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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.	:	Appeal from the Court of Chancery of the State of Delaware
Plaintiff-Below Appellee,	:	C.A. No. 2020-0419-JRS
and	:	
ADKINS ENERGY, LLC,	:	
Nominal Defendant-Below.	:	

APPELLEE'S ANSWERING BRIEF

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Dated: July 12, 2021

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NATURE OF PROCEEDINGS

This is an appeal from a summary proceeding pursuant to 6 *Del. C.* § 18-110 concerning the lawful composition of Adkins Energy, LLC's ("Adkins" or the "Company") governing body, the "Board of Governors" or the "Board." On March 23, 2021, the trial court held in its 69-page post-trial opinion (the "Opinion")[1] that appellee Pearl City Elevator, Inc. ("Appellee" or "Pearl City") was entitled to appoint a seventh and tie-breaking member (a "Governor") to the Board, based on a plain and unambiguous reading of Adkins' constitutive document, the Third Amended and Restated Operating Agreement (the "Agreement").[2] That holding should be affirmed. Appellants' Opening Brief simply re-hashes Appellants' Post-Trial Answering Brief and ignores any evidence or law that conflicts with their narrative.

For the reasons set forth below, Pearl City respectfully requests that the Court affirm the trial court's Opinion in its entirety.

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[1] The Opinion is Exhibit A to Appellants Rod Gieseke, Jay Butson, and Dan Holland's ("Appellants" or the "General Governors") Corrected Opening Brief ("Opening Brief" or "OB").

[2] The Agreement is found in Appellants' Appendix ("A") at A12-62.

SUMMARY OF ARGUMENTS

A. Answers to Appellants' Summary of Arguments

1. Denied. Section 12.1(ii) of the Agreement provides that "***to the extent that*** the proposed Transfer is ***not*** to an existing Member," the transferring Member must obtain the "affirmative consent and approval" of the transfer from the Board by simple majority vote. (A47-48) (emphasis added). The trial court correctly construed this unambiguous language, and harmonized the Agreement as a whole, in holding that the Agreement does not require Board approval for transfers of units between or among existing Adkins Members (*i.e.*, intra-Member transfers) and that Appellants' arguments to the contrary would "render Section 12.1(ii)'s 'to the extent that' language superfluous, contrary to well-settled canons of contract construction." (Opinion 37). Moreover, Appellants ignore that Adkins' own counsel, who was involved in the drafting of the Agreement, agreed with this construction. (B106).[3]

2. Denied. The trial court correctly construed the Agreement's unambiguous language in holding that Pearl City satisfied the procedural requirements of Section 12.1. Section 12.1(i) plainly provides that, in connection with all "proposed Transfer[s]," the parties must provide "written notice" of transfer to Adkins, not "advance notice" as Appellants contend. (A47). Moreover,

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[3] Citations to "B__" are to Appellee's Appendix submitted herewith.

Appellants fail to cite any authority for the proposition that any procedural defects would not be curable, which would lead to an inequitable result.

3. Denied. The trial court correctly construed the Agreement's unambiguous language in holding that Pearl City satisfied the substantive requirements of Section 12.2 when it provided three Opinions of Counsel (the "PC Opinions") to Appellants on August 10, 2020. (A48-49; B242). Moreover, Appellants ignore their own testimony that the PC Opinions satisfied the substantive requirements of the Agreement. (B425; B453; B486).

4. Denied. The trial court properly rejected Appellants' unclean hands defense, which was based largely on the proposition that Pearl City offered different purchase prices for Adkins units to differently situated Adkins Members. Appellants ignore the applicable case law, cited by the trial court, holding that Pearl City was free to offer to purchase Adkins units at whatever price it chose. (Opinion 66). The trial court further held that "Pearl City did not violate any obligation, under the Agreement or otherwise, in the course of its acquisition of units to reach the 56% threshold. Its hands are clean." (*Id.* 67).

5. Denied. The trial court properly exercised its discretion in awarding Pearl City its costs as the prevailing party in the litigation pursuant to Court of Chancery Rule 54(d).

COUNTERSTATEMENT OF FACTS[4]

A. The Relevant Parties and Non-Parties

Adkins, the nominal defendant below, is a Delaware LLC that owns and operates an ethanol plant in Lena, Illinois. (Opinion 5). Adkins is governed by the Board of Governors, which, prior to Pearl City's acquisition of additional Adkins units, was divided equally between three governors appointed by Pearl City (the "Pearl City Governors") and three governors (the "General Governors") elected by the general membership (the "General Members"). (*Id.* 1, 10-11). The General Members are all Adkins Members other than Pearl City. (*Id.* 1).

Plaintiff-below/Appellee, Pearl City, is an Illinois cooperative and Adkins' largest unitholder (or "Member" under the Agreement). (*Id.*). Pearl City's facilities are located directly across the street from Adkins, in Lena (A722; A823), and Pearl City exclusively supplies Adkins with the grain needed for Adkins to produce ethanol and thus value for its Members. (Opinion 5; A722). Pearl City's cooperative members, or "patrons," are primarily farmers who buy product from Pearl City, and most of Pearl City's roughly 2,000 patrons also reside near Lena. (Opinion 5). A small percentage of Pearl City patrons are also Members of Adkins. (*Id.*). As such, there is a symbiotic relationship among Pearl City (as supplier), Adkins (as producer), Adkins' Members (as investors), and the Lena community at large (as

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[4] Except where otherwise noted, these facts are taken from the Opinion.

consumers). (A823). Prior to the purchases of Adkins units at issue in this case, Pearl City owned 50% of the Adkins units. (Opinion 10).

Defendant-below/Appellant Rod Gieseke ("Gieseke") is the Chairman of the Board and a General Governor. (*Id.* 6). He has served on the Board since around 2008. (*Id.*). Gieseke indirectly owns approximately 1,700 Adkins units through his company, RB Gieseke, Inc., making him one of the largest unitholders among the General Members. (*Id.*).

Appellant Jay Butson ("Butson") has been a General Governor since around 2000. (*Id.*). He is also a General Member and indirectly owns his Adkins units through the Butson family trust. (*Id.*). Butson owns over 2,000 Adkins units, making him one of the largest unitholders among the General Members. (*Id.*).

Appellant Dan Holland ("Holland") is Adkins' treasurer, a General Member and General Governor, and he has served on the Board since 2010. (*Id.*).

Non-party, Elmer Rahn, is a Pearl City Governor. (*Id.* 7). He is also Pearl City's President and serves on the Pearl City board. He is a full-time farmer. (*Id.*).

Non-party, Matt Foley, is a Pearl City Governor. (*Id.*). He is Vice Chairman of the Adkins Board. (*Id.*). He is also a full-time farmer and lives in Lena. (*Id.*). Foley has been a Pearl City patron for more than 20 years. (*Id.*).

Non-party, David Schenk, is a Pearl City Governor and the secretary of the Adkins Board. (*Id.*).

Non-party, Phil Ramsel, is Pearl City's General Manager and Chief Executive Officer. (*Id.*).

Non-party, David Daly, was Pearl City's alternative governor to the Adkins Board. The trial court held in its Opinion that Daly was appointed to the Adkins Board as the fourth Pearl City Governor, effective September 1, 2020. (*Id.* 69). Daly's appointment provides Pearl City with majority control of the Board (4 to 3).

