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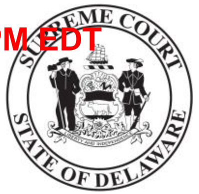

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRUCE P. EAMES, ANDREY OMELTCHENKO, AVG HOLDINGS, LP, and **ASTER SECURITIES (US) LP,**	:	
Defendants Below/Appellants	:	No. 338, 2019
v.	:	APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 2018-0553-JRS
QUANTLAB GROUP GP, LLC, VELOCE, LP, and **MARCO, LP,**	:	
Plaintiffs Below/Appellees,	:	**PUBLIC VERSION FILED OCTOBER 3, 2019**
and	:	
QUANTLAB GROUP, LP,	:	
Nominal Defendant Below.	:	

<u>APPELLANTS' REPLY BRIEF</u>

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PRELIMINARY STATEMENT

Plaintiffs contend "[t]he relevant facts are undisputed."[1] Answering Brief ("AB") at 1. Plaintiffs could not be more wrong. Plaintiffs' "facts" are almost always unsupported by citations to the record, and just as often untrue.

DISPUTED "FACTS"	
Plaintiffs' Version	**The Truth**
In 2017, Defendants tried to orchestrate a "complete change of control" at Quantlab. (AB at 3).	Quantlab was controlled by a three-man vote of Eames, Omeltchenko, and Bosarge. Eames and Omeltchenko had always run the day-to-day at Quantlab, consulting with Bosarge. In 2016, *Bosarge* changed that status quo. As profits plummeted thereafter, Defendants took action in 2017 to *restore* the status quo. (A1514-1517).
Defendants continue to attempt to take control over Quantlab via the Texas litigation and this litigation. (AB at 3-4).	The Texas litigation is only about the parties' rights under the VTA. Moreover, this litigation was filed by Plaintiffs, *not* Defendants. After Defendants admittedly lost the First Delaware Action (hence their decision not to appeal), they have *taken no action* to interfere with the control of Quantlab. Plaintiffs cite no evidence to the contrary.
Defendants' "claimed that the Texas Action was about who will control Quantlab Group." (AB at 4, citing	The word "control" does not appear in A588, ¶55. Defendants explicitly sought declaratory relief that the VTA "is

[1] The terms used herein are defined in Appellants' Opening Brief on Appeal ("OB").

DISPUTED "FACTS"	
Plaintiffs' Version	**The Truth**
A588, ¶55).	effective and continues to govern the Voting Trust Interests and the Voting Trust Parties" along with a request for attorney's fees. (A588, ¶55.) Plaintiffs also ignore Defendants' stipulations that their declaratory judgment action does not seek control of Quantlab. *See, e.g.,* A794:10-A797:17; A3357:18-3358:9; A3364:3-3365:18).
The Texas court abated the Texas Action "pending the outcome of this action…." (AB at 5).	The Texas court initially *refused* to abate that case, and only did so after the trial court granted summary judgment here. (*Compare* Exhibit C, March 19, 2019 Letter Opinion, *to* A3477, May 15, 2019 Order abating the Texas Action).
Limited partners invested in Quantlab with no notice of the VTA. (AB at 15; 36).	The VTA was recorded in Quantlab's books and records. (A2543, ¶5).
The Second Texas Action is barred by the final judgment in this case. (AB at 20 n.4).	This is irrelevant and false. The Second Texas Action is brought solely against Bosarge individually; none of the Plaintiffs here are defendants there. (*See* caption of the Second Texas Action at AB at 19.).
"Under the VTA…the voting interests of the Bosarge family-related entities are purportedly reduced to just one-third." (AB at 30 n.7).	Not all Bosarge family-related entities are Class A limited partners of Quantlab. Only Marco and Veloce are. (*See* A212-220, Schedule A).
"Defendants' argument that the VTA constitutes a "Permitted Transfer[]"	Defendants made no such argument. Rather, Defendants point to the

