circumstantial evidence in reaching its conclusions.

Moreover, the Trial Court found that Plaintiff's version of events was either vague,[59] or inconsistent,[60] or made little sense in light of the documentary evidence[61] and gave little credence to her testimony. *See* Op. at 40 ("Miller's testimony is entirely consistent with an attempt by a fundamentally honest and moral person to testify in support of a position she sincerely believes in but cannot directly confirm without uttering a lie."). Considering the entire record before it,

[58] *See Matter of Langmeier*, 466 A.2d 386, 402 (Del. Ch. 1983) ("Circumstantial evidence can have probative value equal to that of direct, or testimonial, evidence."); *Williams v. State*, 539 A.2d 164, 167 (Del. 1988) ("circumstantial evidence … is intrinsically no different from testimonial evidence"). *Accord*, Del. P.J.I. Civ. § 23.1 (2000).

[59] Op. at 22 & nn. 69-74 ("[Miller] could not testify to what specific changes were made to the 2003 Management Agreement" and "did not know the terms of the Defendants' negotiations until their agreement was finalized, also 'did not read [the finalized agreement] word for word' because '[she] trusted [her] husband.'").

[60] Op. at 40 & n. 123 ("Miller [] neither credibly nor consistently testified that Wilson told her that the Negative Manager Fees were taken out of the Agreement, or that she saw him crossing out the shortfall language in particular.").

[61] Op. at 35-40 ("Miller, in effect, wants me to conclude that Wilson caused HCWV to pay millions of dollars in Negative Manager Fees to National Land Partners that it did not actually owe, and that Wilson knew it did not actually owe, in order to spite her or obstruct her ability to collect at equitable distribution. I find this conclusion to be an unreasonable one, and not supported by the parties' testimony at trial, nor the record before me.").

and having heard the testimony of all of the witnesses and found the Defendants' testimony credible, the Trial Court's decision was the product of an orderly and logical productive process, and should not be disturbed to "effectuate justice".[62]

[62] *See Levitt*, 287 A.2d at 673. ("We do not, however, ignore the findings made by the trial judge. If they are sufficiently supported by the record and are the product of an orderly and logical deductive process, in the exercise of judicial restraint we accept them, even though independently we might have reached opposite conclusions.")

III. THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF IRRELEVANT DOCUMENTS PRECLUDED BY A STIPULATED SCHEDULING ORDER

1. QUESTION PRESENTED

Whether it was error for the Trial Court to prohibit discovery related to the Agreements at issue in NLP's business in thirteen separate states.

The Trial Court properly exercised its discretion in denying discovery of material clearly outside the scope of discovery **agreed to by Plaintiff** under the Amended Scheduling Order.[63] Moreover, the information requested was irrelevant to determining the intent of the Defendants with regard to the Agreements and, therefore, Plaintiff was not prejudiced by its preclusion.

2. STANDARD OF REVIEW

The standard of review regarding pretrial discovery rulings is abuse of discretion. *See* OB at 29.[64] "'When an act of judicial discretion is under review the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his [or her] judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.'"[65] According to this Court, "'[j]udicial discretion is the exercise of judgment directed by conscience and reason, and when

[63] Incredibly, Plaintiff did not provide this Court with a copy of the Amended Scheduling Order, which served as the basis upon which the Trial Court excluded the discovery sought by Plaintiff. *See* (B834-40).

[64] Citing *Coleman v. Pricewaterhouse Coppers, LLC*, 902 A.2d 1102, 1106 (Del. 2006).

[65] *Coleman*, 902 A.2d at 1106 (quoting *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968)).

a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused.'"[66]

3. MERITS OF OPPOSITION

A. The Trial Court's Decision Denying Plaintiff's Discovery of Third-Party Contracts Was Well-Reasoned, Based Upon the Facts and not Arbitrary or Capricious

The Amended Scheduling Order provided that:

> The parties may engage in discovery limited to the issues of the drafting, interpretation, meaning, **intention of the Defendants**, course of performance **among the Defendants** and course of dealing **among Defendants** regarding that certain Management Agreement dated December 3, 2004 by and among NLP, Wilson and HCWV (the "Management Agreement") and any earlier agreement(s) **among these parties** relating to the same subject matter as the Management Agreement, including the accrual or satisfaction of Negative Manager Fees, if any, thereunder at any time and any scrivener's error or mutual mistake reflected therein.

(B837 at ¶ 3) (emphasis supplied).

The Amended Scheduling Order also provided as follows:

> A one-day trial will be held on the **limited issue of mutual mistake and/or reformation** of Section 6.2 of the Management Agreement on December 18, 2013 and the related issues as set forth in paragraph three (3) of this Second Amended Stipulation and Scheduling Order. Nothing herein shall impair the ability of any party to assert any principle of the law regarding contracts under Delaware law.

(B838 at ¶ 11) (emphasis supplied).

