



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MIRTECH, INC.,)	
)	
Plaintiff/Appellant,)	C.A. No. 627,2018
)	
v.)	CASE BELOW:
)	
DECCO U.S. POST HARVEST, INC.,)	COURT OF CHANCERY
)	OF THE STATE OF DELAWARE,
)	C.A. No. 2018-0100-JTL
Defendant/Appellees.)	

**APPELLEE DECCO U.S. POST HARVEST, INC.'S
ANSWERING BRIEF**

OF COUNSEL:

John M. Williamson
Rajeev Gupta
Karthik Kumar
FINNEGAN, HENDERSON,
FARABOW, GARRET & DUNNER,
LLP
901 New York Avenue, NW
Washington, DC 20001
(202) 408-4000

Brock E. Czeschin (#3938)
Angela Lam (#6431)
RICHARDS, LAYTON & FINGER,
P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700
*Attorneys for Appellee Decco U.S. Post-
Harvest, Inc.*

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NATURE OF PROCEEDINGS

This appeal arises from the Court of Chancery’s entry of an order judicially dissolving Essentiv LLC (“Essentiv” or the “Company”). In April 2016, Essentiv was formed as a joint venture between Appellee/Petitioner-Below Decco U.S. Post-Harvest, Inc. (“Decco”) and Appellant/Respondent-Below MirTech, Inc. (“MirTech”). As set forth in its limited liability company agreement (the “LLC Agreement”), Essentiv’s purpose was to use technology licensed from MirTech (the “Licensed Technology”) to develop and commercialize products related to 1-Methylcyclopropene (“1-MCP”), a gas used to inhibit the ripening of fruits and other produce (the “1-MCP Business”).

However, only fourteen months after forming Essentiv, the United States District Court for the District of Delaware ruled that—contrary to MirTech’s representations and warranties—MirTech did not actually own all of the patents included within the Licensed Technology. Instead, the District Court found that key aspects of that technology were actually owned by Decco’s competitor, AgroFresh, Inc. (“AgroFresh”). Not long thereafter, MirTech entered into a Settlement Agreement with AgroFresh and agreed to entry of a Final Consent Judgment in the District Court action, in which MirTech agreed to assign additional intellectual property rights to AgroFresh (including other patents included in the Licensed Technology), admitted all of the allegations in AgroFresh’s complaint, and

stipulated to judgment against it and its principal (Dr. Nazir Mir) on numerous claims, including fraud, willful patent infringement, and misappropriation of trade secrets.

As a result of these events, Essentiv's purpose of developing and commercializing products based on MirTech's "Licensed Technology" was completely frustrated, as MirTech actually had no rights to license the technology to the joint venture. Indeed, as the Court of Chancery properly found, "it is not reasonably practicable for [Essentiv] to carry on its business given that MirTech has agreed that it does not own the intellectual property rights the Company was created to commercialize."¹ Opinion at 1.

Nonetheless, in this appeal, MirTech argues that the Court of Chancery erred in ordering judicial dissolution. MirTech's arguments are scattershot and confusing but appear to distill down to the following: (1) although Essentiv's existing 1-MCP Business was frustrated, the Company could have created new 1-MCP products based on different technologies; (2) the parties had allegedly agreed to pursue certain non-1-MCP technologies as part of the joint venture, which were not affected by the AgroFresh litigation; and (3) the Court of Chancery lacked jurisdiction over the matter because the LLC Agreement contains a "Resolving Deadlocks" provision that

¹ The Court of Chancery's Memorandum Opinion dated November 28, 2018 is referred to herein as the "Opinion."

calls for mediation of any deadlock prior to filing suit. Each of these arguments is without merit, and was properly rejected by the Court of Chancery.

As to the first argument, MirTech appears to acknowledge that *all* of the patents rights making up the Licensed Technology were assigned to AgroFresh, but argues that MirTech retained purported “know-how” and “trade secrets” that would enable it and Essentiv to engage in the 1-MCP Business using new technologies. This argument is factually wrong. The Final Consent Judgment that MirTech agreed to in the District Court action (in which MirTech admitted to twenty counts of wrongdoing) covers MirTech’s purported know-how and trade secrets related to 1-MCP. Moreover, it was never the parties’ agreement that the Company would conduct the 1-MCP Business based on new technologies. Rather, the parties agreed that the 1-MCP Business would be based on the technologies identified in the LLC Agreement, including, most importantly, the technologies underlying specific patents and patent applications. All of those patent rights are now owned by AgroFresh.

MirTech’s second argument is also flawed. While the LLC Agreement contemplates that the parties could subsequently agree to expand their joint venture to include non-1-MCP products, the evidence at trial overwhelmingly established that no such agreement was ever reached. Indeed, the Court of Chancery properly found that Dr. Mir’s self-serving testimony that the parties had agreed to pursue non-

1-MCP technologies was unsupported and, even if accepted, failed to evidence a binding agreement.

The Court of Chancery also properly rejected MirTech's argument that the court lacked jurisdiction as a result of the "Resolving Deadlocks" provision of the LLC Agreement. Decco never claimed the existence of any deadlock between the managers or members of Essentiv, but instead sought dissolution on the grounds that the business had become impracticable as a result of the loss of its rights to the Licensed Technology. And it was on this basis that the Court of Chancery ordered judicial dissolution. Thus, the deadlock resolution provision is simply irrelevant. In addition, the Court of Chancery correctly found that MirTech had waived this argument as MirTech did not raise it until five months into the expedited litigation.

MirTech's remaining assertions concern procedural issues unrelated to the order of judicial dissolution and/or are based upon evidence and arguments that were never presented to the Court of Chancery. Therefore, these arguments are improper and do not support reversal of the trial court.

* * *

For these and other reasons explained below, MirTech's appeal should be rejected and the decision of the Court of Chancery should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly determined that the “Resolving Deadlocks” provision of the LLC Agreement was inapplicable as Decco was not seeking dissolution on the basis of any alleged deadlock and, in any event, MirTech waived this argument by not raising it until five months into the expedited litigation.

2. Denied. The Court of Chancery properly concluded that Essentiv’s 1-MCP Business was no longer reasonably practicable as a result of the Final Consent Judgment in the District Court action, in which MirTech: (i) agreed that AgroFresh was the owner of the Licensed Technology; (ii) agreed with all of AgroFresh’s allegations in the complaint in the District Court action; and (iii) consented to judgment against MirTech and Dr. Mir on twenty counts of wrongdoing, including fraud, unfair competition, willful patent infringement, and misappropriation of trade secrets.

3. Denied. The Court of Chancery applied the correct standard for determining whether judicial dissolution was appropriate, as set forth in 6 *Del. C.* § 18-802 (“Section 18-802”). Specifically, the trial court correctly found that it is no longer “reasonably practicable” for the Company to carry out its business in accordance with the LLC Agreement. Opinion at 1.

4. Denied. The Court of Chancery did not conclude that “the sole purpose of Essentiv was to develop, manufacture and sell one 1-MCP Product.” To the contrary, the trial court properly found that the Company’s 1-MCP Business (including potential future products) was no longer reasonably practicable as the Company had no rights to the technology that was to form the basis of that business.

5. Denied. MirTech failed to show at trial any “malicious intent” or “unclean hands” on the part of Decco in seeking dissolution. Moreover, MirTech’s arguments on these points appear to be largely based upon allegations that were never presented to the trial court and, therefore, are improper on this appeal.

