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Case Number 338,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRUCE P. EAMES, **ANDREY OMELTCHENKO**, **AVG HOLDINGS, LP,** and **ASTER SECURITIES (US) LP**, Defendants-Below/Appellants,	
v.	No. 338, 2019
QUANTLAB GROUP GP, LLC, **VELOCE, LP**, and **MARCO, LP**, Plaintiffs-Below/Appellees,	APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 2018-0553-JRS
- and -	**PUBLIC VERSION FILED September 19, 2019**
QUANTLAB GROUP, LP, Nominal Defendant-Below.	

ANSWERING BRIEF OF APPELLEES/PLAINTIFFS-BELOW QUANTLAB GROUP GP, LLC, VELOCE, LP AND MARCO, LP

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PRELIMINARY STATEMENT

This appeal concerns the governance of nominal defendant, Quantlab Group LP ("Quantlab Group"), a Delaware limited partnership and successful billion-dollar algorithmic trading firm. The relevant facts are undisputed. This case literally turns on the construction of, and relationship between, two documents: (1) an Amended and Restated Voting Trust Agreement executed in 2010 ("VTA"); and (2) the Fourth Amendment and Complete Restatement of the Agreement of Limited Partnership, effective January 1, 2016, governing Quantlab Group ("4LPA"). The 4LPA is the operative partnership agreement, and both the VTA and the 4LPA were executed by *all* of the Plaintiffs-Below/Appellees ("Plaintiffs")[1] and *all* of the Defendants-Below/Appellants ("Defendants").[2]

The VTA purports to "irrevocably assign[] and transfer[] . . . to [a] Voting Trustee all" of the Class A voting "Interests" held by the Class A limited partners of Quantlab Group. Back in 2009, upon advice of counsel—the same Delaware counsel representing Defendants here—to ensure that the VTA would have legal effect on Quantlab Group and bind future investors, a section was included in the

[1] The Plaintiffs are Quantlab Group GP, LLC ("Quantlab GP"), Veloce, LP ("Veloce"), and Marco, LP ("Marco").

[2] The Defendants are Bruce P. Eames ("Eames"), Andrey Omeltchenko ("Omeltchenko"), AVG Holdings LP ("AVG"), and Aster Securities (US) LP ("Aster").

VTA requiring the LPA to be amended to make reference to the VTA and to explicitly state that it was "restricted by and subject to" the VTA. That was sound advice because Section 17-702(a)(3) of the Delaware Revised Uniform Limited Partnership Act ("DRULPA") states that, "[u]nless otherwise provided in the partnership agreement," assignees obtain only the rights to "profits and losses" and other "distributions." 6 *Del. C.* § 17-702(a)(3). The then-operative LPA was promptly amended to include the mandated language.

Years later, however, the LPA was amended several more times by ***all*** of the ***same*** partners that signed the VTA (simultaneous with the issuance of additional or new classes of limited partnership interests to new investors), and in each of the last three amendments (effective 2013, 2015 and 2016) the parties ***removed*** all references to the VTA. Indeed, the 4LPA contains no references to the VTA or any voting trust agreement, but does include an unambiguous integration clause:

> This Agreement contains the ***entire agreement*** among the Partners ***with respect to the matters of this Agreement*** and shall ***supersede*** and govern ***all*** agreements, written or oral, including, without limitation, the Amended Agreement.

(A187, §17.12 (emphasis added).)

In a March 19, 2019 Letter Opinion (cited as "Op."), the trial court correctly found that the plain language of the integration clause, as well as the history of amendments *removing* all references to the VTA, ends the dispute over whether the VTA from 2010 has any legal effect on the operative 4LPA executed in 2016. Voting of the partners is one of the "matters" addressed by the 4LPA, and thus, no other agreement, "written or oral"—and that includes the VTA or any other voting agreement—has any legal effect on the 4LPA. The parties long ago and repeatedly evinced, in writing, their intent not to have the 4LPA be "restricted by and subject to" *any other agreement*, including the VTA.

What this Court should appreciate is that this is not the first dispute amongst the parties over the control of Quantlab Group. Dr. W.E. "Ed" Bosarge, Jr. ("Bosarge," not a party here) and his family-related entities are the ultimate beneficiaries of approximately 71.967% of the Class A Interests in Quantlab Group; Eames controls 23.058% and Omeltchenko controls 3.98%. Not satisfied with their positions, in 2017, Defendants tried to use the VTA to orchestrate a complete change of control at Quantlab Group by executing a series of written consents purporting to remove its General Partner (*i.e.*, Quantlab GP) and replace it with an entity they control. They then initiated a prior action in the Court of Chancery seeking a declaration that they had successfully taken over Quantlab

Group (the "First Delaware Action"). The Court rejected Defendants' attempted coup. *See Eames v. Quantlab Group GP, LLC*, 2018 WL 2041548 (Del. Ch. May 1, 2018).

Relevant here, Defendants argued in the First Delaware Action that through the VTA, they could unilaterally cause the Voting Trustee to amend the 4LPA to remove any provisions protecting Quantlab GP. They also claimed that through the VTA, they could exercise "absolute power" and "limitless" authority to remove Quantlab GP. *Id*. at 21, 22. Although the issue of the VTA's legal effect on the 4LPA was raised, the Court did not address it. Instead, the Court focused on the substance of the written consents and ruled that the 4LPA and the LLC Agreement governing the General Partner (Quantlab GP) were ***unambiguous*** and that Quantlab GP had not been validly removed in accordance with those terms, thus mooting the issue of the effectiveness of the VTA vis-à-vis the 4LPA.

Instead of appealing, Defendants filed an action in the 333rd Judicial District Court of Harris County, Texas, captioned *Eames v. Marco, LP*, No. 2018-36811 (the "First Texas Action"), seeking a judgment declaring that the VTA is viable and "governs the Voting Trust Interests and the Voting Trust Parties," and claimed that the Texas Action was about who will control Quantlab Group. (A588, ¶ 55 (Relief Requested).) To counter Defendants' forum-shopping, on July 27, 2018,

Plaintiffs filed this action seeking, among other things, a declaration that the VTA has no legal effect on the 4LPA. To alleviate comity concerns with the Texas court, Plaintiffs stipulated that the trial court could assume the VTA is valid when addressing the issue raised here—*i.e.*, whether the VTA, even if valid, has any effect on the 4LPA. The Texas court nonetheless abated the First Texas Action pending the outcome of this action, in part because Defendants want to use the VTA to amend the 4LPA and if it is not subject to the VTA, the narrow scope of the First Texas Action is an academic exercise.

Importantly, Plaintiffs did not stipulate that the VTA *is* a viable agreement. The stipulation was that the trial court could *assume* the VTA remains viable because the outcome of the narrow question now before the Texas court does not affect this case. The central question here is whether the unambiguous documents in the record demonstrate that the parties subsequently agreed that the 4LPA—governing Quantlab Group and all of its *current* investors—would no longer be "restricted by and subject to" the VTA, regardless of its viability. The answer is "yes," that is what the trial court ruled and, respectfully, that ruling should be affirmed.

SUMMARY OF ARGUMENT

1. DENIED. The trial court did not have to draw inferences for either side. Instead, the trial court first found that the VTA and the 4LPA (as well as its prior iterations) are unambiguous, and then construed the relevant terms and provisions in accordance with settled principles of contract construction.