Non-party, Ray Baker, is Adkins' statutory Manager and General Manager under the Agreement. (*Id.* 8). He has worked for Adkins since 2001 and in the role of Manager since 2011. (*Id.*). Baker is also a General Member and owns 50 Adkins units. (*Id.*).

Non-party Locke Lord LLP ("Locke Lord") served as Adkins' counsel and participated in the negotiation and drafting of the Agreement in 2011. (*Id.*). Keith Parr and David Kendall are the attorneys at Locke Lord who provided legal advice to Adkins relevant to this dispute. (*Id.*). Messrs. Parr and Kendall are not personal counsel to Gieseke, Butson, Holland or Baker. (A749).

Non-party FNC Ag Stock ("FNC") is an intermediary bulletin board for thinly traded equity interests in agricultural companies. (Opinion 8). Adkins Members can list a non-binding price in which they would sell their Adkins units on FNC. (*Id.* 8-9). Blind offers to purchase Adkins units can then be placed on the bulletin board. (*Id.* 9). Placing a quote or a bid on FNC does not commit any person to buy or sell

units at a quoted price. (*Id.*). Each person who places a blind bid will be notified of any higher bids and given the opportunity to increase his original bid. (*Id.*). A Member who lists her Adkins units for sale does not know the identity of the bidder—including whether the bidder is a member of the Board. (*Id.*).

B. The Formation of Adkins

On December 17, 1999, Adkins was formed. (*Id.*). On August 31, 2011, Pearl City purchased 7.778% of the outstanding Adkins units from Adkins Energy Cooperative (the "Coop"). (*Id.* 10). The next day, Pearl City and the Coop executed the Agreement, after which the Coop was liquidated and dissolved, and its ownership interests in Adkins were distributed to the General Members. (*Id.*). As noted, this transaction resulted in both Pearl City and the General Members each owning 57,510 Adkins units, or exactly 50% of Adkins. (*Id.*).

Adkins' Members are treated as "partners" for federal income tax purposes, (*Id.* 9; A570), and Adkins and its Members enjoy favorable pass-through taxation as a result. (Opinion 9). As Adkins' largest unitholder, Pearl City benefits from Adkins' favorable tax treatment more than any other Member (A762), and losing that favorable tax status would be "very detrimental" to it. (A729-30).

C. The Material Terms of the Agreement

Adkins is governed by the Agreement. (Opinion 10). As noted, the Agreement was executed by Pearl City and the Coop, but not Adkins. (*Id.*). Each

Adkins Member signed a joinder agreement (the "Joinder") when he received his initial Adkins units, which binds the Member to the Agreement's terms. (*Id.*). Once a Member signs a Joinder, he never has to sign another one to purchase additional units. (A749).

1. The Primacy of the Board

Adkins adopted corporate-style governance features. (Opinion 11). Pursuant to Section 5.10 of the Agreement, "the Board [has] the authority to supervise and control all operations of the Company," except as expressly provided in the Agreement. (*Id.*; A28). The Agreement further provides that "[t]he business and affairs of the Company [are] managed by and under the direction of the Board," and "[t]he management of the Company is vested in the Board[.]" (Opinion 11; A31). Thus, although Adkins is a manager-managed LLC, with Baker serving as Manager, the Manager is subject to the oversight of the Board, and his duties are limited to those delegated to him by the Board. (Opinion 11; A27). Indeed, Baker's Employment Agreement states that he "understands that ultimate discretion and control over the Business shall remain vested in the [Board] and Manager shall do nothing inconsistent therewith." (Opinion 11; B18).

2. Composition of the Board

Pursuant to Section 5.1 of the Agreement, when their ownership is in equipoise, Pearl City and the General Members each appoint three (3) Governors to

Adkins' six-member Board—the Pearl City Governors and the General Governors, respectively. (Opinion 10-11; A23). This equal division of power is solidified by Section 9.7 of the Agreement, which states that only the General Members are entitled to vote in the election of the General Governors and only Pearl City is entitled to vote for the appointment of the Pearl City Governors. (Opinion 11; A35). Standing alone, Sections 5.1 and 9.7 present a structural problem; namely, if Pearl City can only vote for the Pearl City Governors, of which there are three, and if the General Members are only able to vote for the General Governors, of which there are three, how can one side ever assume majority control of the Board? (Opinion 11-12).

Enter Section 5.2 of the Agreement, which, by all accounts, was a central focus of the parties' negotiations in the lead up to executing the Agreement. (*Id.* 12). Section 5.2 of the Agreement sets out the procedural mechanism by which either Pearl City or the General Members (as a group) may take control of the Board. (*Id.*; A25). Locke Lord, as Adkins' counsel, participated in these negotiations. (Opinion 12). Section 5.2 states:

> In the event that either Pearl City or the General Member Group increase their Percentage Interest to more than fifty-six percent (56%) ... the size of the Board of Governors shall be increased from six (6) members to seven (7) members and the Member (or group of Members, as applicable) whose Percentage Interest has increased to fifty-six percent (56%) or more shall be

> entitled to appoint or elect four (4) of the seven (7) members of the Board of Governors.

(*Id*.; A25). Throughout the parties' negotiations of Section 5.2, the parties "very clearly" understood that one faction may someday seek to gain majority control of the Board through the accumulation of additional Adkins units. (Opinion 12; A775). It would completely subvert the purpose of Section 5.2 if either side had the power to block the other from expanding the Board after acquiring the requisite number of units. (Opinion 44). Without Section 5.2, either side could own a supermajority of Adkins and still be limited to only three Board designees. (*Id.* 12). Obtaining a majority of the Board is critical to being able to control Adkins because most Board-level decisions require a simple majority vote, while other specified items require either a supermajority vote (the approval of at least five Governors) or unanimity among the Governors. (A29-30).

3. The Transferability of Adkins Units.

It is undisputed that Adkins units are transferrable. (A20; A62; B200). Each of the Appellants has participated in transactions involving the transfer of Adkins units. (A1032; A750). The definition of "Transfer" in the Agreement includes any "sale," including a private sale. (A20; Opinion 13 (discussing transfer history of Adkins units)).

Section 12.1 of the Agreement describes the procedures for transferring Adkins' units. (Opinion 12; A47-48). It is the only provision of the Agreement that describes how to effectuate a transfer. (Opinion 53).

Under Section 12.1(i), in connection with all "proposed Transfer[s]," the parties must provide a "written notice" of transfer to Adkins, which must take the form of a "Notice of Proposed Transfer" (the "Transfer Notice"), which is attached as Exhibit C to the Agreement. (*Id.* 12-13). The Transfer Notice expressly contemplates two "[m]ethod[s] of proposed transfer": "[p]rivate sale[s]" (with "no public solicitation") and public, qualified matching service ("QMS") sales. (*Id.* 13). For Adkins, QMS sales occur on FNC and provide safe harbor under IRS regulations for continued favorable tax treatment. (*Id.*). Adkins' contract with FNC is governed by an executed engagement agreement called the Trading Services Agreement ("TSA"), which required Adkins to maintain a Trading Service Operational Manual (the "Trading Manual") on its website and a Trading Service Summary (the "Trading Summary," together with the TSA and Trading Manual, the "FNC Documents"). (*Id.*).

