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Case Number 570,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DR. UDAY S. UTHAMAN,	:	
	:	
Plaintiff Below,	:	
Appellant,	:	No. 570, 2014
	:	
v.	:	On Appeal from the Court of
	:	Chancery of the State of Delaware,
FAIR HILL, L.P., a Delaware Limited Partnership,	:	Civil Action No. 9135-VCG
	:	
	:	
Defendant Below,	:	
Appellee.	:	
	:	

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

On December 4, 2013, plaintiff below-appellant Uday Uthaman, M.D. filed a Verified Complaint filed in the Court of Chancery seeking a declaratory judgment and specific performance of a right of first refusal relating to the sale of a property in Newark, Delaware, where he has practiced medicine since 1999. The defendant below-appellee, Fair Hill, L.P. ("Fair Hill"), owns the property. Dr. Uthaman brought this action after learning in October 2013 that Fair Hill had entered into a contract to sell the property to a third party and did not intend to honor his right of first refusal.

On August 18, 2014, after written discovery and the deposition of Dr. Uthaman, the parties filed cross-motions for summary judgment. On September 4, 2014, the Honorable Sam Glasscock, III, Vice Chancellor, heard oral argument and issued an order and bench rulings denying Dr. Uthaman's motion and granting Fair Hill's. On October 3, 2014, Dr. Uthaman filed this appeal as to both rulings. This is his opening brief in support of his appeal.

SUMMARY OF ARGUMENT

1. The trial court erred in holding that a memorandum granting a right of first refusal lacked an essential term, *i.e.*, a mechanism for determining price, where the objective meaning of the term right of first refusal provides the holder with an opportunity to match terms that are determined by a third party offer. The trial court erred by giving undue weight to Dr. Uthaman's subjective uncertainty and thoughts and feelings about how price might be determined at his deposition.

2. The trial court erred in holding that a written memorandum, which granted Dr. Uthaman a right of first refusal, was invalid under the statute of frauds. The agreement to a right of first refusal satisfied the requirements of the statute of frauds in that it was evidenced by a writing, signed by or on behalf of the party to be charged, which (a) reasonably identified the subject matter of the contract, (b) was sufficient to indicate that a contract with respect thereto had been made between the parties, and (c) stated with reasonable certainty the essential terms of the unperformed promises in the contract.

3. Dr. Uthaman has met the requirements for obtaining specific performance of the right of first refusal by demonstrating by clear and convincing evidence that a valid right exists, that he is ready, willing, and able to exercise that right, and that the equities favor specific performance.

STATEMENT OF FACTS

A. The Parties, the Property, and Dr. LeRoy

Dr. Uthaman, age 65, is a native of India who earned his medical degree in that country in 1977 and immigrated to the United States in May 1986. A91-93 at 24:15-29:11. He came to Delaware in 1991 as a resident at St. Francis Hospital and obtained his license to practice medicine in Delaware in 1994. A93 at 29:11-30:18; A93 at 31:5-24. He has practiced medicine in Delaware since then. A93 at 32: 1-3.

Fair Hill is a Delaware limited partnership. A63 ¶ 4. At all times relevant to this case, Pierre L. LeRoy, M.D., was a partner of Fair Hill whose authority to bind Fair Hill is not disputed. A63 ¶ 7. Dr. LeRoy passed away unexpectedly on June 14, 2014, after a brief illness. A5 (docket # 37 (Defendant's Ans. Br. 6 n.1)).

The property in dispute is a property at 249 East Main Street in Newark ("the Property"). A48 ¶ 1; A62 ¶ 1. The Property includes a primary building that houses Dr. Uthaman's primary medical practice in unit 1 on the first floor, and an auxiliary building in the back in which Dr. Uthaman, through his entity, Delaware Pain & Spine Center, has rented additional offices, units 7 and 8. A65-66 ¶¶ 14, 21. Dr. Uthaman and/or Delaware Pain & Spine Center have rented unit 1 since 1999 and units 7 and 8 since 2011. A65-66 ¶¶ 14, 21.

B. The 1999 Lease Agreement and the Oral Right of First Refusal

In 1994, while a resident at St. Francis Hospital, Dr. Uthaman was introduced to Pierre L. LeRoy, M.D., who over time became Dr. Uthaman's preceptor and professional mentor with respect to the practice of chronic pain management. A94-95 at 33:16-37:1; A98-99 at 51:13-53:1; A141 ¶ 3. In early 1999, Dr. LeRoy indicated that he would be retiring and offered to rent the space in which he had his medical practice, unit 1 on the Property, to Dr. Uthaman. A99 at 54:3-21. Dr. Uthaman accepted the offer, signed a lease agreement, and opened his practice at 249 East Main Street in May 1999. A98 at 51:16-18; A99 at 54:12-16; A100-101 at 59:22-63:20.

The Lease Agreement, dated May 1, 1999 (the "1999 Lease Agreement") (A14-20) provided that Dr. Uthaman would occupy suite 1 at the 249 East Main Street address. A14. The term was initially for one year but allowed for annual renewal (A14-15 ¶¶ 2, 4), and Dr. LeRoy and Dr. Uthaman renewed the lease informally each year. A102 at 67:22-68:5; *see also* A103 at 70:6-11. Initially, the rent was $2,000 per month, with a security deposit in the same amount. A14-15 ¶¶ 3, 5. The 1999 Lease Agreement also allowed for modifications thereto "by an agreement in writing and signed by the party against whom enforcement of such modification is sought." A19 ¶ 29.

In 1999 or early 2000, shortly after Dr. Uthaman entered into the 1999 Lease Agreement, and during a period in which Dr. LeRoy listed the Property for sale, he told Dr. Uthaman he would place an addendum or note on the property advising potential buyers that someone (Dr. Uthaman) had a right of first refusal. A103 at 70:12-71:21; A105 at 77:14-78:1; A111 at 103:17-104:4. Dr. LeRoy explained to Dr. Uthaman that "if anybody offers, if you're interested you will be on the first choice, you would be the first choice." A104 at 74:1-9.[1] Although Dr. Uthaman was not familiar with the legal concept of a right of first refusal and did not understand the details of the process involved in exercising the right, he knew that he would be given an opportunity to purchase the Property first. A105 at 78:23-79:24 ("I don't know the legal legality, but he told me he would offer me first.").[2] He also knew, based on conversations with Dr. LeRoy, that Dr. LeRoy's practice had fallen off over time and that Dr. LeRoy hoped that Dr. Uthaman would build it

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[1] *See also* A108 at 89:22-90:2 (same); A109 at 94:8-19 (same); A109 at 96:18-23 ("I have the first choice to purchase when all the other offerings Dr. LeRoy has. That's the way I am understanding that language. English is my second language. If there is any legal, legal way of interpreting that, I do not know.").

