

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

RICHARD BALDWIN,

Defendant / Counterclaim-  
Plaintiff Below,  
Appellant,

v.

NEW WOOD RESOURCES LLC,

Plaintiff / Counterclaim-  
Defendant Below,  
Appellee.

No. 334, 2023

Court Below:  
Superior Court of the  
State of Delaware  
C.A. No. N20C-10-231  
SKR CCLD

**APPELLANT'S OPENING BRIEF**

OF COUNSEL:

Chris L. Gilbert  
GILBERT PC  
100 Crescent Court, Suite 700  
Dallas, TX 75201  
214-613-1112 (tel)

Sean J. Bellew (#4072)  
BELLEW, LLC  
Red Clay Center at Little Falls  
2961 Centerville Road, Suite 302  
Wilmington, DE 19808  
610-585-5900 (tel)

*Attorneys for Defendant /  
Counterclaim-Plaintiff Below,  
Appellant Richard Baldwin*

Dated: November 3, 2023

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

NATURE OF THE PROCEEDINGS ..... 1

SUMMARY OF THE ARGUMENT ..... 2

STATEMENT OF THE CASE ..... 4

    A.    The Underlying Litigation ..... 4

    B.    The Events Leading up to the First Delaware Advancement  
          Action ..... 5

    C.    Dr. Baldwin Was Successful in the First Delaware  
          Advancement Action ..... 7

    D.    Dr. Baldwin and OCI Were Forced to Initiate Collection  
          Proceedings After New Wood Refused to Pay ..... 10

    E.    The Superior Court Clawback Action Is Merely a Continuation  
          of the First Delaware Advancement Action ..... 10

    F.    On Remand, the Parties Conducted Limited Discovery ..... 12

    G.    The Superior Court’s Second Decision ..... 12

ARGUMENT ..... 14

I.    SUMMARY JUDGMENT WAS NOT APPROPRIATE IN THIS CASE  
      BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST ..... 14

    A.    Question Presented ..... 14

    B.    Scope of Review ..... 14

    C.    Merits of the Argument ..... 14

1.	Standard for Summary Judgment.....	14
2.	The New Wood LLC Agreement.....	15
3.	An Issue of Fact Exists on Whether New Wood Acted in Good Faith .....	18
a.	New Wood Created the 2020 Written Consent After Dismissing Its Claims Against Dr. Baldwin .....	19
b.	New Wood Refused to Use the 2020 Written Consent as a Defense in the First Delaware Advancement Action.....	20
c.	New Wood Argued in This Court That It Had No Obligation to Act in Good Faith.....	22
d.	Bursky and Liebich Failed to Cite Any <i>Facts</i> upon Which the 2020 Written Consent Is Based.....	23
e.	The 2020 Written Consent Was Not the Result of a Good Faith Process, but Rather an Abuse of Process.....	29
	CONCLUSION .....	32
	CERTIFICATES	
	ADDENDUM	

**Dkt. 79:** Final Order and Judgment (filed Aug. 16, 2023).

**Dkt. 75:** Memorandum Opinion granting Plaintiff / Counterclaim Defendant’s Motion for Summary Judgment (filed July 31, 2023).

## TABLE OF AUTHORITIES

### CASE LAW

<i>Baldwin v. New Wood Res. LLC</i> , 283 A.3d 1099 (Del. 2022) (en banc).....	<i>passim</i>
<i>Baldwin v. New Wood Res., LLC</i> , C.A. No. 2019-0019 (Del. Ch.).....	6
<i>Danenberg v. Fittracks, Inc.</i> , 58 A.3d 991 (Del. Ch. 2012) .....	8
<i>Droz v. Hennessy Indus., LLC</i> , 275 A.3d 257 (Del. 2022).....	14, 15
<i>Goldstein v. Denner</i> , C.A. No. 2020-1061, 2022 Del. Ch. LEXIS 117 (Del. Ch. May 26, 2022).....	24
<i>In re Walt Disney Co. Deriv. Litig. (Disney V)</i> , 906 A.2d 27 (Del. 2006) .....	24
<i>Lyondell Chem. Co. v. Ryan</i> , 970 A.2d 235, 240 (Del. 2009).....	24
<i>New Wood Res. LLC v. Baldwin</i> , C.A. No. N20C-10-231, 2023 WL 4883924, (Del. Super. July 31, 2023) (Mem. Op.) .....	2, 12, 13
<i>Oak Creek Investments, LLC v. Atlas FRM LLC</i> , No. 2018-091-CVM (Miss. Cir. Ct., Winston Cnty.).....	6
<i>Pascal Metrics, Inc. v. Health Catalyst, Inc.</i> , No. N22C-01-175, 2023 WL 3019665 (Del. Super. Apr. 19, 2023).....	15, 24

*Paul v. Deloitte & Touche, LLP*,  
974 A.2d 140 (Del. 2009).....14, 15

*RJR Nabisco, Inc. S'holders. Litig.*,  
C.A. No. 10389, 1989 Del. Ch. LEXIS 9  
(Del. Ch. Jan. 31, 1989) .....24

*Wootten v. Kiger*,  
226 A.2d 238 (Del. 1967).....15

**STATUTES & RULES**

8 *Del. C.* § 145(k) .....21

Super. Ct. Civ. R. 56(c).....14

**OTHER AUTHORITIES**

RICHARD F. BALDWIN, PLYWOOD AND VENEER-BASED PRODUCTS  
(The Donnell Grp. 2016) .....4

## NATURE OF THE PROCEEDINGS

New Wood Resources LLC (“New Wood”) is a Delaware limited liability company that was formed in September of 2013. *Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1102 (Del. 2022) (en banc). “New Wood operates a plywood and veneer manufacturing facility in Louisville, Mississippi known as Winston Plywood & Veneer LLC (‘WPV’).” *Id.* Richard F. Baldwin, Ph.D., was a Manager of New Wood from 2013 to 2016. *Id.*

Certain lawsuits arose by and between Dr. Baldwin, New Wood, and other entities in Mississippi federal court, Mississippi state court, and the Delaware Court of Chancery. *Baldwin*, 283 A.3d at 1105 n.16 (citing the various cases). Dr. Baldwin incurred costs and fees in those other lawsuits and was entitled to an advancement of his expenses under New Wood’s Second Amended and Restated Limited Liability Company Agreement (the “LLC Agreement”) (A29-95).

Dr. Baldwin sought such fees and costs in the Delaware Court of Chancery and ultimately recovered \$541,664.99 for advancement costs and \$325,546.04 as indemnity for the fees and costs he incurred recovering them. New Wood brought this action to recover, or claw back, the amounts it paid for advancement and indemnification costs.

On August 23, 2021, the Superior Court (Abigail M. LeGrow, J.) granted New Wood’s motion for judgment on the pleadings in this case and ordered that “Baldwin

shall repay the \$541,664.99 advanced to him.” Dr. Baldwin appealed and this Court reversed. *See Baldwin*, 283 A.3d 1099. The Court: (1) “agree[d] with Baldwin’s assertion that the [New Wood] LLC Agreement contains an implied obligation requiring that the indemnification determination [by New Wood] be made in good faith,” *id.* at 1118; (2) found that whether Dr. Baldwin “is able to prove that New Wood breached the implied covenant of good faith and fair dealing is for another day,” *id.* at 1124; and (3) remanded the case because Dr. Baldwin “has not yet had an opportunity to take discovery . . . .” *Id.*

On remand, discovery was undertaken and New Wood moved for summary judgment, arguing that no genuine issue of material fact exists on whether it acted with good faith when it found that Dr. Baldwin failed to act in good faith when he requested indemnity. On July 31, 2023, the Superior Court (Sheldon K. Rennie, J.) entered summary judgment in New Wood’s favor, finding that Dr. Baldwin failed to present any evidence that New Wood failed to act in good faith. *See New Wood Res. LLC v. Baldwin*, C.A. No. N20C-10-231, 2023 WL 4883924, Mem. Op. (Del. Super. July 31, 2023) (Addendum). The Court ordered that “Dr. Baldwin shall repay the \$541,664.99 advanced to him, together with applicable prejudgment interest.” Mem. Op. at 36 (Addendum). On September 14, 2023, Dr. Baldwin filed a notice of appeal from that ruling. Dkt. No. 80 (A2).

## **SUMMARY OF THE ARGUMENT**

Summary judgment is an important tool for disposing of cases when there is truly no genuine issue of material fact. This method of resolution conserves limited judicial resources for cases in which there are genuine issues of material fact and a jury is required to resolve a controversy.

Despite the evidence presented below on whether New Wood acted in good faith or bad faith — an inherently factual inquiry that involve nuances such as motive, mental state, intent, ill will, malice, furtive design, and improper purpose — the Superior Court determined as a matter of law that New Wood acted in good faith when it determined that Dr. Baldwin had acted in bad faith. This finding, involving the factual underpinnings of the mental state of both New Wood and Dr. Baldwin, was a clear error of law given the record evidence and must be reversed.