STATEMENT OF FACTS

I. DECCO AND MIRTECH AGREE TO FORM A JOINT VENTURE FOR THE PURPOSE OF COMMERCIALIZING PRODUCTS BASED ON MIRTECH'S 1-MCP TECHNOLOGY.

A. The Parties' Initial Discussions and Letter of Intent.

In October 2014, Dr. Mir and a representative of Decco met during the Produce Marketing Association conference in Anaheim, California. A88 (73:2-7). As a result of this brief meeting, Dr. Mir understood that Decco had “wanted to get into the 1-MCP market” and subsequently met with Decco to explore that opportunity. A88 (73:11-14). This led to the execution of a confidentiality agreement and further discussions between the parties concerning how they might work together on 1-MCP products. Opinion at 4; A22-23 (7:16-8:3).

At the time of these discussions, Decco knew that MirTech had earlier partnered with AgroFresh to develop a 1-MCP technology that was marked under the tradename “RipeLock.” A23 (8:9-14). Decco, however, did not have access to any of MirTech’s agreements with AgroFresh, and was assured by Dr. Mir that those agreements only restricted MirTech from working with others on technology involving 1-MCP used in combination with modified atmosphere packaging. A24 (8:15-9:5); A28-29 (13:21-14:11).

On November 30, 2014, Decco and MirTech executed a Letter of Intent, focused on certain specific 1-MCP technologies. A89 (74:10-15); A182-85. The Letter of Intent contemplated that the parties’ relationship would progress through

three phases. A182-83. In Phase I, MirTech was responsible for prosecuting the MirTech patent applications and continuing R&D regarding potential commercial applications. A182. Decco was responsible for obtaining a written legal opinion concerning the “Right to Practice” the MirTech technology, and assessing potential product registrations.² *See id.* In Phase II, MirTech would continue its R&D work, while Decco would support and coordinate required registration studies for potential products based on the technology. *See id.* Finally, in “Phase III Commercialization of the Technology,” Decco and MirTech would form and each own 50% of “NewCo,” which would thereafter be responsible for commercializing the 1-MCP product. A183. Significantly, the Letter of Intent provides that “MirTech will grant exclusive license to NewCo to use its patents related to 1-MCP technologies,” including “exclusive rights to practice US 8822382 and US 8802140 [Patents], its child applications and Provisional Patent Application 62077867.” A184.

² In a single cryptic sentence in its brief, MirTech appears to assert that Decco relied upon this “Right to Practice” analysis by its counsel, and not MirTech’s representations and warranties concerning ownership of the Licensed Technology. Appellant’s Opening Brief (“Op. Br.”) at 11. This assertion is incorrect. The right to practice analysis involved a study of MirTech’s technology, and whether that technology infringed upon patents issued to third parties. A25 (10:16-20), A54 (39:12-22). The analysis did not include a review of MirTech’s agreements with AgroFresh, which the trial court found were never shared with Decco. Opinion at 4.

B. The Formation of Essentiv and Its Governing Documents.

After forming Essentiv on April 19, 2016, the parties entered into the LLC Agreement of Essentiv LLC on June 30, 2016. A145-81 (“LLC Agreement”). Decco and MirTech are the sole members of Essentiv, each with a 50% interest, and jointly manage the Company through a Management Committee. A152-53 (§ 9). The Management Committee is composed of two members: Dr. Mir on behalf of MirTech and Francois Girin, the CEO of Decco, on Decco’s behalf. *Id.* The LLC Agreement states: “The affirmative vote, approval, or consent of both Managers will be required to make decisions regarding the business and affairs of the Company.” A152 (§ 9.3).

1. Essentiv’s Principal Purpose Is To Develop And Commercialize Products Based On The Licensed Technology.

As with the parties’ earlier discussions, the focus of the LLC Agreement was the commercialization of 1-MCP products based on MirTech’s purported proprietary technology. Indeed, the first sentence of Section 3.1 of the LLC Agreement provides:

Intention. The Intention of the Members in forming the Company is to conduct and coordinate all activities related to chemistry and biology R&D, collaboration with universities and government researchers, regulatory support and registration filings, manufacturing, supply chain activities, strategic marketing and marketing communications related to 1-MCP Products (the “1-MCP Business”).

A145 (§ 3.1). With regard to this business, Decco would be responsible “for all sales-related activities,” providing specified financing, and providing administrative services. A145-46 (§ 3.1). On the other hand, MirTech was required to provide an exclusive license to the “Licensed Technology” and certain related consulting services. *Id.* The “Licensed Technology,” as defined in the LLC Agreement, related solely to MirTech’s purposed 1-MCP technology. A170.

Consistent with Dr. Mir’s prior representations concerning the limitations under his agreements with AgroFresh, Section 3.1 of the LLC Agreement notes that the 1-MCP Business shall not include the “MirTech Excluded Business,” which was defined as “technology and business related to flexible packaging for, or in combination with, 1-MCP or relating to microwavable cooking or both.” A146 (§ 3.1). This described the RipeLock technology that MirTech had developed with AgroFresh.

Finally, in the penultimate sentence of Section 3.1, the LLC Agreement notes that Essentiv may also potentially be used as the vehicle for the development and commercialization of new technologies unrelated to 1-MCP (the “Non-1-MCP Business”), but only pursuant to the express conditions and procedures set forth in Section 6 thereof (discussed in detail below). *Id.*

2. The Potential Non-1-MCP Business.

Although Decco and MirTech entered into the joint venture with the express purpose of developing the 1-MCP Business, the parties included in the LLC Agreement a process by which, should a viable opportunity arise, the Company could engage in Non-1-MCP Business activities. Specifically, Section 6.1 of the LLC Agreement states, in relevant part,

Decco and MirTech intend for the Company to be the vehicle for commercialization of new technologies that are not 1-MCP Products developed by MirTech from time to time. MirTech therefore agrees that except for the MirTech Excluded Business, before granting to any other person or entity rights to license, distribute, commercialize, or otherwise use such technology for revenue-generating purposes, MirTech will first provide a written notice to Decco containing a description of the technology that is sufficiently detailed to allow Decco at its own expense to evaluate the new technology's commercial potential including freedom to operate and potential for registration. *Decco shall have 60 days to give notice to MirTech that it wishes to pursue commercialization of the new technology within the Company. . . . If Decco timely provides such notice, then Decco and MirTech shall negotiate in good faith for one hundred and twenty (120) days to establish terms of commercializing such technology.* If a definitive agreement is not entered into between MirTech and Decco during such one hundred and twenty (120) day period, then MirTech and Dr. Mir shall be free to contract with one or more third parties to license or otherwise commercialize the new technology.

A150 (§ 6.1) (emphasis added).

As Dr. Mir acknowledged at trial, Section 6 provides Decco with a “right of first refusal” with regard to the commercialization of new technologies developed by MirTech. A93 (78:2-18). Whether to exercise that right of first refusal is entirely

in the discretion of Decco. *Id.* Moreover, a non-1-MCP technology may only become part of the Company's business if the parties follow the express terms of Section 6, including the negotiation of definitive agreements within 120 days. A150 (§ 6.1). As Mr. Girin testified at trial, the parties have never engaged in any of these steps and never agreed to pursue any non-1-MCP technologies through the joint venture. A30-32 (15:8-16:3, 16:20-17:9). Moreover, Mr. Girin stated that Decco was willing to give up its right of first refusal in the future, as it no longer has any interest in working with Dr. Mir or MirTech. A32-33 (17:10-18:8); A51 (36:2-5).