Under Section 12.1(ii), "***to the extent that*** the proposed Transfer ***is not to an existing Member***," the transferring Member must obtain the "affirmative consent and approval" of the transfer from the Board by simple majority vote. (*Id.* 14; A47-48) (emphasis added). Section 12.1(ii) thus expressly requires Board approval of

transfers to non-Members. By implication, "affirmative consent and approval" of the Board "is *not* required for transfers among existing Members." (Opinion 36) (emphasis in original). Adkins' counsel who was involved in the drafting of the Agreement agreed with this construction. (B106). Section 12.1(ii) further provides that, "[w]ithout limitation to the foregoing," transfers become effective upon the start of the next fiscal quarter "following the approval of such Transfer by the Board of Governors." (Opinion 14).

Finally, Section 12.1 acknowledges "that the restrictions set forth in Section 12.2 may limit the number of [Adkins] 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 . . . and may defer" their approval "until a later date in order to comply with such limitations." (*Id.*).

4. Prohibited Transfers Under the Agreement

Section 12.2 enumerates eight categories of transfers which are, "[n]otwithstanding anything herein [the Agreement] to the contrary," prohibited. (*Id.*). The final four categories prohibit transfers that would violate the then existing provisions of certain debt financing documents, violate federal or state securities laws, or threaten Adkins' tax status. (*Id.*). Section 12.2 further states that "[n]o issuance or Transfer . . . 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] (which requirement for an opinion may be waived, in whole or in part, at the discretion of the Board)." (*Id.* 15). It also requires "the recipient of the [Adkins] Units [to have] executed a Joinder Agreement." (*Id.*).

It is undisputed that the Board has never requested nor been provided an opinion of counsel for any transfer in the past. (*Id.*; A750; A825). It is also undisputed that the Board has never formally waived any requirement for an opinion for any transfer of any type or scale. (Opinion 15; A825). Obtaining such an opinion is an expensive undertaking, costing several tens of thousands of dollars—as it did in this case. (Opinion 15; A733). Nothing in Section 12.2 states that an Opinion must be delivered to Adkins contemporaneously with the Transfer Notice and Bill of Sale or by any particular time. (A48-49). As described more fully below, it is undisputed that Pearl City provided the three PC Opinions to Adkins and Appellants on August 10, 2020, which addressed the five relevant provisions of Section 12.2. (Opinion 20-21; A703; B242).

5. Amendments to the Agreement

Section 16.4 of the Agreement provides that any amendment to the Agreement, including amendments to the means by which a Member could effectively transfer units, must be in writing, adopted by the Board and approved by a majority of the Members. (Opinion 16; A54). Only two amendments have been made to the Agreement since it was adopted; neither concerned provisions

implicated by this litigation, and neither reflected the terms of the FNC Documents. (Opinion 16, 42 n.173 ("there is no evidence in the record to suggest that all parties to the Agreement intended that the FNC Documents would modify the means by which unit transfers are authorized under the Agreement")).

D. Pearl City Crosses the 56% Ownership Threshold

From February through May 2020, Pearl City purchased 863 Adkins units on FNC. (*Id.* 16). These purchases were approved by the Board. (*Id.*).

On March 5, 2020, Pearl City announced two initiatives to Pearl City patrons for the purpose of accumulating sufficient Adkins units to cross the 56% ownership threshold to appoint a seventh governor (the "7th Governor") to the Board. (*Id.* 16-17). In its first initiative, Pearl City made an offer to purchase Adkins units directly from ***only*** Pearl City's patrons who also held Adkins units (the "Purchase Offer"). (*Id.* 17). Pursuant to the Purchase Offer, Pearl City offered to pay $412.25 per Adkins unit, which price was equal to the then-current highest offer price per Adkins unit on FNC, less the 3% cost per unit for executing a transaction on FNC. (*Id.*). As it turned out, the price of Pearl City's Purchase Offer was based on an FNC bid posted by Baker. (*Id.* 67).

The Purchase Offer was not offered to all Adkins Members. (*Id.* 17). Rather, Pearl City invited only Pearl City patrons who owned Adkins units to a dinner to discuss Pearl City's two initiatives. (A234; A745-46). Pearl City subsequently

purchased Adkins units from certain of these Pearl City patrons. (A741). Appellants admitted at trial that each Pearl City patron was free to accept or reject the cash offer made by Pearl City. (Opinion 63; A774-75). Appellants further conceded that the Agreement does not include any restriction on the price to be offered to purchase Adkins units. (Opinion 63; A774-75). The Purchase Offer culminated in 39 separate private sales and the transfer of 6,475 Adkins units to Pearl City. (Opinion 17). These private sales are memorialized in separate agreements, the "Bills of Sale." (*Id.*). Adding the 6,475 Adkins units obtained through the Purchase Offer to the 863 Adkins units purchased on FNC, resulted in Pearl City owning 64,848 Adkins units, which is 56.38% of the outstanding Adkins units, and more than sufficient for Pearl City to install the 7th Governor under Section 5.2 of the Agreement. (*Id.*).

In its second initiative, which was never completed, Pearl City formed a wholly-owned subsidiary, Alliance Ethanol, LLC ("Alliance Ethanol"), and Alliance Ethanol made an offer to exchange units of its own LLC membership interests for Adkins units from only Pearl City's patrons (the "Exchange Offer"). (*Id.* 17-18). Each Alliance Ethanol unit would have entitled its holder to a pass-through of all distributions received by Alliance Ethanol from Adkins with respect to the Adkins units exchanged for such Alliance Ethanol units. (*Id.* 18). Pearl City did not acquire any Adkins units through this initiative. (*Id.*).

Appellants learned of Pearl City's two initiatives to acquire Adkins units almost immediately. (*Id.*). Appellants were openly hostile to Pearl City's efforts to acquire more Adkins units and to appoint a 7th Governor and were determined to "fight back." (*Id.* 31; A775; B37; B65; B79; B110-11; B120-22). The trial court found that Appellants and Baker, with the assistance of Locke Lord, engaged in the following obstructionism:

- Prevented the Pearl City Governors from sharing any Adkins information with Pearl City (Opinion 18);
- Discussed forming their own LLC to "bid up" the price of units Pearl City was attempting to acquire (*id.* 19);
- Formed a Special Committee consisting of only General Governors empowered to evaluate the Exchange Offer without consulting the Pearl City Governors (*id.*);
- Engaged in a public letter writing campaign against the Exchange Offer (the "Fight Letters"). The Fight Letters stated Appellants' opposition to the Exchange Offer and asserted: (a) all transfers must occur on FNC; (b) Pearl City was putting Adkins' favorable single taxation status at risk; (c) Pearl City was violating federal and state securities laws; and (d) the Exchange Offer required the approval of the General Governors as a Related Transaction under Section 5.15 (*id.*);
- Drafted a Joinder Agreement for Alliance Ethanol that differed from the standard form in several material respects (*id.*); and
- Revealed at the Board's monthly meeting on April 21, 2020, that the General Governors had privately decided the Pearl City Governors were not entitled to vote on whether the transfers to Alliance Ethanol would be recognized (*id.*).

