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Case Number 14,2017D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GLENN D. SCHMALHOFER,	)	
	)	
Appellant/Defendant Below,	)	No. 14, 2017
	)	Court Below:
v.	)	Chancery Court
	)	State of Delaware
LISA WARD and	)	C. A. No: 11-685 VCL
STEPHEN J. MOTTOLA,	)	
	)	
Appellees/Plaintiffs Below.	)	

CORRECTED DEFENDANT'S OPENING BRIEF ON APPEAL

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INTRODUCTION

This appeal involves the judicially enforced forfeiture of almost **one million dollars** in value from Defendant Glenn Schmalhofer – **over 50% of his investment in Main Street Court, LLC** ("MSC") – and handing it **for free** to Plaintiffs, Lisa Ward and Stephen Mottola. The court below did so, not after a trial on the merits and not following a motion for summary judgment, but rather pursuant to a "Motion to Enforce Settlement Agreement" (the "Enforcement Motion").

The trial court went far beyond simply enforcing the terms of the Settlement Agreement dated March 31, 2016 (the "Settlement Agreement"). Rather, the trial court, by Order dated November 10, 2016 (the "Order"), at the behest of the Plaintiffs, completely stripped Defendant's rights under that Agreement and the limited liability operating agreement of MSC (the "Operating Agreement"), and granted Plaintiffs everything they sought, including the forced sale of Defendant's interest in MSC at the Plaintiffs' preferred value -- **in direct contravention of the specific and unambiguous terms in the Operating Agreement**.

The trial court did so without any testimony, without any authority being granted under any agreement between the parties and without affording Defendant his full due process rights, rights to which he would have been entitled if the matter had been filed as a new action, rather than as a motion in a proceeding which already existed.

Indeed, the trial court treated this matter as if it was a motion for a summary direct contempt of an Order of Court, affording little to no due process rights to Defendant. **Yet, no court Order was violated, and no obligation to the trial court had been breached**. What was before the Court was an alleged breach of contract case, no more and no less significant than the myriad of other such cases that are tried in that court, and the court was obliged to treat the matter in such a fashion.

For whatever reason, it did not do so, and rather than affording Defendant the trial he requested, and to which he was entitled, the trial court: (i) ignored the inexplicable, inconsistent and prejudicial actions of Plaintiffs and their counsel, (ii) rejected Defendant's showing that no provision of the Settlement Agreement had been or could have been breached, (iii) brushed past the fact that in order to have brought the Enforcement Motion, the Settlement Agreement required Plaintiffs to formally give Defendant notice of the alleged breach and an opportunity to cure, a requirement that was not met (iv) refused to accept and consider evidence offered by Defendant, (v) found in favor of Plaintiffs on a limited paper record containing disputed issues of fact and, most egregiously (vi) imposed a draconian forfeiture penalty, without proof of any damages, and which exceeded the bounds authorized in the agreements of the parties.

To do all of this was reversible error.

NATURE AND STAGE OF THE PROCEEDINGS

This matter was originally filed on November 6, 2015 (A0001), and arose from a dispute among the three equal members of MSC, Plaintiffs and Defendant, regarding their investment in MSC, an entity formed to engage in apartment rental business in Newark, Delaware.

On March 31, 2016, the parties executed the Settlement Agreement partially settling their dispute. A0063-72. That Agreement, which was not filed with or entered as an Order of the Court, was not approved by the Court and was not contemplated by the parties to be a Court Order, required that Defendant offer for sale his interest in MSC to Plaintiffs. That was done on April 11, 2016. A0076.

On August 31, 2016, despite having complied with **all** of the obligations he had under the Settlement Agreement, Plaintiffs filed the Enforcement Motion. Although styled as a motion to enforce the Settlement Agreement, that was not the Enforcement Motion's intent, as it was clear from the relief sought therein that it was designed to seek an inequitable result: A windfall for Plaintiffs and a "forfeiture punishment" of Defendant, by stripping Defendant's rights not under the Settlement Agreement, but rather under a wholly separate Operating Agreement that was not part of, or incorporated within, the Settlement Agreement.

There was, of course, **no** provision in either the Settlement Agreement or the Operating Agreement that allowed for such punishment, especially where the

demand requirement under the Settlement Agreement had not been met. Yet, Plaintiffs pressed forward with the punitive and unjustified punishment they sought.

On September 30, 2016, Defendant filed his response to the Motion, and on October 10, 2016, Plaintiffs filed their reply.

On November 7, 2016, a hearing, akin to a Rule to Show Cause hearing on a motion for contempt of a court Order, was held.

On November 10, 2016, the trial court entered its Order finding that Defendant had breached the Operating Agreement (which it determined, without record citation or any substantive evidence so providing, was "incorporated by reference" into the Settlement Agreement) by failing to comply with the appraisal process set forth in the Operating Agreement. Exhibit A hereto. Although **no** recognizable or legally cognizable breach of the Settlement Agreement had occurred, the Order compelled the sale of Defendant's interest in MSC in a manner nowhere found in the Operating Agreement, but which had been sought by Plaintiffs. It fixed that sale to take place within 60 days of the Order **for the amount selected by Plaintiffs' own appraiser** -- a forfeiture of over half of Defendant's interest in MSC, and a windfall of approximately **$1,000,000.00** for the Plaintiffs,

On December 8, 2016, the trial court entered a partial final judgment pursuant to Chancery Court Rule 54(b), incorporating the findings of the original Order (collectively, the "Orders"). Exhibit B hereto.

On January 6, 2017, Defendant filed this timely appeal of the Orders. This is Defendant's opening brief.

SUMMARY OF ARGUMENT

1. The trial court erred as a matter of law in finding Defendant breached the Settlement Agreement. No provision of the Settlement Agreement required the action which Plaintiffs claimed had not been done by Defendant, and the document which Plaintiffs contend was breached, the Operating Agreement, was not incorporated in any manner into the Settlement Agreement. The trial court's conclusion that such document was incorporated by reference is not supported by the language of the Settlement Agreement, and is refuted by the fact that when the parties wanted to incorporate a document into that Agreement, they did so with specific and clear language. Further, the action which serves as the basis for the claim that the Settlement Agreement was breached required a prior written demand, and an opportunity to cure, and neither was afforded to Defendant, and thus the trial court erred in exercising authority over the matter and in concluding that there was a breach of the Settlement Agreement.

2. The trial court erred in granting the punitive forfeiture relief sought as such relief was in contravention of the clear terms of the Settlement Agreement which only permitted that Plaintiffs be compensated monetarily for the actual harm allegedly done to them by a breach of the Settlement Agreement.