DISPUTED "FACTS"	
Plaintiffs' Version	**The Truth**
under Section 11.5(c) of the 4LPA (OB at 25-26) is barred…." (AB at 30).	Permitted Transferee sections of the 4LPA to support their argument that the 4LPA contains ambiguities and is not carefully drafted. It both allows and disallows transfers of voting interests. (OB at 25-26).
"The VTA had never been used to impact the governance of Quantlab Group or anything else…. 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." (AB at 37).	The VTA was used to vote in approval of every amendment to the LPA, which obviously 'impact the governance' of Quantlab. For example, the Voting Trust Committee executed a joinder in connection with the 4LPA. (A3292-94.) Moreover, the Voting Trustee is not required to sign any of the LPAs because the Trustee was never a limited partner of Quantlab Group. (*Compare* A2166, Introductory Paragraph *to* A2435-43, Schedule A listing all partners). The LPA amendments Plaintiffs claim eliminated the VTA are not to be signed by voting trustees, they are to be signed by the Class A limited partners, or at least by a Super Majority thereof. (A2234 §17.9 (2LPA); A2315 §17.9 (3LPA); A2409 §17.9 (4LPA).
"Defendants never made an argument about the Joinder to the trial court…." (AB at 37).	Defendants did indeed make this argument. (A3327:12-18; A3333:6-10.)
"If…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-	The consideration for the VTA is recited within that contract. (A103 §J-K and the introductory paragraph under AGREEMENTS; see also A115 §K-L and the introductory paragraph under

DISPUTED "FACTS"	
Plaintiffs' Version	**The Truth**
allocate their 71.967% voting interests. (AB p. 38, n.11).	AGREEMENTS). Plaintiffs claim the VTA was later eliminated in *separate agreements, i.e.*, the LPAs (AB at 27). These later agreements lacked consideration for eliminating the VTA. (OB at 35).
"The actual draft attached to [the Garfield] email makes no reference to the VTA." (AB at 40).	There is no indication that the draft cited by Plaintiffs was attached to the Garfield email. The draft is an undated, unauthenticated, and inadmissible document. It is not even accompanied by an email. (A3140-3150). Plaintiffs also ignore the evidence of control submitted by Defendants (*See, e.g.* OB at 12-14).
"[N]one of the statements [to the Regulators] were made or directed by any of the Plaintiffs." (AB p. 40).	In the very next paragraph, Plaintiffs admit the representations were made to the regulators by "a lawyer for the entire Quantlab Group of Companies." (AB at 40-41.)

Plaintiffs engage in obfuscation to escape the VTA they stipulated should be accepted as viable, valid and enforceable. For example, Plaintiffs cry "forum shopping" because Defendants rightfully filed the Texas Litigation in the appropriate venue and jurisdiction where, *inter alia*, all of the documents are located, where most of the witnesses are located, where the Quantlab entities are

headquartered, and where all of the contracts were executed. AB at 4; OB at 16-17. To the contrary, *Plaintiffs* have forum-shopped by stipulating to the validity, viability, and enforceability of the VTA in order to "distinguish" the issues in this case from those in the Texas Litigation and avoid having to assert affirmative defenses there. Immediately after using the stipulation to defeat Defendants' *McWane* motion, Plaintiffs began to walk back their stipulation and have argued in substance that the VTA is *not* valid, viable and enforceable because it was superseded by the 4LPA. The trial court's failure to apply the stipulation concerning the VTA constitutes reversible error. OB Exhibit B at 2.

ARGUMENT

I. The trial court erred in granting summary judgment on Count II by not adhering to the proper summary judgment standard.

This case is about the intent of the Partners concerning the relationship between two agreements. The parties' intent is always the most important fact in resolving questions of contract interpretation. *Orthopaedic Assocs. of S. Del. v. Pfaff*, 2017 Del. Super. LEXIS 678, at *15 (Del. Super. Dec. 22, 2017). Given the fact issues in the record, which are highlighted above and further detailed below, the trial court erred in granting summary judgment.

