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Case Number 126,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROD GIESEKE, JAY BUTSON and DAN HOLLAND,	:	
Defendants-Below, Appellants,	:	
v.	:	No. 126, 2021
PEARL CITY ELEVATOR, INC.,	:	
Plaintiff-Below, Appellee,	:	On Appeal from the Court of Chancery of the State of Delaware
and	:	C.A. No. 2020-0419-JRS
ADKINS ENERGY, LLC,	:	
Nominal Defendant-Below.	:	

APPELLANTS' CORRECTED OPENING BRIEF

Dated: June 25, 2021

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NATURE OF PROCEEDINGS

Plaintiff Pearl City Elevator, Inc. ("PCE") brought the underlying litigation pursuant to 6 *Del. C.* § 18-110, seeking a declaratory judgment that it was entitled to designate an additional Governor to the Board of Governors of Nominal Defendant Adkins Energy Company, LLC ("Adkins"), a Delaware limited liability company. Defendants, Rod Gieseke, Jay Butson and Dan Holland ("Defendants" or the "General Governors"), are the General Governors of Adkins, elected by its General Members. Historically, PCE had owned approximately 50% of all Adkins Membership Units, and designated three "PCE Governors" to Adkins' six-member Board.

PCE alleged that it had acquired additional Adkins Units, and that under Adkins' Operating Agreement, its increased percentage of equity ownership entitled it to designate a fourth "PCE Governor" to a new, seven-member Board. Following initiation of the litigation, the General Governors disagreed, maintaining that PCE had not complied with the Operating Agreement's requirements for the effective Transfer of Units, as a result did not meet the required ownership threshold, and therefore was not entitled to designate a seventh Governor to the Board.

The case was tried to the Court of Chancery (Slights, V.C.) in October 2020. On March 23, 2021, the Court of Chancery issued a Memorandum Opinion, finding that PCE was entitled to a judgment under §18-110 that it complied with the

Operating Agreement in all relevant respects and was entitled to seat David Daly as the seventh Governor on the Adkins Board. The March 23, 2021 Memorandum Opinion and the April 6, 2021 Final Order and Judgment form the basis for this appeal.

SUMMARY OF ARGUMENT

I. The Court of Chancery erred in finding that the Adkins Operating Agreement does not require Board approval for intra-member Transfers.

II. The Court of Chancery erred in finding that PCE satisfied the procedural requirements for Transfers as set forth in Operating Agreement §12.1.

III. The Court of Chancery erred in finding that PCE satisfied the substantive requirements for Transfers as set forth in Operating Agreement §12.2.

IV. The Court of Chancery erred in holding that PCE's claim was not barred by PCE's own unclean hands.

V. The Court of Chancery erred when it awarded PCE Costs.

STATEMENT OF FACTS

A. The Company

Since 2002, Adkins has operated a dry mill corn-to-ethanol and biodiesel production facility located in northwest Illinois. Adkins had an exclusive supply arrangement with PCE (the Grain Delivery Agreement) to supply all the corn to be used at the facility. (A0743 Tr.95:18-24).

As of 2011, PCE owned half of Adkins, as outlined in Adkins' Third Amended and Restated Operating Agreement (the "Agreement"). (A0057). With PCE owning half and the "General Members" owning the other half of Adkins, the Agreement established a split "Board of Governors" – three for PCE, three for the General Members. The PCE designees to the Board of Governors are called the PCE Governors and the General Members' elected members to the Board are called the General Governors. (A0023 §5.1(a)).

B. The Actors

1. The General Governors

Rod Gieseke ("Gieseke") has been a General Governor since 2007, and has owned Adkins Units (through his holding company) since the beginning. (A0748 Tr.115:5-116:23; A0621, 624-24 Gieseke Dep. 24, 27-28). Gieseke serves as the Board's Chairperson. (A0748 Tr.115:5-8). Jay Butson ("Butson") has been a General Governor since 2007, and was an investor/unitholder before Adkins even

existed. (A0837 Tr.470:24-472:13). Dan Holland ("Holland") has been a General Governor since 2010, and an Adkins investor/unitholder since "1996 or 1997." (A0610, 613 Holland Dep. 23, 28). Holland serves as the Board's Treasurer.

2. Pearl City Actors

Elmer Rahn ("Rahn") has been a director of PCE since 2012. (A0633-34 Rahn Dep. 15-16). Since 2018, Rahn has also served as PCE's President. (*Id.*). In January 2018, PCE elected Rahn to serve as a PCE Governor to the Adkins Board. (A0635-36 Rahn Dep. 17-18). Despite being a PCE Governor since January 2018, Rahn has never read Adkins' Operating Agreement. (A0632 Rahn Dep. 14). Rahn grows corn he sells to PCE which, in turn, is sold to Adkins. (A0633 Rahn Dep. 15). Last growing season, Rahn delivered 300,000 bushels of corn that were thereafter sold to Adkins. (*Id.*). At the current market price of over $7 per bushel, that is more than $2.1 million of corn (annually) Rahn has at issue with Adkins and the General Governors' express authority to control the Grain Delivery Agreement ("GDA") between Adkins and PCE.

Matt Foley ("Foley") is the Vice Chair of PCE's Board of Directors, and has held that position since December 2017. (A0818 Tr.395:13-22; A0641-42 Foley Dep. 8-9). Foley was elected to serve as a PCE Governor to the Adkins Board in January 2018. (A0818 Tr.395:23-396:17). Foley serves the Adkins Board as its Vice Chair, and is a member of the corporate governance committee. (*Id.*).

Remarkably, in spite of these positions of responsibility and authority, Foley had never read Adkins' Operating Agreement before his deposition. (A0818 Tr.396:21-397:10; A0640 Foley Dep. 7). In preparation for trial, Foley only spent "probably an hour" reviewing the Agreement. (A0820 Tr.403:4-12). Like Rahn, Foley has also sold 300,000 bushels of corn he grew to PCE that were thereafter sold to Adkins. (A0643-44 Foley Dep. 10-11). Like Rahn, Foley had a $2.1 million annual bias to see that the General Governors did nothing to disturb the GDA.

In October 2018, Phil Ramsel ("Ramsel") joined PCE as its General Manager and CEO. (A0654-55 Ramsel Dep. 35-36). Ramsel has never owned any Adkins Units. (A0667 Ramsel Dep. 53).

Eric Fogel ("Fogel") is PCE's lead litigation counsel. Since at least July 2019, Fogel has been actively working with Ramsel regarding the attempted Transfer of Adkins units to PCE. (*See*, *e.g.*, A0471 at No. 7). This is more than seven (7) months before the first private Transfer of Adkins Units. (A0172; A0470).

C. Assisted by Litigation Counsel, Pearl City Devises Its Adkins Business Strategy

Ramsel testified that PCE developed a strategy or business plan for Adkins. (A0659 Ramsel Dep. 44). The Adkins strategy was separate from PCE's general strategy for 2020. (A0658-60 Ramsel Dep. 43-45). Ramsel testified that the Adkins strategy was developed by himself, the PCE Board, and Fogel. (*Id.*). Ramsel suggested that the Adkins strategy was first discussed in January or February 2020.