[2] *See also* A104 at 74:10-75:19 ("I did not know at that time how it was working. I don't know what I would have done."); A103 at 70:12-71:8 ("I didn't even know at the time there was something like a first refusal [in] existence, such a term existing on real estate."). When counsel for Fair Hill repeatedly challenged Dr. Uthaman regarding his knowledge as to how a right of first refusal would operate under different scenarios, Dr. Uthaman made clear that he had no special expertise and would need to seek the advice of a professional. *See, e.g.*, A107 at 86:20-24 ("Q: Well, how would it occur? I'm trying to figure out, sir, how would this happen? A: I would have hired an attorney or real estate agent. They would have advised me."); A107 at 88:18-21 ("Q: Well, does a bidding war begin? A. I don't think so. I do not know with a right of first refusal that there is a bidding war. That's my understanding. I may be wrong.").

back up again. A113-114 at 112:11-113:11; A114 at 114:4-12 ("We always talked about someday I'm buying the place and the pain clinic that Dr. LeRoy established could continue."); A117 at 128:18-19 ("Dr. LeRoy always told [said] you should grow the practice here.").

C. The 2006 Memorandum Agreement

In July 2006, Dr. LeRoy sought to modify the arrangement under the 1999 Lease Agreement by raising the monthly rent from the $2,000, as specified therein, to $2,250. A14; A116-117 at 123:17-125:13; A122 at 146:5-147:1. In connection with this proposed modification, Dr. Uthaman wished to obtain additional security regarding the long term issues that he and Dr. LeRoy had discussed, including the right of first refusal that would give him an opportunity to purchase the Property when the time came for it to be sold. A114 at 113:23-114:14. During a meeting on July 12, 2006, Dr. Uthaman wrote on a paper (on the left hand side, in light ink) five points. A22; A116-117 at 122:9-126:24. As they discussed these points, where appropriate, Dr. LeRoy memorialized his response in writing (on the right hand side of the paper in darker ink). A116-117 at 123:2-126:24.

Dr. Uthaman identified as point (1) "Long Term Plan," the general topic that they had discussed over the years, which as noted above included Dr. Uthaman's eventual purchase of the Property. A22; A117 at 125:5-8; A133 at 190:1-18.

Dr. Uthaman requested, as point (2), "No increase Rent future." A22; A117 at 125:9-20. Dr. LeRoy responded by inserting a caret and the word "foreseeable" between "Rent" and "future," indicating that he agreed not to increase the rent again in the foreseeable future. *Id.*

Dr. Uthaman requested as point (3) a right to "Sublease." Dr. LeRoy agreed to this request, writing "ok," with the condition, "[with] approval." A117 at 125:21-126:9.[3]

Dr. Uthaman requested as point (4) that he be permitted to "Take from Deposit." A22. By this phrase he was proposing that Dr. LeRoy withdraw from Dr. Uthaman's 1999 security deposit of $2,000 the additional $250/month rent increase until the deposit was exhausted. A117-118 at 128:20-129:19. Dr. LeRoy inserted "??" by this proposal and did not accept it. A117-118 at 128:20-129:19; A122 at 145:6-23.[4]

Dr. Uthaman requested in point (5) that he be given "1st consideration if selling." A22. Dr. LeRoy wrote an equal sign ("=") followed by the term "first refusal," to indicate that Dr. Uthaman's phrase "first consideration" referred to the

[3] Dr. Uthaman and Dr. LeRoy may not have recalled that the 1999 Lease Agreement already granted Dr. Uthaman a right to sublet the premises "with the written consent of" Fair Hill. A17 ¶ 17.

[4] Dr. Uthaman wrote a few words and numbers at the bottom of the page, including "deposit 2000," in an effort to explain the proposal, but Dr. LeRoy did not agree to it. A116 at 124:18-19; A122 at 145:6-23.

same right of "first refusal" that Dr. LeRoy had previously offered orally.[5] *Id.* Unlike his responses to other requests, Dr. LeRoy's response to point (5) did not question or amend it in any respect. A118 at 132:13-23.

Instead, Dr. LeRoy confirmed in his own handwriting, in at least three ways, his intent to formalize the document as a memorialization of the resolutions and agreements reached between himself and Dr. Uthaman as to the points addressed therein, including, most importantly, the right of first refusal. First, he wrote "Memo" at the top of the document, indicating that it was intended to be a memorialization of terms of agreement for future reference. A22; A116-117 at 124:17-125:4. Second, he dated the document in the top right hand corner, even though Dr. Uthaman had already dated it just above, again underscoring the significance and intended formality of the Memorandum of agreements reached on that date. A22.[6] Third, he signed his initials immediately under point (5) granting the right of first refusal. A22; A121 at 144:6-24. Dr. LeRoy's three confirming actions in signing and dating the document and in titling it a "Memo" were

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[5] Although English is his second language, Dr. Uthaman's request that Dr. LeRoy give him "1st consideration if selling" was to give him a right prior to that of other people, that is, a right of first refusal. *See* A110 at 100:3-101:3; A118 at 132:13-20.

[6] Counsel for Fair Hill did not examine Dr. Uthaman at his deposition about the fact that the date, "7/12/06," was written twice at the top of the Memorandum. However, it is clear from the Memorandum itself that Dr. LeRoy wrote the date "7/12/06", in the darker ink with which he penned his other contributions to the Memo directly below Dr. Uthaman's writing of the date in lighter ink at the top right hand corner of the Memo. This can be seen most clearly from the original Memorandum, which Dr. Uthaman has retained in his possession and would make available in any further proceeding.

consistent with his desire, repeatedly conveyed to Dr. Uthaman, that "When I'm not there to make the decision, we don't know what's going to happen to the clinic here, but I want you to be here." A121 at 142:19-24.