First, the Court must determine whether the 4LPA's integration clause is ambiguous. In other words, does the integration clause unambiguously state the Partners' shared intent such that no objective person could have a different reasonable interpretation of the language? If there is more than one reasonable interpretation of the integration clause, the integration clause is ambiguous and summary judgment was not proper as a matter of law.

If the integration clause is not ambiguous, a second question must be answered: whether any genuine issues of material fact exist concerning the Partners' shared intent for the 4LPA to void the VTA. If genuine issues of material fact exist concerning the Partners' intent for the 4LPA to be a fully integrated agreement, summary judgment was not proper as a matter of law.

A. The trial court erred because the 4LPA's integration clause is ambiguous.

The well-established effect of an integration clause is to "supersede" prior agreements. *See, e.g., ev3, Inc. v. Lesh*, 114 A.3d 527, 533 (Del. 2014); AB at 25. Indeed, this is the specific effect stated by the Partners in the 4LPA's integration clause. To "supersede" means to "[o]bliterate, set aside, annul, replace, make void, inefficacious or useless, repeal." Black's Law Dictionary 1177 (6th ed. 1990). When interpreting the language of an integration clause, the issue generally is not the parties' shared intent to invalidate prior agreements. Instead, the issue almost always concerns the scope of agreements the parties intended to invalidate.

Summary judgment concerning contract interpretation is only appropriate if the contract in question is unambiguous, thus the threshold inquiry in every contract interpretation dispute is whether the contract is ambiguous. *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007). Summary judgment on an issue of contract interpretation is inappropriate unless the movant establishes as a matter of law that its interpretation is the only reasonable interpretation. *Id.* at 834. When a contract is reasonably susceptible to more than one objective interpretation, the contract is ambiguous and the interpreting court must consider all admissible evidence to ascertain the parties' shared intentions. *Sunline Commercial Carriers, Inc. v. CITGO Petrol. Corp.*, 206 A.3d 836, 847 (Del. 2019); *see also Salamone v. Gorman*, 106 A.3d 354, 374 (Del. 2014).

In this case, the trial court erred by failing to find the language of the 4LPA's integration clause to be ambiguous.

1. Defendants' interpretation is objectively reasonable.

The parties offer more than one reasonable interpretation of the 4LPA's integration clause. The disputed language is the statement that the 4LPA "contains the entire agreement among the Partners with respect to the matters of this Agreement..." AB at 2. The parties' interpretations turn on the meaning of the word "among" and its impact on the scope of the integration clause.[2] Plaintiffs failed to establish as a matter of law that their interpretation is the only reasonable interpretation.

Plaintiffs' interpretation of "among" does not require a condition to "appl[y] equally to all members of the referenced group." AB at 32. Under Plaintiffs' interpretation, the 4LPA supersedes all agreements relating to Quantlab that involve any two or more Partners. AB at 33. If the 4LPA were intended to supersede all agreements to which all of the Partners were parties, Plaintiffs argue, then the phrase "between the Partners" should have been used instead. AB at 32. The trial court determined Plaintiffs' interpretation is the only reasonable interpretation. OB Exhibit C at 8. The trial court supports this interpretation by

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[2] Defendants argue "the matters of this Agreement" also has more than one objectively reasonable interpretation, which again affects the scope of the integration clause. Defendants do not further address this argument here and respectfully refer the Court to their Opening Brief.

citing the *Chicago Manual of Style*: “Between indicates one-to-one relationships…. Among indicates undefined or collective relationships.” OB Exhibit C at 16 (emphasis added).

Even if this citation supports an objectively reasonable interpretation of “among the Partners,” it still is not the only objectively reasonable interpretation as a matter of law. Citing the Oxford American Dictionary, Defendants argue the words are synonymous, but “between” is preferred when two parties are involved while “among” should be used when more than two are involved. OB at 23-24. According to Defendants’ interpretation, the 4LPA only supersedes agreements relating to Quantlab to which all of the Partners were parties.