The VTA and the 4LPA were not executed contemporaneously. When the VTA was executed in 2010, the then-operative LPA was amended to make it "restricted by and subject to" the VTA. Years later, however, *all* of the partners that signed the VTA amended the LPA several more times, and the last three amendments (effective 2013, 2015, and 2016) removed all references to the VTA. If there is to be a "*Quantlab* Rule," it is that Delaware courts will enforce integration clauses.

There is no conflict between the VTA being a viable agreement (if that is what the Texas court ultimately decides) and, at the same time, having no legal effect on the 4LPA. The parties to the 4LPA are free to further amend the 4LPA and once again make Quantlab Group subject to the VTA, if that becomes their intent. Even assuming the VTA remains viable, the undisputed documentary record shows that right now the 4LPA is not "restricted by and subject to" it.

2. DENIED. In addition to the reasons set forth in response to Argument 1, Defendants' ***equitable*** defense of "unclean hands" is not available because Plaintiffs sought only ***legal*** relief (*i.e.*, contract construction). Even if applicable, the defense has no relevant support. A lawyer (no longer) representing Quantlab Group who conspired with Defendants was responsible for certain misstatements to regulators, but those were corrected.

3. DENIED. Defendants waived the mediation/arbitration requirements in the 4LPA several times by initiating a prior action in the Court of Chancery (related to the same subject matter) in violation of those requirements, by failing to promptly compel mediation/arbitration when the present action was filed, by asserting counterclaims, and by litigating this case to a final judgment before arguing that the prevailing party provision in the 4LPA (providing a remedy that flows naturally and inextricably from the claims Defendants litigated and lost) is subject to mediation/arbitration.

STATEMENT OF FACTS

This case turns on the unambiguous language in, as well as language previously omitted from, Quantlab Group's governing document. Determining whether the 4LPA is "restricted by and subject to" the VTA requires no discovery. Such a determination only requires review of the plain and unambiguous language of, at most, nine documents, all executed by all of the parties to this appeal. Those documents, with full titles and listed in the chronological order in which they were executed, are:

- Agreement of Limited Partnership for the Quantlab Group, LP, entered into August 27, 2008 (A972-A1004);
- Voting Trust Agreement, entered into February 25, 2009 (and made retroactively effective to January 1, 2009) (A1006-A1016);
- First Amendment to the Agreement of Limited Partnership for the Quantlab Group, LP, entered into February 25, 2009 (and made retroactively effective to January 1, 2009) (A1018-A1020);
- Second Amendment to the Agreement of Limited Partnership for the Quantlab Group, LP, entered into September 8, 2009 (A1022-A1027);
- Amended and Restated Voting Trust Agreement, dated November 20, 2010 (A1029-A1040);
- Amendment and Complete Restatement of the Agreement of Limited Partnership for the Quantlab Group, LP, entered into November 20, 2010 (and made retroactively effective to September 1, 2010) (A1042-A1108);

- Second Amendment and Complete Restatement of the Agreement of Limited Partnership for the Quantlab Group, LP, entered into July 24, 2015 (and made retroactively effective to July 18, 2013) (A1110-A1178);

- Third Amendment and Complete Restatement of the Agreement of Limited Partnership of Quantlab Group, LP, entered into December 31, 2015 (A1180-A1274); and

- Fourth Amendment and Complete Restatement of the Agreement of Limited Partnership of the Quantlab Group, LP, entered into July 8, 2016 (and made retroactively effective to January 1, 2016) (A127-A222).

A. Quantlab Group, The 4LPA, and Management Control

Quantlab Group was formed with the execution of the original LPA on August 27, 2008, and is currently governed by the 4LPA, which mandates that the business and affairs are to be managed by a General Partner. (A146-A154, Art. V.) Quantlab GP currently serves as Quantlab Group's sole General Partner. Only a "Super Majority" of Quantlab Group's Class A limited partners have the right to remove an existing General Partner, subject to the General Partner's rights under the 4LPA. (A147, §§ 5.3, 5.4.) "Super Majority" is defined in the 4LPA as the limited partners representing more than 80% of the Class A-2 "Interests." (A143, § 1.136.)

Most relevant here, the 4LPA contains an unambiguous integration clause:

> This Agreement contains the entire agreement among the Partners with respect to the matters of this Agreement and shall supersede and govern all prior agreements, written or oral, including, without limitation, the Amended Agreement.

(A187, § 17.12.)[3] Consistent with its integration clause, the 4LPA does not refer to, rely on, or incorporate, any other agreements or writings, including the VTA.

B. The VTA

The VTA was not part of Quantlab Group when it was formed in 2008. The VTA executed in 2010 is actually the second iteration of that agreement. On or about February 25, 2009, approximately six months after Quantlab Group was formed, the Class A partners entered into the first version of the VTA. (A1006-A1016.)

On or around November 20, 2010, a little more than two years after the formation of Quantlab Group, the Class A limited partners, including Defendants, entered into the current version of the VTA in which (like the 2009 version) they agreed, among other things, to "irrevocably assign[] and transfer[] . . . to [a] Voting Trustee all of their respective [Class A voting "Interests"] . . ." (A1030-A1031,

[3] The term "Amended Agreement" is defined as "that certain Third Amendment and Complete Restatement of the Agreement of Limited Partnership." (A127, Second WHEREAS Cl.; *see also* A129, § 1.9 ("'Amended Agreement' has the meaning set forth in the recitals to this Agreement.").)

§ 2.1), and that "[a]ll Interests to be voted and controlled by the Voting Trustee [were] hereby deemed delivered to the Voting Trustee." (A1031, § 2.3.) Under the VTA, the Voting Trustee was to "possess and [be] entitled to exercise all rights and power to vote [the] Interests," and it was to "exercise all rights and vote such Interests as directed by the Voting Trust Committee." (A1033, § 5.2.) The Voting Trust Committee consisted of Bosarge, Eames, and Omeltchenko, and was to approve actions by a majority. (A1032, §§ 4.1, 4.4.) By virtue of the signatories to the VTA, the Voting Trustee could vote 99% of Quantlab Group's Class A voting Interests.

To make the VTA legally effective with regard to Quantlab Group and future investors, and to permit the General Partner to accept votes from non-Partners (*i.e.*, a voting trustee), Section 2.4.1 of the VTA (like the 2009 version) provides:

> 2.4.1 The parties . . . shall take all such actions as may be necessary under the [Delaware Revised Uniform Limited Partnership Act] or the LP Agreement to amend the LP Agreement [] in order to add the following provision:
>
> > This Limited Partnership Agreement and the Class A Interest of those Limited Partners that are a signatory hereto is restricted by and subject to the terms of that certain Voting Trust Agreement dated as of January 1, 2009 as amended by this Amended and

> Restated Voting Trust Agreement, a copy of which has been filed at the offices of [Quantlab Group]. The Voting Trust Agreement shall not affect the rights or obligations of any other Partners.

(A1031, § 2.4.1.) The current and operative 4LPA contains no such provision or reference to the VTA as a result of several amendments, *all* knowingly executed by *all* of the parties to this appeal.

C. The Previous Iterations Of The 4LPA

After execution of the original LPA on August 27, 2008, the parties to it then executed the "First Amendment" to the LPA on February 25, 2009 (effective January 1, 2009). (A1018-A1020.) The First *Amendment* (as distinguished from the First *Amended* LPA discussed later) complied with Section 2.4.1 of the 2009 VTA (A1018, ¶ 2) and also provided that the "terms of th[e] First Amendment shall modify and supersede all inconsistent terms and provisions set forth in the [LPA]." (A1019, § 3(c).) A Second Amendment to the LPA, dated September 8, 2009, likewise included a WHEREAS clause referencing the 2009 VTA. (A1022, Recital Cls. B).