(A0659-60 Ramsel Dep. 44-45).

While estimating the Adkins strategy was first discussed in January or February 2020, Ramsel was dutifully working to lay the groundwork for the strategy in October 2019. Ramsel contacted Tracey Garst, a Senior Portfolio Manager at Midland States Bank, in order to see if Garst could serve as a "broker to place an offer for units on our ethanol plant." (A0099). Ramsel testified that PCE wanted to use a broker because "we wanted confidentiality." (A0741 Tr.86:15-87:7; A0581-82 Ramsel Dep. 205-06). Garst and Midland were concerned about what they were being asked to do and had to run it by their "legal people." (A0099). Midland had good cause to be concerned. Consistent with Adkins' Board-approved Trading Service Operational Manual (*see infra*, pp.16-17), brokers and dealers were prohibited from using FNC to purchase or sell Adkins Units for the accounts of others. (A0087 ¶11; A0769 Tr.198:20-199:7). Ignorant of this prohibition or undeterred, PCE caused Midland to ultimately place two confidential, blind offers to purchase Adkins Units on the public FNC Ag Stock exchange. The first offer was placed on December 17, 2019 for 600 units at $400; the second offer was placed on April 13, 2020 for 4,000 units at $380. (A0305; A0307).

D. Pearl City Rolls Out Two Initiatives During the COVID Pandemic

On March 5, 2020, PCE sponsored an invite-only steak dinner meeting for PCE members who also owned at least 100 Adkins Units. (A0744 Tr.100:8-21;

A0234). This group constitutes a sub-set of the General Members. During that dinner meeting, PCE first introduced its two Adkins initiatives. (*Id.*).

1. The Exchange Offer

Initiative No. 1 was an Exchange Offer. (A0248-49; A0235-44). Through the Exchange Offer, an Adkins unitholder would exchange Adkins Units for a like number of units in a newly created, wholly-owned subsidiary of PCE – Alliance Ethanol, LLC ("Alliance"). Alliance was formed solely for the purpose of holding Adkins Units. (A0670-72 Ramsel Dep. 168-70). Once the Adkins Units were subscribed to Alliance, PCE would seek to have Alliance admitted as a new Adkins Member and its Units counted toward the PCE ledger for purposes of reaching the 56% threshold. (A0239-40 ¶¶4(c) and 4(d)). PCE was attempting to use the Exchange Offer and the Alliance shell as a cheaper substitute to actually purchasing an additional 6% of Adkins' Units.

2. The Purchase Offer

Initiative No. 2 was PCE's outright purchase of Adkins Units. (A0248-49). The purchase price was $412.25. (A0243). PCE allegedly reached this price by taking the then highest current offer on FNC ($425, not its anonymous $400 offer) and backing out the 3% fee payable to FNC if the transaction was undertaken on the public exchange. (A0245-47). PCE only offered this $412.25 purchase price to its cooperative members and/or "patrons." (A0303; A0307). Ramsel testified that to

be a PCE member or patron, you had to: (i) be a living/breathing individual (not a corporation and not dead); (ii) be actively engaged in farming; (iii) be under the age of 65; and (iv) purchase at least $3,000 worth of product annually from PCE. (A0740 Tr.81:11-83:24). This expressly excluded other General Members who were, by March 2020, already a minority to PCE's majority ownership.

PCE memorialized its attempted private acquisition of Units from its members or patrons through a Bill of Sale. (*See*, *e.g.*, A0243). Ramsel was not sure who drafted the form "Bill of Sale," but it is not an approved Adkins form under the Adkins Agreement. (A0678 Ramsel Dep. 182). Instead, the Bill of Sale is a form bearing PCE's logo. (A0243). The Bill of Sale was "effective as of the date last written below." (*Id.*). The purported sales were explicitly not effective, as PCE argued in the Court of Chancery, on June 1, 2020 or September 1, 2020. To be certain, 30 days after the date written on the Bill of Sale, PCE was required to pay the Seller the purchase price. (*Id.*). Finding in PCE's favor, the Court of Chancery not only accepted an unfounded reading of the Adkins Agreement, it also re-wrote PCE's own transaction documents.

Beginning in February 2020 and continuing through May 28, 2020 (the day prior to filing the Complaint), PCE undertook at least forty private Transfers for a total of 6,475 Units. (A0470). For each of the forty private Transfers/sales, PCE would not tell the Seller/Transferring Member how many Units PCE had acquired

up to that point in time. (A0738 Tr.73:17-76:6). These were the forty private Transfers that were never provided to Adkins or the General Governors before PCE filed its Complaint.

E. Pearl City's Disparate Treatment of the Minority General Members

Despite the rhetoric, the General Governors were not adverse to PCE purchasing additional Units. When PCE purchased Units through FNC and presented the proposed Transfers for Board approval, the Transfers were approved. (A0233; A0468). Following the February 2020 Board-approved Transfer of 277 Units to PCE, the 50-50 tie was broken and PCE became the majority unitholder.

PCE's expert identified that, in order to side-step the publicly traded partnership pitfalls and the 2% transfer limit safe harbor, PCE embarked on what it alleged was a purely private solicitation for its Exchange Offer and Purchase Offer to only its cooperative members and/or "patrons."[1] (A0307). In turn then, PCE did not make the Exchange Offer and Purchase Offer available to General Members who were not PCE cooperative members or patrons. Instead, PCE intentionally, but covertly, treated the minority General Members differently.

[1] Pearl City's trial expert, Gary Huffman, never tested whether the Purchase Offers were only made available to Pearl City members/patrons. (A0814 Tr.377:22-378:8). Trial was the first time Huffman heard that corporations could not be Pearl City members/patrons. (*Id.*). When presented with private transfers in excess of 5%, this presents contested "facts and circumstances" as to whether the Transfers would convert Adkins to a publicly traded partnership. (*See* A0814-15 Tr.380:20-381:3).

As laid bare by Ramsel's own status report to his PCE Board of Directors – which includes the PCE Governors to the Adkins Board (Rahn, Foley and David Schenk) – PCE meant for its lower $380 standing offer for Adkins Units to be the offer extended to General Members that were not PCE cooperative members or patrons.

> Today, we pulled our offer to buy 600 units at $400. We replaced this with an offer to buy 4,000 units at $380. Our rationale is that for some of the General members who own a lot of units that this may be an optimum time for them to liquidate some or all of their units.

(A0307; *see also* A0303 (Ramsel explicitly reciting that "[w]e're keeping the offer to our members at $412.50" and that "$380 is a fair price paid for Adkins right now for people outside of our membership")). In addition, because PCE withheld from disclosure its accumulation of private Transfers – literally holding on to the information until <u>after</u> the Complaint was filed – PCE robbed the minority Members from: (i) seeking a control premium price on the Units that a fully informed seller would be willing to accept for his or her Units and (ii) deploying their own capital to stave-off a change in control.

F. <u>The Adkins Operating Agreement's Express Requirements</u>

As a general proposition, PCE and the General Members agreed that the Board of Governors is charged with supervising and controlling Adkins' operations.

> 5.10 Authority of and Actions by Board. Except as otherwise provided in this Operating Agreement, the

> Board shall have the authority to supervise and control all operations of the Company.