This Court has previously agreed with Defendants’ interpretation. In *ev3, Inc. v. Lesh*, this Court interpreted the meaning of an integration clause contained in a merger agreement between two parties. *ev3, Inc.* 114 A.3d at 528. That clause stated: “This Agreement contains the entire understanding among the parties hereto with respect to the transactions contemplated hereby. . .” *Id.* at 532 (emphasis added). Recognizing that there were only two parties to the merger agreement, this Court interpreted the clause to say that “the merger agreement superseded all prior agreements and understandings between the parties….” *Id.* (emphasis added). The Court’s understanding of the two terms as being synonymous, but distinguishable by the number of parties involved, is entirely

consistent with Defendants' interpretation of the 4LPA's integration clause. This Court's interpretation of these terms demonstrates that Defendants' interpretation is objectively reasonable.

Defendants were not required to prove as a matter of law that their interpretation reflected the Partners' shared intent in order to overcome summary judgment. Instead, Defendants need only establish that their interpretation is reasonable and therefore, Plaintiffs' interpretation is not the exclusive reasonable interpretation. *United Rentals, Inc.*, 937 A.2d at 832, n.104.

As Delaware courts have recognized, interpretations based on competing dictionary definitions give rise to multiple objectively reasonable interpretations. In *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, a case quoted by Plaintiffs in their Answering Brief, the Court of Chancery interpreted certain restrictive covenants within an asset purchase agreement prohibiting one party from engaging in "competitive" business. *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2008 Del. Ch. LEXIS 44, at *1, 7-8 (Del. Ch. Apr. 3, 2008). The trial court looked to several dictionary definitions of the word "competitive" and found both a broad and a narrow meaning of the term. Under the narrower meaning, the activity in question would not be considered "competitive," but under the broader meaning it would. The trial court noted the ambiguity and, given its context, determined that plaintiffs were likely to prove that their interpretation

reflected the parties' shared intent.[3] Like the situation in *Concord*, this case involves an ambiguity created by competing broad and narrow definitions of a term, rendering summary judgment inappropriate.

2. Plaintiffs' stipulation to the validity of the VTA establishes Defendants' interpretation as the sole objectively reasonable interpretation.

James v. United Med. LLC is a particularly relevant case for demonstrating the ambiguity in the 4LPA's integration clause. As noted, Plaintiffs expressly stipulated the VTA is a viable, valid, and enforceable agreement.[4] Like the present situation (where Plaintiffs stipulate the VTA is valid, yet argue the 4LPA's integration clause renders it "legally ineffective") *James* involved an interpretation dispute wherein one party's interpretation would cause an admittedly valid, pre-existing agreement to fall within the scope of the relevant integration clause.

In *James*, the court ultimately found the scope of the relevant integration clause to be ambiguous. *James v. United Med. LLC*, 2017 Del. Super. LEXIS 161, at *2 (Del. Super. 2017). *James* involved three separate agreements: a letter of

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[3] The trial court subsequently considered the agreement as a whole, along with extrinsic evidence, and found the parties "intended the term 'competitive' to have the [broader] of the two potential definitions[.]" *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2009 Del. Ch. LEXIS 168, at *42 (Del. Ch. Sept. 30, 2009).

[4] Plaintiffs attempt to distinguish between a stipulation that the VTA is a valid agreement and a stipulation that the trial court <u>shall assume for all purposes</u> the VTA is valid. AB at 5; AB Exhibit B at 2. Such a distinction is meaningless for this appeal. From either perspective, the trial court must regard the VTA as valid, viable, and enforceable.

intent, a billing agreement, and an employment agreement. *Id.* at *3-4. The plaintiff brought claims based on the letter of intent and the billing agreement. *Id.* at *5. The defendants argued the letter of intent was superseded by the integration clause of the employment agreement. *Id.* at *8. The plaintiff argued the scope of the integration clause was intended to apply only to matters of employment, not to the non-employment issues addressed in the letter of intent. *Id.* at *12.