On November 20, 2010, the parties executed the "Amendment and Complete Restatement" of the LPA, effective as of September 1, 2010 ("1LPA"). (A1042-A1108) The 1LPA specifically referenced, in its preamble, the First *Amendment* discussed above. (A1042, 2nd WHEREAS Cls.) It also referenced the VTA, but provided an indication that, even as of 2010, the parties were contemplating abandoning the impact of the VTA on Quantlab Group. In that regard, Section 4.91 of the 1LPA, which defined the term "Voting Interest," provided, among other things, that "notwithstanding anything contained herein to the contrary the Voting rights of any Partner shall be expressly subject to the terms and provisions contained in VTA *as may me [sic] in force from time to time*." (A1058, § 4.91 (emphasis added).)

By 2015, the parties clearly desired to no longer have the VTA be effective vis-à-vis Quantlab Group, as evidenced by the undisputed fact that the 1LPA was then "amended and restated" three more times without reference to the VTA or any language indicating the LPA was to be "restricted by and subject to" any other agreement. The "Second Amendment and Complete Restatement" of the LPA, dated July 24, 2015, made effective as of July 18, 2013, two years prior ("2LPA," A1110-A1178), removed any reference to the VTA, including by omitting the provision required under Section 2.4.1 of the VTA and by removing a WHEREAS

clause from the 1LPA that specifically referenced the 2009 VTA. The second WHEREAS clause of the 1LPA had indicated that the First Amendment "provid[ed] for the fact that the then Partners in the Partnership had created a voting trust agreement [small case] . . . relating to their respective voting rights" (A1042), but such reference was omitted entirely from the 2LPA. (A1110.) Further, in the section defining "Voting Interest," the drafters replaced the term "VTA" (as provided in Section 4.91 in the 1LPA) with a generic reference to "any applicable voting trust agreement [lower case] as *may* me [sic] in force from time to time." (A1126, § 1.137 (emphasis added).) No voting trust agreement subsequent to the 2010 version of the VTA was ever executed.

The "Third Amendment and Complete Restatement" of the LPA, dated December 31, 2015 ("3LPA," A1180-A1274), omitted again all references to the VTA. In addition, the section defining "Voting Interest" entirely omitted any reference to any form of voting trust agreement. (A1197, § 1.143 (stating, in full: "'Voting Interest' means the right of the Class A Partners to vote with respect to their Class A Partnership Interest pursuant to the Act and this Agreement.").)

Finally, the 4LPA, dated to be effective January 1, 2016—the now-operative version—also contains no mention of the VTA or any other form of voting trust agreement. Section 1.143 of the 3LPA defining Voting Interest was carried over to the 4LPA in full (as Section 1.144). (A144.)

The fact that the various iterations of the LPAs dropped references to the VTA demonstrates, as a matter of fact and law, the parties' intent to write any legal effect of the VTA out of Quantlab Group. Critically, the very acts of ***all*** of the partners that signed the VTA also then signing each and every amendment and/or restatement of the LPA demonstrates that the 4LPA (like the 2LPA and 3LPA) is not to be "restricted by and subject to" the VTA.

New investors like Big Bird Partners and Elite Destinations Ltd. joined Quantlab Group as Class G limited partners under the 4LPA. These partners made significant capital contributions to Quantlab Group. Neither of these partners signed the VTA or any other agreement permitting voting on Quantlab Group matters to be conducted in any manner except as expressly set forth within the four corners of the 4LPA.

The following chart identifies the signatories to the relevant agreements:

Signatories To Pertinent Agreements					
Interest	VTA (executed in 2010)	1LPA (effective Sept. 1, 2010)	2LPA (effective July 18, 2013)	3LPA (effective Dec. 31, 2015)	4LPA (effective Jan 1, 2016)
Class A	Quantlab Group GP, LLC	Quantlab Group GP, LLC	Quantlab Group GP, LLC	Quantlab Group GP, LLC	Quantlab Group GP, LLC
	Bruce Eames	Bruce Eames	Bruce Eames	Bruce Eames	Bruce Eames
	Andrey Omeltchenko	Andrey Omeltchenko	Andrey Omeltchenko	Andrey Omeltchenko	Andrey Omeltchenko
	Veloce, LP	Veloce, LP	Veloce, LP	Veloce, LP	Veloce, LP
	Aster Securities (US) LP	Aster Securities (US) LP	Aster Securities (US) LP	Aster Securities (US) LP	Aster Securities (US) LP
	Marco, LP	Marco, LP	Marco, LP	Marco, LP	Marco, LP
	AVG Holdings, LP	AVG Holdings, LP	AVG Holdings, LP	AVG Holdings, LP	AVG Holdings, LP
Class B		[redacted]	[redacted]	[redacted]	[redacted]
		[redacted]	[redacted]	[redacted]	[redacted]
Class C		[redacted]	[redacted]	[redacted]	[redacted]
				[redacted]	[redacted]
Class D		[redacted]	[redacted]	[redacted]	[redacted]
Class E		[redacted]	[redacted]	[redacted]	[redacted]
Class F			[redacted]	[redacted]	
			[redacted]	[redacted]	
			[redacted]	[redacted]	
Class G				[redacted]	[redacted]
				[redacted]	[redacted]
				[redacted]	[redacted]
				[redacted]	[redacted]
				[redacted]	[redacted]
				[redacted]	[redacted]
					[redacted]

D. Procedural History And The Trial Court's Rulings

Following the First Delaware Action and the First Texas Action briefly discussed above, on July 24, 2018, Quantlab GP executed an amendment to the 4LPA to clear up any alleged ambiguity as to whether the 4LPA was "restricted by and subject to" the VTA. Plaintiffs then immediately commenced this action on July 27, 2018, pursuant to 6 *Del. C.* § 17-110 and 6 *Del. C.* § 17-111, seeking declarations that: (i) the new amendment is valid and enforceable (Count I); (ii)

even absent the new amendment, under its plain terms, the 4LPA is not "restricted by and subject to" the VTA (Count II); (iii) even assuming the 4LPA is "restricted by and subject to" the VTA, it cannot be used to amend the 4LPA because Section 17.9 of the 4LPA provides that it can only be amended by a "writing" signed by the actual parties to it rather than by a "vote" or a written consent in lieu of a vote (Count III); and (iv) any amendment cannot remove the provisions protecting the General Partner because it would "adversely" impact Quantlab GP and therefore requires its consent pursuant to Section 17.9 of the 4LPA (Count IV).

On August 22, 2018, Defendants moved to dismiss or stay, arguing that the First Texas Action was first-filed. On September 18, 2018, the trial court denied Defendants' motion, noting that the First Texas Action concerns only the narrow issue of whether the VTA remains a "valid agreement," whereas this case turns on "interpretation questions that have been raised regarding the [4LPA]." (A1369.) Plaintiffs also stipulated that the trial court could assume the VTA is valid because even if valid, the 4LPA is no longer "restricted by and subject to" the VTA. (A1317-A1318, A1375.) On November 2, 2018, the trial court denied Defendants' motion for reargument. (A28.)