3. The Other Joint Venture Documents.

The LLC Agreement provides that on the closing date the parties were to execute several other agreements, referred to therein as the "Joint Venture Documents." A146-49 (§ 4). The Joint Venture Documents include three agreements that were executed and delivered by Decco: (1) the Distribution Agreement; (2) the Services Agreement; and (3) the Credit Agreement. As well as three documents that were executed and delivered by MirTech: (1) the License Agreement; (2) the Assignment Documents; and (3) the Consulting Agreement. *Id.* Section 4.1 of the LLC Agreement also required the delivery of an "Agreed Operating Budget projecting the first five years of operations of the Company," which was attached to the LLC Agreement as Exhibit 4.1(d). A147; A178-80. Significantly, all of the revenues shown on the Operating Budget for the Company's

first five years of operation were to be generated by “NT-7815 MOF MCP,” which is a reference to the “TruPick” 1-MCP technology developed with MirTech. A178-80.

All of the foregoing documents, together with the LLC Agreement, represent the entirety of the parties’ contractual agreement with respect to the Company and its intended purpose.

a. The License Agreement

Pursuant to the License Agreement, MirTech was to provide the Company with an exclusive license to the Licensed Technology. A147-48 (§ 4.2); *see also* A192-205 (“License Agreement”). The License Agreement echoed the intent of the parties to utilize the Licensed Technology to develop and commercialize 1-MCP Products. The License Agreement provides that “MirTech desires to grant and the Company desires to acquire an exclusive license to the Licensed Technology (defined below) for use in the development and sale of 1-MCP Products, to engage in the 1-MCP Business.” A192. The License Agreement refers to the same patents and patent applications that comprise the “Licensed Technology” as defined in the LLC Agreement. *Id.*

In the License Agreement, MirTech represents and warrants that (aside from certain rights that the United States government may have) “MirTech is the sole owner of the entire right, title, and interest in and to the Licensed Technology and in

any Patents and Patent Applications relating to the Licensed Technology.” A197 (§ 6.1). MirTech further represents and warrants that it has “the right and power to grant the licenses granted herein” and “there are no other agreements with any other party in conflict with such grant” of licenses. A197 (§§ 6.1-6.2). Underscoring the importance of these representations and warranties to the joint venture, the LLC Agreement further provides that “[a]ll representations and warranties of MirTech made in the License Agreement are hereby incorporated herein by this reference” and “MirTech acknowledges that Decco is relying on the representations and warranties contained in the License Agreement in entering into this [LLC] Agreement.” A161-62 (§ 19.1).

b. The Distribution Agreement

In the Supply and Distribution Agreement, the Company appoints Decco as its exclusive worldwide distributor of 1-MCP Products. B1 (“Distribution Agreement”) (§ 1). In return, Decco agrees to purchase 1-MCP Products solely from the Company and the Company agrees to provide such products. B1-2 (§ 2). As with the License Agreement, the Distribution Agreement is expressly limited to the contemplated 1-MCP Business. *Id.*

c. The Consulting Agreement

The Consulting Agreement, which was entered into among MirTech, Dr. Mir, and Essentiv, further reflects that the parties were focused on the 1-MCP Business

at the time the Company was formed. Indeed, the recitals at the outset of the Consulting Agreement refer exclusively to the 1-MCP Business and MirTech's 1-MCP related technology. A206 ("Consulting Agreement"). In addition, Section 1 of the Consulting Agreement sets forth the "Services" that MirTech and Dr. Mir are to provide the Company. Those Services are delineated in a set of six bullet points, the first five of which refer to the 1-MCP Business. *Id.* § 1.1; *see also* A99-100 (84:21-85:8). The last bullet point refers to "[s]uch other projects as may be assigned by the Company and accepted by MirTech," including potentially the development of "new technologies." A206 (§ 1.1). Dr. Mir testified that this bullet point relates to technologies that may become part of Essentiv's business as result of Section 6 of the LLC Agreement, concerning the potential Non-1-MCP Business. B197-98 (Mir Deposition Transcript) (178:20-179:9); A100-01 (Trial Transcript) (85:14-86:16).

C. Essentiv Enters The 1-MCP Market.

In the summer of 2016, Essentiv began to sell TruPick, its sole registered product, for use with apples. A106 (91:1-3). TruPick combines 1-MCP with MirTech's metal organic framework ("MOF") technology, thereby providing a means of delivering the 1-MCP gas to the fruit. TruPick is the only product that Essentiv has ever developed, marketed, or sold. A106 (91:4-6).

II. AGROFRESH CLAIMS THAT MIRTECH'S JOINT VENTURE WITH DECCO VIOLATES ITS RIGHTS.

On August 3, 2016, AgroFresh, a Decco competitor in the post-harvest marketplace, filed a lawsuit in the District Court, styled *AgroFresh, Inc. v. MirTech, Inc.*, C.A. No. 1:16-cv-00662-SLR (D. Del. 2016). AgroFresh's amended complaint alleged 23 counts against Dr. Mir, MirTech, Decco, Essentiv, and related entities, including claims that AgroFresh owned the '216 Patent by virtue of certain prior consulting agreements between AgroFresh and MirTech. B304-06 (Count I). AgroFresh's Amended Complaint also alleged that the defendants had willfully infringed the '216 Patent through sales of TruPick. B324-25 (Count XIV).

In the District Court litigation, the parties recognized that determining the ownership of the '216 Patent was a threshold issue and agreed to bifurcate the proceedings. B340 (the "District Court Opinion"). The parties agreed that "Phase I" of the case would involve Count I, which challenged MirTech's purported ownership of the '216 Patent, and Count IV, which alleged fraudulent inducement on the part of MirTech and Dr. Mir (together, the "MirTech Defendants") in connection with certain agreements between AgroFresh and the MirTech Defendants. *See id.*; B304-06; B324-25. The Phase I counts were asserted only against the MirTech Defendants, not against Essentiv or Decco. Phase I of the litigation proceeded through discovery and went to trial in March 2017. B340.

A. The District Court Rules In Favor Of AgroFresh In Phase I Of The Litigation.

On June 30, 2017, Judge Robinson ruled in favor of AgroFresh on Counts I and IV, stripping MirTech of its rights to the '216 Patent and declaring AgroFresh its sole owner. B373. Although the District Court found that the MOF technology used in connection with TruPick is distinct from the technology that MirTech had developed with AgroFresh, it nonetheless concluded that MirTech's agreement with AgroFresh (the "AgroFresh Agreement") in connection with the RipeLock technology required MirTech to disclose and assign the MOF technology to AgroFresh. B356-57. Specifically, the District Court held that the '216 Patent relating to the MOF technology had been assigned to AgroFresh pursuant to the AgroFresh Agreement.³ B373.

B. As A Result Of The District Court Opinion, The Parties Agreed That Essentiv Would Cease Operations.

A few days after the District Court Opinion, Dr. Mir and Mr. Girin spoke and jointly determined to stop all commercial activity related to TruPick, which was Essentiv's sole product and business. A47-48 (32:20-33:9). At trial, Mr. Girin described the District Court Opinion as "an extremely significant event," which

³ The District Court also found that the MirTech Defendants had intentionally defrauded AgroFresh with regard to an extension of their consulting agreement. B369-72.

resulted in AgroFresh owning the “key patent which was driving our product TruPick.” A43 (28:9-14); A48 (33:3-9).