The integration clause there stated: "This [Employment] Agreement, between the parties, constitutes the entire agreement between the parties hereto with respect to all matters…." *Id.* at *11. The *James* court interpreted the meaning of "all matters," and found the defendants' interpretation of the scope was indeed reasonable. *Id.* at *14. Nevertheless, the court also found the defendants' interpretation "[was] not the *only* reasonable one" under the facts of the case, which are importantly similar to the facts in this case. *Id.* (emphasis added).

The defendants in *James* <u>admitted</u> the billing agreement remained a binding agreement between the parties. *Id.* Under the defendants' interpretation of the integration clause, however, the billing agreement would have been superseded and invalidated. *Id.* at *14-15. Given the defendants' admission concerning the viability of the billing agreement, the court reasonably inferred that the parties intended to have the separate agreements govern separate matters. *Id.* at *15. On this basis, the court found the scope of the integration clause was ambiguous and

the case required further development to determine whether the letter of intent remained an enforceable agreement. *Id.*

As *James* demonstrates, the current viability, validity, and enforceability of the VTA constitutes a determinative fact reinforcing, at minimum, the ambiguity of the integration clause. It also establishes Defendants' interpretation as the sole objectively reasonable interpretation as a matter of law, and permits this Court to decide in favor of Defendants on appeal. This is because under Plaintiffs' interpretation of the integration clause, the 4LPA would supersede the VTA. If the 4LPA superseded the VTA, the VTA would no longer be a viable, valid, and enforceable agreement. The stipulated *fact* that the VTA is viable, valid, and enforceable can only mean, as in *James*, that it did not fall within the scope of the 4LPA's integration clause. Given the stipulated facts of this case, Defendants' interpretation is the sole objectively reasonable interpretation as a matter of law.

3. The Quantlab Rule must be overruled by the Court in order to correct a mass disruption to Delaware law.

Because Plaintiffs' interpretation of the integration clause is illogical given the stipulated validity of the VTA, they proposed, and the trial court accepted into the law of Delaware, an unprecedented legal position that attempts to reconcile their interpretation with the present validity of the VTA. This position says that the 4LPA's integration clause supersedes only the "legal effect" of the VTA. AB at 15; OB Exhibit C at 15, 17. Neither the trial court nor Plaintiffs have cited any

legal authority from any federal or state court to support such a position. Thus, unless the trial court's opinion is overturned, the "*Quantlab* Rule" will create new Delaware law that "superseded" agreements nevertheless somehow remain "viable, valid, and enforceable." The "*Quantlab* Rule" will be an eternal spring of litigation.

4. Plaintiffs' only criticism of Defendants' interpretation ignores the plain language of the integration clause.

Plaintiffs' only criticism of Defendants' interpretation is that if Defendants' are correct, "the 4LPA would not supersede the 3LPA [because the] 3LPA had fewer partners than the 4LPA…."[5] AB at 32-33. This criticism fails because it ignores the plain language of the integration clause. The integration clause clearly states the Partners' intent that the 3LPA be considered an "agreement among the Partners" regarding Quantlab. The plain language of the integration clause itself states that the 4LPA supersedes the 3LPA. This is entirely consistent with Defendants' interpretation and does not, as Plaintiffs simply say, create an "absurd" result.

[5] Plaintiffs claim the integration clause supersedes "'all agreements,' with no exceptions." AB at 25 (emphasis in original). Plaintiffs surely do not argue the Partners actually intended the 4LPA to supersede every prior agreement ever made by anyone, without exception. The 4LPA certainly reflects an intent only to "supersede and govern all [such] agreements . . ." (*i.e.*, all agreements among the Partners with respect to the matters of the 4LPA). This lack of precision within the integration clause supports a conclusion that the 4LPA was not carefully drafted.