(A0028). This can be viewed as the base governance right should the Court have any question that Board approval of proposed Transfers is required. Absent an express relinquishment of the Board's right and obligation to approve proposed Transfers (which there is none), §5.10 serves as the default governance agreement as to what falls within the Board's purview. To be certain, this Court can take judicial notice of the fact that, armed with a simple Board majority, PCE now contends that Adkins cannot buy a single kernel of corn without Board approval. (PCE Verified Complaint ¶10 & p.34 in the litigation styled: *Pearl City Elevator, Inc. v. Adkins Energy, LLC*, C.A. No. 2021-0412-JRS (Del. Ch.) (Trans. No. 66592071) (seeking a declaration that purchases of corn from a source other than PCE without full Board approval is a breach of the Operating Agreement)).

In the same vein and as evidence of the parties' general understanding, the parties agreed that Members could not bind the Company.

> No Member shall have any power or authority to bind the Company unless the Member has been authorized by the Board of Governors to act as an agent of the Company in accordance with the previous sentence.

(A0032 §7.1). Under PCE's interpretation of the Operating Agreement, intra-Member transfers are effective two days after someone finally gets around to stuffing them into a FedEx envelope. Not only is this a convenient excuse for failing to

adhere to express advance-notice requirements set forth in §12.1 (discussed below), it also improperly allows Members to bind the Company to changes in ownership.

Section 5.2 addresses the effectiveness of any change in the number of Governors on the Adkins Board. Contrary to what PCE alleged below, the change does not occur simultaneously with the proposed Transfer, but rather "simultaneously with the effectiveness of" the Transfer:

> Any change in the number of Governors appointed or elected by Pearl City or the General Member Group shall be effective simultaneously with the effectiveness of the Transfer of Membership Interest giving rise to such change (i.e., upon commencement of the Company's next fiscal quarter following the approval of the Transfer by the Board of Governors).

(A0025)(emphasis added). PCE has not and cannot allege that the proposed Transfers it sent to the Company after its Complaint was filed are effective. This is because the Agreement repeatedly and unambiguously requires Board approval for a proposed Transfer to be effective. *See infra*, pp.24-25.

Contrary to PCE's argument, no Member has free range to Transfer Units without Board oversight and approval. This makes sense for a Company in a local farming community with approximately 200 owners. The Adkins Members each agreed that prior notice of proposed Transfers would be provided to the Company and that the number of Units that might be allowed to be transferred could be limited:

> 12.1 Notice and Approval of Transfer. Before a Transferring Member may Transfer its Membership

> Interest (including all associated LLC Units) to any Person (including another Member), such Member must first (i) give written notice of such proposed Transfer to the Company which notice shall describe the terms and conditions of the proposed Transfer (and, to the extent applicable, shall contain a copy of the proposed contract of sale) and shall be in the form of the Notice of Proposed Transfer included as Exhibit C hereto and (ii) to the extent that the proposed Transfer is not to an existing Member, obtain the affirmative consent and approval of such Transfer from the Board of Governors, which consent shall be determined by a simple majority vote of the Board and shall not be unreasonably withheld. It is acknowledged that the restrictions set forth in Section 12.2 may limit the number of LLC Units that may be Transferred in a given period and, in such case, the Board shall consider such approval requests in the order in which they are received (i.e., on a "first come, first served" basis) and may defer the approval of Transfer requests until a later date in order to comply with such limitations. . . .
>
> Any Transfer of Membership Interests in accordance with this Operating Agreement shall become effective upon commencement of the Company's next fiscal quarter following the approval of such Transfer by the Board of Governors.

(A0047-48)(emphasis added). The Agreement's form Joinder Agreement makes explicit "THAT ARTICLE 12 OF THE OPERATING AGREEMENT LIMITS THE NUMBER OF LLC UNITS THAT CAN BE TRANSFERRED BY ALL MEMBERS OF THE COMPANY IN ANY YEAR AND THAT SUCH RESTRICTIONS MAY SUBSTANTIALLY LIMIT THE ABILITY OF THE MEMBER TO LIQUIDATE THE UNDERSIGNED'S INVESTMENT IN THE COMPANY." (A0059) (all caps in original).

Surprised by the "first come, first served" language in §12.1 during trial, Ramsel confessed that the Adkins Board could delay Transfers to adhere to the first come, first served language. (A0736-37 Tr.68:22-69:18). "[Y]ou know, depending on the number of units that are being transferred in a governing year, potentially the board would want to delay those transfers to another calendar year." (*Id.*). Inherent in a Board's authority to delay is the Board's authority to review and approve.

Section 12.2 specifically sets forth several prohibited transfers and the deliverables that need to be made to the Company by a proposed Transferring Member to ensure that the Company and its members are protected from adverse tax consequences. Consistent with its express terms, § 12.2 took precedence over § 12.1:

> 12.2 Prohibited Transfers. Notwithstanding anything herein to the contrary, the Members acknowledge and agree that no issuance by the Company or Transfer by any Person of LLC Units or any other interest in the Company may be made which would . . . [violate items (i) through (viii)]. No issuance or Transfer of LLC Units or any other interest in the Company may be made unless (a) an opinion of counsel, satisfactory in form and substance to the Board and counsel for the Company (which requirement for an opinion may be waived, in whole or in part, at the discretion of the Board), is delivered to the Board opining that such issuance or Transfer, as applicable, meets the requirements of clauses (iv) through (viii) of this Section 12.2 and (b) the recipient of the LLC Units has executed a Joinder Agreement. Any purported issuance or Transfer which would otherwise violate the requirements of this Section 12.2 shall be void and of no effect.

(A0048-49)(emphasis added). Section 12.2 expressly requires an opinion of counsel be provided addressing five (5) topics – subsections (iv) though (viii). PCE's tax expert, Gary Huffman, only opined on sections (vii) and (viii). (A0567-68).

PCE argued below that the Board never required opinion of counsel letters in the past. While that may be true, the Board was never confronted with the proposed private Transfer of more than 5% of the Company's Units in the past either. History and reasonableness aside, the Operating Agreement expressly preserves the Board's ability to require deliverables that may not have been required in the past:

> 16.8 Waivers. The failure of any party to seek redress for default of or to insist upon the strict performance of any covenant or condition of this Operating Agreement shall not prevent a subsequent act, which would have originally constituted a default, from having the effect of an original default.

(A0054).

G. Adkins' Trading Policy Requirements

FNC is a Qualified Matching Service ("QMS") that IRS regulations view as a safe harbor to ensure continued maintenance of favorable tax treatment. 26 CFR § 1.7704-1(g). Adkins' contract with FNC requires that Adkins maintain a Trading Service Operational Manual on its website, which Adkins does. (A0079 ¶11d; A0086-95); https://www.adkinsenergy.com/wp-content/uploads/2018/04/Adkins-Energy-Trading-Service-Operational-Manual-2018.pdf (last visited June 10, 2021).