It is uncontested that the parties stipulated and agreed to a limited scope as

[66] *Id.* (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

to both discovery and the issues to be presented at trial. As discussed in NLP's opposition to the Motion to Compel, the provisions of Paragraphs 3 and 11 of the Amended Scheduling Order were the subject of significant negotiations between counsel for the Plaintiff and counsel for NLP. *See* (B844-45; B857-91). The Trial Court recognized this fact, stating:

> … the parties here negotiated, and the defendants provided the terms of the negotiations in the course of it, a very narrow set of discovery parameters. And it seems to me that trying – that those discovery parameters do not allow the discovery that is being sought here.
>
> The argument that, because it goes to interpretation of the management agreement, that, therefore, I should allow discovery beyond what appears to be facially the terms of this order of the court, that embodies that agreement of the parties, doesn't seem reasonable to me. It's clear to me that the parties agreed upon a limited scope of discovery. They negotiated it. They agreed to it. I entered it as an order of the court. No one has asked me to lift that order, and I would only do so upon a showing that justice so required. So I am denying the motion to compel.

(A667-68 at 13:18-14:11).

Scheduling orders are not simply advisory and they must be modified by further order of the court.[67] As the Trial Court stated, Plaintiff never sought a modification of the Amended Scheduling Order. A trial court does not abuse its

[67] *See Encite LLC v. Soni*, 2011 WL 1565181, at *2 (Del. Ch. Apr. 15, 2011) ("A scheduling order is an order of the court."); *IQ Holdings, Inc. v. Am. Comm'l Lines Inc.*, 2012 WL 3877790, at *2 (Del. Ch. Aug. 30, 2012) ("'Parties must be mindful that scheduling orders are not merely guidelines but have the same full force and effect as any other court order.") (quoting *Am. Mining Corp. v. Theriault*, 2012 WL 3642345, at *21 (Del. Ch. Aug. 27, 2012) *superseded by* 51 A.3d 1213, 1238 (Del. 2012)).

discretion by precluding discovery that would be in violation of an existing scheduling order.[68] Here, the Trial Court properly denied the Motion to Compel. *See* (A668 at 8-10). There is no abuse of discretion in the Trial Court holding the parties to its **stipulated** case scheduling order limiting discovery.

B. The Requested Discovery Was Irrelevant and Plaintiff Suffered No Prejudice By Being Precluded From Obtaining It

It is also clear that the language of Paragraph 3 of the Amended Scheduling Order limited discovery to agreements that reflected the intention of the **Defendants**, plural, and agreements between the **Defendants**, also plural. *See* (B837 at ¶ 3). Moreover, the discovery was intended for presentation at a trial limited to the issues of **mutual** mistake and/or reformation. (B838 at ¶ 11). In order for Plaintiff to have been prejudiced by the Trial Court's decision denying discovery of agreements between NLP and third-parties, those documents must first have been relevant to the matter to be adjudicated by the Trial Court.[69]

The issue before the Trial Court was the intention of the Defendants in entering into the Agreements, not the intention of any one of them individually. The intention of parties to a contract is determined at the time they enter into that

[68] *See, e.g. Theriault*, 51 A.3d at 1235-36 (affirming Court of Chancery's refusal to modify stipulated trial scheduling order); *Ingram v. Thorpe*, 2014 WL 4805829, at *4 (Del. Jul. 25, 2014) (holding that Superior Court did not abuse discretion in denying motion to amend scheduling order filed after discovery deadline had passed).

[69] *See NiSource Capital Markets, Inc. v. Columbia Energy Group*, 1999 WL 959183, at *2 (Del. Ch. Sep. 24, 1999) (denying discovery where party did not need the information to prove its claims and suffered no prejudice from its preclusion).

contract, and the intention sought is the combined intention of the parties.[70] Moreover, mutual mistake requires a showing that "**both parties** were mistaken about a material term of the written agreement."[71] Thus, any contract other than a contract among all of the Defendants was not probative of any issue before the Trial Court, and the exclusion of any such contract was appropriate and did not prejudice Plaintiff.

[70] *See Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003) ("If, however, the court concludes that a contract's terms are ambiguous or 'fairly susceptible of different interpretations,' the court may consider extrinsic evidence to uphold, to the extent possible, **the reasonable shared expectations of the parties at the time of contracting**.") (emphasis supplied) (citing *Eagle Indus. Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

[71] *Amstel Assoc., L.L.C.*, 2002 WL 1009457, at *5 (citing *Collins v. Burke*, 418 A.2d 999, 1002 (Del. 1980)) (emphasis supplied).

CONCLUSION

The Trial Court erred in concluding that Plaintiff had "equitable standing" to pursue Count I of the Amended Complaint and in denying the NLP Summary Judgment Motion. The Trial Court's broad application of the doctrine of "equitable standing" undermines settled law limiting the ability of strangers to contracts to interfere with the contractual agreements of others. However, the Trial Court correctly concluded that the Agreements do not reflect the intention of the Defendants that HCWV would be liable to NLP for any Negative Manager Fees that might arise and reformed Section 6.2 of the Agreements accordingly.

None of Plaintiff's assertions of error are well-founded. She ignored Section 4.3 of the Agreements at trial, waived the issue afterward, and her interpretation of Section 4.3 is implausible. The Trial Court properly credited the testimony of Patten and Murray and relied on evidence not challenged by Plaintiff. Plaintiff's arguments regarding *Levitt* and *Oxendine* are meritless. The Trial Court properly precluded irrelevant discovery beyond the scope of discovery agreed to by Plaintiff. Therefore, this Court should AFFIRM the Opinion and Order.

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.
/s/ Nicholas J. Brannick
Nicholas J. Brannick (No. 5721)
Michael F. Bonkowski (No. 2219)
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
Counsel for National Land Partners, LLC

Dated: October 13, 2014