Appellants took the foregoing actions, even though Locke Lord had ***privately*** advised them in March 2020—before the current dispute—that Board approval was only required for transfers "not to an existing Member." (B106). Specifically, Locke Lord stated in a private memorandum as follows:

> **Adkins Energy Operating Agreement:**
>
> - Section 12.1(ii) of the Operating Agreement of Adkins Energy (the "Operating Agreement") provides that any Transfer which is not to an existing Member must be approved by the Board of Governors and such consent shall not be unreasonably withheld. We understand that there is currently a proposed initial transfer of Adkins General Units from Pearl City to Alliance Ethanol which is currently pending approved by the Board of Governors under Section 12.1(ii). If this Transfer is approved, Pearl City may then argue that subsequent Transfers pursuant to the Exchange Offer are Transfers to an "existing Member" and not subject to board approval under Section 12.1(ii).

(*Id.*).[5] Pearl City was forced to move to compel to obtain this document (and others) from Locke Lord and Appellants. (B291).

Despite these efforts by Appellants, Baker and Locke Lord, Pearl City was able to accumulate sufficient Adkins units to cross the 56% threshold to take control of the Board. (Opinion 19).

E. Appellants Refuse to Recognize Pearl City's Unit Transfers

On May 29, 2020, immediately after the complaint in this action was filed, Pearl City notified Appellants that Pearl City surpassed the 56% ownership threshold

[5] Because the trial court based its rulings on the unambiguous terms of the Agreement, it did not consider this document. (Opinion 31 n.146).

and that Pearl City was designating Daly as the 7th Governor. (*Id.* 20). The Transfer Notices and Bills of Sale for each relevant transaction were also mailed, via Federal Express, to Adkins and Appellants on May 29, 2020, and were received no later than June 2, 2020. (*Id.*). The trial court found that "[t]he General Governors had made clear ***prior*** to Pearl City's filing of the Complaint that they would not recognize Pearl City's transfers." (*Id.* 20 n.98) (emphasis added).

The Transfer Notices and Bills of Sale each indicate that they were being jointly delivered on behalf of the signatories, Pearl City and the transferor (the "Transferring Member"). (Opinion 62; *Id.* 61 n.227). It is undisputed that Appellants had the Transfer Notices and the Bills of Sale as required by Section 12.1(i) since at least June 2, 2020. (A703). There is also no dispute regarding the authenticity of the Transfer Notices and the Bills of Sale. (A800).

At the June 18, 2020 Board meeting, Pearl City again demanded that Appellants recognize Daly as the 7th Governor. (A825-26). They refused. (*Id.*).

On August 10, 2020, Pearl City provided Appellants and Adkins with the three PC Opinions addressing the five relevant legal matters identified in Section 12.2. (Opinion 20-21). The PC Opinions concluded that Pearl City's acquisitions of Adkins units through the Purchase Offer (a) did not cause Adkins to be deemed a

"publicly traded partnership" or "PTP,"[6] (b) did not cause Adkins to lose its favorable pass-through tax status, and (c) did not violate any state and federal securities laws. (B242).[7] In the cover letter to the PC Opinions, Pearl City offered to dismiss its lawsuit if Appellants dropped their opposition to Daly's appointment to the Board. (Opinion 21). Appellants decided to continue fighting.

At the next Board meeting, on August 18, 2020, after Appellants indisputably were in possession of the Transfer Notices, Bills of Sale, and the PC Opinions, Pearl City once again demanded that Daly be recognized as the 7th Governor, and offered his appointment to be effective as of September 1, 2020. (*Id.*). Appellants again refused to recognize Daly's appointment. (*Id.*).

Following the August 18 meeting, Locke Lord advised Gieseke that the General Governors could approve the private sales on the basis of the PC Opinions. (*Id.*; B279). Thereafter, Gieseke testified at his deposition that he believed that the Agreement's requirement of approval of the PC Opinions by Company counsel was satisfied. (B475). Each Appellant in fact testified that he did not oppose the

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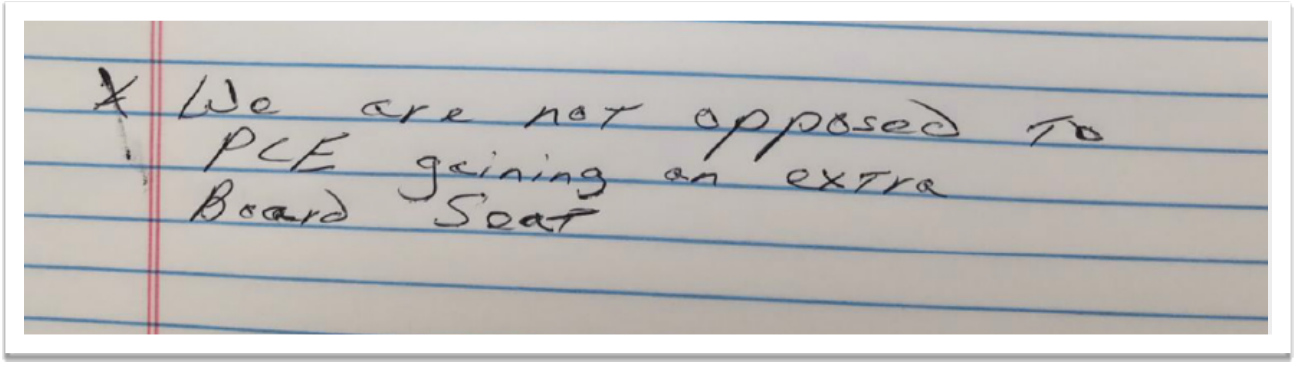
[6] Despite making Adkins' tax status the centerpiece of the Fight Letters and their lead argument at every stage of this litigation prior to trial, Appellants dropped this defense at trial. (*Id.* 60 n.225).

[7] As discussed below, at trial, Pearl City made clear that it was not offering the PC Opinions for the truth of the matters asserted. Rather, they were being offered to show that Pearl City provided these PC Opinions covering the required subjects to the extent they were required under Section 12.2 of the Agreement. (A733-34).

appointment of the 7th Governor at their depositions. (B425; B453; B486). Holland's notes, made after a call with Butson the night before his deposition, state:



(B431; B438).

Appellants' counsel even wrote a letter to the trial court on September 10, 2020 asserting that, ***based on their receipt of the PC Opinions***, litigating procedural issues other than Board approval constituted "a disturbing misuse of this Court's resources" (B285-90), and asked the trial court to limit the remainder of the case to the issue of whether Board approval was required for the private sales to be effectuated. (B290). In other words, after receipt of the PC Opinions, the only remaining procedural or substantive hurdle to the transfer of the units to Pearl City, in Appellants' view, was Board approval.

F. Appellants Call Two Special Meetings to Approve the Unit Transfers

On August 31 and September 6, 2020, Appellants provided the Pearl City Governors with notices of two special meetings of the Board. (Opinion 21; B278; B283). Though the notices purported to call the meetings "with the intention to

approve" the private sales, the trial court found that Appellants "actually planned to establish a quorum at the meetings, block a vote on the transfers and impose conditions to preserve the General Governors' equilibrium." (Opinion 22). Anticipating this ambush, and believing Board approval unnecessary under the Agreement, the Pearl City Governors did not attend either special meeting. (*Id.*).