3. The trial court erred as a matter of law in granting Plaintiffs' Enforcement Motion without any showing by Plaintiffs that they had suffered any

damages and without any trial on the disputed issue of fact on whether Plaintiffs' had, in fact, suffered any damages, or about whether the relief sought by the Plaintiffs was contemplated, permitted or appropriate under the agreements of the parties or the circumstances then existing. Such failure to grant a trial violated Defendant's protected property interests in his interest in MSC and resulted in an unpermitted windfall for Plaintiffs.

4. Plaintiffs' own conduct, which undermined their own arguments to the trial court and which directly impeded Defendant's ability to start his appraisal process, were of such a nature and kind as to require the denial of the relief sought, and the trial court's conclusion that Defendant's assertion of such conduct was a "pretext" is not supported by the record, and suggests, if anything, that a disputed issue of fact exists, precluding the finding made by the trial court on a paper record.

STATEMENT OF FACTS

MSC is a Delaware limited liability company created on March 26, 2007 by its three members, Schmalhofer and Ward, who were the Managing Members, and Mottola, pursuant the Operating Agreement for purpose of purchasing and investing in real estate (A0033-61), which they did by purchasing the residential apartment and commercial complex located at 236 East Delaware Avenue, Newark, Delaware 19711. A0105.

A. Background.

From its creation until approximately mid-2012, the three members largely acted in harmony and in furtherance of their joint endeavor. A0529. By October, 2012, things had changed.

From approximately October, 2012 through October, 2013, Plaintiff Ward, a Managing Member of MSC, effectively abandoned and materially breached her duties and obligations contained in the Operating Agreement and her obligations in managing the business and affairs of the company's residential and commercial rental business. A0529.[1] She also removed the work computers from the MSC office and never returned them or provided access to the information contained

[1]While her wrongful actions were inexplicable at the time, the reasons she abandoned her fiduciary and contractual obligations became clear nearly a year later when she admitted to Defendant and others that she had been abusing and had become addicted to illegal drugs. A0529.

therein. A0530. Plaintiff Ward's actions created a nearly insurmountable obstacle to running the business as the missing computers contained not only nearly all of MSC's financial information, but also all of the critical information regarding tenant payments, balances and security deposits. A0530. In short, Plaintiff Ward left MSC bereft of any functioning management oversight, and without the very tools necessary to carry on the ongoing business of the company.

B. Defendant Creates the Value Plaintiffs' Now Seek to take from him.

Plaintiff Ward's actions began to take its toll on MSC. To avoid the economic catastrophe that was ready to overwhelm MSC and its members, Defendant was forced to scramble and bear the burden of managing MSC himself, a burden not foreseen or expected when the parties entered into the Operating Agreement. A0530. Defendant moved aside his other and very time consuming business interests, assumed the roles forsaken by Plaintiff Ward, pieced together the business' critical financial information that Plaintiff Ward had failed to return, and undertook to manage the day-to-day business of MSC. A0530.

Despite the complete loss of essential and statutorily mandated operating information which would have doomed most other businesses in the rental industry, Defendant was able to locate and/or recreate enough management and business information which allowed MSC to stay afloat until Defendant was able to put into

place and operate commercially acceptable rental management practices that stabilized MSC's business operations. A 0530-31.

Defendant's actions saved the property from bank foreclosure, and his efforts ensured that the business became extremely profitable. A0531. That success was evidenced by the Unanimous Written Consent of the Members and Managers of the Company dated February 19, 2016 (the "Resolution") in which all Members of MSC agreed to **evenly disburse $90,000.00**, an appreciable percentage of MSC's reserves, to the Members. A0072-74.

C. Plaintiffs' "Thank" Defendant for his Efforts in Saving MSC with this Lawsuit.

Despite Defendant's very successful stewardship of MSC, and in spite of the fact that no actions were taken against Plaintiff Ward for her beaches of fiduciary and contractual obligations, on November 6, 2015, Plaintiffs filed the action below seeking a declaratory judgment, dissolution of MSC and damages arising from allegations that **Defendant, not Plaintiff Ward,** misappropriated funds and breached MSC's Operating Agreement. A0001.

On December 8, 2015, Defendant answered the Complaint and vehemently denied the allegations brought against him. A0003. A hearing on Plaintiffs' motion for the appointment of a Receiver *pendente lite* was scheduled for April 5, 2016. A0005.

Just prior to that hearing, the parties were able to reach a mutually agreeable resolution regarding the management of MSC as well as several other outstanding issues. This agreement was memorialized in the Settlement Agreement. A0063-A0071. That Settlement Agreement required Defendant to serve written notice of his intent to sell his interest in MSC. A0064.

As required, on April 11, 2016, Defendant did in fact serve such written notice on Plaintiffs via the signed document entitled "Offer of Sale of Ownership Interest." A0076. **Upon offering his interest in MSC for sale, Defendant had fulfilled his obligations under the Settlement Agreement.** No further provisions of that Agreement were applicable following the making of the required Offer. A0063-0071. At that point, if any disputes arose under the Operating Agreement, the parties were left to pursue their rights and remedies under that Agreement.

D. Plaintiffs' Post-Execution Inequitable Attempt to Engraft the Operating Agreement into the Settlement Agreement.

On April 15, 2016, Plaintiffs accepted Defendant's offer to sell his interest in writing, which contained a proposed "fair market value" of MSC of $9,000,000. A0078-79. This offer, **which ultimately was $3.3 million less than what Defendant's appraiser valued MSC at**, was rejected by Defendant, thereby triggering the appraisal process as laid out in the Operating Agreement. A0106. Pursuant to Article 11.6(b)(iii) of the Operating Agreement, on April 22, 2016, Plaintiffs designated their appraiser, Jay White. A0200-01.

Curiously, even though the Settlement Agreement no longer was applicable to the sale process, and it was only the Operating Agreement that had specific provisions requiring certain action to be taken after an offer for sale had been made, on April 27, 2016, Plaintiffs sent a letter, claiming to be authorized under Section D, Paragraph 1 of the Settlement Agreement, providing Defendant ten (10) days to cure an alleged breach of the Settlement Agreement. A0081-82.[2] According to Plaintiffs, in order to cure Defendant's alleged breach, the letter specifically required him to "pick his own appraiser so that the parties' appraiser can pick a third appraiser pursuant to Section 11.6 of the Agreement." A0082. Nowhere in that demand does it request or require Defendant to "retain" such appraiser. A0081-82.[3]

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[2] As set forth *infra*, Plaintiffs failed to identify the specific provision of the Settlement Agreement Defendant allegedly breached in their April 27, 2016 notice to cure. Rather, Plaintiffs identified several provisions of the Operating Agreement Defendant allegedly had breached. The demand failed to identify how such alleged breaches of the Operating Agreement constituted breaches of the clear terms of the Settlement Agreement.