With this understanding reached, Dr. Uthaman began to pay the increased rent of $2,250 beginning in August 2006 and continuing to the present. A119 at 133:4-9; A121 at 141:11-17.[7] Also, as discussed below, in reliance on the right of first refusal as memorialized in 2006, Dr. Uthaman invested over $52,000 in improvements to the Property and leased two additional units.

D. Actions Taken in Reliance on the Right of First Refusal

In reliance upon Dr. LeRoy's memorialization of the Right of First Refusal in the 2006 Memorandum, Dr. Uthaman made numerous expenditures to improve the portions of the Property that he was then renting and rented additional units. A144-145 ¶¶ 11-15. In 2011, Dr. Uthaman entered into a four-year lease agreement (the 2011 Lease Agreement") to lease suites 7 and 8 on the Property. A144-145 ¶ 13. Dr. Uthaman submitted a Quickbooks report prepared by his wife showing that, from November 4, 2008, through June 10, 2014, he, through his

[7] Six months later, in December 2006, Dr. LeRoy presented a proposed new lease agreement that was based on the 1999 Lease Agreement. A119 at 135:9-10. Dr. Uthaman did not sign, or even read, the new document, but rather relied on the understanding that they had, based on the 1999 Lease Agreement as orally renewed each year and as supplemented by the 2006 Memorandum. A119 at 133:14-20; A119 at 135:9-136:3 ("I told [said] I think whatever the understanding we have is good enough for us . . . [based on] our mutual respect for each other's words."). Dr. LeRoy evidently felt the same way, as he never asked Dr. Uthaman about the 2006 proposed agreement. A119-120 at 136:15-137:4.

entity, Delaware Pain and Spine Center, invested $52,099.77 to renovate and remodel units 1, 7, and 8 on the Property. A82; A129-131 at 173:13-182:4; A145 ¶¶ 11-12, 15. Over less than six years, these expenditures averaged almost $9,000 a year.[8]

E. The 2013 Agreement of Sale and the Litigation

In early October 2013, Dr. Uthaman learned that Fair Hill had entered into an agreement to sell the Property to a third party ("2013 Sales Agreement"). A38-46; A136-137 at 204:23-205:11. He then met with Mrs. LeRoy and a family member, gave them a copy of the 2006 Memorandum, and informed them that he would like to exercise his right of first refusal. A137 at 205:12-17. Fair Hill refused to honor his right of first refusal. A145-46.

On December 4, 2013, Dr. Uthaman filed a Verified Complaint in the Court of Chancery seeking a declaratory judgment regarding the enforceability of the right of first refusal and asserting a breach of contract claim and a request for specific performance. A12; A48-60. Dr. Uthaman's deposition was taken on July 23, 2014. A85. No other depositions were taken. A2-12. Fair Hill did not offer any evidence from Dr. LeRoy to dispute Dr. Uthaman's recollection regarding the right of first refusal or the 2006 Memorandum. However, in a deposition in

[8] At his deposition, when Dr. Uthaman could not recall in detail the nature and extent of these improvements, Fair Hill reserved the right to take additional discovery relating to them. A129-131 at 175:21-182:17.

another case taken five months after Dr. Uthaman filed this suit,[9] Dr. LeRoy appeared to concede that the 2006 Memorandum gives Dr. Uthaman a right of first refusal. When asked whether there "is a document that says Dr. Uthaman has a right of first refusal to purchase the property," he admitted, "I believe there is. That's been submitted to the attorneys involved." A77.

F. The Trial Court's Ruling

At the close of oral argument on the cross-motions for summary judgment, the trial court announced its ruling from the bench and its reasoning. Ex. A at 51:20-22.[10] The trial court first addressed Count I, which seeks a declaratory judgment regarding the existence of an enforceable contract to a right of first refusal. Ex. A at 52:9-15. As a threshold matter, the trial court ruled that the 1999 discussions between Dr. Uthaman and Dr. LeRoy did not result in a "meeting of the minds" with respect to a right of first refusal, and that there was no consideration at that time, sufficient to establish an enforceable contract. Ex. A at 52:16-53:1.

[9] Dr. LeRoy's deposition took place on April 22, 2014, in *Peters v. Uthaman, et al.*, C.A. No. N13C 11-291 (Del. Super.). *See* Delaware Uniform Rules of Evidence, Rule 202(d)(1)(B) (Judicial notice may be taken of the "records of the court in which the action is pending and of any other court of this State or federal court sitting in or for this State.").

[10] The transcript of the trial court's bench ruling is attached as Exhibit A to this brief. A copy of the transcript of the argument on the cross motions for summary judgment and the trial court's ruling is included in the Appellant's Appendix at A147-207.

The trial court then turned to the 2006 Memorandum. Ex. A at 53:7-8. Setting aside the question of consideration, the trial court addressed "what the parties did or didn't agree to at that time." Ex. A at 53:2-6. In particular, the trial court focused on point (5), where Dr. Uthaman sought "1st consideration if selling," and where Dr. LeRoy responded by writing "= first refusal" and signing his initials. Ex. A at 53:7-14. In finding that these statements did not result in an enforceable contract, the trial court reasoned that Dr. LeRoy's response to Dr. Uthaman's proposal was not an "agreement" to a right of first refusal or to "what the terms of such a right contractually might be." Ex. A at 53:14-21.

While it acknowledged that Dr. LeRoy placed his initials on the document (Ex. A at 53:7-8), the trial court did not address other evidence in the document that pointed to the existence of an enforceable contract. For example, the trial court did not address the fact that Dr. LeRoy also dated the document (even though Dr. Uthaman had already done so) and designated the signed and dated document as a "Memo." A22. The trial court also did not address the purpose of the Memorandum, as indicated by the series of proposals and responses, to reach agreement on terms relating to the parties' long term plan.