G. Procedural History

On May 29, 2020, Pearl City filed this action pursuant 6 *Del. C.* § 18-110(a). The litigation then took a strange turn. Baker, on the advice of Locke Lord, (a) improperly retained Delaware counsel for Adkins, a deadlocked LLC, without Board approval; (b) caused Adkins to submit its own competing *status quo* order (B124); (c) had Adkins file an unauthorized answer to the complaint with its own affirmative defenses (B132); and (d) served discovery on Pearl City, but, of course, not Appellants. (B230). None of these actions by Adkins was authorized by the Agreement, and these actions led to the trial court issuing a protective order against Adkins' discovery and striking Adkins' answer, and to the replacement of Baker's chosen Delaware counsel for Adkins with neutral counsel selected by agreement of both sides' counsel shortly before the close of fact discovery and depositions were to begin. (B375).

Locke Lord, despite being Company counsel, refused to turn over to Pearl City the legal advice it provided to Baker and Appellants in connection with the

disputes at issue in this lawsuit, forcing Pearl City (a joint client of Locke Lord) to move to compel. (B291). Pearl City's motion was largely granted on September 21, 2020. *Pearl City Elevator, Inc. v. Gieseke*, 2020 WL 5640268 (Del. Ch.). These documents demonstrated, and the trial court held, that Appellants and Baker—with the aid of Locke Lord—stridently sought to prevent Pearl City from accumulating Adkins units (Opinion 18-19), and they refuted Appellants' primary defenses that (a) the Board approval was required for the private sales to be effective (B106), and (b) that the FNC Documents are binding on the Members. (B82; B118). The foregoing litigation tactics were an extension of the great hostility that Appellants, Baker, and Locke Lord demonstrated towards Pearl City's efforts to obtain Board control prior to the litigation. (Opinion 18-19).

The Court held a two-day trial on October 21 and 22, 2020, conducted via Zoom. Post-trial briefing followed, with closing arguments on January 21, 2021. (*Id.* 23).

On March 23, 2021, the trial court issued its Opinion. (OB, Ex. A). On April 6, 2021, the trial court entered its Final Order and Judgment. (*Id.*, Ex. B). On April 20, 2021, the trial court awarded Pearl City its costs as the prevailing party in this litigation pursuant to Court of Chancery Rule 54(d). (*Id.*, Ex. C).

Appellants filed their Notice of Appeal on April 23, 2021.

ANSWERING ARGUMENT ON APPEAL

I. THE TRIAL COURT CORRECTLY HELD THAT BOARD APPROVAL IS NOT REQUIRED FOR TRANSFERS BETWEEN OR AMONG EXISTING ADKINS MEMBERS

A. Counterstatement of Question Presented (Response to Opening Brief, Section I

Did the trial court correctly interpret the terms of the Agreement when it held that Board approval is not required for transfers of Adkins units between or among existing Adkins Members? Yes. (Preserved at B657-62).

B. Scope of Review and Legal Standard

Whether the trial court correctly interpreted and applied the terms of the Agreement is a question of law subject to *de novo* review. *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014). This Court "will not disturb [factual] findings unless they are clearly erroneous and not supported by the record." *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011).

Delaware courts follow the objective theory of contracts, giving words "their plain meaning unless it appears that the parties intended a special meaning." *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 104 (Del. 2013). The proper interpretation of language in a contract is thus a question of law. *AT&T Corp. v. Lillis*, 953 A.2d 241, 251–52 (Del. 2008). "A contract is not ambiguous 'simply because the parties do not agree upon its proper construction,' but only if it is susceptible to two or more reasonable interpretations.'" *Norton v. K-Sea Transp.*

Partners LP, 67 A. 3d 354, 360 (Del. 2013) (internal citations omitted). Moreover, "[t]he meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan." *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334–35 (Del. 2012); *Elliott Assoc., L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998) (the trial court "… must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument."); *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 926–27 & n.61 (Del. 2017) (an "[a]greement is unambiguous when read in full and situated in the commercial context between the parties").

C. Merits of Argument

Appellants' primary argument is that Board approval is required for ***all*** transfers, and that because Pearl City did not obtain Board approval for the unit transfers that caused it to cross the 56% threshold, it is not entitled to exercise its right to appoint a 7th Governor. (OB 24). Construing the Agreement's unambiguous terms, the trial court rejected Appellants' contention and held that "prospective affirmative Board approval is required only for transfers to non-Members as a means to vet the admission of new Members." (Opinion 33-34).

The trial court based this holding on the plain text of Section 12.1(ii), which states that the Board's "affirmative consent and approval" by simple majority vote is

required only "to the extent that" the transfer is to a non-Member. (*Id.* 34). Indeed, the language—"to the extent that"—indicates that the Agreement contemplates two separate procedures based on the membership status of the recipient: "(1) if the transfer is to a non-Member, 'affirmative consent and approval' is required; and (2) by implication, 'affirmative consent and approval' of the Board is *not* required for transfers among existing Members." (*Id.* 36). (emphasis in original). The court observed that "[o]therwise, there would be no need to distinguish between transfers by the membership status of its recipient; the drafters would simply have written something to the effect that 'all transfers require affirmative Board approval by simple majority vote.'" (*Id.* 37). Appellants' reading was thus properly found to render Section 12.1(ii)'s "to the extent that" language superfluous, contrary to well-settled canons of contract construction." (*Id.*) (citing *NAMA Hldgs., LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007), *aff'd*, 945 A.2d 594 (Del. 2008)). At bottom, Appellants' argument that Board approval is required for all transfers cannot be harmonized with Section 12.1(ii)'s plain text. (*Id.* 43-44).

Based on the foregoing, Appellants' arguments on appeal may be readily rejected. *First*, Appellants contend that the trial court's holding that Board approval is not required for all transfers fails to place the Agreement in its proper commercial context under *Chicago Bridge & Iron Co. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912 (Del. 2017) and its progeny. (OB 26-27). Not so. The trial court correctly

observed that "it is unreasonable to think the parties would carefully negotiate how one faction could expand their Board membership under Section 5.2 while, at the same time, hinder the possibility of expansion by allowing either faction to stonewall the other with *de facto* discretionary veto rights over all unit transfers." (Opinion 44). Indeed, Appellants conceded at trial that it was "very clearly" understood that either faction may someday seek to expand the Board through the accumulation of additional Adkins units. (*Id.* 21). And they also conceded that Section 5.2 was part of a "big discussion" between the parties at the time the Agreement was negotiated and executed. (*Id.*). The court below properly rejected Appellants' argument that they could withhold Board approval of a transfer to effectively write Pearl City's board expansion rights under Section 5.2 out of the Agreement as "in direct conflict with the spirit of the overall transaction." *Heartland Payment Sys., LLC v. inTEAM Assocs., LLC*, 171 A.3d 544, 557 (Del. 2017). In other words, it is Appellants' argument that runs afoul of *Chicago Bridge*. Accordingly, the trial court correctly held that "neither faction would be allowed to stonewall the other's attempt to accumulate more than 56% of Adkins' equity." (Opinion 32).

Second, Appellants contend that the trial court's holding is inconsistent with the parties' course of performance because Pearl City's prior purchases on FNC were approved by the Board. (OB 27-28). However, it is well-established that extrinsic evidence may not be used to alter the plain meaning of a contract. (Opinion 23)

(citation omitted).[8] This is not error. Moreover, to the extent that this Court will consider extrinsic evidence, Appellants ignore the fact that Adkins' counsel who drafted the Agreement interpreted Section 12.1(ii) in the same manner as the trial court. (B106).