## STATEMENT OF THE CASE

### **A. The Underlying Litigation**

Dr. Baldwin is a renowned expert in the forest-products industry, including plywood manufacturing, and has been installing and configuring equipment in plywood mills since 1965.<sup>1</sup> This Court observed that Dr. Baldwin “has an extensive track record of revitalizing underperforming plywood mills.” *Baldwin*, 283 A.3d at 1102 n.7 (internal quotations omitted).

New Wood operates WPV, which is a plywood and veneer manufacturing facility in Mississippi, and controls WPV through its wholly owned subsidiary, WPV Holdco LLC (“Holdco”). *Baldwin*, 283 A.3d at 1102. New Wood’s controlling unitholder is ACR Winston Preferred Holdings LLC (“ACR”), which at all relevant times held approximately 85% of New Wood. *Id.* At all relevant times, Andrew Bursky (“Bursky”) was President of ACR and Kurt Liebich (“Liebich”) was the Chief Executive Officer of WPV. *Id.*

In 2014, the Mississippi facility had been dormant for years and was in need of repair. *Baldwin*, 283 A.3d at 1104. New Wood chose Dr. Baldwin to oversee the restoration and revitalization of the facility because of Dr. Baldwin’s expertise and prior successful business ventures in the forest-products industry. *Id.* On April 28,

---

<sup>1</sup> *See, e.g.*, RICHARD F. BALDWIN, PLYWOOD AND VENEER-BASED PRODUCTS (The Donnell Grp. 2016).

2014, shortly after Dr. Baldwin was retained, an EF-4 tornado struck Louisville, Mississippi, destroying the mill. *Id.* Dr. Baldwin then oversaw an almost complete reconstruction of the mill. On August 24, 2016, just before the mill was set to begin operations, Dr. Baldwin “was terminated from his position as the President and General Manager of WPV by Bursky and Liebich.” *Id.* at 1105.

Dr. Baldwin is a former member of the New Wood Board of Managers. *Baldwin*, 283 A.3d at 1102. Dr. Baldwin is also the founder and president of Oak Creek Investments, LLC (“OCI”), which was also a member of New Wood. *Id.* The controlling LLC Agreement for New Wood provides for the indemnification and mandatory advancement of legal expenses to both current and former members, managers, board committee members, and officers, to the fullest extent permitted by Delaware law. *See* New Wood LLC Agreement §§ 8.2 & 8.3 (A59-60).

**B. The Events Leading up to the First Delaware Advancement Action**

On February 9, 2018, OCI, which was managed by Dr. Baldwin at the time, initiated the first cause of action by filing a complaint in the United States District Court for the Northern District of Mississippi against New Wood, WPV, Holdco, Bursky, Liebich, and Atlas FRM LLC, d/b/a Atlas Holdings, LLC (“Atlas”), alleging, *inter alia*, breach of contract, fraud, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duties (the “Mississippi Federal Action”). *Baldwin*, 283 A.3d at 1105.

On May 17, 2018, the defendants in the Mississippi Federal Action moved to dismiss that action alleging lack of complete diversity, and also filed the Delaware Plenary Action against Dr. Baldwin and OCI in the Delaware Court of Chancery. *Baldwin*, 283 A.3d at 1106. This action asserted various claims against Dr. Baldwin and OCI, including claims for breach of fiduciary duty, breach of contract, negligence, and also sought declaratory relief. *Id.*

On May 25, 2018, before any answer was filed, OCI dismissed the Mississippi Federal Action without prejudice and re-filed the same causes of action against the same defendants in the Circuit Court of Winston County, Mississippi, in an action styled *Oak Creek Investments, LLC v. Atlas FRM LLC d/b/a Atlas Holdings, LLC, et al.*, No. 2018-091-CVM (Miss. Cir. Ct., Winston Cnty.) (the “Mississippi State Action”). *Baldwin*, 283 A.3d at 1106. This action was dismissed on grounds of *forum non conveniens* on February 22, 2019. *Id.*

While the Mississippi State Action was pending, Dr. Baldwin and OCI sought advancement of their litigation expenses. On August 10, 2018, Dr. Baldwin and OCI each sent the requisite “undertaking” letters agreeing to repay any advanced amounts should it be determined that they are not entitled to advancement. *Baldwin*, 283 A.3d at 1106. After their requests had been denied for months, on January 10, 2019, Dr. Baldwin and OCI filed the First Delaware Advancement Action. *See Baldwin v. New Wood Res., LLC*, C.A. No. 2019-0019 (Del. Ch.). This action sought

advancement for fees incurred in the Delaware Plenary Action, as well as fees and interest incurred in bringing the First Delaware Advancement Action (i.e., “fees on fees”). *Baldwin*, 283 A.3d at 1106.

On March 25, 2019, Dr. Baldwin and OCI filed their Answer in the Delaware Plenary Action, and asserted counterclaims against defendants New Wood, WPV, Holdco, Atlas, Bursky and Liebich. *Baldwin*, 283 A.3d at 1107. Those defendants dismissed their affirmative claims on January 23, 2020, in order to avoid the obligation to continue paying advancement, and presently only the counterclaims of OCI and Dr. Baldwin are being litigated. *Id.* at 1108.

**C. Dr. Baldwin Was Successful in the First Delaware Advancement Action**

On May 9, 2019, Dr. Baldwin and OCI moved for partial summary judgment in the First Delaware Advancement Action. *Baldwin*, 283 A.3d at 1107. On September 16, 2019, during oral argument on the motion, the Vice Chancellor noted that he “struggle[ed] to see [the defendants’] construction [of the governing LLC agreements] as being a reasonable one” and granted advancement for attorneys’ fees and expenses in the Delaware Plenary Action, as well as “fees on fees.” *Id.*

On October 14, 2019, after ordering the parties to engage in a *Fitracks* process<sup>2</sup> to negotiate and determine the amounts owed by New Wood, the Court entered an Order directing New Wood to pay: (i) \$269,881.61, as 75% of the advancement costs sought in litigating the Delaware Plenary Action through September 17, 2019; (ii) an additional \$17,726.97 in prejudgment interest; and (iii) \$214,459.59, as 75% of the “fees on fees” for bringing the First Delaware Advancement Action. *Baldwin*, 283 A.3d at 1108.

On March 16, 2020, after New Wood had made only a partial payment of the court ordered amounts, Dr. Baldwin filed a motion for fees and expenses pursuant to Court of Chancery Rule 88 (the “Rule 88 Motion”), seeking \$223,373.70 plus pre- and post-judgment interest, as well as “fees on fees.” *Baldwin*, 283 A.3d at 1108. To avoid being held in contempt for violating Vice Chancellor Slight’s advancement Order, New Wood falsely claimed inability to pay advancement, and only paid Dr. Baldwin and OCI in full in order to avoid post-judgment discovery in Mississippi.

On April 23, 2020, Bursky executed the “2020 Written Consent” (A24-28) stating that, pursuant to New Wood’s LLC Agreement, Dr. Baldwin had not acted in “good faith,” and therefore was required to repay all the amounts that New Wood had advanced pursuant to the earlier court order. *Baldwin*, 283 A.3d at 1109. The

---

<sup>2</sup> See *Danenberg v. Fitracks, Inc.*, 58 A.3d 991 (Del. Ch. 2012) (for submitting a detailed submission of the amount sought through advancement).

timing of the execution of the 2020 Written Consent is telling — more than a year and a half after Dr. Baldwin and OCI sought advancement, and only after having court orders directing payment, did New Wood arrive at the conclusion that Dr. Baldwin had not acted in good faith.

On August 10, 2020, the Court of Chancery heard oral argument and ruled in favor of Dr. Baldwin on his Rule 88 Motion, which the Court considered to be “equivalent to a motion for judgment.” *Baldwin*, 283 A.3d at 1110. Defendants did not raise the issue of the 2020 Written Consent, or New Wood’s purported determination that Dr. Baldwin had allegedly acted in bad faith, at this hearing. Instead, they asserted an inability to pay.

On August 26, 2020, the Court entered final judgement and entered an agreed Order pursuant to which New Wood withdrew all objections to the attorney certifications for fees to be advanced, and ordered that Dr. Baldwin and OCI were entitled to advancement amounts of: (i) \$223,373.70 for advanceable fees and expenses; (ii) \$22,994.40 in interest accrued as of October 7, 2019; (iii) \$7,688.31 in prejudgment interest; (iv) \$111,086.55 for attorneys’ fees and expenses in connection with the Rule 88 Motion; and (v) additional fees and expenses for the time spent preparing invoices, making demands, and addressing responses. *Id.* at 1110. Combined with the amounts ordered on October 14, 2019, New Wood was required to pay a total of \$867,211.03 in the First Delaware Advancement Action,

consisting of \$541,664.99 in advancement and \$325,546.04 in indemnification. *Baldwin*, 283 A.3d at 1110.