On October 25, 2018, Defendants filed their Answer and Counterclaims asserting five counts, two of which mirrored Plaintiffs' Counts I and II and one that alleged fraudulent inducement with regard to 2LPA, 3LPA and 4LPA.

On March 19, 2019, on cross-motions for summary judgment (Plaintiffs only moved on their Count II), as well as on Defendants' motion for summary judgment on their affirmative defense of unclean hands, the trial court ruled in favor of Plaintiffs. In doing so, the Court found:

- "I also find, ***as I did before***, that the LPA is unambiguous. Based on the only reasonable construction of that ***fully integrated*** agreement, I am satisfied its governance provisions are not and cannot be modified by the VTA. Consequently, the VTA cannot be employed as a means to accomplish the removal of Quantlab LP's general partner in a manner inconsistent with the LPA." (Op. at 8 (emphasis added));

- "The LPA does not refer to nor rely upon any other agreement. It reflects, instead, the 'entire agreement' 'among the Partners' 'with respect to the matters of th[e] Agreement,' and 'supersede[s] and govern[s] all prior agreements, written or oral,' including 'without limitation,' the Third Amended LPA. The 'matters of [the LPA]' include the governance of Quantlab LP: (i) Quantlab LP's partners' rights and obligations; (ii) the management of the partnership; and (iii) how the partners vote." (*Id*. at 11-12);

- "Accordingly, as the parties to the VTA clearly understood, for the VTA to assign voting rights under the LPA, the VTA must be incorporated into the LPA. Because the parties to the VTA never took any 'action' to amend the current LPA to add the designated Section 2.4.1 text, or any other 'incorporation by reference' text, the VTA cannot modify the otherwise fully integrated LPA." (*Id*. at 14-15);

- "…the drafting history of the LPA reveals that all of signatories to the VTA agreed to remove any reference to the VTA in the LPA." (*Id.* at 15);

- "The LPA's Integration Clause states the LPA 'contains the entire agreement among the Partners with respect to the matters of this Agreement.'" (*Id.* at 16); and

- "[T]he LPA is fully integrated with regard to these subjects and cannot be altered or supplemented by another unincorporated agreement, including the VTA." (*Id.* at 17).

After the trial court issued its Opinion, Defendants, on April 4, 2019, filed a notice of dismissal of their remaining counterclaims (A11, D.I. 97), which included a claim for "Fraudulent Inducement" (Count V). That counterclaim, which was also listed as an affirmative defense, alleged that "Bosarge" never disclosed to Defendants "a desire by any party to the VTA to eliminate that agreement" and that they were fraudulently induced into entering into the 2LPA, 3LPA and 4LPA. (A1545-A1546, ¶¶ 124-125 (emphasis added).)

In a July 17, 2019 Transcript Ruling, the trial court awarded Plaintiffs their reasonable attorneys' fees pursuant to the prevailing party provision (Section 17.4) in the 4LPA.

On July 19, 2019, Defendants filed a second action in the District Court of Harris County, Texas, captioned *Aster Securities (US), LP, 5D Holdings, LP, AVG Holdings, LP, Andrey Omeltchenko, Bruce Eames v. Wilbur Edwin Bosarge, Jr.*

(the "Second Texas Action"). All of the claims in the Second Texas Action are based on a fraudulent inducement "theory" and essentially repeat the allegations from the counterclaim they dismissed below—*i.e.*, that Defendants were fraudulently induced to enter into the 2LPA, 3LPA and 4LPA. Of course, the trial court relied on those agreements as the foundation of its Opinion.[4]

On August 8, 2019, Defendants filed this appeal challenging (i) the trial court's March 19, 2019 Opinion; (ii) the July 17, 2019 Transcript Ruling awarding Plaintiffs attorneys' fees; and (iii) the July 30, 2019 Final Order and Judgment.

[4] Though it is ultimately a matter for another day, to state the obvious, the claims in the Second Texas Action are subsumed and barred by the Final Order and Judgment here because they arise out of the same transactions or occurrences that were the subject matters addressed and finally resolved by the trial court. *See* Ch. Ct. R. 13(a); *T.A.H. First, Inc. v. Clifton Leasing Co., Inc*., 90 A.3d 1093, 1095 (Del. 2014). Ironically, on appeal, Defendants are asking this Court to accept the 4LPA as ***valid*** and ***binding*** for purposes of its review and analysis (because Defendants waived the issue by dismissing their compulsory counterclaim), while simultaneously attempting to argue to the Texas court that it is the product of fraud. Even though Defendants are seeking only damages and not rescission in Texas, unlike the situation with the VTA, if the 4LPA is found to be the product of fraud, it would upend this entire controversy. Moreover, if this Court were to reverse and remand for the trial court to consider parol evidence, Defendants would then be litigating one aspect of its dispute here while simultaneously litigating in Texas a claim it once asserted here arising out of this entire controversy. Such gamesmanship should not be countenanced.

ARGUMENT

I. THE TRIAL COURT ADHERED TO THE SUMMARY JUDGMENT STANDARD AND CORRECTLY ENTERED JUDGMENT IN PLAINTIFFS' FAVOR BASED ON SETTLED PRINCIPLES OF CONTRACT CONSTRUCTION

A. Question Presented

Whether the trial court adhered to the summary judgment standard and correctly applied principles of contract construction when it found that (i) the 4LPA is unambiguous and fully integrated, (ii) discovery into parol evidence was unnecessary, and (iii) Defendants' equitable defense of unclean hands is not applicable to Plaintiffs' purely legal claim? These issues were preserved below. (A936-A1276; A2717-A3043; A3050-A3075; A3127-A3172.)

B. Standard and Scope of Review

This Court reviews grants of summary judgment and contract construction *de novo*. *Sunline Commercial Carriers, Inc. v. CITGO Petrol. Corp.*, 206 A.3d 836, 845 (Del. 2019) (reviewing summary judgment); *BLGH H'ldgs LLC v. enXco LFG H'ldg, LLC*, 41 A.3d 410, 414 (Del. 2012) (reviewing contracts).

Summary judgment is appropriate "if the moving party demonstrates, based on the record before the Court, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *LNR P'rs, LLC v. C-III Asset Mgmt., LLC*, 2014 WL 1312033, at *13 (Del. Ch. Mar. 31,

2014) (citing Ct. Ch. R. 56(c)). Summary judgment is particularly appropriate when a case turns on the unambiguous terms of a written agreement. *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 829–30 (Del. Ch. 2007); *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007) ("Where the dispute centers on the proper interpretation of an unambiguous contract, summary judgment is appropriate because such interpretation is a question of law.") (citation omitted).

With regard to contracts, "Delaware adheres to the 'objective' theory of contracts." *Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). "This theory focuses on the written text of the contract, and the court's task in interpreting the contract is to determine from the language of the agreement itself what a reasonable person in the parties' position would have believed the contract meant when they entered into it." *Cephalon, Inc. v. Johns Hopkins Univ.*, 2009 WL 4896227, at *8 (Del. Ch. Dec. 18, 2009) (citation omitted). "When the plain, common, and ordinary meaning of the words lends itself to only one reasonable interpretation, that interpretation controls the litigation." *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008).