The trial court next found that the only other evidence of a contractual agreement to a right of first refusal was "oral evidence," which it stated was "insufficient to sustain a contract for the purchase of real estate unless there is

some exception to the statute of frauds." Ex. A at 53:22-54:2. The trial court did not address documentary evidence such as the 1999 Lease Agreement, which allowed for modifications "in writing" so long as they were "signed by the party against whom enforcement of such modification is sought." A19 ¶ 29. Nor did the trial court address Dr. LeRoy's admission, in a deposition in another case, that he believed that there is a document that says Dr. Uthaman has a right of first refusal to purchase the property – clearly alluding to the 2006 Memorandum. A75-77.

The trial court acknowledged that Fair Hill had never offered any "refutation in the record that such a contract was reached." Ex. A at 54:3-10. However, the trial court incorrectly stated that "there really can't be in this circumstance." Ex. A at 54:9. Dr. LeRoy did not pass away until June 14, 2014, over six months after this case was filed. A5 (docket # 37 (Defendant's Ans. Br. 6 n.1). And as noted above, while this litigation was pending, Dr. LeRoy testified that he believed that there was a document that says that Dr. Uthaman has a right of first refusal. A77.

The trial court then found that Dr. LeRoy and Dr. Uthaman had not reached a meeting of the minds on a term that it deemed essential, that is, a mechanism for determining price. Ex. A at 54:16-55:3. In so finding, the trial court relied on Fair Hill's counsel's cross-examination of Dr. Uthaman at his deposition as to his understanding of how a right of first refusal works. The trial court stated:

> I have read closely Dr. Uthaman's deposition, and I cannot conclude that he and Dr. LeRoy in 2006, or at any other time, had a meeting of

> the minds as to the contractual terms or right of first refusal. It's clear to me that Dr. LeRoy thought of Dr. Uthaman as a mentee, that he thought it was a good idea for him to buy the property, that he would like him to do so. It's clear they discussed it. But when I try to understand what one of the essential terms was, which was the mechanism for price, I am at a loss to see, in reading through the record, what the meeting of the minds was with respect to that term.

Ex. A at 54:16-55:3. In explaining its conclusion, the trial cited examples of Dr. Uthaman's thoughts and feelings at his deposition, and the absence of evidence as to Dr. LeRoy's thoughts and feelings, including, for example, that (i) Dr. Uthaman "*thought at some point* – it's not clear when he gained this insight – that a right of first refusal of itself required one, two, or three appraisers" (Ex A at 55:4-8) (emphasis added); (ii) "nothing in the record showed that "Dr. LeRoy *thought that* or agreed to that" (Ex. A at 55:8-9) (emphasis added); and (iii) "there's nothing that tells me that even Dr. Uthaman *felt that* . . . Dr. LeRoy would be bound to accept that price. He's asked that repeatedly, and he says he doesn't know." Ex. A at 55:10-16 (emphasis added).

The trial court then addressed whether, assuming a contract existed, the statute of frauds would prevent enforcement of it. Ex. A at 55:16-56:7. With respect to the part performance exception, the trial court appeared to give no weight to Dr. Uthaman's testimony that he would have not put over $52,000 worth of improvements into the property "if he hadn't received at the time of the rent increase some affirmative evidence that there was a right of first refusal." Ex. A at

56:1-8. Finding such testimony "self-serving, the trial court stated, "that's not the standard I need to employ." Ex. A at 56:8-9. Instead, the trial court held that "[t]he standard I need to employ is whether the objective evidence of what he did – and I assume for purposes of this argument that he really did put over $50,000 in improvements into the property -- [is] inconsistent with anything other than an agreement to exercise a right of first refusal that had been guaranteed him by contract." Ex. A at 56:8-15.

The trial court then held that the exception failed based on a critical factual error. As the trial court had previously correctly noted, Dr. Uthaman had testified that he would not have put over $52,000 in improvements into the Property if he hadn't received a right of first refusal "at the time of the rent increase" – that is, 2006. Ex. A at 56:1-5. Nevertheless, in assessing the significance of those improvements, the trial court mistakenly judged the significance of Dr. Uthaman's investment based on the assumption that "this right of first refusal arose in 1999." Ex. A at 56:16-18. Using 1999 as the starting point, and apparently calculating a sixteen-year period from 1999 through 2014, the trial court found the investment insignificant because "[w]e're talking about 3 or $4,000 a year to operate a doctor's office." Ex. A at 56:17-19. In fact, the record shows that Dr. Uthaman began to make such improvements in 2008 and has made them over a period of approximately six years – which averages out to a little less than $9,000 per year.

A82. The trial court did not consider that the annual expenditures on improvements were almost twice the amount of the "repair and maintenance" expenses that Fair Hill had incurred for the entire 249 East Main Street property during 1998, the only year in which there is record evidence.[11] The trial court also did not address the combined annual investment that Dr. Uthaman was making, taking into consideration that expenditures on improvements were over and above the approximately $40,000 per year that he incurred after the 2006 Memorandum in connection with the renewal of the lease on unit 1 and the rental of two additional units beginning in 2011.

The trial court also found that the improvements were "consistent with running a doctor's office in a rented facility just as much as they are with the right of first refusal." Ex. A at 56:11-24. While the trial court noted that Dr. Uthaman did not have an absolute right to purchase the Property, the trial court did not consider the inchoate nature of the right that Dr. Uthaman held as confirming the reasonableness of his investment as opposed to a larger investment that one might make in reliance upon an agreement of sale. Instead, the trial court found that the improvements made were "insufficient to give me an assurance that the performance took place in reliance on a contract" for a right of first refusal. Ex. A at 56:24-57:14.

[11] *See* A12.2 (indicating that Fair Hill paid about $4,614.16 for "repair and maintenance" of the 249 East Main Street property in 1998).

In closing, the trial court acknowledged that there was "no doubt that Dr. Uthaman had discussions with Dr. LeRoy and that Dr. LeRoy wanted him to buy the property." Ex. A at 57:20-58:2. However, the trial court concluded that the evidence was not sufficient to find that they had reached an enforceable contract granting Dr. Uthaman a right of first refusal to do so. Ex. A at 58:2-58:8. As such, the trial court denied Dr. Uthaman's motion for summary judgment and granted Fair Hill's, without reaching the issue of specific performance.