[3]That no retention at the time of designation was required is evident from the actual demand made for Defendant to only "pick" his appraiser. Moreover, that there was no obligation, contractual or otherwise, to "retain" an appraiser at the time of designation was confirmed by the actions of these Plaintiffs themselves. Plaintiffs did not "retain" White **until May 24, 2016, a month after their own designation** and immediately prior to Plaintiffs obtaining the required information to allow White to start his appraisal process. *See* A0201.

Conveniently, and inequitably, Plaintiffs changed their position on this when they filed the Enforcement Motion to argue Defendant had an obligation to "retain" Nickel rather than simply "designate" him as his appraiser, as is only required by the clear language of the Operating Agreement. Apparently, in the rush to seek to gain

Notwithstanding the fact that the Settlement Agreement was inapplicable, wishing to comply with the terms of the Operating Agreement and without conceding that the Settlement Agreement was applicable, on May 6, 2016, within the 10-day period demanded by Plaintiffs, Defendant did just as Plaintiffs asked, and as Plaintiffs themselves had done just days earlier – Defendant "designated" his appraiser. A0084. Pursuant to Section 11.6(b)(iii) of the Operating Agreement, and within the ten (10) day period to cure, Defendant, through counsel, notified Plaintiffs that he had picked, and would be using Doug Nickel of Integra Realty Resources as his independent appraiser. A0084.

Counsel for Defendant also asked that the appraisers **pick** the third appraiser that was required under the Section 11.6 of the Operating Agreement. A0084. That step, rather than the creation of separate appraisals, was the next step in the valuation process under the Operating Agreement (A0051; Section 11.6(b)(iii)("the designated appraisers shall jointly appoint a third appraiser.")), but even though Defendant requested it, that appointment did not happen. A0458-61.[4]

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some undue advantage over Defendant, they neglected to remember that they themselves had not even done so when they "designated" White as their appraiser **more than a month before formally retaining him**.

[4] If any breach of the Operating Agreement occurred here, it was the failure of both parties' designated appraisers to "appoint" another. Such a motion on that failure would not have allowed Plaintiffs to bring about the punitive result they sought in Enforcement Motion and explains why such breach was never brought to the attention of the Court by Plaintiffs.

Nonetheless, while Defendant had "picked" his appraiser as required by the Operating Agreement, not the Settlement Agreement, and as specifically requested in the April 27th letter, Nickel informed Defendant that he was unable to start the appraisal, let alone complete it, without the required information which was in the custody of Plaintiffs and/or the third-party manager put in place as a result of the Resolution. A0178. Obviously, having such critical financial information was required for anyone seeking to undertake an appraisal of the value of MSC, including Plaintiffs' appraiser White, who was not "retained" by Plaintiffs until his access to such information had been assured.[5]

E. Counsel for Plaintiffs Denies Access to the Information Needed to Start the Appraisal Process.

Unfortunately, and contrary to the understandings of the parties, in April, 2016, Defendant's access to the management software Buildium was revoked, and he was prevented from accessing the information needed to be provided to his designated appraiser. A0108; A0474-75. As a result, from the day he designated Nickel as his appraiser forward, Defendant's access to information to allow Nickel

[5] Defendant, at the time the appraisers were picked, had no access to MSC's financials due to his access to Buildium being revoked, and the locks being changed to the premises without Defendant being provided a new key. A0108; A-0474-75.

to undertake the appraisal was completely dependent upon Plaintiffs providing such information to him. A0084; A165-178; A0191.

On or about May 25, 2016, Plaintiff Ward, who alone among the parties had direct access to both Buildium and MSC, created an electronic drop box to allow the parties to centrally access documents to be used in the appraisal process. A0201. On May 25, 2016, Plaintiff Ward invited via email Plaintiff Mottola, Jay White and Plaintiffs' counsel, Phillip Giordano, Esquire and Emmanuel Fournaris, Esquire. A0247. Allegedly Defendant was sent an invite to the drop box (A), but Defendant never received that invite. A0171.[6]

The need for Defendant to have such information was critical, and Plaintiffs and their counsel knew this. The very next day, on May 26, 2016, counsel for Defendant sent an email to Plaintiffs' counsel requesting the information Plaintiffs' appraiser would be using so that such information could be forwarded to Nickel to start his appraisal process. A0165. Despite counsel's having receiving access to that drop box the day before (A0247), and despite knowing that he had himself had all

[6] Despite repeatedly being told by counsel for Defendant that Defendant did not have access, Plaintiffs' counsel, who himself had received the invite, and thus knew about the fact that Defendant allegedly received an invite, **never** informed counsel for Defendant that Defendant was allegedly sent an invitation to the drop box. A0084; A0165-78; A0191-93. As **confirmed** by the multiple emails between counsel for Defendant and Plaintiffs' counsel, **Defendant never received such invitation**. Counsel for Plaintiffs was explicitly informed of this fact, but still failed to provide the requested access. A0171.

of the information counsel for Defendant was asking for, he did not provide it to Defendant or his counsel. Yet, assurances that it would be made available were made. A0109; A0191-93.

Because the promise made was not kept and he did not receive what he requested and his client needed, counsel for Defendant continued to pursue the information for Defendant and his appraiser. Thus, on May 31, 2016, counsel for Defendant sent another email to Plaintiffs' counsel informing him that Defendant neither had the required information, nor had access to the electronic drop box. A0171. Counsel for Defendant wrote opposing counsel that: **"I've not gotten access to the drop box and to my knowledge, [Defendant] hasn't."** *Id.* (emphasis added). Again, although assurances of its forthcoming were offered, neither such information, nor access, was provided to Defendant or his counsel. Indeed, Plaintiffs' counsel did not explain why he just did not provide access when he was acutely aware this was now an issue, **and where he himself had the required access that was not being provided by his clients**.[7]

[7] Counsel for Defendant did not know then that Plaintiffs' counsel had direct access to the drop box. Incredibly, this information came to light only after Plaintiffs' submitted information in an Affidavit in support of the Reply to the Enforcement Motion. A0219. There, the documentation relied on by Plaintiffs confirmed that Plaintiffs' counsel had the necessary information to allow an appraisal of MSC, **from the outset,** yet, inexplicably, and contrary to the clear intent of the parties, failed to provide it, or access to it, to Defendant, or his counsel. A0247.

Two weeks later, on June 15, 2016, counsel for Defendant once again sent an email to Plaintiffs' counsel informing him that neither Defendant nor Nickel had received the requested information. A0175. Again, Plaintiffs neither provided the information or access to the drop box. *Id.*

Finally, less than two weeks later, on June 27, 2016, counsel for Defendant once again sent another email to counsel for Plaintiffs informing him that Nickel still could not do anything until he had the required information to start the appraisal process, information to which counsel for Plaintiffs himself had immediate access **for more than a month**. A0178. No access was given, and no information was provided. *Id.*

Over the course of four (4) weeks, counsel for Defendant made it explicitly clear to Plaintiffs' counsel that neither he, nor Defendant, had the information needed to undertake an appraisal, MSC financial information (i) which counsel for Plaintiffs readily acknowledged should have been provided, (ii) which was solely in the possession and custody of Plaintiffs (iii) which Plaintiffs' own appraiser, White, had then had access to for over four weeks and (iv) which counsel for Plaintiffs himself had direct access.