**D. Dr. Baldwin and OCI Were Forced to Initiate Collection Proceedings After New Wood Refused to Pay**

Following the August 26, 2020 judgment order, New Wood refused to advance the court-ordered amounts, claiming that it was nearing insolvency, lacked sufficient funds, and was on the verge of a potential involuntary bankruptcy. *Baldwin*, 283 A.3d at 1110. Only after Dr. Baldwin domesticated the judgment in Mississippi, and sought discovery concerning New Wood's finances, did New Wood comply with the Court's order and pay the full \$867,211.03. *Id.*

**E. The Superior Court Clawback Action Is Merely a Continuation of the First Delaware Advancement Action**

On October 26, 2020, New Wood filed the Superior Court Clawback Action "seeking to claw back the \$867,211.03 New Wood had paid to Baldwin." *Baldwin*, 283 A.3d at 1110. In this case, New Wood alleges that Dr. Baldwin was required to repay the same \$867,211.03 awarded in the First Delaware Advancement Action because, pursuant to the 2020 Written Consent, New Wood had determined that Dr. Baldwin had failed to act in good faith. *Id.* As a result, the Superior Court Clawback Action is essentially a continuation of the First Delaware Advancement Action because it involves the issue of whether Dr. Baldwin should be permitted to *retain* the amounts awarded to him in the First Delaware Advancement Action.

In response to New Wood’s Superior Court Complaint, Dr. Baldwin filed an Answer with affirmative defenses and a counterclaim alleging, *inter alia*, that pursuant to the implied covenant of good faith and fair dealing implicit in all Delaware contracts, the New Wood LLC Agreement that permitted the 2020 Written Consent required that New Wood’s determination of Dr. Baldwin’s alleged bad faith was itself subject to a requirement of good faith. *Baldwin*, 283 A.3d at 1111.

On March 16, 2021, New Wood filed a motion for judgment on the pleadings, and on August 23, 2021, the Superior Court ruled in New Wood’s favor, holding that the LLC Agreement expressly required Dr. Baldwin to repay the entire \$541,664.99 that New Wood had advanced to him, plus \$9,505.12 in pre-judgment interest, but not the \$325,546.04 that the Court of Chancery awarded for indemnification. Dr. Baldwin appealed that ruling to this Court. *Baldwin*, 283 A.3d at 1111-13.

On August 16, 2022, this Court reversed the Superior Court and held that the LLC Agreement, and the provision therein allowing New Wood to assess Dr. Baldwin’s good faith, was subject to an implied covenant of good faith and fair dealing. *Baldwin*, 283 A.3d at 1118 (“We agree with Baldwin’s assertion that the [New Wood] LLC Agreement contains an implied obligation requiring that the indemnification determination be made in good faith.”). This Court remanded the matter back to the Superior Court to determine whether New Wood had in fact acted



with good faith when it required Dr. Baldwin to repay the indemnification and advancement amounts.

**F. On Remand, the Parties Conducted Limited Discovery**

After this Court confirmed that New Wood had an affirmative obligation to act in good faith regarding the 2020 Written Consent, the parties engaged in limited discovery. This discovery included written discovery, as well as the depositions of Bursky, Liebich, Dr. Baldwin, and Dr. Baldwin's son, Richard Baldwin.

**G. The Superior Court's Second Decision**

On April 3, 2023, New Wood filed a motion for summary judgment arguing that no genuine issue of material fact exists on whether it had acted in good faith when it issued the 2020 Written Consent finding that Dr. Baldwin had not acted in good faith. The Court held that Dr. Baldwin had the burden of proving that New Wood acted in bad faith, which required:

[T]o prove bad faith, Dr. Baldwin must demonstrate that New Wood's conduct was motivated by a culpable mental state. The term "bad faith" is not simply bad [judgment] or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will. Bad faith has been defined in many ways, but in essence it means that New Wood's conduct must be driven by an improper purpose. Dr. Baldwin must present evidence to rebut the presumption of good faith; otherwise, summary judgment for New Wood is proper.

Mem. Op. at 20-21 (Addendum) (footnotes & internal quotations omitted).

The Court reviewed the evidence submitted and concluded that there was insufficient evidence to demonstrate a triable issue of fact that New Wood acted in bad faith. The Court first considered the evidence against ACR and Bursky, the President of ACR, who had signed the Written Consent because “ACR held approximately 85.52 percent of New Wood’s then-outstanding units, making it the majority unitholder of New Wood.” *Baldwin*, 283 A.3d at 1109. The Court held that there was “no *evidence* of bad faith by ACR or New Wood with respect to executing and acting on the Written Consent.” Mem. Op. at 25 (Addendum).

The Court then held that even “assuming *arguendo* that ACR’s actions rose to the level of bad faith, there is *no* evidence that New Wood colluded with, or had any knowledge of, ACR’s actions.” Mem. Op. at 25 (Addendum). For support, the Court pointed to the testimony of Liebich, the former CEO of WPV, that “‘I’m not a party to ACR, nor was I involved in the conversations with ACR.’” Mem. Op. at 26 (Addendum). The Court concluded that “no evidence exists to show that New Wood had any reason to doubt ACR’s determination in the Written Consent.” *Id.* Accordingly, the Court held that even if there had been a showing of bad faith as against ACR, and the Court held that there was not, such a showing would not be enough and Dr. Baldwin was required to prove bad faith by New Wood, which he failed to do. *Id.* at 27.

## ARGUMENT

### **I. SUMMARY JUDGMENT WAS NOT APPROPRIATE IN THIS CASE BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST**

#### **A. Question Presented**

Was summary judgment appropriate in New Wood’s favor given the volume of evidence Dr. Baldwin presented establishing a genuine issue of material fact on whether New Wood breached its obligation to act in good faith when it found that Dr. Baldwin did not act in good faith by seeking and acquiring indemnification?

The issue was preserved for appeal. *See* Plf.’s Response to Def.’s Motion for Summary Judgment (Dkt. 70, A4-5).

#### **B. Scope of Review**

“We review the Superior Court’s decision on a motion for summary judgment *de novo*, applying the same standard as the trial court.” *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).

#### **C. Merits of the Argument**

##### **1. Standard for Summary Judgment**

“Superior Court Civil Rule 56 requires a party moving for summary judgment to show ‘there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Droz v. Hennessy Indus., LLC*, 275 A.3d 257, 261 (Del. 2022) (quoting Super. Ct. Civ. R. 56(c)). If the movant

demonstrates that no genuine issue of material fact supposedly exists, “the burden shifts to the nonmoving party to demonstrate that there are genuine issues of material fact that must be resolved at trial.” *Paul*, 974 A.2d at 145.

“The court reviews the record, including any reasonable inferences to be drawn therefrom, in the light most favorable to the non-moving party.” *Droz*, 275 A.3d at 261-62 (internal quotations omitted). “If there are material facts in dispute, it is inappropriate to grant summary judgment and the case should be submitted to the fact finder to determine the disposition of the matter.” *Paul*, 974 A.2d at 145; *see also Droz*, 275 A.3d at 260 (“we reverse because Ms. Droz met her burden to raise a genuine issue of material fact whether Mr. Droz was exposed to asbestos dust from using the arc grinder with asbestos-containing brake drum shoes.”); *Pascal Metrics, Inc. v. Health Catalyst, Inc.*, No. N22C-01-175, 2023 WL 3019665, at \*1 (Del. Super. Apr. 19, 2023) (a question becomes one of law for the court “[w]hen the facts permit a reasonable person to draw only one inference . . . .”) (citing *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967))).

## **2. The New Wood LLC Agreement**

Sections 8.02 and 8.03 of the New Wood LLC Agreement are unambiguous provisions, conferring extremely broad rights to indemnification and advancement, respectively. These provisions require New Wood to provide indemnification to current of former Members (such as Dr. Baldwin) to the fullest extent of the

Delaware LLC Act, and to provide mandatory advancement to all persons who qualify for indemnification.

Section 8.2 of the New Wood LLC Agreement provides in relevant part:

**8.2 Right to Indemnification.** Subject to the limitations and conditions as provided in this Article 8, *each Person who was or is made a party or is threatened to be made a party to or is involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitral or investigative (hereinafter, a “Proceeding”), or any appeal in such a Proceeding or any inquiry or investigation that could lead to such a Proceeding, by reason of the fact that it, or a Person of whom it is the legal representative, is or was a Member, Manager, Member of a Committee of the Board or an Officer, or while a Member, Manager or an Officer is or was serving at the request of the Company as a member, manager, director, officer, partner, venturer, proprietor, trustee, employee, agent or similar functionary of another foreign or domestic limited liability company, corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan or other Person (each, an “Indemnitee”) shall be indemnified by the Company to the fullest extent permitted by the Act, as the same exists or may hereafter be amended . . . against judgments, penalties (including excise and similar taxes and punitive damages), fines, settlements and reasonable expenses (including attorneys’ fees) actually incurred by such Person in connection with such Proceeding, and indemnification under this Article 8 shall continue as to a Person who has ceased to serve in the capacity which initially entitled such Person to indemnity hereunder.*

LLC Agreement § 8.2 (A59-60) (emphasis added).