ARGUMENT

I. THE 2006 MEMORANDUM GRANTS DR. UTHAMAN AN ENFORCEABLE RIGHT OF FIRST REFUSAL.

A. Question Presented

Did the trial court err in ruling, on a summary judgment record, that the 2006 Memorandum did not grant Dr. Uthaman a right of first refusal to the Property at issue based on a finding that there was no "meeting of the minds" between him and Dr. Leroy as to the mechanism for determining price, even though the 2006 Memorandum provides for a right of "first refusal," which by law requires the price to be determined by a third party offer? Ex. A at 54:16-19.

B. Standard of Review

This Court's review of a grant of summary judgment is *de novo*.[12] Even where, as here, counsel agreed to submit summary judgment cross-motions on a stipulated record (A150-53 at 3:12-5:23), this Court "will remand the case for a new fact-finding process, with leave to enlarge the record" if it finds that the trial court "reached its conclusion by selectively considering the material facts."[13]

This Court also reviews questions of contract interpretation *de novo*. "Delaware law adheres to the objective theory of contracts, *i.e.*, a contract's

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[12] *Seaford Golf and Country Club v. E.I. duPont de Nemours and Co.*, 925 A.2d 1255, 1261 (Del. 2007).

[13] *Id.* at 1256 and n.2, 1262; *see also id.* at 1263-64 (noting that the fact-finding powers of the trial court "although broad, were not limitless, because this case involved a paper record, not live testimony that the trial court was free to accept or reject on credibility grounds").

construction should be that which would be understood by an objective, reasonable third party."[14] When interpreting a contract, this Court "will give priority to the parties' intentions as reflected in the four corners of the agreement," construing the agreement as a whole and giving effect to all its provisions.[15] "Under standard rules of contract interpretation, a court must determine the intent of the parties from the language of the contract."[16]

C. Under Delaware's Objective Theory of Contracts, the 2006 Memorandum Creates an Enforceable Right of First Refusal

In denying Dr. Uthaman's request for a declaratory judgment[17] and in granting Fair Hill's cross-motion for summary judgment, the trial court erroneously held that Dr. Uthaman and Dr. LeRoy did not have a sufficient "meeting of the minds" as to the right of first refusal. Ex. A at 53:7-55:20. In so ruling, the trial court did not give appropriate weight to the objective evidence of agreement in the 2006 Memorandum regarding the right of first refusal. Instead, it relied on the thoughts and feelings expressed by Dr. Uthaman when quizzed by opposing counsel at his deposition about his understanding of that legal term.

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14 *Salamone v. Gorman*, -- A.3d --, 2014 WL 7003889, at *10 (Del. Dec. 9, 2014) (internal citations omitted).

15 *Id.*

16 *Id.*

17 Under 10 *Del. C.* § 6502, "Any person interested under a . . . written contract or other writings constituting a contract . . . may have determined any question or construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder."

Under Delaware law, an agreement for the sale of land is enforceable where the intention of the parties can be determined with "reasonable certainty" from evidence showing the surrounding circumstances and the conduct of the parties.[18] Even if aspects of the agreement are obscure, the agreement will be enforceable if the court is able to ascertain the terms and conditions on which the parties intend to bind themselves.[19] Indeed, an agreement may be enforceable even where some of its terms are left to future determination.[20]

In a right of first refusal, terms that are normally regarded as essential – including price – need not be included in the written agreement because they will be supplied by the third party's offer. "A right of first offer . . . obligates the owner to offer the property to the [right-holder] before offering it to any third party. . . . A right of first refusal is triggered when a seller of an asset subject to such right has agreed to sell the asset to a third-party buyer. The holder of a right of first refusal then has the option to purchase the asset on the same terms as those accepted by the third-party buyer."[21] An agreement to offer a right of first refusal

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18 *Heckman v. Nero*, 1999 WL 182570, at *4 (Del. Ch. Mar. 26, 1999).

19 *Id.*

20 *Id.*

21 *See, e.g., RCM LS II, LLC v. Lincoln Circle Associates, LLC*, 2014 WL 3706618, at *7 (Del. Ch. July 28, 2014) (internal quotations, citations omitted) (applying law of District of Columbia and citing general authorities); *see also Union Oil Co. of California v. Mobil Pipeline Co.*, 2006 WL 3770834, at *13 and n.58 (Del. Ch. Dec. 15, 2006) (discussing right to "match" a third party offer and holding that "[t]he law is clear that when a first refusal right is involved, all

"is not void for failure to specify definite terms and conditions of the acquisition, because they will be supplied by the third person's offer."[22]

In determining whether the 2006 Memorandum includes an enforceable right of first refusal under Delaware's objective theory of contracts, the oft-used phrase, "meeting of the minds," must be properly understood. As one authority has explained:

> In the formation of contracts . . . it was long ago settled that . . . subjective intent is immaterial, so that mutual assent is to be judged only by overt acts and words rather than by the hidden, subjective or secret intention of the parties. During the first half of the nineteenth century, however, there were many expressions which seemed to indicate a contrary rule. Chief among these was the familiar statement, still invoked by many courts today, that a contract requires a "meeting of the minds" of the parties. However, the fundamental basis of contract in the common law is reliance on an outward act (that is, a promise), as may be seen by the early development of the law of consideration as compared with that of mutual assent. . . .As a general principle, the inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract.[23]

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deal terms must be commercially reasonable, imposed in good faith, and not specifically designed to defeat the preemptive right.").

[22] *Brownies Creek Collieries, Inc. v. Asher Coal Mining Co.*, 417 S.W.2d 249, 252 (Ky. 1967); *Steinberg v. Sachs*, 837 So.2d 503, 505 (Fla. Dist. Ct. App. 2003) (reversing grant of summary judgment and noting that the trial court erred as a matter of law in its determination that a right of first refusal was voidable for lack of enforceable terms such as price); *Cf. Bellevue Health & Emergency Clinic, Inc. v. Bert Murphy L.L.C.*, 2002 WL 452185, at *6 (Neb. Ct. App. Mar. 26, 2002) ("A right of first refusal, rather than an option to purchase real estate, is created by an agreement which (1) contains no terms or conditions of sale; (2) fails to indicate that the party interested in purchasing real estate has an absolute right to demand conveyance of the property at any time prior to the owner's decision to sell it; and (3) implements the word "first" to indicate that if the owner decides to sell the real estate, he or she is compelled to offer it first to the other party to the agreement.").