Consistent with Adkins' Agreement, the Operational Manual expressly sets

forth that Board approval is required for all Transfers or the Transfers will be null and void:

> Transfers that are not made through the Trading Service [*i.e.*, the FNC exchange] will be null and void unless they are approved by the Adkins Energy's Board of Governors (the 'Board') and comply with Adkins Energy's Third Amended and Restated Operating Agreement (the 'Operating Agreement'). All transfers of Membership Units must be approved by the Board and must meet all of the conditions and requirements of the Operating Agreement.

(A0086)(emphasis added). The Trading Service Summary, which is a three-page summary of the Operational Manual, echoes the same express requirements identified in the Adkins Agreement and Operational Manual. (A0083-85).

Gieseke and Baker testified and the record confirms that the Operational Manual and Summary were approved by the Adkins Board in 2012 and again, as amended, in 2018. (A0756 Tr.146:6-12; A0769 Tr.197:15-17; A0770 Tr.201:4-21; A0781 Tr.246:15-247:4; A0096; A0693-94 Baker Dep. 198-99). All three PCE Governors and its alternative Governor attended the 2018 Board meeting where updates to the Operational Manual and Summary were unanimously adopted. (A0096).

Before filing its lawsuit, PCE had independent verification of the Board approval requirement. By May 18, 2020, Ramsel read and highlighted the Operational Manual's clear disclosure that all Transfers required Board approval.

ADKINS ENERGY LLC
TRADING SERVICE OPERATIONAL MANUAL
EFFECTIVE – JANUARY 1, 2018

* * *

defined in this Trading Service Operational Manual ("Operational Manual"). Transfers that are not made through the Trading Service will be null and void unless they are approved by the Adkins Energy's Board of Governors (the "Board") and comply with Adkins Energy's Third Amended and Restated Operating Agreement (the "Operating Agreement"). All transfers of Membership Units must be approved by the Board and must meet all of the conditions and requirements of the Operating Agreement.

(A0310; A0769-70 Tr.200:12-201:2)(emphasis in original). What is more troubling is the fact that on that same day, PCE's privilege log shows emails between Ramsel and Fogel "regarding the Trade Serving [sic] Manual and Operating Agreement." (A0542-43 at Nos. 513-516)). PCE clearly knew about the Board approval requirement but simply chose to ignore it.

Below, PCE attempted to distance itself from the Operational Manual and FNC, by claiming that there was no writing signed by PCE showing it agreed to be bound by FNC documents (presumably, including the Operational Manual and Summary). Initially, the Board approval of the Operational Manual and Summary as detailed above is sufficient and dispositive. If the Court needed more evidence, it need only look at the FNC Order Ticket Packages that Ramsel signed on PCE's behalf when it purchased Units through FNC. (A0178-232; A0251-302; A0312-33). In each Order Ticket Package Ramsel executed, it clearly states and puts PCE on notice of restrictions that weigh upon proposed Transfers.

- When identifying the "Proposed Trade Effective Date" the package specially notes "*date based on trade date and company trading policy subject to board approval and timely completion of transaction documentation" (*E.g.*, A0315) (emphasis added).

- When addressing "Conditions to Closing" the package identified for Ramsel and PCE that the closing shall not occur until the sale complies with ". . . any transfer-related document, including approval of the sale by the Company or other transfer agent designated by the Company." (*Id.*).

H. Pearl City Purchased Units through FNC, Thereafter Seeking and Obtaining Board Approval for the Transfers

Further evidence of PCE's knowledge of the Board approval requirement can be gleaned from PCE's historical conduct of actually soliciting and obtaining Board approval for Units it purchased. On several occasions prior to filing this litigation, PCE purchased Units through FNC. (A0470 (transferring bearing a "FNC Date" at the bottom). At the next Board meeting, PCE would present those Transfers for Board approval and the Board (including the General Governors) approved the transfers. (A0233; A0311; A0468). PCE Governor David Schenk, acting as Board Secretary, actually signed the Board resolutions approving the Transfers. (A0233; A0468). Not only does the Agreement's express language and the Operational Manual and Summary indicate that Board approval of Transfers is required, PCE's own course of performance (when it could not hide its conduct) shows that Board approval is required.

I. Pearl City Never Presented the Proposed Private Transfers to the Company or the General Governors Prior to Filing the Complaint

PCE filed its Complaint in this action on Friday, May 29, 2020. It was docketed as 4:30 p.m. EDT. (A0334). PCE did not deliver its one page letter demanding recognition of its alleged right to a fourth Board member until Friday, May 29, 2020 at 5:48 p.m. EDT – more than one hour after the Complaint was filed. (A0388) (time in CDT). PCE's May 29 letter did not attach the Transfer Notices. Instead, those documents were "being sent to [Adkins] under separate cover." (A0389). Baker testified, and the parties stipulated, that PCE's delivery of the Notices of Proposed Transfer and Bills of Sale (collectively, the "Transfer Notices") was not received by Adkins until June 2, 2020. (A0703 Stip. Fact ¶ 33; A0792 Tr.289:6-9; A0690 Baker Dep. 191). This was a full day after PCE claimed the proposed transfers were effective, and the second business day after PCE sued the General Governors on Friday, May 29, 2020.

J. Pearl City's Post-Litigation Actions

While PCE did not attempt to remedy its procedural deficiencies, after filing its litigation PCE did attempt to rectify its substantive shortcomings. On the substantive front, Elmer Rahn delivered a settlement offer to the General Governors on August 10, 2020 which purported to attach three opinions of counsel. While the existence of the Rahn cover letter is not objectionable, PCE's efforts to introduce three opinions of counsel is objectionable. The opinion letters are inadmissible

hearsay and part of a settlement offer. At trial, PCE's counsel agreed that the opinion letters were not being offered for the truth of the matters asserted therein. (A0733 Tr.56:8-19). Although PCE may have "checked the box" under §12.2 for (eventually) delivering opinion of counsel letters, PCE never satisfied §12.2's requirement that the letters be "satisfactory in form and substance" to the Board and counsel for Adkins.

ARGUMENT

I. THE COURT OF CHANCERY ERRED WHEN IT HELD THAT THE OPERATING AGREEMENT'S BOARD APPROVAL REQUIREMENT DID NOT APPLY TO PEARL CITY'S PROPOSED INTRA-MEMBER TRANSFERS

Question Presented

Whether the Adkins Operating Agreement requires Board approval before proposed intra-Member Transfers of Units become effective. This issue was preserved in the trial court. (A0903-08).

Standard and Scope of Review

This Court's standard of review for "questions of law and contractual interpretation, including the interpretation of LLC agreements [is] *de novo*." *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 816 (Del. 2018); *see also Monzo v. Nationwide Prop. & Cas. Ins. Co.*, -- A.3d --, 2021 WL 926535, at *6 (Del. Mar. 11, 2021) ("The Court 'review[s] questions of law, including contract interpretation, *de novo*.'") (quoting *Urdan v. WR Cap. P'rs, LLC*, -- A.3d --, 2020 WL 7223313, at *4 (Del. Dec. 8, 2020)).