C. Merits of Argument

1. Applicable Principles Of Contract Construction

"If a court determines that a contract is unambiguous, it may interpret the contract as a matter of law." *Sassano*, 948 A.2d at 462. "Words in a contract are unambiguous if they reasonably can be understood to have only one meaning." *Id.* "[T]he clear and unambiguous language of an agreement will not give way to what the parties thought the agreement meant or was intended to mean," *id.* (citation omitted), and "[a] contract is not rendered ambiguous solely because parties do not agree as to its construction." *Concord Steel, Inc. v. Wilm. Steel Processing Co., Inc.*, 2008 WL 902406, at *3 (Del. Ch. Apr. 3, 2008) (citing *Rhone–Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).

"[I]n determining whether a contract is fully integrated, the court focuses on whether it is carefully and formally drafted, whether it addresses the questions that would naturally arise out of the subject matter, and whether it expresses the final intentions of the parties." *Addy v. Piedmonte*, 2009 WL 707641, at *9 (Del. Ch. Mar. 18, 2009) (citation omitted). Where a court determines that a contract is completely integrated, "the fact of integration triggers the parol evidence rule." 11 *Williston on Contracts* § 33:15 (4th ed. 2017). "If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the

terms of the contract or to create an ambiguity." *Phillips v. Wilks, Lukoff & Bracegirdle, LLC*, 2014 WL 4930693, at *3 n.15 (Del. Oct. 1, 2014) (TABLE) (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)). "The policy underlying that rule is cautionary: to avoid upsetting the sanctity of fully integrated written agreements." *Galantino v. Baffone*, 46 A.3d 1076, 1081 (Del. 2012) (citing 11 *Williston on Contracts* § 33:1 (4th ed.)).

2. The 4LPA Is Unambiguous, Fully Integrated, And Not "Restricted By And Subject To" The VTA

The plain language of the 4LPA is unambiguous and the terms within its four corners are the only ones that matter. The 4LPA neither refers to, nor relies on, *any* other agreements, nor does it contain any provision even implying that it is "restricted by and subject to" any other agreement. The 4LPA contains an integration clause, which states that the 4LPA contains the "entire agreement" "among the Partners" "with respect to the matters of this Agreement." (A187, § 17.12.)[5] In accordance with its integration clause, the 4LPA "supersede[s] and govern[s] *all* prior agreements, written or oral, including *without limitation* the [3LPA]." (*Id.*)

[5] As expanded upon *infra*, the scope or "matters" of the 4LPA include everything related to the governance of Quantlab Group: (i) all the rights and obligations of its partners, (ii) the management of the partnership, and (iii) how the partners vote.

Defendants argue that because the integration clause in the 4LPA (like the 3LPA) does not "specifically" mention the VTA, but does mention the "prior" iteration, that shows that only the 3LPA was intended to be superseded. (OB at 31.) That is not a reasonable reading of the contract language. The reference to the prior iteration is immediately preceded by the phrase "including, *without limitation*," which means more than the prior iteration. Moreover, the integration clause refers to "*all* agreements," with no exceptions. The integration clause also employs the words "*entire* agreement," and the VTA is not mentioned anywhere in the 4LPA.

The plain language of the 4LPA (executed in 2016) alone could, and should, end the analysis here because the VTA is a prior agreement (from 2010) "with respect to" "matters" addressed in the 4LPA (*i.e.*, voting). There is only one reasonable interpretation of the integration clause with respect to the current dispute: the 4LPA is not "restricted by and subject to" *any* other agreement, including the VTA, and Quantlab Group is governed *solely* by Delaware law and the four corners of the 4LPA. *See ev3, Inc. v. Lesh*, 114 A.3d 527, 533 (Del. 2014) (holding that where an agreement contains an integration clause, that agreement "supersede[s] all prior agreements and understandings between the parties, except for those contained in the [current agreement]").

3. The History Of Amendments To The 4LPA Further Demonstrates That It Is Not "Restricted By And Subject To" The VTA

Beyond the four corners of the 4LPA, the history of its amendments establishes the VTA's current ineffectiveness vis-à-vis Quantlab Group.[6] To make the VTA legally effective with regard to Quantlab Group—*i.e.*, to comply with DRULPA and to put subsequent investors on notice of that effect (discussed *infra*)—Section 2.4.1 of the VTA provides that "[t]he parties . . . shall take all such actions as may be necessary under [DRULPA] or the LP Agreement to amend the LP Agreement [] in order" make it "restricted by and subject" to the VTA. (A1031, § 2.4.1.) This requirement was satisfied in the "First" and "Second" amendments to the original LPA.

The parties then contemporaneously executed the amended and restated VTA and the 1LPA in November of 2010, and the VTA was specifically recognized in the 1LPA. (A1029-A1040; A1042-A1108.) However, even as of

[6] A prior final and executed version of a subsequently-amended agreement is not a traditional form of parol evidence, but to the extent this is an issue, limited use of extrinsic evidence is permitted under fundamental principles of contract interpretation. *See Addy*, 2009 WL 707641, at *9 ("Courts . . . may consider extrinsic evidence to discern if the contract is completely or partially integrated.") (citing II E. Allan Farnsworth, *Farnsworth on Contracts* § 7.3, at 231 (3d ed. 2004)); *accord Restatement (Second) of Contracts* § 213 cmt. b (1981) (whether an integrated agreement is inconsistent with the term in question requires "interpretation both of the integrated agreement and of the prior agreement.").

2010, the record shows the parties were contemplating abandoning the VTA's impact on Quantlab Group because Section 4.91 of the 1LPA, which defined the term "Voting Interest," stated that "notwithstanding anything contained herein to the contrary the Voting rights of any Partner shall be expressly subject to the terms and provisions contained in VTA *as may me [sic] in force from time to time*." (A1058, § 4.91 (emphasis added).)

Years later, however, *all* of the parties to the VTA agreed the "time" had come to abrogate the VTA's effect on Quantlab Group. Specifically, the 2LPA, dated July 24, 2015, which was executed by *each* and *every* partner that signed the VTA, removed any reference to the VTA, including deleting in the 2LPA a WHEREAS clause from the 1LPA specifically referring to and defining the VTA. (A1110-A1178.) Similarly, in the 3LPA, dated December 31, 2015, which was executed by *each* and *every* partner that signed the VTA, *all* references to the VTA were completely removed. (A1180-A1274.) If that was not enough, then came the 4LPA—the *operative agreement* for this case—which also does not contain any mention of the VTA or any other voting trust. (A127-A222.)

These amendments eliminated all doubt about the continued effect of the VTA vis-à-vis the 4LPA. No version of Quantlab Group's governing document has been "restricted by and subject to" the VTA for several years now.

4. Voting Is One Of The "Matters" Addressed By The 4LPA And Both The Terms Of The 4LPA And DRULPA Require The VTA To Be Incorporated Into The 4LPA For It To Have Any Legal Effect On Quantlab Group

Defendants contended that the VTA is not within the ambit of the "matters of [the 4LPA]" language in the integration clause because, they claim, there is not "a single provision in the 4LPA that addresses and governs *how* partners vote." (OB at 36 (emphasis added).) That is wrong in both substance and focus.