C. MirTech And AgroFresh Enter Into A Settlement Agreement And A Final Consent Judgment.

Following the District Court Opinion, Dr. Mir claims that he contacted Decco to request that they reimburse his legal fees and agree to cover his future legal fees. A108-09 (93:21-94:12). When Decco did not promptly agree to this request, Dr. Mir determined to enter into a settlement agreement (the “Settlement Agreement”) with AgroFresh. A109-10 (94:19-95:7). Decco had no involvement in the negotiation of the Settlement Agreement, and neither Decco nor Essentiv are parties to the Settlement Agreement. Remarkably, Dr. Mir testified that *he did not even read the Settlement Agreement* before entering into it on September 15, 2017. A110 (95:17-22).

Among other things, the Settlement Agreement required the MirTech Defendants to seek entry of an attached “Final Consent Judgment” in the District Court action. A215-26. The Final Consent Judgment, which was entered by the District Court on September 18, 2017, provides that the MirTech Defendants “admit the allegations contained in the First Amended Complaint and have agreed to entry of judgment against them on all counts of the original Complaint and the First Amended Complaint.” A216 (¶ 3). Specifically, the MirTech Defendants agreed to judgment against them on twenty different counts of wrongdoing in AgroFresh’s

Amended Complaint, including claims for Fraud, Fraudulent Inducement, Constructive Fraud, Unfair Competition, Willful Infringement of Patent, and Misappropriation of Trade Secrets. A216-24.

In addition, the Final Consent Judgment provides that “the MirTech Defendants have agreed to disclose to AgroFresh all inventions, discoveries, or improvements (whether patentable or not) related to 1-methylcyclopropene (‘1-MCP’) . . . , along with all lab books and other documents concerning such inventions, discoveries, or improvements.” A224 (¶ 7(q)). The Final Consent Judgment further provides that “the MirTech Defendants acknowledge and agree that all such inventions, discoveries, and/or improvements have been automatically assigned to AgroFresh pursuant to the [AgroFresh Agreement].” *Id.*

Accordingly, the Final Consent Judgment went far beyond the scope of the District Court Opinion, which was limited to the ’216 Patent. In fact, the Final Consent Judgment expressly provides that AgroFresh is the owner of not just the ’216 Patent, but also several other patents and patent applications relating to 1-MCP technology that MirTech had purported to own. A221-22 (¶ 7(a)). As a result, AgroFresh became the owner of *all of the patents and patent applications* that are contained within the definition of “Licensed Technology” as set forth in the LLC Agreement.

Dr. Mir testified that he did not read either the Settlement Agreement or the Final Consent Judgment before they were executed, and does not believe that he or MirTech actually committed any of the wrongdoing admitted therein. A110-11 (95:20-96:8); *see also* A113-14 (98:13-99:15). Rather, in Dr. Mir's view, the Settlement Agreement and Final Consent Judgment were simply a way to stop his legal fees from mounting and get him out of the District Court litigation. *Id.*; *see also* B161 (142:12-23). But regardless of Dr. Mir's views about his conduct, the fact remains that MirTech and Dr. Mir consented to judgment against them with regard to all of AgroFresh's claims.

Decco's CEO, Mr. Girin, testified that upon learning of the Settlement Agreement and the Final Consent Judgment, "[t]he trust was broken" between Decco and MirTech, and he could not continue to work with either MirTech or Dr. Mir. A33 (18:1-8); A45 (30:11-22).

III. IN LIGHT OF THE SETTLEMENT AGREEMENT AND FINAL CONSENT JUDGMENT, ESSENTIV MAY NO LONGER OPERATE AS CONTEMPLATED BY THE LLC AGREEMENT.

While the operations of Essentiv had already been shuttered following the District Court Opinion, once Decco learned of the Settlement Agreement and the Final Consent Judgment it became clear that Essentiv no longer had the right to use any of the Licensed Technology. A45 (30:13-22). Accordingly, it would be impossible for Essentiv to use that technology to engage in the 1-MCP Business as

contemplated by the LLC Agreement. In early 2018, Mr. Girin therefore called Dr. Mir to explain that Essentiv has lost its ability to operate, has lost its technology, and that they should mutually agree to dissolve the Company. A46 (31:2-11). But Dr. Mir refused to agree to dissolution. *Id.* As a result, Decco was left with no choice but to file this action seeking judicial dissolution of Essentiv.

IV. THE COURT OF CHANCERY DETERMINED THAT ESSENTIV SHOULD BE JUDICIALLY DISSOLVED.

The Court of Chancery held a one-day trial on August 27, 2018, which included live testimony from Dr. Mir, on behalf of MirTech, and Mr. Girin, on behalf of Decco.

On November 28, 2018, following post-trial briefing, the Court of Chancery issued its Memorandum Opinion, holding that “Decco proved at trial that it is not reasonably practicable for [Essentiv] to carry on its business given that MirTech has agreed that it does not own the intellectual property rights the Company was created to commercialize.” Opinion at 1. In particular, the trial court found that the Final Consent Judgment entered by the District Court “prevents the Company from continuing to sell TruPick,” which was its sole product. *Id.* at 15. Accordingly, the Company no longer had a 1-MCP Business. *Id.* The trial court further rejected MirTech’s argument that the Company could use MirTech’s “know-how” to engage in new forms of 1-MCP Business that would not be affected by the Final Consent Judgment. *Id.* at 15-16.

Turning to the possibility of the Company engaging in a Non-1-MCP Business, the Court of Chancery found no evidence to support MirTech's arguments that the parties had ever agreed to pursue any such technology through the joint venture. *Id.* at 16-17. Indeed, the trial court noted that Dr. Mir's testimony in support of this assertion was concededly based on discussions that he purportedly had with "individuals at Decco who did not have decision-making authority." *Id.* at 17. Moreover, the trial court noted that Dr. Mir admitted that the parties "never signed any definitive agreements with respect to any non-1-MCP technology," as required by the LLC Agreement. *Id.* Finally, the trial court found credible Mr. Girin's testimony that "Decco does not trust Mir and will not do business with him in the future." *Id.* at 16-17. Therefore, Decco would never exercise its right of first refusal over any new technologies that MirTech might invent and elect to pursue such new technologies through the joint venture. Given these circumstances, the Court of Chancery held that "there is no viable Non-1-MCP Business," and "[i]t is not reasonably practicable for the Company to carry out this aspect of its business." *Id.* at 17.

For these reasons, the Court of Chancery determined to enter an order of judicial dissolution.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY ORDERED THE DISSOLUTION OF THE COMPANY UNDER SECTION 18-802.

A. Question Presented

Was it appropriate for the Court of Chancery to grant Decco's Petition for Dissolution and to order the dissolution of Essentiv pursuant to Section 18-802?