Merits

A. Standards Applicable to Pearl City's Request for Declaratory Relief

PCE brought this suit under 6 *Del. C.* §18–110 seeking a declaration that it was entitled to seat a fourth Governor of what would be a newly-expanded seven

member Board. As the Court of Chancery stated, "[t]o obtain the declaration it seeks under Section 18-110, PCE must demonstrate that its construction of the Agreement is superior and that the Agreement supports the relief it seeks—the placement of a seventh Governor on the Board." (Mem. Op. 24). PCE had the burden of proving each element of its claim by a preponderance of the evidence. *Henry v. Phixios Holdings, Inc.*, 2017 WL 2928034, at *7 (Del. Ch. July 10, 2017). One such requirement is that the dispute was ripe for adjudication – meaning that PCE met all of the procedural prerequisites to the effectiveness of its proposed private transfers. *See Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 479-80 (Del. 1989). PCE failed to meet its burden of showing that it had met those prerequisites.

While adhering to the objective theory of contracts, this Court should interpret the Operating Agreement by "standing in the shoes of an objectively reasonable third-party observer who is bound to give ordinary meaning to the words used by parties and to enforce the agreements as written when that meaning can be readily discerned." *Solomon v. Fairway Cap, LLC*, 2019 WL 1058096, at *9 (Del. Ch. Mar. 6, 2019) (internal citation and quotations omitted). In addition, the Court must give priority "to the parties' intentions as reflected in the four corners of the agreement." *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). In doing so, this Court should attempt to discern whether the Agreement has only one reasonable interpretation "when read in full and situated in

the commercial context between the parties." *Chicago Bridge & Iron Co. NV v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 926-27 (Del. 2017).

B. Board Approval Is Required for the Effective Transfer of Units

PCE was not entitled to appoint a fourth Governor unless it met its burden of showing that the private Transfers had become effective. Section 5.2 of the Agreement provides that any change in the number of Governors shall occur "simultaneously" with the effectiveness of the transfer giving rise to that change. *See supra*, p.13. PCE's claim fails because the private Transfers never became effective, for several reasons.

The Operating Agreement (as well as PCE's own conduct, and the parties' course of dealing) establishes that Board approval is required before any proposed Transfer of Units can become effective. Within the "four corners" of the Operating Agreement, there are five specific instances where the Adkins Members expressly and unambiguously agreed that Board approval is necessary before any proposed Transfer becomes effective.

1. "Any Transfer of Membership Interests in accordance with this Operating Agreement shall become effective upon commencement of the Company's next fiscal quarter following the approval of such Transfer by the Board of Governors." (A0048 §12.1).

2. "12.2 Prohibited Transfers. Notwithstanding anything herein to the contrary, . . . No issuance or Transfer of LLC Units or any other interest in the

Company may be made unless (a) an opinion of counsel, satisfactory in form and substance to the Board and counsel for the Company . . . is delivered to the Board . . . ." (*Id.* at §12.2).

3. "It is acknowledged that the restrictions set forth in Section 12.2 [portion recited immediately above] may limit the number of LLC Units that may be Transferred in a given period and, in such case, the Board shall consider such approval requests in the order in which they are received . . . ." (*Id.* at §12.1).

4. "Treatment of Transferees. . . . the Board may only change such method of allocation [losses, income, gains and expense deductions] on a prospective basis to take effect for the Transfers submitted to the Board for approval in the fiscal quarter following the fiscal quarter in which the Board approves the change in the method of allocation." (A0072 §12.6) (Amendment No. 2 to Operating Agreement).

5. "Any change in the number of Governors appointed or elected by Pearl City or the General Member Group shall be effective simultaneously with the effectiveness of the Transfer of Membership Interest giving rise to such change (i.e., upon commencement of the Company's next fiscal quarter following the approval of the Transfer by the Board of Governors)." (A0025 §5.2).

(emphasis added in each).

Approval means approval. The parties did not qualify the word "approval" with the words "constrained," "limited," "tacit" or "passive" as the Court of Chancery expressly does at different parts of its Opinion. (Mem. Op. 41, 45, 48 n.190). Instead, these five specific, repeated, and unambiguous pronouncements of the parties' intent control. The Court must "interpret clear and unambiguous terms

according to their ordinary meaning." *GMG Capital*, 36 A.3d at 780.

To the extent there is any doubt that "approval" means actual, affirmative Board approval and not a constrained right to defer, limited approval, tacit approval or passive approval (as the Court of Chancery separately qualified the word), this Court need look no further than §5.10. Section 5.10 is the default governance standard. The Court of Chancery should not have diluted it or the plain language of the five sections recited above with a *Chicago Bridge* "big picture" analysis that led to the court inserting qualifiers before words the parties chose not to qualify when they contracted for Adkins' governance. The Court of Chancery's trepidation over "unreasonable . . . *de facto* discretionary veto rights over all unit transfers" (Mem. Op. 44) is contrary to the undisputed evidence in the record. PCE never presented its private Transfers for Board approval before filing suit. The General Governors approved every proposed Transfer PCE brought before the Board prior to filing suit. The Agreement and form Joinder Agreement make clear Transfers could be limited.

Moreover, "*de facto* discretionary veto rights" are inherent in any company split 50-50. The alleged unreasonable expectation that one set of Governors could possess a *de facto* discretionary veto right is exactly the outcome any reasonable owner would expect with evenly split ownership and an evenly split Board of Governors. The Court of Chancery granted PCE a better deal than it contracted for in 2011 under the guise of what the court believed was reasonable or unreasonable

under *Chicago Bridge's* "big picture" in 2021. That was error. The Court of Chancery need not re-interpret the Agreement to avoid the potential pitfalls any reasonable actor should have known existed with evenly split decision-making authority. If a Governor unreasonably exercised discretion to take advantage of an evenly split Board, such alleged conduct could be addressed under fiduciary principles.

C. Dissection of One Sentence in Section 12.1 Cannot Override the Balance of the Agreement

PCE argued that the first sentence of §12.1 establishes that private intra-Member transfers require only written notice and evidence of the Transfer to be effective. However, this sentence does not define the Board's rights, obligations or privileges. Instead, it expressly details what a Transferring Member must do first before it may Transfer Units. Nonetheless, the Court of Chancery adopted a result that gave life to PCE's argument that private, intra-Member Transfers do not require Board approval (in essence giving PCE a *de facto* approval right). The Court of Chancery identified that the first sentence of §12.1 should be read in such a way as intra-Member transfers "are implicitly reviewed under a different process." (Mem. Op. 37). Through its implicit reading, the Court of Chancery artificially created two separate processes for Transfer of Units – one process for Transfers to new Members and another process for Transfers to existing Members.

The Court of Chancery's interpretation not only runs counter to the

Agreement's plain language, but also to the parties' years of performance under the Agreement. As identified above, the Agreement speaks only in terms of Board approval, and nowhere expressly defines two paths for the effective Transfer of Units. PCE's past purchases of Adkins Units through FNC were, by definition, intra-Member transfers. PCE's litigation posture was that Board approval was not required for such intra-Member Transfers. However, PCE executed Order Ticket Packages confirming that Board approval was required for such Transfers. (A0178-232; A0251-302; A0312-33). Thereafter, PCE presented those proposed intra-Member Transfers for Board approval and obtained Board approval. (A0233; A0468). For years, the parties followed this same process for other proposed inter-Member Transfers. (A0780 Tr.241:6-242:1; A1032). The parties intentionally did not choose to differentiate between private and public Transfers or between inter- and intra-Member Transfers when they defined the word "Transfer." (A0020).