[23] 1 Williston on Contracts § 4:1 (4th ed.).

Under these principles, Dr. LeRoy's express grant of a right of "first refusal"[24] in the 2006 Memorandum conveys to Dr. Uthaman a right to match a bona fide third party offer for the Property and thereby satisfies the requirement of "reasonable certainty" regarding essential terms. By employing a term with legal significance, signing his initials, dating and designating the document as a "Memo," Dr. LeRoy indicated that the parties intended the Memorandum to be, not just a set of notes from an inconclusive discussion, but a document that would confirm and memorialize agreements reached.[25] Any subjective uncertainty on the part of Dr. Uthaman as to how that right would be enforced, including the mechanism for determining price, is irrelevant. Rather, the Court "stand[s] in the shoes of an objectively reasonable third-party observer" and applies the objective meaning of the term right of first refusal.[26] Fair Hill must be held to its contractual obligation to give Dr. Uthaman an opportunity to match a bona fide, commercially reasonable third party offer because "a reasonable person in the same

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[24] The term "first refusal" is synonymous with the fuller term "right of first refusal." *See Walton v. Beale*, 2006 WL 4763946 (Del. Ch. Jan. 30, 2006), at *5 n.72 ("The parties also agreed that they would give Walton *first refusal* if the Beales ever sold the back parcel which included lot 2.") (emphasis added).

[25] A "memorandum" is defined as "an informal written note or record outlining the terms of a transaction or contract." Black's Law Dictionary, at 998 (9th ed. 1999). *See* https://www.google.com/?gws_rd=ssl#q=memorandum+definition (defining "memorandum" as "a note or record made for future use," "a written message, especially in business or diplomacy," and (in the law) "a document recording the terms of a contract or other legal details.").

[26] *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2-3 (Del. Ch. Nov. 8, 2007).

circumstances would have understood that they were taking on such an obligation."[27]

In reaching a contrary conclusion, the trial court erred in two respects. First, the trial court did not offer any reasoning in support of its conclusion that the Memorandum was just notes of a discussion and did not address the facts pointing to an enforceable agreement. For example, the trial court did not give weight to the point-by-point, proposal-response nature of the Memorandum, in which Dr. LeRoy responded, in writing, to each specific proposal by signaling his acceptance or rejection of each proposal. Nor did the trial court address the significance of three specific measures – initialing and dating the document and designating it a "Memo," that Dr. LeRoy took to ensure that the Memorandum would be acknowledged as a binding memorialization of the terms upon which Fair Hill's relationship with Dr. Uthaman would proceed.

Second, the trial court gave too much weight to Fair Hill's counsel's examination of Dr. Uthaman at his deposition on the scope and nature of a right of first refusal. No manner of skilled cross-examination can change the fact that the 2006 Memorandum grants Dr. Uthaman a right of first refusal under the law of Delaware, whether Dr. Uthaman fully understood that right or not. Fair Hill

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[27] *Bell Atl. Meridian Sys. v. Octel Commc'ns Corp.*, 1995 WL 707916, at *6 (Del. Ch. Nov. 28, 1995) (citing *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) (stating that the "true test is ... what a reasonable person in the position of the part[y] would have thought it meant.")).

proves nothing by its ability to confuse a doctor from India with respect to an American legal concept.

Finally, while the trial court did not resolve the issue of consideration, the undisputed record establishes that, in exchange for and following the promises made by Dr. LeRoy in the 2006 Memorandum, Dr. Uthaman provided consideration by agreeing to the monthly rent increase, effective August 2006, that Dr. LeRoy sought. The trial court did not question the sufficiency of the 2006 Memorandum with respect to any other issue or term. Therefore, Dr. Uthaman respectfully requests that the Court reverse the decision of the trial court and remand with directions to issue a declaratory judgment upholding the 2006 Memorandum and the right of first refusal.

II. THE RIGHT OF FIRST REFUSAL IN THE 2006 MEMORANDUM SATISFIES THE STATUTE OF FRAUDS.

A. Questions Presented

Did the trial court err in determining, on a summary judgment record, that the 2006 Memorandum violated the statute of frauds, even though it is a writing, signed by or on behalf of Fair Hill, the party to be charged, that (a) reasonably identifies the subject matter of the contract, (b) indicates that a contract has been made, and (c) states with reasonable certainty the essential terms of the agreement by creating a right of first refusal. Ex. A at 57:15-19. In the alternative, did the trial court err in holding that Dr. Uthaman's improvements to the Property in reliance on the 2006 Memorandum did not warrant enforcement of the right of first refusal to avoid injustice? Ex. A at 55:21-57:19.

B. The Standard of Review

The standards set forth in Argument I.B apply to Argument II as well.

C. The Right of First Refusal Satisfies the Statute of Frauds

Delaware's statute of frauds states in pertinent part that "No action shall be brought to charge any person . . . upon any contract or sale of lands . . . or any interest in or concerning them, . . . unless the contract is reduced to writing, *or some memorandum, or notes thereof, are signed by the party to be charged*

therewith . . . ."[28] A "memorandum" is sufficient "if it is signed by or on behalf of the party to be charged and (a) reasonably identifies the subject matter of the contract, (b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and (c) states with reasonable certainty the essential terms of the unperformed promises in the contract."[29] The primary purpose of the Statute is evidentiary, to require reliable evidence of the existence and terms of the contract and to prevent enforcement through fraud or perjury of contracts never made.[30]

Here, the 2006 Memorandum satisfies each requirement of the statute of frauds. It is a "memorandum," specifically designated as such. It expressly grants the right in dispute, a right of "first refusal." And Dr. LeRoy signed it with his initials as the undisputed agent of Fair Hill, the party to be bound.[31] In addition, the 2006 Memorandum reasonably identifies the subject matter of the contract as

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[28] 6 *Del. C.* § 2714 (emphasis added).