Incredibly, given what has transpired here, counsel for Plaintiffs **never** informed Defendant's counsel that he believed access to the drop box had already been sent to Defendant. Had he even bothered to offer that, Defendant's counsel

could have, at minimum, confirmed to him that such invitation had not actually been received. The failure of Plaintiffs' counsel to provide access, while actually having access and knowing access is required, is what it looks like: A denial of access, and, in and of itself, a standalone breach of the Operating Agreement.

F. Having Set Up Defendant by Denying Him the Requested Information Needed by his Appraiser to Undertake the Appraisal, Plaintiffs' Counsel Files the Enforcement Motion.

Framed appropriately against this back drop of counsel for Plaintiffs' denial of access to the documents needed to undertake an appraisal, it is a little more than ironic that counsel for Plaintiffs was making his own request concerning Defendant's appraiser, a request that made no sense given that the documents needed by Defendant's appraiser were being denied by him. Thus, while denying Defendant the critical information he was seeking for his appraiser to start his work, counsel for Plaintiffs began to ask that Defendant formally "retain" Nickel. A0165-78.

Given that Plaintiffs did not formally retain their own appraiser until May 24, 2016 (A0201), when access to the critical financial information had been assured, it seems, in retrospect, that such a newly minted request in light of the denial of the information was nothing more than an attempt to deflect the obligation that Plaintiffs' counsel had to provide the documents that such appraiser needed to undertake his work.

Then, on August 11, 2016, counsel for Plaintiffs, forwarded a copy of White's appraisal to Defendant's counsel. That appraisal, which valued MSC at approximately $9.85 million, **or approximately three million less than Defendant ultimately valued it**, was sent approximately three (3) months after Plaintiffs agreed to purchase Defendant's interest in MSC, and (2) two months after Plaintiffs received the same information which was still being sought by Defendant and which he had still not received. A0094.

On August 23, 2016, despite still not receiving any of the required information to perform the appraisal, and after relying upon Plaintiffs' assertions that Defendant would be given access to it, Defendant "retained" Nickel. A0578-85.[8] Counsel for Plaintiffs was so informed. A0586. Nevertheless, the denial of access to the critical information continued, and the ongoing breach of the terms of the Operating Agreement by Plaintiffs for failing to provide Defendant with that information remained.

[8] It is important to note that, as counsel for Defendant informed Plaintiff several times, the appraisal process which Plaintiffs wished to take place prior to appointing the third-party appraiser could not begin **until** Defendant or Nickel received the requested information, or, at minimum, were allowed access to the electronic drop box. A0168-79; A0191-93. Nonetheless, Nickle was retained to perform a review of Plaintiffs' appraisal in order to try to keep the matter moving forward by performing a review of Plaintiffs' appraisal which did not require any additional information.

Incredibly, rather than provide counsel for Defendant the information requested repeatedly beginning in May 2016 or to give counsel the same access that counsel for Plaintiffs already had, on August 31, 2016, a full week after Nickel was formally retained, Plaintiffs filed the Enforcement Motion. A0011.

In that Motion, Plaintiffs failed to cite to any provision of the Settlement Agreement which Defendant breached. Rather, Plaintiffs cited to provisions of the Operating Agreement. A0021-23. Moreover, Plaintiffs' requested forfeiture relief is found nowhere in the Settlement Agreement, Resolution or Operating Agreement, and Plaintiffs failed to allege any actual harm caused by Defendant's alleged breach of the Settlement Agreement. Nor could they. It is undisputed that the valuation date set by the Operating Agreement was March 31, 2016,[9] and, therefore, no harm could exist even if the allegations contained in the Motion were found to be true, as it was Defendant, not Plaintiffs, who would be harmed by any delay in obtaining a final resolution on the value of his interest in MSC.

G. Defendant Finally Receives the Information Plaintiffs had Exclusive Access and Control of for More than Four Months.

On September 8, 2016, after Nickel's review of Plaintiffs' appraisal resulted in what Nickel believed, in his professional opinion, to be a likely undervaluation of

[9] As a result of Defendant's serving his offer to sell, pursuant to Article 11.6(b)(i) of the Operating Agreement, the date of valuation of Defendant's interest in MSC was fixed. The valuation date was set at March 31, 2016. A0050.

the fair market value of MSC, and despite still not receiving the required information from Plaintiffs or White, Defendant signed a retainer agreement with Nickel to conduct an independent appraisal. A0180-87.

On September 30, 2016, Defendant filed his timely response to the Enforcement Motion opposing the relief requested therein. A0104-90. Not surprisingly, access to the information needed to conduct the independent appraisal was given on the day of the filing of Defendant's response, a response which exposed Plaintiffs' denials of access to that information. A0249.

Upon gaining access to the drop box, Defendant immediately provided such information to Nickel who was finally able to start his appraisal process.

Thereafter, On October 10, 2016, Plaintiffs filed their reply, which, for the first time, introduced affidavits of White and Plaintiff Ward regarding various alleged highly disputed facts leading up to the filing of the Motion. A0199-434. Given the affidavits were contained in the reply, Defendant was not afforded the opportunity to respond.[10]

[10] Defendant had no opportunity to respond to the allegations contained therein, submit his own affidavit, or otherwise contest the facts contained in them. Indeed, counsel's submission of such affidavits in Plaintiffs' reply, which should have been submitted with the original Motion, played a critical role in the denial of Defendant's due process rights at the subsequent hearing. Indeed, as Defendant noted in its Response to the Motion, Defendant contacted Plaintiffs' appraiser, White, with permission from counsel, regarding the drop box information. In contradiction to the affidavits and previous communications from counsel for Plaintiffs, White indicated that he in fact did not possess the information. A0116. Such statement, if

Within two (2) weeks of receiving the information which had been requested for months, on October 11, 2016, Nickel performed an onsite inspection of MSC, and within approximately 30 days from receiving the information, on October 31, 2016, completed his appraisal and report which was provided to counsel for Plaintiffs on November 1, 2016, nearly a week before the scheduled hearing on Plaintiffs' Motion. A0539-40. Nickel's appraisal of $12.3 million was substantially higher than Whites' valuation of $9.85 million resulting in a roughly **1-million-dollar discrepancy** in the payout amount which would have to be paid to Defendant under the terms of the Operating Agreement.