Additional course of performance evidence underscores the parties intended that all transfers required Board approval. The Trading Service Operational Manual and Trading Service Summary both expressly state that Board approval is required for all Transfers. *See supra*, pp.16-17. The Operational Manual and Summary are not new agreements amongst the Adkins Members but rather a course of performance that demonstrates PCE and the PCE Governors understood the parties' intent under the Agreement was that Board approval was required for all Unit

Transfers.

Additionally, there would be no way for the Board or the Company to police compliance with all the requirements of §12.2. Even when an opinion of counsel is presented or excused (addressing §12.2(iv)-(viii)), the requirements of §12.2(i)-(iii) must still be maintained. If intra-Member Transfers become effective without any Board approval, there is no gatekeeper for the requirements of §12.2(i)-(iii). This Court should not disturb the process laid out in 2011 simply because it does not serve PCE's purposes in 2021.

Contrary to the Court of Chancery's finding, the General Governors' interpretation does not render §12.1(ii)'s "to the extent that" language superfluous. (Mem. Op. 37-38). To the contrary, §12.1(ii) would continue to have its intended effect – requiring a prospective Transferring Member to obtain Board approval of the admission of a new Member before seeking Board approval of the proposed Transfer to that new Member. Under §12.1(ii), a Transferring Member is excused from seeking Board approval of keeping an existing Adkins Member an Adkins Member.

For these reasons, the Court of Chancery erred in finding that Board approval was not required for PCE's proposed private Transfers to be effective.

II. PEARL CITY FAILED TO SATISFY THE OPERATING AGREEMENT'S PROCEDURAL REQUIREMENTS FOR MAKING THE PROPOSED TRANSFERS EFFECTIVE

Question Presented

Whether PCE satisfied the Operating Agreement's procedural requirements for proposed transfers of Adkins Membership Units. This issue was preserved in the trial court. (A0908-11).

Standard and Scope of Review

Same as Argument I.

Merits

As detailed above, the Agreement sets forth mandatory procedural requirements that must be followed before a "proposed" Transfer of Units can become an effective Transfer of Units. Without an effective Transfer of Units, PCE is not entitled to an expansion of the Board or the additional Board seat. The Court of Chancery erred in finding that PCE satisfied these procedural requirements.

The plain meaning of the words in §12.1 controls this inquiry. While other specific interpretation errors are found in the Court of Chancery's Opinion, one example is independently sufficient. On Opinion page 54, the Court of Chancery holds as follows with respect to §12.1:

> The Agreement unambiguously requires "written" notice of transfers to be submitted at a time chosen by the transferring Members.

(Mem. Op. 54) (emphasis added).

This holding cannot be reconciled with the words in §12.1 and the plain meaning of those words:

> Before a Transferring Member may Transfer its Membership Interest (including all associated LLC Units) to any Person (including another Member), such Member must first (i) give written notice of such proposed Transfer to the Company which notice shall describe the terms and conditions of the proposed Transfer (and, to the extent applicable, shall contain a copy of the proposed contract of sale) and shall be in the form of the Notice of Proposed Transfer included as Exhibit C hereto . . . .

(A0047) (emphasis added). Page 54 of the Opinion is a re-write of §12.1. Plainly, §12.1 requires a Transferring Member to take action on a proposed Transfer before the Transfer is complete. Section 12.1 does not give the Transferring Member discretion as to when notice must be given. It must be given before the Transfer – not months after – and its must include the terms of the "proposed" Transfer. The Court of Chancery's Opinion renders superfluous the words "Before a Transferring Member may Transfer," "must first" and "proposed." The word "proposed" appears no fewer than ten times in the selection recited above and in the parties' Exhibit C Notice of Proposed Transfer. If the Agreement implicitly contemplated review of intra-Member Transfers under a different process, then the Agreement would not explicitly require a Transferring Members to give advanced written notice of a "proposed" Transfer.

PCE's after-the-fact, May 29, 2020 notification letter: (i) arrived one hour

after it filed the Complaint; (ii) assumed consummation of all the proposed private and public transfers; and (iii) demanded acknowledgement of the relief requested in this lawsuit, namely, the appointment of a fourth PCE Governor to the Board. (A0389). PCE's letter was not a notification by the Transferring Member(s), but rather a demand by the purported acquiring Member. This is not proper prior notice as required under §12.1.

III. PEARL CITY FAILED TO SATISFY THE OPERATING AGREEMENT'S SUBSTANTIVE REQUIREMENTS UNDER §12.2

Question Presented

Whether PCE satisfied the Operating Agreement's substantive requirements for proposed Transfers of Adkins Units. This issue was preserved in the trial court. (A0911-15).

Standard and Scope of Review

Same as Argument I.

Merits

The Agreement expressly states what must be provided to the Board to enable it to make a decision to approve, deny, or potentially sequence the effective Transfer of Units – namely, an opinion of counsel that the proposed Transfer does not violate the five prohibitions set forth in §12.2(iv)-(viii). The Agreement clearly provides that such an opinion, satisfactory in form and substance to the Company's Board and counsel, must be delivered to the Board before any proposed transfer may be made:

> No issuance or Transfer of LLC Units or any other interest in the Company may be made unless (a) an opinion of counsel, satisfactory in form and substance to the Board and counsel for the Company . . . is delivered to the Board . . . ."

(A0048 §12.2) (emphasis added). Even if PCE could get past the Board approval requirement and the procedural requirements (which it cannot), PCE's claim would nonetheless fail as a matter of law because PCE did not timely comply with the

substantive requirements of §12.2.

A. Pearl City's After-The-Fact Delivery of Opinions of Counsel Demonstrates that Its Complaint Was Not Ripe When Filed and the Court's Opinion Raises Ripeness Issues

The Court of Chancery rejected PCE's argument that §12.2's opinion of counsel requirement did not apply to intra-Member transfers, stating:

> [T]he Board may require a conforming Opinion verifying that any transfer, both as between Members and as between Members and non-Members, complies with the legal considerations identified in Section 12.2, and may defer recognition of the transfer until such Opinion is delivered . . .

(Mem. Op. 33-34)(emphasis in original). The question remaining was whether PCE substantively discharged §12.2's requirements.

It is undisputed that PCE did not deliver any opinions of counsel to the Company or the General Governors prior to demanding Board expansion or prior to filing its Complaint. That fact alone was fatal to the claim in PCE's May 29, 2020 Complaint – namely, that PCE was entitled to a declaration that all of its proposed Transfers were effective as of June 2020, and that it therefore had the right to appoint a fourth PCE Governor as of June 2020. PCE's Complaint was not ripe when filed. *See MPT of Hoboken TRS, LLC v. HUMC Holdco, LLC*, 2014 WL 3611674, at *8 (Del. Ch. July 22, 2014).