Section 8.3 of the LLC Agreement, in turn, mandates advancement of reasonable expenses, including attorneys' fees, to an Indemnitee, as that term is defined by Section 8.2, who is named as a defendant in any Proceeding:

**8.3 Advance Payment.** The right to indemnification conferred in this Article 8 shall include the right to be paid or reimbursed by the Company the reasonable expenses incurred by a Person of the type entitled to be indemnified under Section 8.2 who was, is or is threatened to be made a named defendant or respondent in a Proceeding *in advance of the final disposition of the Proceeding and without any determination as to the Person's ultimate entitlement to indemnification*; provided, however, that the, payment of such expenses incurred by any such Person in advance of the final disposition of a Proceeding shall be made only upon delivery to the Company of a written affirmation by such Person of its good faith belief that it has met the standard of conduct necessary for indemnification under this Article 8 and a written undertaking, by or on behalf of such Person, to repay all amounts so advanced if it shall ultimately be determined that such indemnified Person is not entitled to be indemnified under this Article 8 or otherwise.

LLC Agreement § 8.3 (A60) (emphasis added).

Pursuant to these clear provisions, the Court of Chancery in the First Delaware Advancement Action awarded Dr. Baldwin \$325,546.04 in indemnification, and \$541,664.99 in advancement (for a total award of \$867,211.03). The Court found that Dr. Baldwin, a former Member of New Wood, had incurred these expenses defending himself against allegations brought by New Wood and others in the Delaware Plenary Action.

### **3. An Issue of Fact Exists on Whether New Wood Acted in Good Faith**

New Wood did not establish on the record below, viewed in the light most favorable to Dr. Baldwin, that there is no genuine issue of material fact on the question of whether New Wood breached its obligation to act in good faith in making its determination that Dr. Baldwin acted in bad faith. To the contrary, the evidence establishes that a genuine issue exists because:

- a. New Wood only created the 2020 Written Consent after voluntarily dismissing its claims against Dr. Baldwin (i.e., Dr. Baldwin was the prevailing party), and cannot show that Dr. Baldwin engaged in bad faith conduct by successfully defending himself against claims that were ultimately dismissed;
- b. New Wood refused to present the 2020 Written Consent as a defense in the First Delaware Advancement Action when it had every opportunity to do so;
- c. New Wood argued in this Court that it had no obligation to act in good faith regarding the 2020 Written Consent (i.e., that the LLC Agreement permitted it to act in bad faith);
- d. Bursky and Liebich failed to cite *any* facts upon which the 2020 Written Consent is based, and instead offered only conclusory statements and irrelevant complaints about job performance and unrelated litigation; and

e. The 2020 Written Consent was not the result of any type of good faith process designed to fairly evaluate Dr. Baldwin's conduct, but rather a pretext and abuse of process created by New Wood and its counsel of record.

**a. New Wood Created the 2020 Written Consent After Dismissing Its Claims Against Dr. Baldwin**

The timing of the 2020 Written Consent indicates that New Wood failed to act in good faith. New Wood filed the Delaware Plenary Action against Dr. Baldwin and OCI on May 17, 2018, and dismissed those claims on January 23, 2020. Only after dismissing its claims against Dr. Baldwin did Bursky execute the 2020 Written Consent three months later on April 23, 2020.

Because New Wood dismissed its claims against Dr. Baldwin in the Delaware Plenary Action, which is the only action for which Dr. Baldwin has been awarded indemnification and advancement, New Wood must now argue that Dr. Baldwin failed to act in good faith when he defended himself against claims that New Wood eventually dismissed. It simply defies credulity to suggest that Dr. Baldwin acted in bad faith by successfully defending himself against claims that were eventually dismissed.

Any counterclaims brought by OCI against New Wood are irrelevant. Some of OCI's counterclaims against New Wood in the Delaware Plenary Action have been dismissed and some remain pending, but neither OCI nor Dr. Baldwin was



awarded any amounts for indemnification or advancement in connection with the counterclaims against New Wood, only the defense of New Wood's affirmative claims, which were dismissed. *See, e.g.*, Orders of Oct. 14, 2019 Granting Dr. Baldwin and OCI Partial Mot. for Summary Judgment ¶ 8 (Delaware Plenary Action) (Trans. ID. 64313478) (carving out reimbursement for amounts related to counterclaims); and Order Governing Demands for Advancement ¶ 2 (also Trans. ID. 643134) (defining "Covered Claims" to exclude amounts spent prosecuting counterclaims).

Accordingly, the fact that New Wood dismissed its claims against Dr. Baldwin in the Delaware Plenary Action demonstrates conclusively that, far from acting in bad faith, Dr. Baldwin was successful, and was in fact the prevailing party. Dr. Baldwin successfully defended New Wood's purportedly multi-million dollar claims against him and is entitled to the amounts awarded him by the Delaware Court of Chancery.

**b. New Wood Refused to Use the 2020 Written Consent as a Defense in the First Delaware Advancement Action**

Bursky executed the 2020 Written Consent on April 23, 2020 (A25-28). Almost four months later, on August 10, 2020, the Court of Chancery heard oral argument and ruled in favor of Dr. Baldwin on his Rule 88 Motion, which the Court considered to be "equivalent to a motion for judgment." *Baldwin*, 283 A.2d at 1109-

10. Defendants did not raise the issue of the 2020 Written Consent, or New Wood's purported determination of Dr. Baldwin's alleged bad faith conduct, at this hearing or at any other time prior to the Court of Chancery's entry of final judgment on August 26, 2020.

The question of Dr. Baldwin's alleged "bad faith," on which the Superior Court Clawback Action is premised, should have been raised and decided in the first advancement proceeding three years ago. New Wood, however, withheld from that proceeding the 2020 Written Consent that purportedly determined Dr. Baldwin's bad faith, and instead sought a re-do of the Court of Chancery's judgment by filing a new case to claw back those same funds in the Superior Court — which unlike the Court of Chancery does not have exclusive jurisdiction over advancement and indemnification claims. *See 8 Del. C. § 145(k)* (providing Court of Chancery with "exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise.").

At his deposition, Bursky admitted that the 2020 Written Consent was "the basis for the filing of the Superior Court [Clawback] action." Bursky Dep. at 154:16-19 (A151). Yet he had no recollection of the fact that New Wood had failed to raise the issue of Dr. Baldwin's alleged bad faith in the First Delaware Advancement Action, the proceeding in which the Court of Chancery adjudicated to judgment Dr.

Baldwin's rights to indemnification and advancement. *Id.* at 147:10-16 (A149). Likewise, when Liebich was asked why New Wood never raised the 2020 Written Consent as a defense to payment in the Court of Chancery, he simply responded: "I don't know the answer to that question." Liebich Dep. at 110:13-20 (A297).

The fact that New Wood refused to present the 2020 Written Consent in the Court of Chancery, when New Wood's theory of the case is that this document is a complete defense to its indemnification and advancement obligations, demonstrates that New Wood has never acted in good faith on the issue of the 2020 Written Consent, and indeed suggests that New Wood has acted in bad faith. Stated plainly, the 2020 Written Consent is a sham.

**c. New Wood Argued in This Court That It Had No Obligation to Act in Good Faith**

In the previous appeal to this Court, New Wood argued that it was never required to act in good faith when assessing the conduct of Dr. Baldwin. New Wood expressly argued, *inter alia*, that "a majority of New Wood's unitholders must make a determination regarding whether or not Baldwin was entitled to indemnification" and "the LLC Agreement does not require anything further from the New Wood unitholders apart from this specific indemnification decision." New Wood's Ans. Br. in Del. Supreme Ct. at 20 (Filing ID. 67155824).

Believing that it never had any affirmative obligation to assess Dr. Baldwin's conduct in good faith — i.e., based on objective factual determinations as part of a

fair and impartial process — New Wood acted according to this belief. Bursky testified that he “personally truly believ[es] that Baldwin failed to act in good faith,” and that he was not “lying about that today.” Bursky Dep. at 216:24 – 217:13 (A166). Liebich testified that “the way I *perceive it* is that he has acted in bad faith through all these lawsuits.” Liebich Dep. at 23:14-16 (A198) (emphasis added).

But the requirement to act in good faith, imposed by this Court, means that the decision to require Dr. Baldwin to pay back the monies awarded him by the Court of Chancery must be based on much more than just a “personal belief” or “perception.” New Wood was required to make a good faith effort to assess Dr. Baldwin’s conduct, fairly and objectively, based on facts and pursuant to an impartial process. This required it to articulate *some basis in fact* for the finding that it made. The record demonstrates that New Wood never acted in this manner because it never understood or believed that it had an obligation to do so. Instead, New Wood created the 2020 Written Consent as pretext for a clawback lawsuit, and abuse of the litigation process.