H. Defendant is Denied his Due Process Rights

On November 7, 2016, a hearing was held on Plaintiffs' Enforcement Motion. Rather than a trial on the merits of whether the contract, the Settlement Agreement, had been breached, a hearing akin to a motion for direct summary contempt of an Order of the Court was held. During this hearing, **no evidence was permitted to be introduced and no testimony was allowed to be taken**. A0436-500.[11] Indeed, no

Defendant would have had the opportunity to respond to Plaintiffs' Reply, would have certainly bolstered his argument.

[11]At that hearing, counsel for Defendant attempted to introduce an additional exhibit supporting his position and in opposition to the affidavits filed in Plaintiffs' reply. A0471. However, such exhibit was not permitted to be introduced, despite the affidavits being presented for the first time in Plaintiffs' reply to the Enforcement Motion.

evidence of any damages, or, for that matter, argument by counsel for Plaintiffs identifying any damages suffered by Plaintiffs' due to the alleged breach was offered.

On November 10, 2016, without a trial as to what, if any, damages Plaintiffs may have suffered or were entitled to, the trial court entered the Order in favor of Plaintiffs and awarded Plaintiffs all of the punitive relief they were seeking resulting in an approximate **$1 million penalty** to Defendant. Exhibit A. The Order further directed closing on Defendant's interest in MSC to take place within 60 days. *Id*. None of that relief was provided for in any agreement between the parties, and none was authorized by any agreement.

Thereafter, a partial final judgment was entered pursuant to Chancery Court Rule 54(b) on December 8, 2016 which incorporated the original Order. A0573-77. This timely appeal was subsequently filed.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING DEFENDANT HAD BREACHED THE SETTLEMENT AGREEMENT.

A. Question Presented

Did the trial court err in finding that Defendant breached the Settlement Agreement when such Agreement clearly and unambiguously does not require Defendant to perform the obligation which Defendant was found to have breached. A0110-12; A0453-54.

B. Standard of Review

On appeal, this Court reviews the trial court's decisions on contract interpretation *de novo*. *In re Viking Pump, Inc.*, 148 A.3d 633, 644 (Del. 2016).

C. Merits of the Argument

a. The Settlement Agreement was inapplicable to any alleged breach asserted by Plaintiffs.

What is before this court, in part, is the simple question of whether Defendant in fact breached the Settlement Agreement entered into among the parties? The only answer is **no**. **There was no breach of the Settlement Agreement**, and, therefore, the trial court erred as a matter of law in finding to the contrary.

The Settlement Agreement is clear and unambiguous. A comparison of the claims made by Plaintiffs with the Settlement Agreement confirms that there is not

one provision of that Agreement which was either breached by Defendant, or that Plaintiffs allege was breached by Defendant.

The only obligation which is contained in the Settlement Agreement which could have possibly have any relation to this matter is contained in Paragraph 4, which states: "In accordance with the Resolution, [Defendant] will present an offer to Plaintiffs to sell his interest in the Company within 10 days of the execution of this Agreement." A0064. This obligation has undisputedly, and admittedly, been met. A0021; A0076. Immediately upon satisfying his obligations under that provision of the Settlement Agreement, Defendant had no further obligations under it, and that provision became inapplicable and expired. Therefore, with this provision satisfied, there are no other provisions in the Settlement Agreement that are even remotely applicable to the matters before this Court.

Rather than allege that Defendant breached a specific provision of the Settlement Agreement, the very agreement which formed the sole basis for Plaintiffs' Enforcement Motion, Plaintiffs attempted to bootstrap an alleged violation of the Operating Agreement, into a breach of a non-existent obligation under the Settlement Agreement.[12] Indeed, Plaintiffs acknowledge in their own

[12] Plaintiffs expressly sought, and were ultimately awarded, attorney's fees and costs in filing and bringing the Enforcement Motion. Exhibit A, p. 10. Such relief cannot be awarded for a breach of the Operating Agreement as no such fee shifting provision exists therein. A0033-61. However, because a provision for fees was part of the Settlement Agreement (A0066), Plaintiffs conveniently alleged a breach of

motion that Defendant did not breach the Settlement Agreement, but rather, that he allegedly breached the Operating Agreement. A0027-31. Not surprisingly, nowhere below did Plaintiffs argue or suggest **how** an alleged violation of the Operating Agreement resulted in a breach of the Settlement Agreement. The best they could assert was to conclude, without explanation, that "[Defendant] is in breach of the Operating Agreement and, thus, the Settlement Agreement." A0029. Such *ipse dixit* simply cannot support any claim of a breach, where no single provision of the Agreement requires Defendant to undertake the action that Plaintiffs demanded of him.

Incredibly, the trial court concluded, without explanation, without citation to any portion of the record, and without any evidence to support its assertion, that the terms of the Operating Agreement "are incorporated by reference into the Settlement Agreement." Exhibit A, p. 9. Yet, **no** provision in the Settlement Agreement incorporates the Operating Agreement, by reference or otherwise, and no reading of the Settlement Agreement would alert anyone, let alone a party, that the Operating Agreement in its entirety had been made a part of the Settlement Agreement.

Here, there need not be and cannot be any divining of the intent of the meaning of the Settlement Agreement. That document is clear. Neither the Operating

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the Settlement Agreement doubtlessly in order to attempt to gain leverage over Defendant.

Agreement, nor the obligations thereunder were incorporated by reference into the Settlement Agreement. When the terms of a contract, as they do here, "establish **the parties' common meaning** so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language" the terms themselves are controlling.[13] Here, the expectations of the parties cannot be inconsistent with what was agreed to by them, and since the Agreement is clearly silent concerning the parties' obligations under the Operating Agreement, the actual terms of the Settlement Agreement can lead to only one conclusion: the terms of the Operating Agreement are not incorporated therein.

Further, even though no extrinsic evidence can be used to controvert an unambiguous contract, it was noteworthy that no testimony or other evidence was offered to the trial court that the parties intended the Operating Agreement to be incorporated into the Settlement Agreement. In fact, there is no evidence anywhere in the record that the Operating Agreement, or any portion thereof, was incorporated into the Settlement Agreement.

The Settlement Agreement was carefully drafted by counsel for both parties, the very same counsel on this appeal, to contain very specific duties and obligations. *See* A0063-71. If the parties wanted to have incorporated, wholesale, the Operating

[13] *Eagle Indus. v. DeVilbiss Health Care,* 702 A.2d 1228, 1232 (1997) (Emphasis added).

Agreement in to the Settlement Agreement, they could have done so, simply by saying so, and if they wanted to have incorporated the Buy/Sell provisions of Article XI of that Agreement, and make them part of the Defendant's sale obligations under the Settlement Agreement, they could have incorporated the obligations of that Article into Paragraph 4 into the Settlement Agreement. They did neither.