Plaintiffs' criticism further ignores the definitions relevant to the term "Partners" by presupposing that the term represents a static number of persons. For example, Plaintiffs assert that Defendants' interpretation would not supersede the 3LPA for the specific reason that the number of "Partners" under the 3LPA is less than the number of "Partners" under the 4LPA. AB at 32. What Plaintiffs ignore is that under both the 3LPA and the 4LPA, "Partners" is defined to be a fluid term automatically reflecting whatever "Limited Partner(s)" and "General Partner(s)" have been admitted to Quantlab. For purposes of understanding the scope of the integration clause, the exact number of "Partners" who signed a prior agreement is irrelevant. What determines if a prior agreement is superseded by the 4LPA is whether it was an agreement that involved all the "Partners" at the time. As Plaintiffs' chart clearly shows, the VTA was not an agreement involving all the "Partners" when it was executed in 2010. AB at 16.

B. The Partners did not intend for the 4LPA to be the final and total expression of their agreement.

Separate from the question of whether the scope of the 4LPA's integration clause is ambiguous is the question of whether the Partners actually intended the 4LPA to be the final and total expression of their agreement, to the exclusion of the VTA. While the presence of the integration clause creates a presumption that the Partners intended the 4LPA to be the final and total expression of their agreement, that presumption is not irrefutable. *Addy v. Piedmonte*, 2009 Del. Ch. LEXIS 38,

at *29 (Del. Ch. Mar. 18, 2009). This is because the parties' intent always controls. *Orthopaedic Assocs. of S. Del.*, 2017 Del. Super. LEXIS at *15.

For purposes of this appeal, the question is whether the record creates a genuine issue of material fact concerning the Partners' intent regarding integration. Plaintiffs noticeably fail to respond to Defendants' evidence and arguments concerning the relevant factors to consider when evaluating the Partners' intent (*e.g.*, the discernable intent of the parties, the language of the contract, whether the contract was carefully and formally drafted, and whether the contract addresses questions naturally arising from its subject matter), including the evidence demonstrating the design of the VTA to resolve stalemates created by the 4LPA. Further, Plaintiffs fail to respond to the logical necessity that, given the stipulated validity of the VTA, if the interpreting court determines the Defendants' interpretation of the integration clause is not the correct interpretation, the only other way for the VTA to be a viable, valid, and enforceable agreement is if the Partners did not actually intend for the 4LPA to state the final and total expression of their agreement. The summary judgment evidence, including the VTA stipulation, creates a genuine issue of material fact concerning the Partners' integration intent, and the trial court granting summary judgment on this record was error.

The trial court indicated that it examined the record of parol evidence to determine whether the Partners intended to integrate the 4LPA fully or partially. OB Exhibit C at 10-11. Concerning this question, Plaintiffs argue in the AB that the Partners intended the 4LPA to be fully integrated. AB at 24. To support this contention, Plaintiffs point to nine different documents and specifically say that language from these documents not later included in the 4LPA, in addition to the language included in the integration clause itself, evidences the Partners' intent. AB at 8-9, 34.[6] It is certainly ironic for the Plaintiffs to argue, on the one hand, that the Partners' intent is "clear" while at the same time arguing, on the other hand, that one must look to a slow erosion of language from nine documents in order to discern this "clear" intent. AB at 13. It also goes beyond the boundaries of reason for Plaintiffs to argue that determining the Partners' "clear" intent from the surreptitious changes hidden within the depths of these nine documents did not require the trial court to draw any inferences at all from them. AB at 6.

The trial court's treatment of such summary judgment evidence is precisely where it committed error on this question of the Partners' integration intent.

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[6] The trial court summarily dismissed Defendants' request for discovery by finding that "[t]he relevant parol evidence with respect to integration is already before the Court." OB Exhibit C at 18. How can the trial court know this (as a matter of law) without drawing inferences in favor of Plaintiffs? "It is black letter law that before a motion for summary judgment is decided, the non-movant must be afforded an opportunity to take all necessary discovery." *Kier Constr., Ltd. v. Raytheon Co.*, 2002 Del. Ch. LEXIS 138, 6 (Del. Ch. Nov. 4, 2002).