**d. Bursky and Liebich Failed to Cite Any *Facts* upon Which the 2020 Written Consent Is Based**

If this Court’s good faith requirement means anything at all, it must necessarily mean that New Wood’s decision to require Dr. Baldwin to pay back the judgment awarded him by the Court of Chancery must be based on objective facts determined in a fair process. Here, the record demonstrates that New Wood failed

to act in good faith regarding the 2020 Written Consent because the document was not based on any specific relevant facts regarding Dr. Baldwin's alleged misconduct. At the very least, even assuming *arguendo* that there are some facts suggesting New Wood's good faith, New Wood comes nowhere close to its summary judgment burden that its good faith is the "only inference" a reasonable person could take away from these facts. *See Pascal Metrics, Inc.*, 2023 Del. Super. LEXIS 201, at \*4.

In Delaware, "bad faith" is defined to include two types of misconduct, namely "an intent to harm" and also "intentional dereliction of duty." *Goldstein v. Denner*, C.A. No. 2020-1061, 2022 Del. Ch. LEXIS 117, at \*113 (Del. Ch. May 26, 2022) (quoting *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 240 (Del. 2009)); *accord In re Walt Disney Co. Deriv. Litig. (Disney V)*, 906 A.2d 27, 64-66 (Del. 2006)). The phrase "intentional dereliction of duty" is also described as "a conscious disregard for one's responsibilities." *Id.* Bad faith "can be the result of 'any human emotion [that] may cause a director to [intentionally] place his own interests, preferences or appetites before the welfare of the corporation' including greed, 'hatred, lust, envy, revenge, . . . shame or pride.'" *Id.* (quoting *RJR Nabisco, Inc. S'holders. Litig.*, C.A. No. 10389, 1989 Del. Ch. LEXIS 9, at \*15 (Del. Ch. Jan. 31, 1989)).

Here, the record demonstrates that the 2020 Written Consent was not procured in good faith, as this Court has required. To the contrary, the record suggests either

an attempt to punish Dr. Baldwin for the alleged or perceived problems with the Mississippi plywood facility project, or an intentional dereliction of New Wood's duty to conduct a good faith assessment of Dr. Baldwin's conduct before revoking the indemnification and advancement rights to which Dr. Baldwin is entitled under the LLC Agreement, as affirmed by the Court of Chancery.

Bursky admitted that the 2020 Written Consent, and its determination of bad faith conduct by Dr. Baldwin, was "the basis for the filing of the Superior Court [Clawback] Action." Bursky Dep. at 154:16-19 (A151). Yet during his testimony, when asked to name *one* fact, *any* fact, supporting the claim that Dr. Baldwin acted in bad faith and must now re-pay the amounts awarded him by the Court of Chancery, Bursky, the sole signatory of the document, provided evasive and non-responsive answers for more than five pages of testimony. *See* Bursky Dep. 147:18 – 152:20 (A149-50).

When pressed further, Bursky provided only conclusory allegations, unrelated to Dr. Baldwin's successful defense of himself against claims that New Wood eventually dropped. For example, Bursky testified that Dr. Baldwin made claims against New Wood that were "frivolous" and that he had "perjur[ed] himself" and therefore not acted "in the best interest of the company." Bursky Dep. at 162:9-25 (A153). Putting aside the conclusory nature of these allegations, any claims by Dr. Baldwin against New Wood would have been counterclaims which, as explained

above, were beyond the scope of Dr. Baldwin's indemnification and advancement payments.

Bursky also testified that the finding of bad faith against Dr. Baldwin was based in part on alleged managerial and job performance issues, including "both the failings on execution and the cost of bad judgments made by Baldwin . . . ." Bursky Dep. at 163:13-14 (A153). Bursky testified that Dr. Baldwin's allegedly poor job performance "certainly would be a contributor to an assessment that one would make regarding behaving in good faith and in a fashion consistent with the best interest of the company, it would be a contributing factor." *Id.* at 171:5-10 (A155). These allegations of poor job performance are clearly unrelated to the matter for which Dr. Baldwin sought indemnification, and therefore are irrelevant under Section 8.2 of the LLC Agreement and should never have entered into any assessment of whether Dr. Baldwin had acted in good faith in defending New Wood's claims against him.

Bursky further testified that irrelevant litigation — in which Dr. Baldwin was a plaintiff and for which he never sought indemnification or advancement — contributed to the finding that Dr. Baldwin did not act in good faith. When asked whether Dr. Baldwin had received any indemnification or advancement related to litigation that Dr. Baldwin initiated in Mississippi, Bursky confirmed that "[m]y understanding is [that] you are not entitled to advancement if you are the plaintiff." Bursky Dep. at 165:16-20 (A153). Bursky also confirmed that the plain text of the

2020 Written Consent attributed Dr. Baldwin’s alleged bad faith to litigation in Mississippi, stating specifically that Dr. Baldwin “failed to act in good faith” in connection with “the lawsuits,” which was defined to include both the “Mississippi State Court Lawsuit” and the “Mississippi Federal Court Lawsuit.” *Id.* at 176:8-25 (A156). This irrelevant litigation in Mississippi should never have factored into any “analysis” of Dr. Baldwin’s conduct.

Like Bursky, Liebich also failed to articulate any fact suggesting bad faith conduct by Dr. Baldwin that was related to any issue for which Dr. Baldwin sought indemnification or advancement. For example, Liebich testified as follows:

Q. ... Do you have any facts related to that specific case to substantiate a finding that Dr. Baldwin acted in bad faith?

A. You have to give me the details of that specific case. I’m not sure I understand the question.

Q. So as of right now, you can’t provide me one fact to support a finding that Dr. Baldwin acted in bad faith in connection with defending the Delaware Court of Chancery action?

[Objection to form]

[A] I stated my belief. Whether it’s related to that case or not — I’m giving you my personal view for why Dr. Baldwin has acted in bad faith throughout this whole legal process.

Liebich Dep. at 14:22 – 15:13 (A188-89).

When asked directly whether Dr. Baldwin had acted in bad faith “in defending the lawsuit brought against him,” Liebich responded that “I can’t put myself in Dr.



Baldwin’s shoes on why he’s decided to defend the lawsuit, given his actions up to this point. Those were his decisions.” Liebich Dep. at 20:3-6 (A194). When asked whether he was even aware that New Wood withdrew its affirmative claims against Dr. Baldwin in the Delaware Plenary Action, Liebich responded that “I don’t know all the specifics in each case. I’m aware that in certain cases, we have withdrawn certain claims, but I don’t know — I’m not close enough to know the specifics of in which case — I can’t be 100 percent confident in that answer.” *Id.* at 21:18-23 (A196).

As did Bursky, Liebich also testified that he believed Dr. Baldwin had “acted in bad faith through all these lawsuits.” Liebich Dep. at 23:14-16 (A198). Liebich, however, cited the language of Section 8.2 of the LLC Agreement, stating that Dr. Baldwin’s obligation to act in good faith only applies “with respect to the matter for which such person is seeking indemnification . . . .” *Id.* at 33:1-3 (A209).

Finally, when asked again to “point to any facts specifically related to defending the Delaware Court of Chancery action,” Liebich responded that “***the way I perceive it*** is that he has acted in bad faith through all these lawsuits. That’s my view.” Liebich Dep. at 23:14-16 (A198) (emphasis added). Here again, the admonishment by this Court that any assessment of Dr. Baldwin’s conduct must be made in good faith precludes a finding that it be based on a “perception,” as opposed to some genuine articulated facts.

The testimony of these witnesses comes nowhere close to supporting summary judgment on the issue of whether New Wood made a good faith determination that Dr. Baldwin acted in bad faith and is therefore required to repay the amounts awarded him by the Court of Chancery. If anything, the combined testimony is improperly conclusory, fails to articulate any objective factual basis for the 2020 Written Consent, and demonstrates that the decision to require Dr. Baldwin to repay the Court-awarded sums was based in part on irrelevant litigation and alleged managerial and job performance issues. It is solely the province of a Delaware jury to decide these issues, as well as any counterclaims and compensatory and punitive damage claims against New Wood.

**e. The 2020 Written Consent Was Not the Result of a Good Faith Process, but Rather an Abuse of Process**

New Wood also fails to meet its summary judgment burden because the record demonstrates that the 2020 Written Consent was not the result of any good faith process designed to impartially assess the conduct of Dr. Baldwin.