Third, Appellants argue that the trial court's holding contravenes the FNC Documents, which require Board approval for unit transfers. (OB 28-29). However, Section 16.4 of the Agreement requires that any amendment to the Agreement be in writing, approved by the Board, and approved by a majority of the Members. (Opinion 16). The Agreement was never amended to require Board approval for all transfers. (*Id.*). The trial court properly found that the FNC Documents were "at best guidelines," and not binding on the Members. (*Id.* 66; B26 (describing "purpose" of FNC Documents is to establish "guidelines for the transfer of units"); A79 (describing the Trading Manual and Trading Summary as merely "instructions" to be maintained on Adkins' website); A81 ("[N]othing in this Agreement or the [Trading] Manual shall be construed to prevent a subscriber (as such term in defined in Regulation ATS) from trading outside the ATS.")). Appellants once again ignore that Adkins' counsel, Locke Lord, agreed with this conclusion. (B82; B119). The

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[8] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract[,] or to create an ambiguity.") (citations omitted).

court below also found that Ramsel's highlighting of the FNC Documents equally supported Pearl City's interpretation of the Agreement. (A1011-12).

Fourth, Appellants state "there would be no way for the Board or the Company to police compliance with all the requirements of §12.2" under the trial court's construction of the Board approval requirement. (OB 29). Appellants ignore what the trial court actually ruled. As an initial matter, Board approval is required for transfers involving a new Member. (Opinion 36). As for intra-Member transfers, the trial court, in harmonizing the Agreement, stated as follows:

> Sections 5.2, 12.1 and 12.2 can all be harmonized when the Court gives life to Section 12.1's distinction between "affirmative consent and approval . . . determined by a simple majority vote of the Board"—required "to the extent that" transfers involve a non-Member under Section 12.1(ii)—and mere tacit "approval," or recognition of the unit transfer, that occurs after the Board is provided notice of the transfer under Section 12.1(i) and either receives or waives the Opinion required under Section 12.2. Section 12.1 states expressly in its second sentence that the limits in Section 12.2 are subject to "approval requests" as contemplated in that section. Section 12.1 also makes clear that the Board may request an Opinion for the sole purpose of ensuring that prohibited transfers are not consummated; the Board may then only "defer" (not reject) a transfer under Section 12.2 until it receives an Opinion "satisfactory in form and substance."

(*Id.* 45-46). Accordingly, the Board is able to police intra-Member transfers by requesting an Opinion after it receives written notice of the proposed transfer. The

trial court then outlined the consequences if the Board decides not to request an Opinion for an intra-Member transfer:

> 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."
>
> In the event the Board opts not to seek an Opinion for a transfer prohibited under Section 12.2, it would nevertheless be void *ab initio* under the last sentence of Section 12.2 upon discovery that it violates Section 12.2.

(*Id.* 47). It is not the case that the trial court's construction eliminates the Board's oversight role under Section 12.2 for intra-Member transfers. Such oversight occurs by action of the Board requesting an Opinion of Counsel, and, even if the Board declines to request one, if an intra-Member transfer is found to violate Adkins' loan documents, securities laws, or threatens the tax status of Adkins as a limited liability company, as set forth in Section 12.2, then the transfer is void *ab initio*. (*Id.*).

This Court should affirm the trial court's well-reasoned decision that Board approval is not required for transfers between or among existing Adkins Members.

II. THE TRIAL COURT CORRECTLY HELD THAT PEARL CITY SATISFIED THE PROCEDURAL REQUIREMENTS OF SECTION 12.1

A. Counterstatement of Question Presented (Response to Opening Brief, Section II

Did the trial correct correctly find that Pearl City satisfied the procedural requirements of Section 12.1 of the Agreement? Yes. (Preserved at B662-63).

B. Scope and Standard of Review

Whether the trial court correctly interpreted and applied the terms of the Agreement is a question of law subject to *de novo* review. *Salamone*, 106 A.3d at 367-68. This Court "will not disturb [factual] findings unless they are clearly erroneous and not supported by the record." *Genger*, 26 A.3d at 190.

C. Merits of Argument

Appellants' second argument is that, even if Board approval is not required for intra-Member transfers, Pearl City did not follow the procedural requirements of Section 12.1; specifically, that Pearl City did not provide "advance notice" to Appellants of the private sales before filing this lawsuit. (OB 30-32). As a factual matter, the trial court properly rejected the argument that Appellants were unaware of the Purchase Offer and that they did not know that Pearl City was acquiring Adkins units prior to this litigation, based on extensive record evidence, including Appellants' own contemporaneous text messages. (Opinion 18). The trial court also dismissed as not credible Appellants' contention that they did not know that Pearl

City wanted to purchase sufficient Adkins units to obtain an additional Board seat. (*Id.*; A772; B120-22 (discussing "[Pearl City's] desire to obtain another board seat to take control of the Board"); B112). Indeed, Appellants admitted at trial that it was "very clearly" understood that one faction may someday seek to gain majority control of the Board through the accumulation of additional Adkins units. (Opinion 12). Their supposed shock was properly rejected by the trial court.

The trial court held that Section 12.1(i) of the Agreement does not require "advance notice" of transfers; it only requires "written notice." (*Id.* 12-13). Indeed, the court observed that "the drafters chose not to include such language"—namely, the word "advance"—in Section 12.1(i). (*Id.* 50). It is undisputed that Pearl City provided "***written*** notice" to Adkins and Appellants of the private sales on May 29, 2020, and that the Transfer Notices and Bills of Sale were received no later than June 2, 2020. (*Id.*). That is sufficient under Section 12.1(i).

The trial court also observed that the concept of "advance notice" did not "jibe with the self-executing notice contemplated by Section 16.1, which provides that, '[a]ny notice, demand, or communication required or permitted to be given by any provision of this Agreement shall be deemed to have been sufficiently given or served for all purposes . . . two days after the date of its mailing or deposit with such delivery service.'" (*Id.* 51).

The trial court further noted that, contrary to Appellants' argument, the words

"first" and "proposed" in Section 12.1 simply demonstrate that such written notice must be given to Adkins ***before*** the "proposed transfer" becomes effective at the beginning of the next fiscal quarter. (*Id.* 53). Indeed, the court held that Appellants' arguments regarding the words "first" and "proposed" appearing in Section 12.1 "misconstrue the provisions they cite and seek to expand the limited role those provisions play within the larger Agreement." (*Id.*). The court observed that

> lack of *advance* notice does not conflict with the Board's authority to supervise and control the Company's operations. Nor does it authorize Members to bind the Company to changes in its ownership and allocations without the Board's knowledge. Rather, the Board defers by default the effectuation of certain transfers pending production of a satisfactory Opinion, which it may waive expressly or by recognizing the transfer upon commencement of the next fiscal quarter.

(*Id.* 52) (emphasis in original).

In short, the trial court's determination that "[t]he Agreement unambiguously requires 'written' notice of transfers to be submitted at a time chosen by the transferring Members" (*Id.* 54), is correct. A "proposed transfer" is not effective unless and until written notice is provided. (*Id.* 53). Accordingly, the court's finding that Pearl City complied with the procedural requirements of Section 12.1 should be affirmed.