The 4LPA governs, among other things, the substantive voting rights of the partners. (*See, e.g.*, A127-A222, §§ 1.136, 1.137, 1.144, 5.12 (defining which partners have what voting rights and what thresholds are necessary to obtain a "Super Majority").) The VTA does not really provide the missing "how," as Defendants contend, but merely says the Voting Trustee votes. The 4LPA also says that partners "vote." (*See* A152, § 5.12 (describing voting of limited partners).) What the VTA really purports to do is *assign* all of the substantive voting rights of the Class A Limited Partners' voting interests. The two agreements clearly touch on the same issue (indeed, that is why the VTA was incorporated into earlier iterations of the LPA). Accordingly, the VTA cannot be used to alter, or even supplement, any of the 4LPA's terms. *See Restatement (Second) Contracts* § 213(2) & cmt. c (1981) ("A binding completely integrated agreement discharges prior agreements to the extent that they are within its

scope."). How can the VTA not relate to "matters of [the 4LPA]," but at the same time be the key to "absolute power" and "limitless" authority over the management of Quantlab Group? This question is rhetorical.

Moreover, both the terms of the 4LPA and DRULPA require the VTA to be incorporated into the 4LPA for it to impact Quantlab Group, and its absence means that the 4LPA is not "restricted by and subject to" the VTA. The 4LPA does not provide assignees with the right to "vote" the assigned interests. Rather, Section 11.5(d) of the 4LPA provides that any "assignee" of a partnership interest, such as what the Voting Trustee would have (if anything), "has only the rights granted under Section 17-702(a)(3) of [DRULPA]." (A174, § 11.5(d).) In turn, Section 17-702(a)(3) of DRULPA provides that "[u]nless otherwise provided in the partnership agreement . . . [a]n assignment of a partnership interest entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled, to the extent assigned." 6 *Del. C.* § 17-702(a)(3).

Defendants' argument that the VTA constitutes a "Permitted Transfer[]" under Section 11.5(c) of the 4LPA (OB at 25-26) is barred because that specific argument was never raised below. *See* Supr. Ct. R. 8; *Jeffrey v. Seven Seventeen Corp.*, 461 A.2d 1009, 1011 (Del. 1983). That aside, the argument is also wrong because Section 11.5(c) is "[s]ubject [to] Section 11.5(f)," and the Voting Trustee was never "admitted" as a "substitute Limited Partner" on terms "satisfactory" to the "General Partner" as required by Section 11.5(f); nor could that occur for several reasons, including that only voting rights were assigned under the VTA, not the full Limited Partnership Interests per Sections 1.89 and 1.103 and the holders of those interests remain as the Limited Partners and cannot be "substitute[d]" out and replaced by the Voting Trustee.[7]

[7] Absent incorporation or authorization in the 4LPA, the VTA would violate the 4LPA by effectively re-setting the Class A voting interests of the Bosarge family-related entities, Eames and Omeltchenko, and by permitting non-partners to vote. The 4LPA's provisions clearly state that the "interests" of Quantlab Group's partners are as set forth in Schedule A. (*See, e.g.*, A131, § 1.26 (defining "Class A Partnership Interest"), A131, § 1.27 ("[A] Partner's percentage used to reflect the relative value of the assets and property contributed to the Partnership . . . as specified for such Class A Partner in Schedule A.").) Under Schedule A, the Bosarge family-related entities have a clear majority of the Class A interests. (A212-A220, Sch. A.) Under the VTA, however, the voting interests of the Bosarge family-related entities are purportedly reduced to just one-third. Without being incorporated into the 4LPA, the VTA cannot be used to vary the unambiguous provisions setting forth the Class A partners' voting interests.

The only way that the assignee of a partnership voting interest would have any right to vote is if that assignment is incorporated into the governing document, because such voting rights are not included in the bundle of rights permitted to be transferred under Section 17-702(a)(3). Accordingly, for Quantlab Group to validly accept votes per the assignment of voting interests in the VTA, the VTA must be incorporated into the 4LPA, and it is not.

Likewise, Defendants citation to Delaware's Voting Trust Statute, 8 *Del. C.* § 218 (applicable to general corporations), is also unavailing. (OB at 41-42.) Even if it applies to limited partnerships pursuant to Section 17-101(14) of DRULPA, it does not state that it supersedes or provides a statutory exception to compliance with specific provisions in a governing agreement (here, Section 11.5 of the 4LPA) or DRULPA (here, Section 17-702(a)(3)).

Defendants' contrary arguments are puzzling because, on January 8, 2009, their counsel advised Quantlab Group that the VTA should be incorporated by reference into the then-LPA and drafted Section 2.4.1 to effectuate that requirement. (Op. at 15 n.41.) That was sound advice then (and it remains correct today) because Section 17-702(a)(3) of DRULPA compelled that amendment for the VTA to have any effect on Quantlab Group.

Accordingly, the VTA has no effect on Quantlab Group because the terms of the 4LPA and DRULPA require its incorporation for that to occur, but it has long since been written out of the 4LPA.

5. The VTA And 4LPA Are Agreements "Among The Partners"

Defendants argue that the phrase "among the Partners" in the integration clause excises the VTA from its purview because there is not exact parity of partners between the signatories to the VTA and the 4LPA. (OB at 6, 24, 29.) This too lacks merit.

To start, the word "among" is not a mere synonym of "between" and does not necessarily connote that a condition applies equally to all members of the referenced group. *See, e.g.*, *Chicago Manual of Style* 269 (16th ed. 2010) ("Between indicates one-to-one relationships . . . . Among indicates undefined or collective relationships."). Defendants' reading is neither correct, nor reasonable.

Moreover, Defendants cannot seriously argue that the only "agreements" excluded by the integration clause are prior agreements to which *all* of the signatories to the newly-amended agreement are also a party because, were that correct, the 4LPA would not supersede the 3LPA, and the same would go with regard to the 3LPA versus the 2LPA. The 3LPA had fewer partners than the 4LPA and the 2LPA fewer than its predecessor agreement. By Defendants' so-called

logic, the 4LPA would not supersede the 3LPA because there is no parity in signatories. Such a result would be absurd and must be avoided. *See Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract.") (collecting cases).

All that matters here is that ***all*** of the partners that signed the VTA also signed the 2LPA, 3LPA and 4LPA, making the VTA a prior agreement "among the Partners" related to "matters of [the 4LPA]." Defendants cannot disavow unambiguous contracts they knowingly executed.

6. The Viability Of The VTA Is A True "Red Herring"

Several themes permeate Defendants' Opening Brief: that "the parties lacked intent to eradicate the VTA" (OB at 27), its continued legal effect on the 4LPA is evinced "by their failure to terminate the VTA" (*id.* at 28), and that the VTA cannot be viable and at the same time have no legal effect on Quantlab Group. (*Id*. at 32, 41.) None of these contentions has merit.

To start, Plaintiffs did not stipulate that the VTA ***is*** viable or that it actually controls the voting interests of the 4LPA. Viability is for the Texas court to decide. The stipulation was that the trial court could ***assume*** the VTA is valid

because regardless, the 4LPA is not "restricted by and subject to" it.[8]

Furthermore, the parties did not "eradicate" the VTA; they simply determined—not coincidently when issuing additional or new classes of limited partnership interests to new investors—that the 4LPA would no longer be subject to the VTA. Nor did the parties have to terminate the VTA to accomplish that goal; they did it with the language they used in, and omitted from, the 4LPA, along with its integration clause. "[A] court must determine the intent of the parties from the language of the contract." *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014). Eliminating the effect of the VTA is the clear import of removing all references to it in the 4LPA.[9]

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[8] This is clear from Defendants' record citations (OB at 4-5) and others. (A761-A762 ("MR. REED: Whether [the VTA is] viable or not, whether they can make the argument that it has effect, is in Texas. But this Court can assume the VTA is viable. It makes no difference. Because you still have to address the question of what did the parties intend to happen with regard to the limited partnership agreement, given the elimination of the reference to it that was once in there and given the integration clause.").) The trial court acknowledged this limitation as well. (A819 ("MR. REED: . . . We're going to assume it's valid. The question before Your Honor is what can they do with it vis-a-vis the LP agreement. . . . THE COURT: That's my understanding as well.").)