Recognizing that fact, PCE altered course during the litigation and urged the Court of Chancery to find instead that the private Transfers became effective as of

September 1, 2020. In other contexts, stockholders are not permitted to ignore timely deliverables and then seek to remedy their noncompliance with those deliverables after the fact. In *BlackRock Credit Allocation Income Tr. v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964, 980 (Del. 2020), this Court stated in the context of advance notice bylaws that "[e]ncouraging [] after-the-fact factual inquiries into missed deadlines could potentially frustrate the purpose of advance notice bylaws, which are designed and function to permit orderly meetings and election contests and to provide fair warning to the corporation . . ." Article 12 of the Agreement sets forth an orderly process for the Members, the Board, and the Company to follow for proposed Unit Transfers.[2] PCE failed to satisfy the procedural and substantive requirements of Article 12, and therefore the Court of Chancery erred in finding that the private Transfers should be effective.

The Court of Chancery also held that, at the very least, "Section 12.2 confers on the Board a constrained power of approval (i.e., the power to 'defer') separate from, and more limited than, the Board's power to reject by 'affirmative consent and approval' [new Member Transfers under § 12.1(ii)]." (Mem. Op. 40). Assuming the General Governors are only left with this holding, the Court of Chancery

[2] The Court of Chancery's reliance on the void *ab initio* language at the end of §12.2 is not compelling. (Mem. Op. 32). Why would reasonable members of a Delaware LLC trade in the propriety of prudent Board decision-making following advance notice for the protection of a void *ab initio* clause?

deprived the Board from even exercising its constrained right to defer. It is undisputed that the PCE Governors refused to attend any Board meeting for the purposes of accepting the belated opinions of counsel. (A0734 Tr.58:20-59:8). Yet, the Court of Chancery decreed that the Transfers became effective as of the later, litigation-concocted September 1, 2020 date. For all intents and purposes, the Court of Chancery robbed the Adkins Board of its minimal authority to review the Transfers for potential deferral and substituted its own judgment for a Board that was not given the ability to act. *Klang v. Smith's Food & Drug Centers, Inc.*, 702 A.2d 150, 156 (Del. 1997) ("In the absence of bad faith or fraud on the part of the board, courts will not 'substitute [our] concepts of wisdom for that of the directors.'") (quoting *Morris v. Standard Gas & Electric Co.*, 63 A.2d 577, 583 (Del. Ch. 1949)). Until the full Board is given a chance to review the opinions of counsel and make decisions on deferring Transfers (if any), the dispute is not ripe for adjudication even under the Court of Chancery's undisturbed reasoning.

B. The Court's Rationale Creates a Pocket-Approval Framework

In attempting to rationalize the framework created by its implicit interpretation of express and unambiguous words, the Court of Chancery created a pocket-approval right for Transfers requiring an opinion of counsel under §12.2. The Court of Chancery held as follows:

> If the Board takes no action with respect to the unit transfer(s) "upon commencement of the Company's next

> fiscal quarter," then it has waived its right to a legal opinion under Section 12.2, thereby "approv[ing]" the transfer such that it "*shall* become effective."

(Mem. Op. 47) (emphasis in original). Imagine a scenario in which PCE secretly acquired Units in March of a given fiscal year. Under the Court of Chancery's interpretation of the Agreement, all that PCE would need to do to make the proposed Transfers effective is: (i) obtain a legal opinion, any opinion, even one scribbled on a cocktail napkin, and (ii) skip the Board meetings in April and May of that year. Then, the proposed Transfers would automatically become effective as of June 1 of that fiscal year, because the Board had not taken any action on them. Under the Court of Chancery's holding, PCE enjoys a pocket-approval right (just like the President can exercise a pocket-veto right when Congress is out of session), by simply refusing to allow its Governors to attend a Board meeting during the quarter Transfers and/or an opinion of counsel was submitted to the Board. That is no way to run a Delaware limited liability company.

What is more, the holding grafts a waiver provision in §12.2 where there is none, it runs afoul of the Board's default authority to operate the Company under Agreement §5.10, and it runs contrary to the non-waiver provision under Agreement §16.8. This Court cannot endorse a holding that opens up such a hole in a Delaware limited liability company's internal affairs.

C. Pearl City's Admissible Opinions of Counsel Fell Short of §12.2's Requirements

Even if this Court were to accept PCE's arguments for an alternate, September 1, 2020 effective date, PCE's claim would still fail because PCE did not meet §12.2's opinion of counsel requirement by September 1, 2020 either. The only substantively admissible expert legal opinions presented to the Court of Chancery were from PCE's tax expert, Gary Huffman. Huffman opined on only two of the five opinion of counsel deliverables required under §12.2(iv)-(viii). Assuming without conceding that Huffman's opinions were credible, there is no evidence in the record satisfying the three other opinions required under §12.2.

The opinion letters attached to Elmer Rahn's August 10, 2020 settlement demand letter were not offered for the truth of the matters asserted therein. (A0733 Tr.56:8-19). Nonetheless, the Court of Chancery held that it could consider the opinion letters "for the facts that they exist and say what they say (true or not)." (Mem. Op. 59).[3] In the first instance, the court could not accept the opinions for the true or falsity of the matters asserted therein. PCE conceded as much at trial. Moreover, once a party frames its own evidence as such (to escape a hearsay objection), Delaware law is clear that the court cannot thereafter consider the truthfulness of the evidence. *Israel Disc. Bank of New York v. First State Depository*

[3] An examination of this evidentiary sub-issue is subject to an abuse of discretion standard of review.

Co., LLC, 2013 WL 2326875, at *27 (Del. Ch. May 29, 2013) (holding that an out-of-court valuation report was not admissible for the truth of the valuations asserted therein); *Paron Capital Mgmt., LLC v. Crombie*, 2012 WL 214777, at *4 (Del. Ch. Jan. 24, 2012). Likewise, the Court of Chancery's rationalization that it consideration of the truthfulness of the opinion letters was consistent with "Defendants' acceptance of the [] Opinions at the start of the litigation" is factually false. (Mem. Op. 59). The litigation started in May 2020. The opinion letters were not delivered until Rahn sent them along with his settlement demand on August 10, 2020. The opinion letters have to be "satisfactory in form and substance to the Board and counsel for the Company" not the trial court when the proffering party expressly limits their admissibility.

Against this belated and inadequate backdrop of required deliverables, the Court of Chancery should have denied the relief that PCE first alleged was due as of June 1, 2020, and then alleged was due instead on a litigation-concocted September 1, 2020 alternative date.

IV. THE COURT OF CHANCERY ERRED WHEN IT HELD THAT THE GENERAL GOVERNORS' UNCLEAN HANDS DEFENSE DID NOT BAR PEARL CITY'S CLAIM

Question Presented

Whether the General Governors' affirmative defense of unclean hands foreclosed PCE's claim. This issue was preserved in the trial court. (A0920-22).

Standard and Scope of Review

The Court of Chancery's adjudication of the General Governors' unclean hands defense involved factual questions. This Court's review will be limited to an inquiry as to whether the findings below support the conclusion that PCE did not have unclean hands. *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 876 (Del. 2015).

Merits

The doctrine of unclean hands is equity's maxim that a plaintiff who engaged in his own reprehensible conduct in the course of a transaction at issue must be denied equitable relief. *RBC Capital*, 129 A.3d at 875-76 (internal quotations and citations omitted). The Court of Chancery erred when it failed to find the existence of unclean hands in any one of the three scenarios presented.