[29] Restatement (Second) of Contracts § 131 (1981). *See ROI, Inc. v. E. I. duPont de Nemours & Co.*, 1989 WL 135717, at *5 (Del. Super. Ct. Oct. 19, 1989) (Walsh, J.) (holding that multiple writings may satisfy the statute of frauds "as long as the writings, collectively considered, (a) reasonably identify the subject matter of the contract, (b) indicate that a contract has been made between the parties or an offer extended by the signing party and (c) state with reasonable certainty the essential terms of the unperformed promises in the contract.") (citing Restatement (Second) of Contracts § 131).

[30] Restatement (Second) of Contracts § 131 cmt. c.

[31] Identification by initials is sufficient to bind the parties to the agreement. *See, e.g.*, *George A. Ohl & Co. v. A.L. Smith Iron Works*, 288 U.S. 170, 176 (1933) (noting that "[s]ignature by initials has been held to be sufficient under the Statute of Frauds and the Statute of Wills, and in other transactions.") (citations omitted); Restatement (Second) of Contracts § 131 cmt. f ("identification may consist of a name or initials").

the "Long Term Plan," which included, as the trial court found, that "Dr. LeRoy wanted [Dr. Uthaman] to buy the property." Ex. A at 57:20-58:2. And as set forth in Argument I, the 2006 Memorandum establishes that a contract was agreed to by Dr. LeRoy and states with reasonable certainty the essential terms necessary to create a right of first refusal to match a third party offer.

In ruling that the Memorandum did not satisfy the statute of frauds, the trial court relied on Dr. Uthaman's uncertainty at his deposition about the mechanism for determining price under a right of first refusal. Ex. A at 54:16-55:3. For the reasons discussed above, this conclusion was erroneous. In addition, the trial court erred in stating that "oral evidence" is "insufficient to sustain a contract for the purchase of real estate unless there is some exception to the statute of frauds" (Ex. A. at 53:22-54:2), at least insofar as it was suggesting that extrinsic evidence may not be considered in an effort to understand a term in a writing. While it relied excessively on oral evidence to conclude that an objective agreement to a right of first refusal was unenforceable, the trial court incorrectly held that oral evidence could not be considered in determining whether the Memorandum complies with the statute of frauds.

Under Delaware law and generally, extrinsic evidence may be considered to shed light on the meaning of terms used in a writing. While parol evidence is inadmissible "to add to, vary or explain a written instrument," courts recognize

"various exceptions under which such evidence can be accepted, for example, to identify persons or things to which plain written terms apply or to interpret doubtful technical terms."[32] As an early case explained, addressing the statute of frauds:

> Parol evidence, to a considerable extent and variety, is admissible in aid of written contracts; but it is admissible only for the purpose of interpreting the meaning of words or expressions used in the writing, and not, in any case, to supply a deficiency of expression. And this restriction would seem to apply more stringently to cases in which the contract, or instrument, is one required by statute to be in writing, than to those which may be good without writing.[33]

For example, courts have considered extrinsic evidence to determine the identification of a property for purposes of the statute of frauds, holding that "by the aid of the facts and circumstances surrounding the parties at the time, the court can with reasonable certainty determine the land which is to be conveyed.[34] Similarly, here, the Court may consider the extrinsic evidence that helps define with reasonable certainty the scope of the right of first refusal.

In sum, the 2006 Memorandum satisfies the requirements of the statute of frauds.

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[32] *Lewis v. Ennis*, 1976 WL 1709, at *2 (Del. Ch. May 19, 1976) (citing *Crockett v. Green*, 3 Del. Ch. 466, 482-83 (1870)).

[33] *Crockett v. Green*, 3 Del. Ch. at 482-83.

[34] 72 Am. Jur. 2d Statute of Frauds § 226 (citations omitted); *see also Coppage v. Equitable Guarantee & Trust Co.*, 102 A. 788, 789 (1917) (holding that extrinsic evidence was properly admitted to identify a lot of land alluded to in a memorandum).

D. The Right Must Be Enforced to Avoid Injustice

Courts have recognized that an oral agreement in violation of the statute of frauds nonetheless may be enforced if necessary to prevent injustice. In particular, courts have identified, as circumstances warranting exceptions to the statute of frauds, situations (i) where the agreement has been partially performed or (ii) where a party has been induced to act by reliance on a promise.[35] Contrary to the ruling of the trial court, the circumstances here, whether viewed as part performance or detrimental reliance, warrant relief from the statute of frauds even if the 2006 Memorandum were deemed not to comply with it.

"[A]ctual part performance of an oral contract is recognized as a substitute for the statute of frauds on the theory that acts of performance constitute substantial evidence of a contract."[36] The acts relied on "upon must be consistent with the existence of the alleged contractual commitment relied upon, and the existence of the term must be established by clear, convincing and satisfactory proof.[37] Dr. Uthaman met these criteria by taking numerous actions in reliance on

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[35] *Taylor v. Jones*, 2002 WL 31926612, at *4 (Del. Ch. Dec. 17, 2002).

[36] *Durand v. Snedeker*, 177 A.2d 649, 651-52 (Del. Ch. 1962).

[37] *Lewis v. Ennis*, 1976 WL 1709, at *2 (Del. Ch. May 19, 1976) (citing *Durand*, 177 A.2d 649). *See also Bielo v. Delaware Wild Lands, Inc.*, 1995 WL 106302, at *5 (Del. Ch. Feb. 8, 1995) (noting that the statute of frauds might, in some circumstances, actually protect fraud, if it prevented enforcement of a contract where one party to an oral land contract had already performed part of the agreement, and holding that the statute of frauds will not bar the recognition of oral contracts for the sale of lands *if the existence* of the oral contract *and its*

the promise of a right of first refusal as confirmed in the 2006 Memorandum. Most significantly, he invested over $52,000 over a course of six years from November 2008 to June 2014, nearly $9,000 per year. A82. By way of comparison, information presented in an effort to sell the property in 1999 showed that Fair Hill had invested only $4,614 during the prior year for repairs on the entire Property. A12.2. As discussed in Section F of the Statement of Facts above, the trial court underestimated by half the significance of Dr. Uthaman's investments in the Property by incorrectly spreading them across a fifteen-year period.