In fact, the parties to the Settlement Agreement knew how to incorporate a document into that Agreement, and did so incorporating the Resolution, by attaching it to the Settlement Agreement as "Exhibit A" and stating that it "is incorporated in the Agreement." A0063.[14] The fact that the parties did not include any incorporating language concerning the Operating Agreement and did not include it as an exhibit, can only lead to the conclusion that the plain meaning of the Settlement Agreement means what it says, or in this case, what it doesn't say, and thus neither the Operating Agreement nor its provisions are incorporated into the Settlement Agreement.

The trial court's conclusion in interpreting the Settlement Agreement as including the provisions of the Operating Agreement and thereby concluding that Defendant's alleged breach of the Operating Agreement breached the Settlement Agreement was in error. The Orders must be reversed, and the matter remanded to the trial court.

[14] It is a little more than ironic that the same parties did the exact same thing in drafting the December 8 Order, "incorporating by reference" the Order. Exhibit B, p. 2. ¶1.

b. Defendant Complied with his Obligations Under the Settlement Agreement.

Assuming, without conceding, that a breach of the Operating Agreement could somehow be incorporated into a breach of the Settlement Agreement, there was no breach that could be adjudicated by the trial court because the condition precedents to the right to seek a judicial review of the alleged breach of the Settlement Agreement were not met.

According to Plaintiffs, the breach of the Settlement Agreement was not that Defendant failed to designate his appraiser, a fact that they admit he did, but that Defendant did not "retain" him. A0029. However, because Plaintiffs failed to make the pre-suit demand regarding this alleged breach by Defendant and provide him with the opportunity to cure as required by the Settlement Agreement, the trial court had no authority to have considered the Enforcement Motion, and the Orders of the trial court must be reversed and remanded.

As Plaintiffs well knew, a breach of the Settlement Agreement required a formal notice and an opportunity to cure. That Plaintiffs understood that such was the process was confirmed when they made a demand under Section D, Paragraph 1 of the Settlement Agreement in connection with their request that Defendant "pick" his appraiser. A0081-82.

That section of the Settlement Agreement could not be any clearer. No right to bring suit arises, absent compliance with the pre-conditions to suit.

As set forth in the Settlement Agreement:

> In the event of a breach or threatened breach of any of the provisions of this Agreement, the non-breaching Party(ies) shall provide a written demand to cure the breach and provide 10 days for the breaching Party(ies) to cure such breach.

A0066., Settlement Agreement, Section D, Paragraph 1.

There was no written demand made and no opportunity to cure concerning the alleged breach of the Settlement Agreement concerning the failure to "retain" Defendant's appraiser, and none was offered in Plaintiffs' papers or at the hearing. Therefore, Plaintiffs had no right to bring the Enforcement Motion, and had no standing to pursue it, and thus there can be no breach of the Settlement Agreement.

Plaintiffs, no doubt, will assert as they did below that their original demand to "pick" an appraiser is sufficient to encompass the obligation to "retain" such an appraiser. A0207-09. Yet, the only demand they made, and the act that they asked Defendant to undertake, was to "pick" an appraiser. A0081-82. (Request that Defendant "pick his own appraiser so that the parties' appraiser can pick a third appraiser pursuant to Section 11.6 of the Agreement."). Defendant did as he was asked (A0084), and any post-demand attempt to reconstruct the actual wording of their demand must be rejected. Words, of course, must be given their plain meaning.[15] If the Plaintiffs wanted the appraiser "retained," they could have asked

[15] *Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 738 (Del. 2005).

for it, and since they did not, they are now precluded from arguing that they intended more than what they asked for from Defendant.

In any event, that the word "pick" never was intended to cover "retain" is clear from Plaintiffs' own actions. When Plaintiffs "picked" their own appraiser, they did not retain him. Indeed, they did not retain him until a month after picking him, on May 24, 2016 (A0201), just at the same time they obtained access to the documents that were needed to complete the appraisal, the same documents that were then being denied to Defendant's appraiser. Thus, not only does "pick" mean what it plainly says, and what Defendant thought it meant, it had the same meaning Plaintiffs' themselves ascribed to it, prior to making this motion and apparently forgetting that they hadn't "retained" their appraiser when they "picked" him.[16]

The court below found Defendant's conduct was contrary to the language of the Operating Agreement, yet, the trial court ignored the fact that its authority to adjudicate the dispute between the parties arose only if Defendant did not do what was asked of him in the demand. Because Defendant "picked" his appraiser, as

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[16]The trial court never bothered to consider that Plaintiffs acted in an identical manner as Defendant. Exhibit A, p. 4. Indeed, Plaintiffs did just as Defendant had done, "designate" their appraiser, consistent with the parties' reading of the language contained in the Operating Agreement. A0200-01. By their own admission, Plaintiffs did not retain their appraiser until May 24, 2016 – an act inconsistent with their later attempts to create an obligation that Defendant "retain" Nickel to cure the alleged violation, an obligation the trial court found as the breach of the Settlement Agreement. A0201; A0509.

asked, there was no basis for the court's intervention, absent a failure of the Defendant to do what was asked of him, a failure that did not exist here.

The law is clear as to the effect of the unambiguous language – it is controlling.[17] As Defendant complied with the very clear and controlling language of the Plaintiffs' request designating Nickel on May 6, 2016, the violation which Plaintiffs sought to rectify was cured. Plaintiffs cannot after-the-fact, after already setting forth their own consistent reading of the relevant language of the Operating Agreement, argue Defendant had some other duty, a duty not expressed in the April 27, 2016 notice.

The trial court's failure to focus on what the actual demand made on Defendant was, but rather on what it believed the Operating Agreement provided, was in error. Because no written demand was made that Defendant "retain" his appraiser, and no opportunity for him to cure the alleged "breach" of the Settlement Agreement was provided, the trial court had no authority to adjudicate the Enforcement Motion, and the Orders granting Plaintiffs relief thereunder must be reversed.

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[17] *Eagle Indus*, at 1232.

II. THE TRIAL COURT ERRED IN AWARDING THE RELIEF SOUGHT BY PLAINTIFFS

A. Question Presented

Where the Settlement Agreement provides for a limited scope of relief which may be awarded for a breach of such agreement, is it reversible error for the trial court to award relief beyond that authorized by that agreement. A0477-79.

B. Standard of Review

Decisions of the trial court interpreting contracts are reviewed *de novo*. *In re Viking Pump, Inc.*, 148 A.3d at 644.

C. Merits of the Argument

Assuming that this Court could even conclude that the word "pick" encompassed "retain," such that the original written demand and opportunity to cure were somehow sufficient to meet the pre-conditions to suit of the Settlement Agreement, Plaintiffs are not entitled to the relief which they sought and which was awarded by the Court.

The parties, in their Settlement Agreement, were quite specific about the scope of remedies that would be available for a breach of the Settlement Agreement. As set forth in the Agreement itself:

> Should the breach not be cured within the 10 day period, the non-breaching Party(ies) shall have the right to seek monetary damages for such breach and equitable relief.