Disregarding the legal standards for summary judgment, the trial court improperly weighed the evidence in the record, failed to draw inferences in favor of Defendants, and instead drew inferences in favor of Plaintiffs.[7] For example, the summary judgment record includes affidavits from Defendants Bruce Eames and Andrey Omeltchenko. Both limited partners testified under oath in their affidavits that they have never intended to terminate the VTA. A2540-56. If these limited partners did not intend to terminate the VTA, and if the 4LPA's integration clause appears to terminate the VTA, then the summary judgment evidence raises a genuine issue of material fact concerning whether the Partners intended to integrate the 4LPA fully or partially. It was error for the trial court not to give this summary judgment evidence any weight and to fail to draw all inferences from it in Defendants' favor.

In addition, the trial court gave weight to certain provisions within the documents reviewed while at the same time giving no weight to other provisions within the same documents. One example concerns the VTA itself. In ascertaining the parties' intent, the trial court gave ultimate weight to Section 2.4.1 of the VTA yet gave absolutely no weight to the actual termination provision of the

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[7] The trial court should have given equal weight to all the summary judgment evidence and drawn all reasonable inferences from that evidence in Defendants' favor. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).

VTA.[8] The parties to the VTA expressly agreed in the VTA how to terminate the Trust, if that is what they truly intended to do, yet the trial court ignored this part of the agreement.

Under the agreement, to terminate the VTA prior to its stated termination date, the parties thereto would first execute a unanimous written consent. Next, these parties would deliver a written acknowledgement to the Voting Trustee that the VTA had been terminated. Finally, the Voting Trustee would reassign the voting interests subject to the VTA back to the appropriate parties. This agreed-upon procedure, coupled with the complete absence of any evidence fulfilling this

[8] The trial court found that the 4LPA's reference to DRULPA Section 17-702(a)(3) requires the 4LPA to have the language of VTA Section 2.4.1 if the terms of the VTA were to supplement the 4LPA. OB Exhibit C at 13-14. Contrary to Plaintiffs' continued mischaracterization of this issue, the parties hotly dispute the genesis and import of this language.

More importantly for purposes of this appeal, however, the trial court employs faulty reasoning to interpret this language by only looking forward in time to assignments made under the terms of the 4LPA and failing to look backwards in time to assignments already made pursuant to the terms of previously-existing versions of the LPA. The trial court's ruling puts the Partners in a serious legal conundrum that will require even more litigation to resolve. Neither the trial court nor Plaintiffs deny that 99% of the Class A voting interests of Quantlab were transferred to the Voting Trustee pursuant to the VTA. Those voting interests have never been reassigned by the Voting Trustee. Under the trial court's ruling and Plaintiffs' argument, if the VTA is not "legally effective" and if the 4LPA through its reference to DRULPA Section 17-702(a)(3) prevents the transfer of non-economic interests, 99% of Quantlab's Class A voting interest are forever suspended in the hands of a vacant Voting Trustee position. It is the trial court's ruling and Plaintiffs' argument that creates the truly absurd outcome in this matter. That question may have to be resolved by the Texas court determining the rights of the parties to the VTA.

procedure, raises a genuine issue of material fact concerning the intent of the VTA parties to terminate the VTA through the 4LPA's integration clause. Importantly, Plaintiffs admit the parties to the VTA agreed to irrevocably assign and transfer the voting interests to the Voting Trustee. AB at 10. If the VTA is determined to have been terminated, the absence of any reassignments of these voting interests through the agreed termination procedure raises important questions concerning who presently holds 99% of the Class A voting interests in Quantlab.

Plaintiffs are wholly incorrect in their assertion that the trial court did not have to draw inferences for either side. The summary judgement record raised genuine issues of material fact. Instead of denying summary judgment, the trial court weighed the evidence and drew inferences in favor of Plaintiffs to prematurely reach its own judgment concerning the genuine issues of material fact that existed. Doing so was error at this pre-discovery, summary judgment phase of the case and, Defendants respectfully submit, requires the reversal of the trial court's judgment.