This Court already concluded in this case that New Wood’s LLC Agreement contains an implied obligation that any indemnification decision by New Wood under Section 8.2 must “be made in good faith.” *Baldwin*, 283 A.3d at 1118. Absent such an undertaking, Dr. Baldwin’s right to recovery under the LLC Agreement “would be rendered meaningless.” *Id.* at 1120. This is because “the parties

bargained for indemnification ‘to the fullest extent permitted’ so long as the indemnitee acted in good faith and in the best interests of [New Wood].” *Id.*

The requirement to act in good faith regarding the assessment of Dr. Baldwin’s conduct necessarily involves a fair process. But the record demonstrates no mention of any formal investigation into Dr. Baldwin’s conduct, no retention of outside consultants on any relevant issues, no interviews conducted by New Wood or notes of interviews regarding Dr. Baldwin’s alleged bad faith conduct, and no solicitation of any input from Dr. Baldwin himself to account for his allegedly improper conduct.

In direct contrast to any semblance of a fair process, Bursky testified that “what stood behind this [written] consent” was that he “listened carefully” to his “team” and to “members of the Board of New Wood” and that his “observations, discussions and deliberations which took place over five years . . . .” Bursky Dep. at 167:8 – 168:13 (A154). As set forth above, the LLC Agreement requires that New Wood’s assessment of Dr. Baldwin’s conduct be limited to the matter for which Dr. Baldwin sought indemnification, namely his successful defense of the charges against him in the Delaware Plenary Action, which New Wood and others initiated on May 17, 2018. Even putting aside that this testimony reveals no specific facts demonstrating Dr. Baldwin’s alleged misconduct, Bursky’s admission that the 2020 Written Consent is based on personal observations dating back five years — i.e.,

dating back to 2015 — demonstrates conclusively that the 2020 Written Consent is invalid and/or was enacted in bad faith because it was not limited to the conduct for which Dr. Baldwin sought indemnification as required by the explicit terms of the LLC Agreement. The credibility of Bursky and Liebich, or the lack thereof, is a matter for a Delaware jury to decide.

Finally, New Wood’s argument below that the decision on indemnification was not a New Wood decision, but “by members of New Wood,” avails New Wood of nothing. Assuming *arguendo* that ACR was the majority unitholder of New Wood, and that Section 8.2 of the LLC Agreement permits a decision on indemnification via “holders of a Majority of the then-outstanding units,” then any formal decision by the majority unitholder is necessarily attributable to New Wood.

As the entity seeking to claw back Dr. Baldwin’s court-ordered judgment, New Wood cannot divest itself of any connection with or responsibility for the 2020 Written Consent by arguing that its majority unitholder, and not New Wood itself, made the decision that Dr. Baldwin’s alleged bad faith conduct required him to repay what the Court of Chancery has awarded him. Otherwise, it would render the implied covenant of good faith and fair dealing that this Court held is in the New Wood LLC Agreement utterly meaningless — the right hand cannot disavow what the left hand has done.

## CONCLUSION

For the reasons set forth above, Appellant / Defendant / Counterclaim-Plaintiff Richard Baldwin respectfully requests that this Court reverse the Superior Court's August 16, 2023, Final Order and Judgment and remand this case for a jury trial on whether New Wood acted in good faith when it found that Dr. Baldwin acted in bad faith by defending himself against the claims brought against him by New Wood that were ultimately dismissed.

Respectfully submitted,

/s/ Sean J. Bellew

Sean J. Bellew (#4072)  
BELLEW, LLC  
Red Clay Center at Little Falls  
2961 Centerville Road, Suite 302  
Wilmington, DE 19808  
610-585-5900 (tel)

*Attorneys for Defendant /  
Counterclaim-Plaintiff Below  
Appellant Richard Baldwin*

OF COUNSEL:

Chris L. Gilbert  
GILBERT PC  
100 Crescent Court, Suite 700  
Dallas, TX 75201  
214-613-1112 (tel)

Dated: November 3, 2023

# **ADDENDUM**



**So Ordered**  
/s/ Sheldon Rennie Aug 16, 2023

**EFiled: Aug 16 2023 03:07PM EDT**  
**Transaction ID 70649015**  
**Case No. N20C-10-231 SKR CCLD**



**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

NEW WOOD RESOURCES LLC,

Plaintiff/Counterclaim-Defendant,

v.

RICHARD BALDWIN,

Defendant/Counterclaim-Plaintiff.

C.A. No. N20C-10-231 SKR CCLD

**[PROPOSED] FINAL ORDER AND JUDGMENT**

IT IS HEREBY ORDERED, for the reasons said in the Court's July 31, 2023, opinion (Trans. ID 70520943):

1. Judgment is entered for New Wood Resources LLC ("New Wood") and against Richard Baldwin ("Baldwin"), on: (a) all counts of New Wood's Amended Complaint, and (b) all counts of Baldwin's Counterclaims.
2. Judgment is entered against Baldwin in the amount of \$646,741.37, consisting of \$541,664.99, plus prejudgment interest at the legal rate from January 5, 2021, to August 11, 2023, totaling \$105,076.38.<sup>1</sup>
3. Post-judgment interest, at the legal rate, will start August 12, 2023.
4. All parties will bear their own fees.

---

The Honorable Sheldon K. Rennie

---

<sup>1</sup> Calculated consistent with *Schneider Nat'l Carriers, Inc. v. Kuntz*, 2022 WL 1222738, at \*32 (Del. Super. Ct. Apr. 25, 2022).



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

NEW WOOD RESOURCES LLC, )  
)  
Plaintiff/ )  
Counterclaim Defendant, )  
)  
v. ) C.A. No. N20C-10-231 SKR CCLD  
)  
RICHARD BALDWIN )  
)  
Defendant/ )  
Counterclaim Plaintiff. )

Submitted: June 14, 2023

Decided: July 31, 2023

**MEMORANDUM OPINION**

Richard P. Rollo, Esquire, Travis S. Hunter, Esquire, Jordan L. Cramer, Esquire, Richards, Layton & Finger, P.A., Wilmington, Delaware, *Attorneys for Plaintiff/Counterclaim Defendant New Wood Resources LLC.*

Sean J. Bellew, Esquire, Bellew LLC, Wilmington, Delaware; Chris L. Gilbert, Esquire, Gilbert PC, Dallas, Texas, *Attorneys for Defendant/Counterclaim Plaintiff Richard Baldwin.*

**Rennie, J.**



## I. INTRODUCTION

Plaintiff and defendant have been embroiled in lawsuits against each other over the past several years. Defendant's exit from a plaintiff-owned company was the catalyst for multiple lawsuits spanning state and federal courts. This iteration of the conflict stems from plaintiff's agreement to indemnify defendant for costs incurred in defending certain lawsuits. This commitment was conditioned upon defendant's agreement to repay plaintiff, if it was later determined that defendant was not entitled to indemnification under the standard set forth in their agreement. Defendant requested indemnification, and plaintiff complied after being ordered by a court. Plaintiff then determined that defendant did not meet the contractual standard for indemnification and sought to claw back the funds advanced to defendant. That is what this action is about—the claw back.

Plaintiff asserted a breach of contract claim as a result of defendant's refusal to return the advanced indemnification funds. In response, defendant asserted a counterclaim that alleges, among other things, that the agreement contained an implied term requiring any determination on indemnification to be made in good faith. This Court previously granted judgment on the pleadings in plaintiff's favor on both the breach claim and the counterclaim. As to the breach claim, the Court determined that defendant breached the agreement and, as to the counterclaim, the Court determined that that the agreement contained no implied term. The ruling on

the counterclaim was appealed to the Delaware Supreme Court. The Supreme Court held that the agreement contained an implied term that any indemnification determination must be made in good faith. Thus, the case was remanded to this Court.

Following remand, the parties conducted discovery. Plaintiff now moves for summary judgment on the counterclaim. The issue before the Court is whether defendant can demonstrate that plaintiff breached the implied covenant of good faith and fair dealing when plaintiff determined that defendant was not entitled to indemnification. Stated differently, can defendant establish that plaintiff acted in bad faith? The answer is no, because the record does not support a plausible finding of bad faith. Accordingly, for the reasons set forth more fully below, plaintiff is entitled to summary judgment on defendant's counterclaim. Plaintiff is also entitled to judgment in its favor on its breach claim because defendant has no valid basis to excuse his breach.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. The Parties**

Plaintiff/Counterclaim Defendant, New Wood Resources LLC (“New Wood”), is a Delaware limited liability company with its principal place of business

in Boise, Idaho.<sup>1</sup> New Wood has multiple members.<sup>2</sup> Defendant/Counterclaim Plaintiff, Dr. Richard Baldwin, served as a member of New Wood’s Board of Managers from September 13, 2013 to August 24, 2016.<sup>3</sup> Dr. Baldwin is a citizen of Texas.<sup>4</sup>

Several non-parties are relevant to this action. Oak Creek Investments, LLC (“OCI”) is a member of New Wood. Dr. Baldwin served as OCI’s manager.<sup>5</sup> New Wood operates a plywood and veneer manufacturing facility in Mississippi known as Winston Plywood & Veneer LLC (“WPV”).<sup>6</sup> New Wood controls WPV through its wholly owned subsidiary WPV Holdco LLC (“Holdco”).<sup>7</sup> ACR Winston Preferred Holdings LLC (“ACR”) was the majority holder of New Wood Units at the relevant time, holding approximately 85.52% of New Wood’s then-outstanding Units.<sup>8</sup> Andrew Bursky was President of ACR.<sup>9</sup> Kurt Liebich is the former CEO of WPV.<sup>10</sup>

---

<sup>1</sup> Amended Complaint (“Am. Compl.”) ¶ 2 (D.I. 6).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* ¶ 3; Answer & Counterclaim (“Counterclaim”) ¶ 3 (D.I. 7).