A0066, Settlement Agreement, Section D, Paragraph 1. Thus, actual monetary damages arising out of that breach, and equitable relief relating to that uncured breach are the only forms of relief available under the Settlement Agreement.

However, by the time of the filing of the Enforcement Motion, the need for equitable relief was mooted because Defendant had already "retained" his appraiser on August 23, 2016 (A0578-85), and, therefore, requests for equitable relief, including those of specific performance or a mandatory injunction to force Defendant to retain the appraiser, were mooted.

Thus, at the time of the filing of the Enforcement Motion, the **only** relief that Plaintiffs had available to them under the Settlement Agreement was the right to seek their actual damages arising from Defendant's alleged breach. Yet, **no** damages, actual or otherwise, were alleged by Plaintiffs, and **no** evidence of damages sustained were offered in Plaintiffs' papers (A0019-99; A0199-433) or at the hearing. A0436-500. Having failed to offer any evidence of the damages that they had sustained, Plaintiffs were not entitled to any damages.

Notwithstanding clear restriction on remedies that are available for a breach of the Settlement Agreement, the Plaintiffs sought more, much more, than they could otherwise achieve under the terms of that Agreement. In fact, what Plaintiffs sought was an entire abrogation of Defendant's rights thereunder, and under the Operating Agreement, by seeking a forfeiture of Defendant's rights to have an independent

third-party appraiser determine the value of his interest in MSC and requiring that he accept Plaintiffs' inordinately low valuation number. Nowhere can such a punitive penalty, a forfeiture punishment which the law abhors,[18] be read into the Settlement Agreement.

Yet, the trial court ignored the clear language of the Settlement Agreement, the agreed to restrictions on the rights of these Plaintiffs, and, in contravention of the clear terms of the Agreement which the Plaintiffs' assert applies to this alleged breach, awarded the forfeiture relief which punished Plaintiffs, rather than compensated Plaintiffs monetarily for the actual harm allegedly done to them by the alleged breach of the Settlement Agreement. Because the limitations on the scope of the relief are clear and unambiguous, the trial court is bound to accept, and must be limited to, the restrictions on relief set by the parties.[19]

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[18] *Merrill Lynch Pierce Fenner & Smith, Inc. v. North European Oil Royalty Trust*, 490 A.2d 558, 563 (Del. 1985).

[19] *See ABRY Partners V. L.P. v. F&W Acquisition, LLC*, 891 A. 2d. 1032 (Del. Ch. 2006). The limitation to actual, proven damages is clear, and the trial court erred in granting damages which punished Defendant, rather than compensated Plaintiffs for the harm done to them from the breach. Indeed, the outrageous relief awarded here is akin to punishment inflicted in a finding of a contempt of Court, an act which was not before the Court.

Although Defendant believes that there is no ambiguity which would suggest that Plaintiffs were entitled to damages which punished him, rather than compensated Plaintiffs for whatever harm befell them, to the extent that the Settlement Agreement is ambiguous on this point, then the matter must be remanded to the trial court for a

Because the trial court's Order granted relief beyond that permitted by the agreement of the parties, the trial court committed legal error. The Order Must be reversed and remanded.

trial to determine whether such damages were contemplated by the parties to the Agreement.

III. THE TRIAL COURT ERRED AS IT DENIED DUE PROCESS RIGHTS TO DEFENDANT BY FAILING TO HOLD A TRIAL REGARDING DAMAGES SUFFERED BY PLAINTIFFS.

A. Question Presented

Whether the trial court violated Defendant's due process rights under the Fourteenth Amendment of the United States' Constitution by failing to hold a trial to resolve the dispute of fact as to whether Plaintiffs suffered any damages. A0478.

B. Standard of Review

Denials of a constitutional right are reviewed by this Court *de novo*.[20]

C. Merits of the Argument

This matter arose on a motion to enforce the Settlement Agreement, which, in reality, did not seek to enforce it, but rather sought to punish Defendant based on Plaintiffs' position that Defendant had allegedly violated it. Indeed, rather than seek an order directing Defendant to carry out the responsibilities under the Operating Agreement the Plaintiffs' contend were not being followed, the Plaintiffs sought to divest Defendant of his rights thereunder. A0030-31. Indeed, no specific enforcement of the terms of the Agreement was sought. *Id.*

It is that punishment aspect of the Plaintiffs' application which apparently colored the trial court's view of the matter, and rather than scheduling this breach of

[20]*Taylor v. State*, 28 A.3d 339, 404 (Del. 2011).

contract matter for a trial, or setting it down to be treated as a motion for summary judgment, the trial court treated it for all intents and purposes as if it were a motion for contempt of an Order of the court. Yet, no such Order had been violated, and the Settlement Agreement was nothing other than a new agreement among the parties executed following the filing of this matter that should have been treated by the trial court as such.[21] It was not, and it is against that background, that the court's failure to hold a trial must be considered.

As a matter of contract, the Operating Agreement gave Defendant an unequivocal protected property interest in his shares of MSC. Plaintiffs failed to offer any argument that they had been harmed by the alleged breach. Indeed, the transcript of the November 7, 2016 hearing is devoid of any argument, let alone evidence, that Plaintiffs were harmed in any manner.[22] The trial court failed to conduct a trial, or otherwise solicit any evidence regarding actual damages suffered by Plaintiffs from the alleged breach, and issued its Order resulting in forfeiture of

[21] The Court should note that the Settlement Agreement was not entered as an order of the court, nor was it filed of record with the trial court. As such, it was not before the court until the Enforcement Motion put it there, and, in actuality, any application about the Agreement should have first been part of a supplemental and amended pleading in the Court. Court of Chancery Rule 15 (a).

[22] The reason no harm was alleged was because no harm existed. The valuation date of MSC was set as March 31, 2016. A0050. Moreover, a third-party manager was put in place to preserve the status quo. Any delay attributable to Defendant, rather than to Plaintiffs' failure to provide him with the requested and required information, in no way harmed Plaintiffs.

approximately **$1 million dollars in value**, a benefit to which Defendant was contractually entitled to under the Operating Agreement.

Without any showing by Plaintiffs that they had suffered any damages, without any provision in any agreement among the parties which eschewed Defendant's right to a trial on the damages allegedly sustained by Plaintiffs, without granting any trial on the vigorously disputed issue of fact about whether Plaintiffs had, in fact, suffered any damages, and without any determination on whether the punitive relief sought by the Plaintiffs was contemplated, permitted or appropriate under the circumstances or the terms of the Operating Agreement, the trial court granted Plaintiffs the entire relief they sought, set the purchase price of Defendant's interest in MSC, in contravention of the clear terms of the Operating Agreement, as the appraised value set by Plaintiffs' appraiser, and directed the closing on such sale to occur within 60 days from the date of the Order.[23]

The trial court, at the hearing and in its Order, never addressed Defendant's request for a trial on damages, [24] so Defendant is at a loss to understand why such

[23]Defendant believes that his right to due process has been violated. Because this matter was decided on a paper record, it could be determined that because there was a disputed issue of material fact on the issue of damages, the court's determination here, akin to a grant of summary judgment, could not have been made because of those disputed issues of material fact. *See* Court of Chancery Rule 56. Under either scenario, the end result is the same: A trial on damages was required.