B. Scope of Review

The trial court's conclusion that the established facts satisfied the statutory standard for an order of judicial dissolution is reviewed *de novo*. See *Corvel Corp. v. Homeland Ins. Co. of N.Y.*, 112 A.3d 863, 868 (Del. 2015). However, this Court will defer to the trial court's findings of fact absent clear error. *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011). This Court will further review the trial court's exercise of its discretion in favor of ordering dissolution for abuse of discretion. See *Haley v. Talcott*, 864 A.2d 86, 93 (Del. Ch. 2004) (whether to order judicial dissolution rests within the discretion of the Court of Chancery); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002) ("This Court reviews the Court of Chancery's fashioning of remedies for abuse of discretion.").

C. Merits of Argument

1. The Court of Chancery Applied The Proper Standard In Determining To Enter An Order Of Judicial Dissolution.⁴

Pursuant to Section 18-802, “[o]n application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not *reasonably practicable* to carry on the business in conformity with a limited liability company agreement.” 6 *Del. C.* § 18-802 (emphasis added). In this regard, the Court of Chancery has repeatedly recognized that the standard for judicial dissolution is “whether it is ‘reasonably practicable’ to carry on the business of [the company], and not whether it is impossible.” *Fisk Ventures, LLC v. Segal*, 2009 WL 73957, at *3 (Del. Ch. Jan. 13, 2009), *aff’d*, 984 A.2d 124 (Del. 2009) (TABLE) (quoting *PC Tower Ctr., Inc. v. Tower Ctr. Assoc. Ltd. P’ship*, 1989 WL 63901, at *6 (Del. Ch. June 8, 1989)). Accordingly, although Essentiv’s purpose was frustrated in this case, it is not necessary for a petitioner seeking judicial dissolution to show complete frustration of purpose in order to justify dissolution. *Id.*; *see also Meyer Natural Foods LLC v. Duff*, 2015 WL 3746283, at *3 (Del. Ch. June 4, 2015).

⁴ MirTech’s brief contains eight separate argument sections, many of which are overlapping or entirely repetitive. Here, Decco responds to MirTech’s “Argument 1,” “Argument 3,” and “Argument 8,” concerning the proper standard for a grant of judicial dissolution.

In its brief, MirTech argues that the Court of Chancery failed to apply the proper standard under Section 18-802. First, MirTech asserts that the trial court engaged in an “abuse of discretion by ignoring the traditional 3-Prong Test for Judicial Dissolution,” which MirTech contends was established by the Court of Chancery in *Fisk Ventures*. Op. Br. at 13-14 (citing *Fisk Ventures*, 2009 WL 73957, at *3).⁵ However, the *Fisk Ventures* court expressly stated that the factual circumstances it identified were “not individually dispositive; nor must they all exist for a court to find it no longer reasonably practicable for a business to continue operating.” *Fisk Ventures*, 2009 WL 73957, at *4. Moreover, the factual circumstances identified in *Fisk Ventures* were in the context of a deadlocked board.⁶ *Id.* Neither the *Fisk Ventures* court, nor any other Delaware court, has held that judicial dissolution is only available in the context of a deadlock. To the contrary,

⁵ MirTech also argues that the trial court improperly relied upon the implied covenant of good faith and fair dealing. Op. Br. at 23 (citing this Court’s recent opinion in *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 2019 WL 237360 (Del. Jan. 17, 2019)). However, MirTech’s argument makes no sense given that the trial court’s Opinion was not based upon (nor did it even reference) the implied covenant.

⁶ In *Fisk Ventures*, the court identified following circumstances as supporting an order of judicial dissolution:

- (1) the members’ vote is deadlocked at the Board level;
- (2) the operating agreement gives no means of navigating around the deadlock;
- and (3) due to the financial condition of the company, there is effectively no business to operate.

2009 WL 73957, at *4.

the Delaware courts have repeatedly recognized that other circumstances, including events that effectively frustrate the purpose of the business, may justify judicial dissolution. *See, e.g., Meyer*, 2015 WL 3746283, at *5 (ordering dissolution where the purpose of the joint venture was to market beef supplied exclusively by the minority members, but that purpose was no longer feasible because the supply agreement had been terminated). Accordingly, MirTech’s argument that the trial court was required to consider the *Fisk Ventures* factors is simply incorrect.⁷

Finally, MirTech asserts that the trial court improperly relied upon a purported “50-50 rule,” which MirTech contends applies to cases under 8 *Del. C.* § 273 (“Section 273”). Op. Br. at 26. This argument is nonsense. The trial court did not reference Section 273 anywhere in the Opinion, nor did it purport to apply any “50-50 rule.” Instead, the Court of Chancery carefully and properly applied the “reasonably practicable” standard as set forth in Section 18-802.

⁷ MirTech’s assertion that the trial court wholly ignored *Fisk Ventures* is also wrong as the trial court cited the case in the Opinion. Opinion at 13, n.64. The trial court also cited *In re Arrow Inv. Advisors, LLC*, 2009 WL 1101682 (Del. Ch. Apr. 23, 2009) and *In re Seneca Invs. LLC*, 970 A.2d 259 (Del. Ch. 2008), cases upon which MirTech heavily relies. *Id.* at n.64-66. Thus, the trial court did not ignore these authorities, but instead properly determined that the cases were distinguishable from the present circumstances.

2. The Court of Chancery Properly Found That It Was Not Reasonably Practicable For The Company To Engage In The 1-MCP Business.⁸

MirTech argues that while the Company was forced to end its production of TruPick (its sole product) as a result of the District Court Opinion and the Final Consent Judgment, Essentiv could still pursue other 1-MCP products. The Court of Chancery properly rejected this argument.

At trial, Decco showed that MirTech no longer had ownership rights with respect to the Licensed Technology and, therefore, could not lawfully license that technology to Essentiv, as contemplated by the LLC Agreement. As a result, Essentiv's principal purpose of developing and commercializing products based upon the Licensed Technology had been entirely frustrated. Indeed, in the Final Consent Judgment, MirTech expressly consented to judgment that "AgroFresh is hereby declared the owner of the '216 Patent, U.S. Patent No. 8,822,382, U.S. Patent No. 8,802,140, U.S. Patent No. 9,005,657 B2, and U.S. Patent Publication Number 2014/0326620, along with all associated technology." A221-22 (¶ 7(a)). These patents were the core of the Licensed Technology that MirTech was obligated to exclusively provide to Essentiv, but now they are owned solely by AgroFresh. A170. In addition, in the Settlement Agreement and the Final Consent Judgment,

⁸ In this Section, Decco responds to MirTech's "Argument 1," "Argument 2," "Argument 3," and "Argument 6," concerning whether it was reasonably practicable for Essentiv to carry on the 1-MCP Business.

the MirTech Defendants agreed that “all inventions, discoveries, or improvements (whether patentable or not) related to 1-methylcyclopropene (‘1-MCP’)” have been “automatically assigned to AgroFresh.” A224 (¶ 7(q)). As a result, the whole of MirTech’s 1-MCP technology became the exclusive property of AgroFresh.

Nonetheless, MirTech argued before the lower court that the definition of Licensed Technology also includes MirTech’s “know-how and trade secrets for processing and forming products incorporating 1-MCP that meet the impurity standards of US EPA.” A170. MirTech asserted that this “know-how and trade secrets” were unaffected by the Final Consent Judgment and, therefore, MirTech could still provide this information to Essentiv in order to pursue some unidentified, future 1-MCP Business. But this assertion is incorrect. In addition to assigning all of MirTech’s 1-MCP technology to AgroFresh, the Final Consent Judgment further provides that “[t]he MirTech Defendants admit the allegations contained in the First Amended Complaint and have agreed to entry of judgment against them on all counts of the original Complaint and the First Amended Complaint.” A216 (¶ 3).