<sup>4</sup> Am. Compl. ¶ 3.

<sup>5</sup> *See id.* ¶ 12; Plaintiff/Counterclaim Defendant’s Opening Brief (“Opening Br.”) at 5 (D.I. 61).

<sup>6</sup> *Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1102 (Del. 2022).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

## **B. Dr. Baldwin's Employment by New Wood**

New Wood leased the WPV manufacturing facility in Mississippi.<sup>11</sup> The facility was dormant and in need of repairs.<sup>12</sup> New Wood started repairs with the intent to operate a plywood mill there.<sup>13</sup> New Wood selected Dr. Baldwin to oversee the facility's repairs because he was an industry expert.<sup>14</sup> Before repairs were completed, a tornado destroyed the facility.<sup>15</sup> As a result of the damage to the facility, WPV received funding from the Federal Emergency Management Agency, and Dr. Baldwin led the facility's restoration effort on behalf of New Wood.<sup>16</sup> On August 24, 2016, Dr. Baldwin's employment as President and General Manager of WPV ended.<sup>17</sup>

## **C. The LLC Agreement**

The verbiage of New Wood's Second Amended and Restated Limited Liability Company Agreement (the "LLC Agreement") is central to this dispute. The LLC Agreement provides specific indemnification and advancement rights to

---

<sup>11</sup> *Baldwin*, 283 A.3d at 1104.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1104-05.

<sup>17</sup> It is unclear from the record whether Dr. Baldwin resigned or whether he was terminated. *Compare Baldwin*, 283 A.3d at 1105 (stating that Dr. Baldwin was "terminated"), *with* Answering Br., Ex. A at 1 (stating in the New Wood Written Consent document that Dr. Baldwin resigned).

its Managers.<sup>18</sup> Hence, as a Manager, Section 8.2 of the LLC Agreement establishes

Dr. Baldwin's indemnification rights:

Subject to the limitations and conditions as provided in this Article 8, each Person who was or is made a party or is threatened to be made a party to or is involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitrative or investigative (hereinafter, a ***“Proceeding”***), or any appeal in such a Proceeding or any inquiry or investigation that could lead to such a Proceeding, by reason of the fact that it, or a Person of whom it is the legal representative, is or was a Member, Manager, Member of a Committee of the Board or an Officer, or while a Member, Manager or an Officer is or was serving at the request of the Company as a member, manager, director, officer, partner, venturer, proprietor, trustee, employee, agent or similar functionary of another foreign or domestic limited liability company, corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan or other Person (each, an ***“Indemnitee”***) shall be indemnified by the Company to the fullest extent permitted by the [Delaware Limited Liability Company] Act, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the Company to provide broader indemnification rights than said Act permitted the Company to provide prior to such amendment) against judgments, penalties (including excise and similar taxes and punitive damages), fines, settlements and reasonable expenses (including attorneys' fees) actually incurred by such Person in connection with such Proceeding, and indemnification under this Article 8 shall continue as to a Person who has ceased to serve in the capacity which initially entitled such Person to indemnity hereunder. *Notwithstanding anything to the contrary in this Section 8.2, no Person shall be entitled to indemnification hereunder unless it is found (in the manner described below in this Section 8.2) that, with respect to the matter for which such Person seeks indemnification, such Person acted in good faith and in a manner that he or she reasonably believed to be in or not opposed to the best interests of the Company and, with respect to any*

---

<sup>18</sup> “Managers” is defined in the LLC Agreement. See Defendant/Counterclaim Plaintiff's Answering Brief (“Answering Br.”), Ex. B § 7.2(a) (D.I. 70); see also *id.*, Ex. B at Exhibit A to the LLC Agreement at 4 (defining “Manager”).

criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful. . . . *The finding of the standard of conduct required above shall be made* (a) by a majority vote of all the Managers who are not parties to such Proceeding even though less than a quorum or (b) if there are no such Managers, or if such Managers so direct, by independent legal counsel in a written opinion or (c) *by holders of a Majority of the then-outstanding Units (determined without regard to any Members that are parties to such Proceeding)*. Notwithstanding anything to the contrary herein, **“internal disputes”** shall be excluded from the types of claims indemnified hereunder. For purposes of the preceding sentence, an **“internal dispute”** is defined exclusively as any proceeding commenced by any Atlas Member or one or more officers, directors, managers, partners, members or employees of any Atlas Member against any other Atlas Member or one or more other officers, directors, managers, partners, members or employees of any Atlas Member against any other Atlas Member or one or more other officers, directors, managers, partners, members or employees of such Atlas Member.<sup>19</sup>

Section 8.3 of the LLC Agreement covers “Advance Payment” and states:

The right to indemnification conferred in this Article 8 shall include the right to be paid or reimbursed by the Company the reasonable expenses incurred by a Person of the type entitled to be indemnified under Section 8.2 who was, is or is threatened to be made a named defendant or respondent in a Proceeding in advance of the final disposition of the Proceeding and without any determination as to the Person’s ultimate entitlement to indemnification; provided, however, that the[] *payment of such expenses incurred by any such Person in advance of the final disposition of a Proceeding shall be made only upon delivery to the Company of a written affirmation by such Person of its good faith belief that it has met the standard of conduct necessary for indemnification under this Article 8 and a written undertaking, by or on behalf of such Person, to repay all amounts so advanced if it shall ultimately be determined that such indemnified Person is not entitled to be indemnified under this Article 8 or otherwise.*<sup>20</sup>

---

<sup>19</sup> *Id.*, Ex. B § 8.2 (underlining and bold in original) (italics added).

<sup>20</sup> *Id.*, Ex. B § 8.3 (underlining in original) (italics added).

## **D. Lawsuits and Advancement**

### **1. *Underlying Actions***

Four lawsuits that are relevant to this action will be discussed—two in Mississippi, and two in the Delaware Court of Chancery.

On February 9, 2018, Dr. Baldwin, as the manager of OCI, filed a complaint in the United States District Court for the Northern District of Mississippi against New Wood, WPV, Holdco, Mr. Bursky, Mr. Liebich, and Atlas FRM LLC d/b/a Atlas Holdings, LLC (“Atlas”). Dr. Baldwin alleged breach of contract, fraud, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duties, among other counts (the “Mississippi Federal Action”).<sup>21</sup> In the Mississippi Federal Action, OCI also sought declaratory relief for an alleged improper dilution of OCI’s equity interests and veil piercing arising from a Management Services Agreement by and between Dr. Baldwin and WPV and investments by Dr. Baldwin in New Wood and Holdco.<sup>22</sup> Dr. Baldwin alleged, and the Delaware Supreme Court noted, that Dr. Baldwin’s basis for the Mississippi Federal Action arose from the end of his employment as President and General Manager of WPV.<sup>23</sup>

---

<sup>21</sup> See Opening Br. at 5-6, Ex. 1.

<sup>22</sup> See *id.* at 5-6; see also *Baldwin*, 283 A.3d at 1105.

<sup>23</sup> See *Baldwin*, 283 A.3d at 1105-06.

On May 17, 2018, the defendants in the Mississippi Federal Action moved to dismiss for lack of subject matter jurisdiction.<sup>24</sup> On the very same day, those same defendants filed a suit against OCI and Dr. Baldwin in the Delaware Court of Chancery, asserting claims for breach of contract, breach of fiduciary duty, and negligence (the “Delaware Plenary Action”).<sup>25</sup> Those defendants also asserted a declaratory judgment claim in the Delaware Plenary Action and requested a declaration that OCI’s allegations in the Mississippi Federal Action were false.<sup>26</sup>

On May 25, 2018, OCI filed a notice of dismissal without prejudice in the Mississippi Federal Action and refiled the same claims against the same defendants in the Circuit Court of Winston County, Mississippi (the “Mississippi State Action”).<sup>27</sup> The Mississippi State Action was dismissed in February 2019 under the doctrine of *forum non conveniens*.<sup>28</sup>

## ***2. Advancement Action***

Before dismissal of the Mississippi State Action, Dr. Baldwin and OCI sought advancement of their litigation expenses under Section 8.3 of the LLC Agreement.<sup>29</sup> Section 8.3 required Dr. Baldwin and OCI to provide an “affirmation” and an

---

<sup>24</sup> Answering Br. at 12.

<sup>25</sup> *Id.*; Opening Br. at 6.

<sup>26</sup> *Baldwin*, 283 A.3d at 1106.