[24] During the November 7, 2016 hearing, counsel for Defendant explicitly requested trial be held on the issue of damages given no evidence or argument on the part of

request was denied. The trial court also never addressed why Defendant should be punished for his alleged breach of the Settlement Agreement, rather than whether damages would or should have been a more appropriate remedy. The failure of the trial court to make either findings are reversible errors, in and of themselves.

Notwithstanding the trial court's failure to make the requisite findings, Defendant had a protectible property right interest in his investment in MSC.[25] The Fourteenth Amendment's procedural rights for protection of property safeguards Defendant's property interest, and the trial court's Order forcing a forfeiture of half of the value of Defendant's interest in MSC, in light of contested issues of fact regarding Plaintiffs' damages and the Plaintiffs' alleged right to the relief it was seeking, necessitated the implementation of procedural due process protections.[26] Such due process would have been satisfied by the holding of a trial,[27] but none was held. That failure, in light of the Constitutional obligation to do so, was reversible error. The Order must be reversed and remanded.

Plaintiffs had been presented. A478. That request was denied upon the Order being entered.

[25] *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972).

[26] *Roth*, at 576.

[27] *Lujan v. G & G Fire Sprinkler*, 532 U.S. 189, 197 (2001) (finding a trial on the merits satisfied procedural due process regarding a dispute about the contractual right to a debt); *See also Greenberg v. Thomas Edison Charter Sch.*, 2011 Del. C.P. WL 6210632 (Nov. 21, 2011).

IV. THE TRIAL COURT ERRED IN NOT FINDING PLAINTIFFS' COURSE OF CONDUCT A BAR TO THE RELIEF THEY WERE SEEKING

A. Question Presented

Whether the trial court erred by failing to deny the requested relief based on the unclean hands conduct of both Plaintiffs and their counsel. A0112-16.

B. Standard of Review

This Court reviews mixed issues of law and fact *de novo*.[28]

C. Merits of the Argument

The trial court erred as it failed acknowledge Plaintiffs' own actions and "breaches" of the very same provisions of the Operating Agreement they sought to enforce against Defendant.

Plaintiffs' argued below that Defendant had an obligation to "retain" his appraiser at the time that he "picked" him to cure the alleged violation of the Settlement Agreement. A0029. However, they themselves did not retain their own appraiser until more than a month after "designating" him. A0201. Plaintiffs cannot argue Defendant was required to "retain" his appraiser to cure the alleged violation, and, at the same time, demonstrate by their own conduct that the clear language of the Operating Agreement required no such thing. Plaintiffs' conduct within the

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[28] *Zirn v. VLI Corp*., 681 A.2d 1050, 1055 (1996).

litigation itself is nothing short of inexcusable, and their inconsistent position – on the very issue that they seek to hold Defendant accountable – is the very definition of bad faith, and should have led the trial court to preclude any relief under the Enforcement Motion. The court's failure to acknowledge these acts of the Plaintiffs, and to have denied them the relief requested was reversible error.

Moreover, and more significantly for this matter is the trial court's absolute reliance on the timing elements contained in the Operating Agreement in finding a substantive breach of the Settlement Agreement by Defendant. The alleged breach that the trial court found was that Defendant had not "retained" his appraiser within the 30-day period contemplated by the Operating Agreement which, according to the court, expired on April 30, 2016. Exhibit A, p.7. It was that alleged breach, that the trial court concluded was a breach of the Settlement Agreement which gave rise to the right of Plaintiffs to be awarded the forfeiture penalty. *Id.*

Yet, the trial court ignored the very clear fact that Plaintiffs themselves did not actually retain their appraiser **until May 24, 2016** (A0201) -- more than a month after designating him, more than three (3) weeks after the parties' appraisers were supposed to designate a third appraiser (A0051) and, most significantly, well after the expiration of the identical time frame in which the trial court found that Defendant had to have "retained" his appraiser and which the trial court held was Defendant's breach of the Settlement Agreement!

Defendant did exactly as Plaintiffs had done and requested to be done, yet, the trial court ignored such inconsistent facts, finding Defendant was the only party to be penalized for not "retaining" his appraiser within the time frame contemplated by the Operating Agreement, when neither party had done so. The end result of this myopic focus is that Plaintiffs have been awarded a windfall, and Defendant has been forced to forfeit over half his value in MSC, despite the fact that both parties acted in an identical manner relating to the very timing the trial court found to have been a breach of the Settlement Agreement.

Here, it is quite evident that these acts of Plaintiffs alone preclude the relief being sought by them, as the doctrine of unclean hands which provides a shield from "problematic misdeeds" of a litigant in any given case.[29] Plaintiffs conduct here, precludes them from having the court consider their claims, regardless of their merit.[30] The trial court's singular focus on Defendant's conduct, **to the exclusion of Plaintiffs' own identical conduct**, was error, and must be reversed.

Lastly, the trial court erred by not giving appropriate consideration to Plaintiffs' and their counsel's failure to comply with the intention of the parties and the assertions they made – intentions and assertions which Defendant reasonably and

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[29] *In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205, 237 (Del. Ch. 2014).

[30] *Id.*

appropriately relied upon. Despite multiple requests and assurances that information would be provided to Defendant and/or his counsel, **it was not**. Rather than provide the information, a very simple process, Plaintiffs moved forward with their own appraisal, which itself was not completed until weeks later, ignoring Defendant's predicament and setting him up for the very Motion they subsequently brought.

Indeed, Plaintiffs **knew** Defendant did not have the information to start his appraisal when they filed the Motion. Plaintiffs knew White was supposed to provide such information to Defendants, and yet, did not, Plaintiffs knew Defendant did not receive the email invitation, the invitation neither Plaintiffs nor their counsel even informed Defendant, or his counsel, had been sent, and most significantly, knew that Defendant's appraiser could not start the appraisal until he received the financial information, information in the sole possession of Plaintiffs' and their counsel.

The trial court, based on a paper record, with no testimony, and in the face of a disputed record which showed that Defendant had, in fact, been removed from access to the requested documents and had no access to it, concluded that Defendant had that access, and that the claims of Plaintiffs' denial of access were a "pretext" for his alleged breach. A0508. Such a finding, on a disputed paper record in a hearing akin to a contempt proceeding, where no contempt was being adjudicated, in error, and the court's Orders must be reversed and remanded.

Respectfully submitted,

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