At worst, Pearl City substantially complied with the Agreement's terms or cured any deficiencies by providing the PC Opinions on August 10. *Jefferson Chem.*

Co. v. Mobay Chem. Co., 267 A.2d 635, 637 (Del. Ch. 1970) ("[E]quity .... will disregard a forfeiture occasioned by failure to comply with the very letter of an agreement when it has been substantially performed.") (citation omitted).

Finally, even if Appellants' reading of the Agreement were correct—and it is not—they still would not be entitled to the draconian (and *in personam*) remedy they seek: invalidation of all the private sales in this summary *in rem* proceeding. *Genger*, 26 A.3d at 200 ("In a Section 225 proceeding the [C]ourt 'cannot go further and actually rescind a transaction procured through such unlawful behavior. ...'") (citation omitted).

III. THE TRIAL COURT CORRECTLY HELD THAT PEARL CITY SATISFIED THE SUBSTANTIVE REQUIREMENTS OF SECTION 12.2

A. Counterstatement of Question Presented (Response to Opening Brief, Section III)

Did the trial correct correctly hold that Pearl City complied with the substantive requirements of Section 12.2 of the Agreement when it provided the PC Opinions? Yes. (Preserved at B663-68).

B. Scope and Standard of Review

Whether the trial court correctly interpreted and applied the terms of the Agreement is a question of law subject to *de novo* review. *Salamone*, 106 A.3d at 367-68. This Court "will not disturb [factual] findings unless they are clearly erroneous and not supported by the record." *Genger*, 26 A.3d at 190.

This Court reviews evidentiary rulings of the trial court for an abuse of discretion. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co*., 866 A.2d 1, 19 (Del. 2005). "Where a court 'has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused.'" *Id.* (citation omitted).

C. Merits of Argument

It is undisputed that Pearl City provided the PC Opinions to Appellants and Adkins on August 10, 2020. (Opinion 55). The PC Opinions opined on all five relevant issues identified in Section 12.2. (*Id.*; B242). It is also undisputed that

(a) Locke Lord was willing to approve the PC Opinions; and (b) Appellants called two special meetings for the purpose of approving the private sales based on the PC Opinions. (Opinion 55; B278; B279; B283). Indeed, in deposition testimony ignored in Appellants' brief, Gieseke, Chairman of the Board, stated that he was "willing to accept those legal opinions" "based upon the advice [he] received from [Locke Lord]" and that it was fair to say the only thing remaining for Pearl City to appoint a seventh Governor was for the Board to approve the private sales. (Opinion 55; B475; B485-86). Accordingly, Appellants' subsequent argument that the PC Opinions are substantively deficient should be rejected out of hand. *Bruce E. M. v. Dorothea A. M.*, 455 A.2d 866, 871 (Del. 1983) ("[A] court may refuse to allow a party to assert a contradictory position in the same or separate action if the court believes that the litigant is not acting in good faith or that the party's procedural posture would lead to an inequitable result.").

Moreover, as the trial court observed, "[i]f the Board approved the private sales at that time, they would have been effective as of September 1, 2020—the start of the next fiscal quarter." (Opinion 56). Thus, the court properly held that Pearl City complied with the substantive requirements of Section 12.2 when it provided the PC Opinions on August 10, 2020.

Appellants claim four purported errors by the trial court under Section 12.2 (1) that Pearl City's delivery of the PC Opinions came too late; (2) that the trial court

usurped the role of the Board; (3) that the trial court gave Pearl City an improper "pocket veto" power; and (4) that the PC Opinions are impermissible hearsay. None of these complaints has merit.

First, the PC Opinions were not delivered too late. The Court considered Appellants' claim that Pearl City's conduct violated the mend-the-hold doctrine and rejected it. The trial court held:

> The record before the Court simply does not support a finding that Pearl City has proceeded in bad faith. Rather, Pearl City believed, based on the Agreement's text, that an (expensive) Opinion was not necessary for intra-Member transfers. History supported that view, as the Board has never sought an Opinion with respect to any unit transfer. Absent evidence of bad faith, the "mend-the-hold" doctrine is inapt.

(Opinion 57). The consequence of delivering the PC Opinions on August 10, 2020, according to the trial court, was that the appointment of Daly became effective at the start of the next fiscal quarter, *i.e.*, September 1, 2020, rather than June 1, 2020. (*Id.* 60).

Second, the trial court did not usurp the Board's right to defer approval of the transfers. It is undisputed that Appellants received written notice of the transfers on May 29, 2020. (Opinion 21). At the June 2020 Board meeting, Pearl City demanded that Appellants recognize the transfers and the appointment of Daly, yet Appellants refused. (A825-26). On August 10, 2020, Appellants were indisputably in possession of the Transfer Notices, Bills of Sale and PC Opinions. (Opinion 21;

B242). At the August 18 Board meeting, Pearl City once again demanded that Appellants recognize the appointment of Daly to the Board, and Appellants once again refused. (Opinion 21; B275). Based on these refusals, the court determined that the transfers became effective on September 1, 2020 (Opinion 60), because the Board "cannot blithely deny … intra-Member transfer requests." (*Id.* 53). Indeed, as the court shrewdly observed that "upon receipt of the notices, the Board effectively exercised its right to receive a conforming Opinion." (*Id.* 54). Appellants have no cause for complaint.

Third, Appellants make an odd argument that the trial court effectively gave Pearl City an improper "pocket veto" over intra-Member transfers. (OB 37). In support of its contention, Appellants proffer a hypothetical involving an arguably inequitable scheme. (*Id.*). It is improper to assume that the Pearl City Governors would not act as appropriate fiduciaries. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). But, in any event, just because something is possible, does not mean it is equitable. *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 96 (Del. 2021). If the Pearl City Governors were found to have acted inequitably (which they were not), the Court of Chancery would be able to provide a remedy.

Fourth, the trial court ruled that the PC Opinions are not hearsay because they were not being submitted for the truth of their contents. (Opinion 59; A733-34).

Rather, they were admitted to show that Pearl City "checked the boxes" and satisfied any requirement to provide an Opinion addressing the specific items required by Section 12.2. (A733-34). Indeed, the court ruled that it "may consider the PC Opinions for the facts that they exist and say what they say (true or not)," and observed that "[o]n their face, the PC Opinions address each of the matters identified in Section 12.2." (Opinion 59 n.223). None of this contravenes the rules of evidence. D.R.E. 801(c) (defining hearsay). In any event, Appellants—despite having the PC Opinions since August 10—were unable to identify ***any*** substantive issue with the PC Opinions when pressed at post-trial argument. (Opinion 58-59; A1003-05). That is not surprising, as each Appellant previously testified that they would approve the transfers based on these same opinions (B425; B453; B486), and called two special meetings for the purpose of approving the transfers because they had received these opinions. (Opinion 59; B278; B283).

The trial court's holding that Pearl City complied with the substantive requirements of Section 12.2 of the Agreement should be affirmed.

IV. THE TRIAL COURT PROPERLY REJECTED APPELLANTS' UNCLEAN HANDS DEFENSE

A. Counterstatement of Question Presented (Response to Opening Brief, Section IV

Did the trial correct correctly reject Appellants' unclean hands defense? Yes. (Preserved at B725-28).