C. Plaintiffs fail to address how Delaware partnership law impacts the applicability of Defendants' unclean hands defense.

Plaintiffs contend the defense of unclean hands does not apply "because Plaintiffs sought only *legal* relief" and "made no appeal to equity[.]" AB at 38-39. Plaintiffs' position incorrectly states Delaware law concerning partnership disputes and Plaintiffs do not even attempt to distinguish the cases Defendants cited that

correctly state Delaware law on the matter. Specifically, Defendants cited the seminal case of *Mack v. White*, 165 A. 150 (Del. Super. 1933) and *Albert v. Alex. Brown Mgmt. Servs.*, 2004 Del. Super. LEXIS 303 (Del. Super. Sept. 15, 2004) for the proposition that disputes among partners inherently invoke equity because such suits represent a suit against oneself. Plaintiffs did not respond to these cases or this statement of the law in Delaware. It was error for the trial court to find that "Plaintiffs' claims do not invoke equity and are not, therefore, subject to equitable defenses." OB Exhibit C at 17.

II. The court erred in awarding attorneys' fees to Plaintiffs.

Plaintiffs charge Defendants with failing to address the relevant precedent concerning the Plaintiffs' assertion that Defendants waived their contractual right to arbitrate disputes concerning the 4LPA. It is Plaintiffs, not Defendants, who fail to address the relevant precedent. Specifically, Plaintiffs' response fails to address the fact that, at Plaintiffs' request, the trial court addressed the wrong question of waiver.

Plaintiffs moved for attorneys' fees and costs relying on Section 17.4 of the 4LPA. The question before the trial court was whether Defendants waived the conditions precedent for recovery of attorneys' fees under Section 17.4 of the 4LPA. In response, Defendants challenged Plaintiffs' right to attorneys' fees and costs because Plaintiffs failed to satisfy the conditions precedent to recovery, namely that Section 17.4 required Plaintiffs to engage a multi-stepped dispute resolution process before initiating a claim if Plaintiffs wanted to preserve the possibility of recovering its attorneys' fees and costs. Plaintiffs have not challenged the conditions precedent and have not disputed that they failed to satisfy these conditions precedent. Instead, Plaintiffs assert that Defendants have waived their right to arbitrate disputes concerning the 4LPA. This, however, is not the issue.

Both the trial court and Plaintiffs address only the question of whether Defendants' participation in litigation waived their right to compel arbitration. Whether Defendants waived a particular step in the detailed alternative dispute resolution provision of the 4LPA is a completely different question than whether Defendants waived their rights under the separate attorneys' fee provision of the 4LPA. Plaintiffs have the burden of proof to establish their right to attorneys' fees and costs under Section 17.4 of the 4LPA. It is undisputed that Plaintiffs did not establish that they satisfied the preconditions of Section 17.4. Thus, the only way under these circumstances for Plaintiffs to prove their right to attorneys' fees and costs under Section 17.4 is to prove that Defendants waived their own rights under that section, which is the right to have an award of attorneys' fees and costs be contingent upon satisfaction of the conditions precedent. Plaintiffs have not met this burden and it was error for the trial court to award Plaintiffs attorneys' fees and costs in this matter.

III. Conclusion

As detailed above and in Defendants' Opening Brief, the trial court committed several errors when it granted summary judgment and awarded attorneys' fees in favor of Plaintiffs. Defendants respectfully pray for the Court to reverse the trial court's judgment and render judgment in favor of Defendants or, alternatively, to remand this case for further proceedings.

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CERTIFICATE OF SERVICE

I, Scott B. Czerwonka, hereby certify that on this 3rd day of October, 2019, true and correct copies of the PUBLIC VERSION OF APPELLANTS' REPLY BRIEF were served upon the following counsel of record via File & Serve*Xpress*:

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