[9] Although there is no need to go beyond the clear language of the 4LPA, uncoupling Quantlab Group from the VTA is not inconsistent with what was contemplated. (A1058, § 4.91 ("Voting rights of any Partner shall be expressly subject to the terms and provisions contained in VTA *as may me [sic] in force from time to time*.") (emphasis added); A1126, § 1.137 ("any applicable voting trust agreement [lower case] as *may* me [sic] in force from time to time.") (emphasis added).)

There is also no conflict between the VTA being viable (if that is what the Texas court ultimately decides) and, at the same time, having no legal effect on the 4LPA. The parties are free to further amend the 4LPA and once again make it subject to the VTA, if that becomes their intent, but several years ago they determined—and reaffirmed two more times—that for now, the governance of Quantlab Group would not be "restricted by and subject to" the VTA.

The notion that Defendants did not intend to eliminate the VTA's effect on the 4LPA is impossible to accept. Various versions of Quantlab Group's governing document were entered into by sophisticated parties who affirmatively and systematically stripped out any reference to the VTA. In addition to the integration clause, Section 17.17 of the 4LPA states:

> Disclosure. *Each of the Partners acknowledges* that such Partner (1) was not represented by the Attorney who prepared this Agreement and was urged in advance to secure separate independent legal counsel in connection with signing and making this Agreement and its effect upon each of them and their property, (2) *has carefully read and understood the provisions of this Agreement*, (3) understands that the Partner's rights in real property may be adversely affected by this Agreement, (4) is signing and making this Agreement voluntarily, . . .

(A187, § 17.17 (emphasis added).)[10]

[10] In light of Section 17.17, it is difficult to understand how Defendants asserted a "fraudulent inducement" claim below, and are now doing so before a Texas court.

Defendants cannot use the VTA to alter, or even supplement, any of the 4LPA's terms. *See Restatement (Second) Contracts* § 213(2), cmt. c (1981) ("Where the parties have adopted a writing as a complete and exclusive statement of the terms of the agreement, even consistent additional terms are superseded."). The conclusion that the four corners of the 4LPA governs Quantlab Group makes complete sense. Many investors, including the largest investor to date, Big Bird Partners, invested under the 4LPA, with an integration clause and unambiguous language that makes no reference to the VTA or any voting trust agreement. Those limited partners would thus have no notice that provisions of the 4LPA, let alone control of Quantlab Group, could be impacted by some separate agreement. That notice concern was one of the precise reasons why the VTA had Section 2.4.1, and it is precisely why, with all such language removed, it cannot, as a matter of law, impact the 4LPA.

Significantly, the viability of the VTA is a "red herring" because this entire appeal is an act of futility for Defendants. Before Defendants' attempted coup—swiftly put down in the First Delaware Action—the VTA had never been used to impact the governance of Quantlab Group or anything else. The parties merely replaced a voting trustee, but that is not use vis-à-vis the 4LPA. Noticeably absent from any of the relevant documents is a signature from the Voting Trustee because

the VTA was not used to carry out the amendments. The reason is that per the express terms of the 4LPA (and all of its prior iterations), it can only be amended by a "writing" executed by the Partners, whereas the VTA only assigns voting (not *all* rights) and, even when it *had* a legal effect on Quantlab Group, it only covered matters put up for a vote. This issue was raised by Plaintiffs as their Count III, but was mooted by the Opinion.

Specifically, Section 17.9 of the 4LPA provides: "Except as set forth with specificity herein, this Agreement may be amended, modified or supplemented only by an agreement *in writing signed by a Super Majority of Partners* . . . ." (A186, § 17.9 (emphasis added).) This is why none of the previous amendments were effectuated through a "vote" from the Voting Trustee or any of the Partners. This is also why Defendants' reference to the July 8, 2016 Joinder (OB at 12, 27) is irrelevant. Putting aside that Defendants never made an argument about the Joinder to the trial court, and that the Joinder refers to the 2009 not 2010 VTA, the Voting Trustee *never* executed, attempted to execute, or claimed a right to execute the 4LPA (or any prior iteration) because the VTA has nothing to do with amendments per Section 17.9.

To reiterate, assuming the VTA remains viable, the parties to the 4LPA are free to amend the 4LPA once again and make it subject to the VTA, but for now the 4LPA's plain language confirms it is not; and regardless, this case will not aid Defendants in their ill-conceived quest to strip Bosarge of a 71.967% controlling interest in Quantlab Group.[11]

7. Defendants' "Unclean Hands" Defense Is Inapplicable And Meritless

The *equitable* doctrine of "unclean hands" does not apply here because Plaintiffs sought only *legal* relief (*i.e.*, pure contract construction). *See Lehman Bros. Hldgs. Inc. v. Spanish Broad. Sys., Inc.*, 2014 WL 718430, at *7 (Del. Ch. Feb. 25, 2014), *aff'd*, 105 A.3d 989 (Del. 2014) (refusing to apply laches where plaintiff sought only a declaratory judgment regarding a breach of contract and explaining that unclean hands "does not apply to a plaintiff seeking *legal* relief") (emphasis added); *Standard Gen. L.P. v. Charney*, 2017 WL 6498063, at *25 (Del. Ch. Dec. 19, 2017) ("Because Count II seeks money damages—a quintessentially legal form of relief—[defendant's] unclean hands defense fails a matter of law.").

[11] If, as Defendants argue, there was "no consideration" to eliminate the VTA's effect on the 4LPA (OB at 35), then there was no consideration in the first instance for the Bosarge family-related entities to re-allocate their 71.967% voting interests.

Defendants say the cases are inapposite because none involved partnerships and the rule does not apply to partnership disputes that "proceed in equity rather than at law" before "the Court of Chancery, a court of equity." (OB at 40.) This, of course, does not change the fact that Plaintiffs made no appeal to equity, and Defendants offer no rationale for deviating from the rule just because the contract language being construed is in a partnership agreement. Moreover, Defendants' approach overlooks the fact that it would prejudice all of the non-party limited partners of Quantlab Group, who are entitled to contractual enforcement of the plain terms of the 4LPA. *See NHB Advisors, Inc. v. Monroe Capital LLC*, 2013 WL 6906234, at *5 (Del. Ch. Dec. 27, 2013) (trusts implicate equity, and in construing terms of trust agreement, court refused to apply unclean hands "even if [defendant] could satisfy its burden" because the trust's other beneficiaries "are entitled to have the trust administered in accordance with a correct interpretation of the Trust Agreement's terms.").

Even if the defense is applicable, Defendants bear the burden to demonstrate that Plaintiffs are "tainted with inequitableness or bad faith relative to the matter in which [they] seek[] relief." *SmithKline Beecham Pharm. Co. v. Merck & Co.*, 766 A.2d 442, 449 (Del. 2000). What Defendants point to falls woefully short of this high hurdle.