B. Scope and Standard of Review

For affirmative defense determinations, issues that the trial court resolved as a matter of law are reviewed *de novo*. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (citation omitted). Related factual determinations are overturned only if they are determined to be clearly erroneous. *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016).

C. Merits of Argument

The doctrine of "unclean hands" provides that "a litigant who engages in reprehensible conduct in relation to the matter in controversy ... forfeits his right to have the court hear his claim, regardless of its merit." *Nakahara v. The NS 1991 American Trust*, 739 A.2d 770, 791-92 (Del. Ch. 1998) (citation omitted). "[T]he purpose of the clean hands maxim is to protect the court against misuse by one who, because of his conduct, has forfeited his right to have the court consider his claims, regardless of their merit. As such it is not a matter of defense to be applied on behalf of a litigant; rather it is a rule of public policy." *Skoglund v. Ormand Indus., Inc.*,

372 A.2d 204, 213 (Del. Ch. 1976). Therefore, "[t]he question raised by a plea of unclean hands is whether the plaintiff's conduct is so offensive to the integrity of the court that his claims should be denied, regardless of their merit." *Gallagher v. Holcomb & Salter*, 1991 WL 158969, at *4 (Del. Ch.). "Th[e] [trial c]ourt has consistently refused to apply the doctrine of unclean hands to bar an otherwise valid claim of relief where the doctrine would work an inequitable result." *Dittrick v. Chalfant*, 948 A.2d 400, 408 n.18 (Del. Ch.), *aff'd*, 935 A.2d 255 (Del. 2007) (citations omitted).

Appellants assert that the following acts Pearl City took in furtherance of its "schem[e]" to accumulate Adkins units amount to unclean hands:

- Pearl City falsely reported the number of units it owned at various times. By "sandbagging" the General Members with their accumulation of units through private transfers, Appellants argue Pearl City: (1) robbed the minority of their ability to seek a control premium for the units, and (2) robbed the minority unitholders from deploying their own capital to stave off a change in control.

- Pearl City enlisted the help of a broker to place confidential standing offers on FNC. Pearl City's use of the broker to purchase units for its own account violated the Adkins' Trading Service Operational Manual.

- Pearl City was offering two different prices on the FNC and to its patrons in private purchases, thereby breaching its fiduciary duties of loyalty to minority Members.

(Opinion 64-65).

The trial court properly held that "[n]one of the acts asserted by [Appellants]

justifies this Court's equitable intervention to bar Pearl City's claims." (*Id.* 65). *First*, the court held that the purported omission within the Transfer Notices of the 277 Adkins units Pearl City purchased in February 2020, or roughly 4% of the 6,475 units it acquired through private sales from existing Members, was (a) de minimis, and (b) not done in bad faith. (*Id.* 66). Moreover, the trial court observed that Pearl City owned 50% of Adkins' units since 2011. Thus, Pearl City's patrons (as well as Appellants) were presumably aware that Pearl City's purchase of any more units might warrant a control premium. (*Id.*). Indeed, Pearl City's initiatives were presented only to Pearl City's patrons. (A234; A745-46).

Second, the trial court dismissed Appellants' argument that Pearl City's use of a broker was inequitable because the FNC Documents were not made binding on Pearl City or the Members. (Opinion 66; B82; B118). As stated above, the FNC Documents were mere guidelines. (Opinion 66). Accordingly, the trial court found "there is no inequity here" either. (*Id.*).

Finally, the trial court rejected Appellants' argument that Pearl City's purchase of different units at different prices from its patrons was wrongful under well-settled Delaware law. (*Id.* 66-67 (citing *In re Ocean Drilling & Expl. Co. S'holders Litig.*, 1991 WL 70028, at *3 (Del. Ch.) and distinguishing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)). Appellants simply ignore the court's analysis. Moreover, Appellants admitted at trial that any Member was not

obligated to sell, and was free to offer any price on FNC and to negotiate price as a matter of course. (*Id.* 67). And the price of Pearl City's cash offer was, as it turned out, based on an FNC bid posted by Baker—who was at all times aiding Appellants' resistance of Pearl City's initiatives. (*Id.* 67; *Id.* 18-19 (discussing Baker's role in Appellants' hostility towards Pearl City)). Accordingly, the trial court properly held that Pearl City's hands are clean, and the Court should affirm the trial court's ruling.

V. THE TRIAL COURT PROPERLY AWARDED PEARL CITY ITS COSTS AS THE PREVAILING PARTY IN THE LITIGATION

A. Counterstatement of Question Presented (Response to Opening Brief, Section V)

Did the trial court properly award Pearl City its costs as the prevailing party at trial? Yes. (Preserved at B732).

B. Scope and Standard of Review

Whether the trial court properly awarded costs to the prevailing party is subject to an abuse of discretion standard. *Jardel Co. v. Hughes*, 523 A.2d 518, 533 (Del. 1987).

C. Merits of Argument

Court of Chancery Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the Court otherwise directs." Ct. Ch. R. 54(d). The trial court has wide discretion to award the amount of costs to the prevailing party, including the right to deny the request altogether. *Graham v. Keene Corp.,* 616 A.2d 827, 829 (Del. 1992).

As the Final Order and Judgment makes clear, Pearl City prevailed at trial. *Id.* at 828 ("[T]he term 'prevailing party' as used in Rule 54(d) refers to the party for whom final judgment has been entered in any civil action."; OB, Ex. C). Costs were thus properly assessed against Appellants under Court of Chancery Rule 54(d) and the trial court's inherent authority and discretion to do so in furtherance of the

administration of justice. *Peyton v. William C. Peyton Corp.*, 8 A.2d 89, 92 (Del. 1939).

Appellants' sole argument on appeal is that they should not be responsible for any costs under Rule 54(d) because, pursuant to Section 5.16 of the Agreement, they are "not liable … to any Member for any loss or damage sustain by … any Member …" unless their conduct constitutes "fraud, deceit, gross negligence, recklessness, willful misconduct or a wrongful taking." (OB 46). Notably absent, however, is a citation to any authority in support of the proposition that Section 5.16 could preclude the trial court from using its equitable powers or discretion to award costs. *Everitt v. Everitt*, 146 A.2d 388, 393 (Del. 1958) ("[A]warding of costs is ***always*** within the sound discretion of the Chancellor. 'As in all equity suits, costs are within the discretion of the court, and depend somewhat upon the circumstances of the case") (emphasis added). Pearl City is aware of no such authority.

Moreover, an award of "costs" is not a "loss or damage sustained … by any Member"—it is an award to Pearl City in its capacity as the prevailing party in litigation for vindicating its rights. The distinction between "costs" and "damages" is readily apparent from the Opinion, which states that "[t]here is no claim for damages and no evidence was presented to support such a claim." (Opinion 22-23). Accordingly, even if parties could preclude an award of costs by private contract, no such agreement is present here. The trial court's award of costs should be affirmed.

CONCLUSION

For the foregoing reasons, the trial court's Post-Trial Opinion and Final Order and Judgment should be affirmed.

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CERTIFICATE OF SERVICE

Aaron M. Nelson, Esquire, hereby certifies that, on July 12, 2021, the foregoing Appellee's Answering Brief was served electronically upon the following counsel:

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