As the trial court noted, AgroFresh’s Amended Complaint alleges that it had “helped Mir set up his laboratory to measure 1-MCP accurately and provided him equipment to assist in this effort” and that MirTech had misappropriated AgroFresh’s trade secret information, including “information concerning how to synthesize and measure 1-MCP and how to use a gas chromatograph.” Opinion at

16; *see also* B293; B298. On this basis, AgroFresh asserted against Dr. Mir and MirTech claims for misappropriation of trade secrets. B329; B330-31. In the Final Consent Judgment, Dr. Mir and MirTech admitted these allegations and agreed to entry of final judgment against them with respect thereto. A223 (¶ 7(1)). Dr. Mir further conceded at trial that the production of any 1-MCP product would require the accurate measurement of the 1-MCP gas. A136-37 (121:9-122:19). The trial court found that this “evidence establishes that there is no viable 1-MCP Business,” with respect to TruPick or any other 1-MCP product.⁹ Opinion at 16.

Thus, MirTech’s repeated assertion that the trial court improperly found that Essentiv’s purpose was to commercialize only the TruPick product is plainly wrong. *See, e.g.*, Op. Br. at 9-12. The trial court recognized that Essentiv’s purpose included the possibility of commercializing new 1-MCP products based on MirTech’s Licensed Technology. Opinion at 7. However, that purpose was completely frustrated, and certainly was no longer reasonably practicable, once MirTech agreed that it no longer had rights to the Licensed Technology (including its purported “know-how”) through the entry of the Final Consent Judgment. *Id.* at 15.

Moreover, even if MirTech does still possess some undefined “know-how”

⁹ Although MirTech now argues that AgroFresh’s allegations were false and without merit (including, in particular, that the 1-MCP measurement methods were trade secrets of AgroFresh), MirTech entered into a Final Consent Judgment in the District Court action.

related to 1-MCP that is not the property of AgroFresh, which could potentially be used to develop new 1-MCP technologies, the parties never agreed to base their business on such new technologies. Section 1 of the License Agreement sets forth an integrated set of technology rights, the most important of which are the specific patent and patent application rights. A192 (§ 1). It was never the parties' intention that the Company could lose all of those patent rights, but Decco would still be bound to conduct the 1-MCP Business with MirTech simply because MirTech's "know-how" might enable it to develop some other 1-MCP technology at some point in the future. *Cf. Vila v. BVWebTies, LLC*, 2010 WL 3866098, at *7 (Del. Ch. Oct. 1, 2010) ("[T]he fact that Hill says that WebTies can make profits running a website that does not use the Vila IP is beside the point. Vila did not sign up for such a business strategy and, in any event, does not support it.").¹⁰

For these reasons, the Court of Chancery properly determined that it was not reasonably practicable for the Company to carry on the 1-MCP Business in conformity with the LLC Agreement.

¹⁰ See also *In re Silver Leaf, L.L.C.*, 2005 WL 2045641 (Del. Ch. Aug. 18, 2005) (ordering dissolution where the purpose of the company was to sell Tasty Fries vending machines but a key contract enabling that purpose had been terminated); *In re GR Burgr, LLC*, 2017 WL 3669511, at *11 (Del. Ch. Aug. 25, 2017) (ordering dissolution after the company's only revenue-generating business was terminated as a result of one partner's criminal conviction).

3. The Court of Chancery Properly Found That It Was Not Reasonably Practicable For The Company To Engage In The Non-1-MCP Business.¹¹

MirTech also argues that the trial court erred in granting dissolution because the Company remained capable of pursuing a Non-1-MCP Business, as set forth in the LLC Agreement. This argument is flawed for the reasons explained by the Court of Chancery.

As the trial court noted, “the Purpose Clause [of the LLC Agreement] held out the possibility that the Company might in the future pursue a Non-1-MCP Business.” Opinion at 7. This possibility was detailed in Section 6 of the LLC Agreement, which set forth how potential non-1-MCP technologies could become a part of the Company’s business. A150 (§ 6.1). This section grants Decco a right of first refusal with regard to any new technologies developed by MirTech. *Id.* As MirTech admitted at trial, whether to exercise that right of first refusal is solely in the discretion of Decco. A93 (78:14-18). If Decco exercises the right of first refusal and elects to pursue a new technology through the Essentiv joint venture, the parties shall attempt to negotiate a “definitive agreement” regarding the technology within 120 days. A150 (§ 6.1); *see also* A94 (79:5-10). As shown at trial, the parties never agreed that any new technologies would become part of Essentiv’s business through

¹¹ In this section, Decco responds to MirTech’s “Argument 1,” “Argument 2,” and “Argument 6,” concerning whether it was reasonably practicable for Essentiv to carry on the Non-1-MCP Business.

this process. In fact, Dr. Mir conceded that the parties had “never signed any definitive agreements with respect to any non-1-MCP technology.” A94 (79:11-14).

Nonetheless, MirTech argued below that two new technologies (known as “in-transit ripening” and “nano-adsorbent technology”) were agreed to be part of Essentiv’s business. A94 (79:15-20). MirTech’s position on when the purported agreement to pursue these technologies was reached shifted during the course of the litigation. Initially, MirTech argued that the parties had reached agreement to pursue these technologies during 2015, prior to the formation of the joint venture. B110-11 (91:11-92:22). MirTech’s position was based largely on Decco having provided two “letters of support” in connection with MirTech’s application for research grants related to the new technologies. *Id.* But MirTech abandoned this position at trial.

Instead, Dr. Mir testified at trial that when Decco provided the letters of support, the new technologies were “MirTech projects” and were *not* part of Essentiv’s business. A100 (85:20-23). This change of position was apparently meant to harmonize Dr. Mir’s trial testimony with his prior testimony in the District Court action, in which Dr. Mir took “the position that those two new technologies [were] not part of Essentiv.” A104 (89:8-17); *see also id.* at A105 (90:3-9).¹² At

¹² Had the parties actually agreed to pursue Non-1-MCP technologies prior to the time Essentiv was formed, as MirTech originally claimed, one would expect some mention of those technologies in the LLC Agreement and/or the other Joint Venture Documents. But those agreements refer solely to 1-MCP technologies.

trial, Dr. Mir claimed that the new technologies did not become part of Essentiv's business until January 18, 2017, when Dr. Mir claims to have met with Mr. Sagar Kaushik, an executive of Decco's parent company. A104-05 (89:18-90:2). Dr. Mir also appeared to rely upon certain discussions with Dr. Lynn Oakes of Decco as support for his position. A130-31 (115:14-116:21). Significantly, MirTech presented no evidence of these discussions other than Dr. Mir's self-serving testimony.