Defendants point to statements made by *non-parties* to European regulatory authorities, indicating they *believed* the VTA was still in force over Quantlab Group, to argue that Plaintiffs should be barred from taking a contrary position. (OB at 12-15, 40-41.) However, the trial court correctly found that none of the statements were made or directed by any of the Plaintiffs. The August 10, 2017 letter from [redacted] (A2562-A2571) was on behalf of Quantlab Europe, B.V., which has its own board of directors. (A3030, ¶4.) Likewise, the September 13, 2017 email (A2601-A2603) was from [redacted], who does not represent any of the Plaintiffs. (A3030, ¶3.)

Most importantly, Defendants have misrepresented the genesis of these documents, as they did to the trial court. (A3132-A3133.) Defendants refer to an August 7, 2017 email (A3121) and claim the August 10 NRF letter was written by [redacted] "based upon Quantlab's records." (OB at 13.) However, the actual draft attached to that email makes no reference to the VTA. (A3140-A3150.) The August 7 email was sent to Allen Dempster, a lawyer for the entire Quantlab Group of companies who had been conspiring with Defendants. It was not until Mr. Dempster opined on the draft that the NRF letter and subsequent documents mentioned the VTA. (A3030, ¶5.) Mr. Dempster himself then certified the

misrepresentations to the regulators. (A3030, ¶6; A3034-A3036.) Plaintiffs and the entire Quantlab Group of family companies assumed in good faith that their lawyer was acting in good faith when he was not.

Finally, once the scheme was exposed, on May 8, 2018, Quantlab Europe made corrective statements to the European regulators (A3030 ¶7; A3038-A3041), mooting any "reliance" argument by Defendants.

8. An Examination Of Traditional Parol Evidence Is Unnecessary

Another consistent theme behind the myriad of ancillary facts and strained legal issues raised by Defendants is that there should be an inquiry into all of it. Respectfully, Plaintiffs cannot respond any better than the trial court already did, noting the hypocrisy:

> The Court has determined that the VTA and LPA are unambiguous; there is no need for parol evidence to interpret those agreements. The relevant parol evidence with respect to integration is already before the Court. And Defendants have failed to identify any specific discovery that would inform the Court's consideration of their affirmative defenses. Indeed, *Defendants themselves acknowledge there are no facts in dispute when arguing that summary judgment in their favor is justified*. I agree—there is no need for discovery here.

(Op. at 18-19 (emphasis added).)

II. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS ARE ENTITLED TO THEIR ATTORNEYS' FEES PURSUANT TO THE PREVAILING PARTY PROVISION OF THE 4LPA

A. Question Presented

Whether the trial court correctly held that Plaintiffs were entitled to their attorneys' fees pursuant to Section 17.4 of the 4LPA because Defendants waived the mediation/arbitration provision in the 4LPA? These issues were preserved below. (A3460-A3461, A3482-A3485, A3571-A3580.)

B. Standard and Scope of Review

This Court reviews contract interpretations *de novo, Nationwide Emerging Managers, LLC v. Northpointe Hldgs., LLC*, 112 A.3d 878, 889 (Del. 2015), but Defendants challenge the award of attorneys' fees on the basis that the trial court did not have sufficient evidence of Defendants' knowledge and intent to waive the mediation/arbitration provision. Although the question of waiver implicates facts, this Court will consider the trial court's findings with respect to waiver with "a high level of deference." *Amirsaleh v. Board of Trade of City of New York, Inc*., 27 A.3d 522, 529 (Del. 2011).

C. Merits of Argument

"[A] party waives its right to invoke an arbitration provision by 'actively participat[ing] in a lawsuit or tak[ing] other action inconsistent with the right to arbitration….'" *Menn v. Conmed Corp*., 2019 WL 925848, at *2 (Del. Ch. Feb. 25, 2019) (quoting *SBC Interactive, Inc. v. Corp. Media P'rs*, 714 A.2d 758, 762 (Del. 1998); *Russykevicz v. State Farm Mut. Auto. Ins. Co*., 1994 WL 369519, at *5 (Del. Ch. June 29, 1994) (finding that a party waived an arbitration provision when it initiated litigation without first seeking arbitration); *W.R. Ferguson, Inc. v. William A. Berbusse, Jr. Inc*., 216 A.2d 876, 878 (Del. Super. 1966); *Dorsey v. Nationwide Gen. Ins. Co*., 1989 WL 102493, at *2 (Del. Ch. Sept. 8, 1989); *Falcon Steel Co. v. Weber Eng. Co., Inc*., 517 A.2d 281 (Del. Ch. 1986).

Defendants fail to address any of the relevant precedent when they argue that the trial court did not have sufficient evidence to determine that "Defendants had any knowledge that not compelling arbitration would waive the conditions precedent for recovery of attorneys' fees" and that "Defendants actually intended to waive the mediation/arbitration provision." (OB at 47.)[12] In *Russykevicz*, the

[12] Defendants cite two cases with dissimilar issues: *James J. Gory Mech. Contr., Inc. v. BPG Residential P'rs*, 2011 WL 6935279 (Del. Ch. 2011) (discussing the document party claimed constituted waiver but deciding motion to dismiss on other grounds); and *Bantum v. New Castle County Vo-Tech Educ. Ass'n*, 21 A.3d 44 (Del. 2011) (discussing whether a school district's representative's testimony had waived statutory immunity).

Court of Chancery explained that "to find a waiver of a contractual right to arbitration, [a court] must find an intentional relinquishment of a right with both knowledge of its existence and intention to relinquish it." 1994 WL 369519, at *2 (internal citations omitted). However, the court then held that a party who actively participates in litigation has taken "steps inconsistent with the right to arbitrate" and "[t]his action affirmatively constitutes an intention to waive the [party's] right to demand arbitration." *Id.*; *see also W.R. Ferguson, Inc.*, 216 A.2d at 232-33 (finding that defendant had waived arbitration provision based on the fact that defendant had waited more than nine months to raise issue of arbitration and had also filed counterclaims); *Dorsey*, 1989 WL 102493, at *2 (litigating for two years "amount[ed] to 'waiver'").

Here, the prevailing party provision (Section 17.4) is subject to mediation/arbitration because "*any* dispute…relating to" the 4LPA is subject to Section 16. (A184-A185.) Recovery of attorneys' fees is not an independent claim, but is intrinsically linked to, and flows naturally from, an underlying claim. When Defendants waived mediation/arbitration with respect to the underlying claims, they also waived it with respect to a dispute over attorneys' fees under Section 17.4.

Defendants cannot deny knowledge of Section 16's requirements because it was the subject of a motion in the First Delaware Action (A3539-A3540) and the trial court correctly concluded that Defendants were aware of the arbitration provision. (OB, Ex. B at 31:2-6 ("I think both parties were well aware of Article XVI. It was mentioned in the prior litigation…and both sides have referred to it, I'll note."). Putting aside Defendants' filing of the First Delaware Action, even in the narrowest reading of the record, there is an indisputable waiver because Defendants chose not to compel mediation/arbitration when this action was filed, then asserted counterclaims and litigated to a final judgment. The trial court correctly found a waiver from those three indisputable facts.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the decisions of the trial court be affirmed.

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CERTIFICATE OF SERVICE

I, Kelly L. Freund, hereby certify that on this 19th day of September, 2019, I caused true and correct copies of the REDACTED PUBLIC VERSION of **ANSWERING BRIEF OF PLAINTIFFS-BELOW/APPELLEES QUANTLAB GROUP GP, LLC, VELOCE, LP AND MARCO, LP** to be served upon the following counsel of record in the manner indicated:

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