To the extent that assessing detrimental reliance on a right of first refusal under the rubric of "part performance" is problematic (*see* Ex. A at 56:24-57:5), Dr. Uthaman's actions may also be considered under the second exception to the statute of frauds, which applies where a party has been induced to act by reliance on a promise.[38] Under the Restatement (Second) of Contracts, both exceptions are

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partial performance is proven by clear and convincing evidence) (citing *Shepherd v. Mazzetti*, 545 A.2d 621 (Del. 1988) and *Quillen v. Sayers*, 482 A.2d 744, 747 (Del. 1984)).

[38] *See Walton*, 2006 WL 4763946, at *4 (noting that plaintiff took actions to his detriment in reliance on the agreement by paying $20,000 in earnest money and property taxes, and concluding that the equitable estoppel exception to the statute of frauds applied); *Heckman*, 1999 WL 182570 (applying equitable estoppel to avoid the statute of frauds where plaintiff's improvements to the lot he believed he had a contract to purchase, combined with his payment of rent to defendant, supported application of the equitable estoppel exception). Dr. Uthaman argued in the trial court that "the record evidence demonstrates that Uthaman relied on Fair Hill's promise to his detriment," pointing to the same repairs and renovations made in reliance on the right of first refusal in the 2006 Memorandum. *See* Plaintiff's Answering Brief in

treated together under § 139, "Enforcement by Virtue of Action in Reliance."[39] Under either name, LeRoy and Fair Hill reasonably should have expected the 2006 Memorandum with the right of first refusal to induce significant actions on the part of Dr. Uthaman, it did induce such actions, and injustice can be avoided only by enforcement of the right that Dr. LeRoy clearly intended to give him.

Opposition to Defendant's Motion for Summary Judgment, filed August 25, 2014, at p. 20 (A5 at docket # 38).

[39] Restatement (Second) of Contracts § 139 (1981). Section 139 states: "(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires. (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was foreseeable by the promisor."

III. THE RIGHT OF FIRST REFUSAL SHOULD BE ENFORCED BY SPECIFIC PERFORMANCE

A. Question Presented

Should an order of specific performance be issued where, as here, Dr. Uthaman has demonstrated by clear and convincing evidence that he has a valid, enforceable right of first refusal and he is ready, willing, and able to exercise his right under commercially reasonable terms? *See* Ex. A at 51:13-52:15.

B. Standard of Review

The standards set forth in Argument I.B apply to Argument III as well.

C. An Order of Specific Performance Is Warranted

Based on its other rulings, the trial court did not address Dr. Uthaman's request for specific performance. If, for the reasons above, the Court agrees that these rulings were in error, Dr. Uthaman respectfully requests that the Court grant specific performance requiring Fair Hill to honor Dr. Uthaman's right of first refusal.

As the party seeking specific performance of an agreement relating to real estate, Dr. Uthaman bears the burden of proving by clear and convincing evidence that he has "a valid contract [for a right of first refusal] and that he is ready, willing, and able to perform [his] obligations under the contract."[40] In addition, the court must determine whether the balance of equities favors specific

[40] *Walton,* 2006 WL 4763946, at *3 (internal quotation omitted).

performance.[41] Here, Dr. Uthaman has met his burden by demonstrating the existence of an enforceable right, by showing that he ready, willing, and able to exercise his right of first refusal, and in light of the fact that the equities weigh heavily in his favor.

The contract issues have already been addressed above. Dr. Uthaman is ready, willing, and able to match the price offered by the third party, as demonstrated by the fact that he had already obtained significant financing before even learning of the details of the 2013 Sales Agreement, and by the fact that he is has relied on the right of first refusal for so many years and continues to seek to vindicate it. Fair Hill's effort to cast doubt on his willingness to proceed is a red herring. At the time of his deposition, Dr. Uthaman had just learned the proposed purchase price and had had only a few days to review the eight-page fine print Agreement of Sale. A134 at 195:7-196:13. When asked why he wouldn't immediately sign the contract, he testified, "That's why I need my attorney's advice and then we need some days to think." A135 at 198:13-18.[42] No

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41 *Id.*

42 A typical exchange was as follows: "Q . . . I'm asking you if you would sign this contract. We're going to change the name of the buyer to you. Will you sign this contract? . . . I need to discuss with my attorney . . . . Q. Sir I think you're missing the point. I'm going to hand you a contract that's this exact contract in your name though as the buyer, all the same terms and conditions. Will you sign that contract? A. This is what I need, time. This is not as is. Q. So if it was as is, you wouldn't do it? Is there anything in particular about the property that concerns you if it was as is? A. I do not know because we need all the title search information." A135 at 199:4-24.

"commercially reasonable" offer would require a holder of a right of first refusal in real estate to commit under such circumstances. Nor would it be commercially feasible to expect any holder of a right of first refusal to arrange full financing within a few days of learning the details of the offer.

Finally, the equities weigh decidedly in Dr. Uthaman's favor. He has practiced medicine at his current location for fifteen years; his pain management patients are accustomed to receiving treatment there; and he is 65 years old and would like to conclude his practice there. And Fair Hill would be prejudiced in no way by honoring its commitment to Dr. Uthaman. As the trial court has found, Dr. LeRoy wanted Dr. Uthaman to buy the Property. A204 at 57:20-58:2. Dr. LeRoy took multiple steps to confirm the legal effect of the document that granted the right of first refusal by employing that legal term, by designating the document as a "Memo," and by signing and dating it. Dr. Uthaman then made significant financial commitments in reliance upon that Memo, above and beyond his continued and expanded rent payments. No equitable purpose would be served now by permitting Fair Hill to back out of its agreement to grant him a right of first refusal upon its decision to sell the Property.

CONCLUSION

For the reasons set forth above, Dr. Uthaman respectfully requests that the Court (i) reverse the trial court's bench ruling denying his motion for summary judgment and granting Fair Hill's motion and (ii) remand the case to the trial court with directions that it issue an order of specific performance requiring Fair Hill to honor Dr. Uthaman's right of first refusal. In the alternative, should the Court determine that such a directive would not be appropriate at this time, Dr. Uthaman respectfully requests that the Court remand the case with instructions for further proceedings including a trial, so that the trial court will have an opportunity to resolve any factual issues and assess the credibility of the witnesses.

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