However, as the trial court explained, even accepting Dr. Mir's testimony concerning these discussions as true, MirTech's argument still failed as neither individual Dr. Mir allegedly spoke with had decision-making authority for the Company. Opinion at 17. Indeed, Dr. Mir admitted that Dr. Oakes had "no decision-making" authority with regard to Essentiv. A139 (124:16-23); *see also* A131 (116:15-21) (noting that Dr. Oakes "is limited in terms of any decision-making. So he didn't commit to either way."). With regard to Mr. Kaushik, although he works for Decco's parent company, the LLC Agreement is clear that *Decco* must agree to pursue any new technology.¹³ A150 (§ 6.1). Mr. Girin is the CEO of Decco and Decco's appointed manager for the joint venture. A21 (6:1-4); A27 (12:4-8). It was

¹³ At trial, Dr. Mir also acknowledged that Mr. Kaushik did not have authority to bind Decco. Specifically, Dr. Mir testified that "Sagar told me that, Nazir, I don't take these decisions myself" and that Mr. Kaushik asked him to send a written proposal through the lawyers for Decco's consideration. A129 (114:10-16). Dr. Mir testified that Decco never responded to that proposal. A108-09 (93:21-94:12).

proven at trial that Mr. Girin never approved pursuit of the new technologies. A31-32 (16:2-17:9) (testifying that neither new technology was intended to be part of Essentiv). Moreover, Dr. Mir conceded that the parties never entered into definitive documentation within the time period prescribed by the LLC Agreement (A94 (79:11-14)), further establishing that his purported informal discussions with Messrs. Kaushik and Oakes were insufficient to bind Decco and Essentiv to pursue the new technologies.

Finally, Dr. Mir's testimony concerning the new technologies was inconsistent with Essentiv's "Agreed Operating Budget," which was attached to the LLC Agreement. A178-80. That Operating Budget showed that the Company's sole income for the five years covered by the budget would come solely from the TruPick product. *Id.*¹⁴ While Dr. Mir testified that such budget failed to reflect Essentiv's expected revenue from Non-1-MCP products (which he claimed would be up to three times higher), the Court found this testimony not credible. Opinion at 15 n.70. Therefore, the Court of Chancery correctly concluded that the Company had no existing Non-1-MCP Business. Opinion at 17.

The Court of Chancery further concluded that the Company had no reasonable prospect of a future Non-1-MCP Business. This is because Mr. Girin made clear at

¹⁴ In the Operating Budget, the TruPick product is referred to by the internal company label "NT-7815 MOF MCP." A178.

trial that Decco had lost its trust in Dr. Mir and did not intend to do business with him in the future. A32-33 (17:10-18:8); A85 (70:5-22). The trial court found this testimony credible, stating that it was “understandable” given “the seriousness of the claims to which MirTech admitted” in the District Court action. Opinion at 17. As such, Decco was willing to give up its right of first refusal with regard to MirTech technologies through the dissolution of Essentiv.¹⁵

For all of these reasons, the Court of Chancery correctly decided that it is was not reasonably practicable for the Company to carry on a Non-1-MCP Business in accordance with the LLC Agreement.

¹⁵ Decco’s decision to give up the right of first refusal was an obvious benefit to MirTech, as MirTech may now seek to work with third-parties concerning any of its new technologies.

II. THE TRIAL COURT DID NOT LACK JURISDICTION AS A RESULT OF THE “RESOLVING DEADLOCKS” PROVISION.

A. Question Presented

Whether the “Resolving Deadlocks” provision of the LLC Agreement deprived the trial court of jurisdiction over the parties and subject matter of the action?

B. Scope of Review

Issues of contract interpretation are subject to *de novo* review. *Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1212 (Del. 2012).

C. Merits of Argument¹⁶

On appeal, MirTech further argues that the Court of Chancery lacked both personal and subject matter jurisdiction as a result of the “Resolving Deadlocks” provision in the LLC Agreement. Op. Br. at 17-19. This argument was properly rejected by the trial court.

As an initial matter, MirTech has failed to identify any basis to question the trial court’s jurisdiction over MirTech and, in any event, MirTech waived such argument by not timely raising the issue in its answer. *See Plummer v. Sherman*, 861 A.2d 1238, 1243 (Del. 2004). Further, the LLC Agreement expressly states that the parties agreed to the “exclusive” jurisdiction of the Delaware courts and the

¹⁶ Here, Decco responds to MirTech’s “Argument 4” and “Argument 8,” concerning the “Resolving Deadlocks” provision of the LLC Agreement.

courts of the United States located in Delaware, and “consent to jurisdiction in such courts.” A165 (§ 24.13).

MirTech’s argument that the Resolving Deadlocks provision deprived the trial court of subject matter jurisdiction also lacks merit. The Resolving Deadlocks provision merely provides that if there is a disagreement between Decco and MirTech, which causes the Company to be unable to act or achieve the financial performance set forth in its operating budget, the parties shall engage in direct negotiations for a period of 30 days and, if that fails to result in a resolution, hold a JAMS mediation in Philadelphia. If the mediation is unsuccessful, the parties may initiate litigation. A154-55 (§ 11). MirTech argues that Decco failed to follow these procedures prior to filing the Petition for Dissolution and, on this basis, the action should have been dismissed by the trial court.

However, Decco’s Petition for Dissolution was not based upon and did not allege any “deadlock” between the parties. B380-94. Rather, the Petition asserts that it is no longer reasonably practicable to carry on the business of Essentiv in conformity with its LLC Agreement because MirTech does not actually own the technology that it purported to license to Essentiv and which was to form the foundation of Essentiv’s business.¹⁷ As Mr. Girin stated at trial: “Essentiv has lost

¹⁷ This fact distinguishes the cases relied upon by MirTech, such as *Lola Cars Int’l Ltd. v. Krohn Racing, LLC*, 2010 WL 3314484 (Del. Ch. Aug. 2, 2010), which solely involved allegations of deadlock and not any frustration of purpose.

its substance, Essentiv has lost its technology, Essentiv cannot operate. So its not an issue of disagreement between managers. It's a fact." A53 (38:1-4). Accordingly, Section 11 of the LLC Agreement is simply irrelevant to this action.

Further, even if Section 11 were implicated by this action (which it is not), MirTech waived any ability to insist upon compliance with the dispute resolution procedures therein. MirTech failed to even mention the Resolving Deadlocks provision in its answer, let alone assert that the action should be dismissed or stayed as a result thereof. Instead, MirTech participated in the expedited litigation for more than five months before first raising this issue through an untimely motion to dismiss. Opinion at 12-13 n.62. As a result, MirTech waived any right to a pre-litigation mediation pursuant to the Resolving Deadlocks provision. *Id.*; *see also Nutzz.com, LLC v. Vertrue Inc.*, 2006 WL 2220971, at *9 (Del. Ch. July 25, 2006) (finding plaintiff waived its right to arbitration by actively participating in litigation before filing notice of arbitration).

For all of these reasons, the trial court properly rejected MirTech's arguments related to the Resolving Deadlocks provision of the LLC Agreement.

III. THE COURT OF CHANCERY PROPERLY GRANTED THE MOTION STRIKING MIRTECH'S COUNTERCLAIM.

A. Question Presented

Whether the trial court properly granted Decco's motion to strike MirTech's counterclaims for breach of contract?

B. Scope of Review

The question presented is an issue of law, which is subject to *de novo* review. *See, e.g., Asbestos Workers Local Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935, 940 (Del. 2007).

C. Merits of Argument¹⁸

In its brief, MirTech also takes issue with the Court of Chancery's May 7, 2018 Order, in which it granted Decco's motion to strike MirTech's counterclaim. Op. Br. at 24-25; B395-96. MirTech's argument on this issue is procedurally improper as it failed to identify the trial court's May 7, 2018 Order in any of its three notices of appeals filed in this matter. Trans. IDs 62805535, 62805897, 62873627. But even putting that issue aside, MirTech's argument lacks merit.