Under Delaware law, majority owners owe fiduciary duties to the minority owners. *In re Atlas Energy Resources, LLC*, 2010 WL 4273122, at *6 (Del. Ch. Oct. 28, 2010). A majority or controlling stockholder "owe[s] the same fiduciary duty of disclosure as directors." *In re WeWork Litig.*, 2020 WL 6375438, at *13 (Del. Ch.

Oct. 30, 2020). Thus, if a majority or controlling shareholder chooses to speak, it "has a fiduciary duty to speak honestly." *Firefighters Pension Sys. of Kansas City, Mo. Trust v. Presidio, Inc*., -- A.3d --, 2021 WL 298141, at *51 (Del. Ch. Jan. 29, 2021). In *Lynch v. Vickers Energy Corp*., 383 A.2d 278, 281 (Del. 1977), this Court recognized that its duty was "to examine what information defendants had and to measure it against what they gave to the minority stockholders, in a context in which 'complete candor' is required."

A. Duty of Disclosure to the Private Transferring Members

Beginning in February 2020, PCE became the majority Unitholder and the General Members and their elected General Governors were in the minority. PCE's clandestine and deceptive actions fell short of its duty of honesty and "complete candor." The Court of Chancery limited its inquiry to only 277 Units, not the full run-up to the 56% threshold. (Mem. Op. 65-66). In the first instance, the Court of Chancery committed a factual error when it concluded that the initial 277 Units were not reflected on the Company's register. (Mem. Op. 66). They were and PCE Governor David Schenk signed the Board resolution following Board approval of the Transfers. (A0233). But each of the following forty private transactions increased PCE's consummated Transfers and record ownership of Adkins Units. (A0470). So too did the subsequent FNC sales that received Board approval. (A0233; A0311; A0468). However, PCE never disclosed either the private or FNC

run-up to the private Transferring Members. Each Exhibit C Notice of Proposed Transfer the Transferring Member executed included the same 57,510 Units or 50% ownership number. (A0100-77). This is a breach of the duty of disclosure and the Court of Chancery never adjudicated Defendants' defense in that context.

B. Duty of Disclosure to the Minority Members

PCE also owed a duty of disclosure to the minority General Members who were not Transferring Members. With private Transfers being consummated starting in late February 2020, PCE and the PCE Governors had an opportunity to inform the full Board of their dealings during the April and May 2020 Board meetings (March 2020 meeting cancelled because of COVID). Rather than discharging its obligation of honesty and complete candor, PCE remained mute. When PCE did seek Board approval for its public, FNC purchases during the May 19, 2020 Board meeting it did not disclose the nature or extent of its private Transfers to that date. (A0311; A0233; A0468). When PCE hoarded its alleged private Transfers, it was breaching its duty of disclosure to all minority General Members. As detailed above, the practical effect of PCE sitting on its Transfer Notices robbed the minority unitholders of any chance to deploy their own capital to stave-off a change in control at the 56% ownership threshold. PCE's serious fiduciary and contractual breaches demonstrate its unclean hands.

The Court of Chancery did not adjudicate this defense. Instead, the court

simply speculated that "Pearl City's patrons [the private Transferring Members] (as well as the General Governors) were presumably aware that PCE's purchase of any more units might warrant a control premium." (Mem. Op. 66). No mention of the minority General Members, no mention of depriving the minority of an opportunity to deploy their own capital to stave-off a change in control, and no mention of PCE's false and misleading disclosure to the Board at the May 19, 2020 meeting.

C. Coercive Pricing and Disclosures

It is undisputed that PCE was offering two different prices to two different factions of the minority General Members – $412.50 per unit to Adkins Members who were also PCE cooperative members or "patrons," but only $380 to Adkins members who were neither. *See infra*, pp.10-11. Offering two different prices for the same Units is a breach of fiduciary duty when "material information about the offer has been withheld or misrepresented or that the offer is coercive in some significant way." *In re Ocean Drilling & Expl. C. S'holders Litig.*, 1991 WL 70028, at *3 (Del. Ch. Apr. 30, 1991).

PCE's offer to purchase Units from its own cooperative members and patrons for $412.50 per Unit demonstrated that PCE believed the Units were worth substantially more than the $380 per unit that PCE offered to the disfavored General Members who were neither cooperative members nor PCE patrons. PCE cannot argue that the minority General Members who were neither PCE members nor

patrons were aware of and could participate in PCE's Purchase Offer because their tax expert, Huffman, opined that this was a private purchase initiative being offered to only PCE members and patrons.

What actually happened with PCE's Purchase Offer, during the height of the COVID pandemic, was that PCE pointed to its anonymous market marker of $380 on the FNC site and told its members and patrons that $412.50 was an above-market price. This is coercive. The fact that the price PCE selected was based on a FNC offer Ray Baker posted is of no moment. The ultimate consideration the private Transferring Member was to receive was the same – $412.50 ($425 minus FNC charges). But, PCE promised the money within thirty days, not after Board approval, which was expressly required through a FNC Transfer. In March, April and May 2020, no one could be assured when the Board would be able to meet to approve Transfers.

Likewise, as discussed above, material information about the offer had been withheld or misrepresented. PCE failed to provide advance notice of the proposed private Transfers and it failed to contemporaneously disclose the Transfers when consummated. When it did make disclosures to the full Board when seeking approval of the public FNC Transfers, PCE lied about the Units it had already purchased (*see*, *e.g.*, A0251-302, 258) and failed to disclose the private Transfers to the full Board. (A0233; A0311; A0468). The Court of Chancery assumed the

"private sales [were] placed among Members who were on notice of PCE's majority-owner status." (Mem. Op. 67). This is unfounded because the Court of Chancery already identified that the failure to disclose the first incremental increase of 277 from the disclosed 57,510 Units (or 50% level) was not material. (Mem. Op. 66). The fact remains all the Notices of Proposed Transfer for the private Transfers disclosed PCE's 50% ownership, not a majority-owner status. (A0100-77).

Based on this record, this Court should vacate the *de facto* denial of the unclean hands affirmative defense (on any one or more of the grounds asserted) and remand the defense for a full adjudication.

V. THE COURT OF CHANCERY ERRED WHEN IT AWARDED COSTS

Question Presented

Whether the Court of Chancery erred when it awarded PCE costs when the Agreement states individual Governors cannot be held liable to another member for loss or damage. This issue was preserved in the trial court. (A0001 at No. 170).

Standard and Scope of Review

Same as Argument I.

Merits

Under Operating Agreement §5.16, the Adkins members – including PCE – agreed that they would not hold individual Governors liable to another member for any loss or damage. (A0031). None of the exceptions identified in §5.16 are applicable. For these reasons, the Court of Chancery erred when it awarded PCE a recovery of costs below.

CONCLUSION

For the reasons set forth herein, Appellants respectfully request that this Court reverse the Court of Chancery's declaratory judgment in PCE's favor and remand to the Court of Chancery with instructions to enter judgment in their favor. Alternatively, the Court should vacate a denial of Appellants' unclean hands defense and remand for further proceedings.

Dated: June 25, 2021

/s/ David A. Felice

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