MirTech's counterclaim, which was a mere two paragraphs, stated in its entirety:

Respondent hereby counter claim against the Petitioner. Petitioner's February 14, 2015 support letter to Mirtech and Dr. Mir, promises a payment of \$2.5 million on successful completion of first and second phases of QMS technology. Though both phases were completed, the

¹⁸ This section responds to MirTech's "Argument 7."

sum of \$2.5 million was never paid to Mirtech and Dr. Mir. Petitioner has also agreed in writing that they would not challenge the patentability of QMS, but now they have started an Interpartis Review against QMS (to defend themselves from AgroFresh), which is a breach of contract.

A support letter dated October 5, 2015, by Petitioner encourages Mirtech, Dr. Mir and Essentiv to continue working on Intransit Ripening Technology. Then, a consulting agreement between Petitioner and Essentiv promises a \$300,000 payment to Dr. Mir while Essentiv continues working on new technologies, which it continues to do to this day. The payment has not been made in 2018.

B377. Accordingly, the counterclaim suggested that MirTech (or non-party Dr. Mir) sought to assert certain breach of contract claims against Decco or the Company.¹⁹

In response, Decco promptly moved under Court of Chancery Rule 12(f) to strike the counterclaim. *See* Ct. Ch. R. 12(f) (“the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter”). After full briefing, on May 7, 2018, the Court of Chancery granted the motion to strike. B395-96. This decision was plainly appropriate.

Under Rule 12(f), an issue is considered “immaterial” when it “has no essential or important relationship to the claim for relief or the defenses being pleaded[.]” *Salem Church (Del.) Assocs. v. New Castle Cty.*, 2004 WL 1087341, at *2 (Del. Ch. May 6, 2004) (internal quotation marks omitted). “Similarly,

¹⁹ Notably, in its brief, MirTech includes allegations of purported additional wrongdoing by Decco. *See, e.g.*, Op. Br. at 25. As these allegations were not raised in the counterclaim below, they are irrelevant to considering the appropriateness of the Court of Chancery’s Order granting the motion to strike.

impertinent material is defined as statements that do not pertain, and are not necessary, to the issues in question.” *Id.* (internal quotation marks omitted). Here, MirTech’s short counterclaim appeared to assert claims for breach of four separate documents, including two so-called “support letters,” an unidentified “writing,” and the Consulting Agreement. The resolution of these contract claims had no bearing on whether Essentiv should be dissolved because it is no longer reasonably practicable to carry on the business in conformity with the LLC Agreement. Accordingly, MirTech’s purported claims were entirely collateral and not necessary to the issue set forth in the Petition for Dissolution.

It is well established that in summary proceedings, the Court of Chancery “may eschew collateral matters and strike otherwise permissible counterclaims.” *In re Data Processing Consultants, Ltd.*, 1987 WL 25360, at *5 (Del. Ch. Nov. 25, 1987). In fact, the Court of Chancery frequently narrows the scope of summary and expedited proceedings to focus on the key issues to be resolved. *See, e.g., id.* (“[T]his court ought not consider collateral matters in a Section 273 action. In such an action, only issues immediately relevant to the dissolution will be heard.”); *In re S. One-Stop, Inc.*, 1986 WL 628588, at *1 (Del. Ch. Dec. 3, 1986) (“8 *Del. C.* § 273 narrowly limits the issues in a dissolution proceeding and such a proceeding cannot be used as the vehicle to determine damages for a diversion of a corporate

opportunity.”).²⁰

Moreover, as the Court of Chancery explained in its Order, even if dissolution of the Company were granted (as it ultimately was), the dissolution does not prohibit MirTech from asserting, and potentially recovering on, its purported contract claims against Decco and/or the Company. B396 (noting that even if dissolved, Essentiv “could sue or be sued” during its winding up period).

For all of these reasons, the Court of Chancery’s May 7, 2018 Order granting the motion to strike MirTech’s counterclaim was appropriate.

²⁰ See also *Gotham P’rs, L.P. v. Hallwood Realty P’rs, L.P.*, 714 A.2d 96, 103–04 (Del. Ch. 1998) (“Time and time again, this Court has rejected claims that would expand a statutory hearing beyond its statutory purpose.”); *Bossier v. Connell*, 1986 WL 11534, at *3 (Del. Ch. Oct. 7, 1986) (granting a motion to dismiss the counterclaim because “[a]llegations of breach of fiduciary duty are collateral to the issues in an 8 *Del. C.* § 225 proceeding and cannot be considered in such a proceeding”).

IV. MIRTECH'S ARGUMENT THAT DECCO ACTED WITH "MALICIOUS INTENT" IN CONNECTION WITH THE DISSOLUTION IS UNSUPPORTED AND IMPROPER.

A. Question Presented

Whether MirTech raised below allegations of "malicious intent" and "unclean hands" and, if so, did the Court properly consider such allegations?

B. Scope of Review

This Court generally declines to review contentions not raised below and not fairly presented to the trial court for decision. *Turner v. State*, 5 A.3d 612, 615 (Del. 2010).

C. Merits of Argument

In "Argument 5" of its brief, MirTech contends that the trial court committed an "abuse of discretion by ignoring Decco's malicious intent to dissolve Essentiv." Op. Br. at 20. This argument lacks merit for several reasons.

First, MirTech appears to base its argument on unsupported factual allegations that were never presented to the trial court, including that Mr. Girin testified at deposition in the ongoing District Court action (after the trial below) that Decco had entered into an agreement with Hazel Technologies related to potential 1-MCP products. *Id.*²¹ MirTech argues that by entering into this agreement, Decco has breached the LLC Agreement and shown that it sought the dissolution of Essentiv

²¹ The deposition MirTech refers to is neither part of the record below nor part of the record on appeal.

with “unclean hands.” *Id.* However, because MirTech never presented these arguments or facts below, they are not properly presented on this appeal. *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013).

Furthermore, MirTech’s suggestion that Decco’s entering into an agreement related to 1-MCP with a third-party somehow shows that *Essentiv* still had a viable 1-MCP Business is obviously false. Op. Br. at 20. *Essentiv*’s ability to engage in the 1-MCP Business was frustrated once MirTech consented to judgment providing that MirTech did not actually own any of the Licensed Technology on which *Essentiv*’s 1-MCP Business was to be based. *See supra* Argument, Section I. Decco never asserted that the 1-MCP marketplace no longer existed, or that it would not pursue opportunities in that market with third-parties. Also, to the extent MirTech believes that Decco has breached the LLC Agreement (notwithstanding its own prior material breaches of that agreement), MirTech may seek appropriate relief. As with MirTech’s counterclaim, any such breach of contract claim would be entirely collateral and irrelevant to the issue of whether *Essentiv* should be dissolved.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Chancery's decision and order dissolving the Company.

OF COUNSEL:

John M. Williamson
Rajeev Gupta
Karthik Kumar
FINNEGAN, HENDERSON,
FARABOW, GARRET & DUNNER,
LLP
901 New York Avenue, NW
Washington, DC 20001
(202) 408-4000
Dated: March 20, 2019

/s/ Brock E. Czeschin
Brock E. Czeschin (#3938)
Angela Lam (#6431)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

*Attorneys for Appellee Decco U.S. Post-
Harvest, Inc.*