<sup>27</sup> Answering Br. at 12.

<sup>28</sup> *Id.*

<sup>29</sup> *See Baldwin*, 283 A.3d at 1106.



“undertaking.”<sup>30</sup> On August 10, 2018, Dr. Baldwin sent one letter on behalf of himself and one on behalf of OCI stating that they agreed “to repay all amounts so advanced if it shall ultimately be determined that [Dr. Baldwin and OCI are] not entitled to be indemnified in [the Delaware Plenary Action].”<sup>31</sup> New Wood denied Dr. Baldwin’s and OCI’s requests.<sup>32</sup>

On January 10, 2019, Dr. Baldwin and OCI filed an advancement action in the Delaware Court of Chancery against New Wood, Holdco, and WPV (the “Advancement Action”).<sup>33</sup> Dr. Baldwin and OCI sought advancement for the fees incurred in the Delaware Plenary Action, and fees and interest incurred in litigating the Advancement Action (the “fees on fees”).<sup>34</sup>

On March 25, 2019, after the Mississippi State Action was dismissed, Dr. Baldwin and OCI filed their answer and asserted counterclaims against New Wood, WPV, Holdco, Atlas, Mr. Bursky, and Mr. Liebich in the Delaware Plenary Action.<sup>35</sup>

Thereafter, in May 2019, Dr. Baldwin moved for partial summary judgment in the Advancement Action.<sup>36</sup> The Vice Chancellor ruled that Dr. Baldwin was entitled to advancement of the litigation expenses that Dr. Baldwin incurred in

---

<sup>30</sup> See Answering Br., Ex. B § 8.3.

<sup>31</sup> Opening Br., Ex. 2.

<sup>32</sup> See Answering Br. at 12.

<sup>33</sup> *Id.*; *Baldwin*, 283 A.3d at 1106.

<sup>34</sup> Answering Br. at 12; *Baldwin*, 283 A.3d at 1106.

<sup>35</sup> Answering Br. at 13.

<sup>36</sup> *Baldwin*, 283 A.3d at 1107.

defending the claims in the Delaware Plenary Action, plus fees and expenses incurred in the Advancement Action, following the execution of his “undertaking” letter.<sup>37</sup>

The precise ruling by Court of Chancery was issued in October 2019. It ordered New Wood to pay: 75% (\$269,881.61) of the advancement costs sought for Dr. Baldwin’s and OCI’s costs and expenses incurred in defending the Delaware Plenary Action through September 17, 2019; \$17,726.97 in pre-judgment interest; and 75% (\$214,459.49) of the fees on fees Dr. Baldwin and OCI incurred in bringing the Advancement Action.<sup>38</sup> New Wood made only a first partial payment but then objected to subsequent payments.<sup>39</sup> Dr. Baldwin thereafter filed a motion for fees and expenses under Court of Chancery Rule 88 (the “Rule 88 Motion”).<sup>40</sup> In the Rule 88 Motion, Dr. Baldwin asserted that New Wood improperly claimed that it had insufficient funds to advance the amounts owed.<sup>41</sup> Dr. Baldwin acknowledged in the Rule 88 Motion that New Wood paid \$502,068.07 of the \$638,702.13, plus interest, that was requested.<sup>42</sup> Dr. Baldwin requested that New Wood be ordered to pay \$233,373.70, plus pre- and post-judgment interest, as well as fees on fees.<sup>43</sup>

---

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1107-08.

<sup>39</sup> *See* Answering Br. at 14.

<sup>40</sup> *Baldwin*, 283 A.3d at 1108.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Meanwhile, in January 2020, New Wood, Holdco, and WPV voluntarily dismissed their claims in the Delaware Plenary Action, leaving only Dr. Baldwin’s and OCI’s counterclaims remaining.<sup>44</sup> Later, in March 2020, New Wood moved for partial judgment on the pleadings in the Delaware Plenary Action. After considering the motion, the Court of Chancery dismissed certain of Dr. Baldwin’s and OCI’s counterclaims, while others remained.<sup>45</sup>

#### **E. April 2020 Written Consent**

To be entitled to indemnification, Section 8.2 of the LLC Agreement requires Dr. Baldwin to act in good faith and in a manner that he reasonably believed to be in or not opposed to the best interests of New Wood.<sup>46</sup> New Wood sought a determination as to whether Dr. Baldwin and OCI were entitled to indemnification under Section 8.2. This Section permits such a determination to be made in one of three ways—one of which is “by holders of a Majority of then-outstanding Units (determined without regard to any Members that are parties to such Proceeding).”<sup>47</sup> New Wood chose this option. Specifically, at that time, ACR held approximately 85.52% of New Wood’s then-outstanding Units, and Mr. Bursky was the President of ACR.<sup>48</sup> On April 23, 2020, Mr. Bursky executed a Written Consent of Certain

---

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See* Answering Br., Ex. B § 8.2.

<sup>47</sup> *Id.*

<sup>48</sup> *See Baldwin*, 283 A.3d at 1109.

Members of New Wood Resources LLC (the “Written Consent”).<sup>49</sup> The Written Consent stated:

[T]he undersigned Members, constituting a Majority of the currently outstanding Units (determined without regard to Members that are party to the Lawsuits), (i) are familiar with and have had sufficient time to consider the performance, conduct and behavior of Baldwin prior to his resignation, (ii) are familiar with and have had sufficient time to consider the allegations and claims made by the parties to the Lawsuits, and (iii) have determined that Baldwin *failed to act in good faith* and in a manner that he reasonably believed to be in or not opposed to the best interest of the Company with respect to the matters at issue in the Lawsuits.<sup>50</sup>

The Written Consent itself sheds no additional light on ACR’s determination that Dr. Baldwin failed to act in good faith. After execution by Mr. Bursky, New Wood adopted the Written Consent and requested that Dr. Baldwin repay the advanced amounts. Dr. Baldwin refused.<sup>51</sup>

Eventually, in August 2020, the Court of Chancery ruled on Dr. Baldwin’s Rule 88 Motion in the Advancement Action.<sup>52</sup> In total, the Court of Chancery ordered New Wood to pay Dr. Baldwin \$867,211.03, which consisted of \$541,664.99 in advancement and \$325,546.04 in indemnification.<sup>53</sup> New Wood did

---

<sup>49</sup> See Answering Br., Ex. A.

<sup>50</sup> *Id.*, Ex. A at 2 (emphasis added).

<sup>51</sup> *Baldwin*, 283 A.3d at 1109.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1110.

not pay until Dr. Baldwin domesticated the judgment in Mississippi.<sup>54</sup> New Wood thereafter sought to claw back the money paid and initiated the current action.

## **F. The Current Action**

### **1. Superior Court Proceedings**

New Wood filed the current action on October 26, 2020.<sup>55</sup> New Wood's Amended Complaint alleges that Dr. Baldwin breached the LLC Agreement and the "undertaking."<sup>56</sup> On January 20, 2021, Dr. Baldwin filed his Answer and a Counterclaim. In the Answer, Dr. Baldwin asserted three affirmative defenses: (1) Section 8.2 of the LLC Agreement requires that the findings in the Written Consent be made in good faith, (2) Dr. Baldwin acted in good faith, and (3) New Wood's lag in satisfying the judgment for Dr. Baldwin in the Advancement Action caused him to incur expenses offsetting any money he owed to New Wood.<sup>57</sup>

Dr. Baldwin's Counterclaim seeks a declaration that: (i) New Wood must pay Dr. Baldwin the attorneys' fees and costs he incurred in domesticating the Advancement Action judgment in Mississippi, including the cost of discovery there; (ii) Section 8.2 of the LLC Agreement contains an implicit term that any determination of a right to indemnification must be made in good faith; and (iii) the

---

<sup>54</sup> *Id.*

<sup>55</sup> Complaint (D.I. 1).

<sup>56</sup> See Am. Compl. ¶¶ 21-25.

<sup>57</sup> Counterclaim at 13.

Written Consent was entered into in a bad faith attempt to avoid New Wood's indemnification obligations under Section 8.2.<sup>58</sup>

On March 16, 2021, New Wood moved for judgment on the pleadings on its breach of contract claim and Dr. Baldwin's Counterclaim.<sup>59</sup> This Court heard oral argument on New Wood's motion on May 12, 2021.<sup>60</sup> During oral argument, Dr. Baldwin asserted that his Counterclaim was both an implied covenant claim and a claim seeking to imply a term in the LLC Agreement.<sup>61</sup>

On August 23, 2021, this Court entered judgment in New Wood's favor.<sup>62</sup> This Court interpreted the LLC Agreement and undertaking to require Dr. Baldwin to repay \$541,644.99, the amount advanced by New Wood.<sup>63</sup> Because the Written Consent stated that Dr. Baldwin acted in bad faith and was not entitled to indemnification, this Court held that Dr. Baldwin's undertaking required him to repay the money advanced to him by New Wood.<sup>64</sup> Only the advancement payments, not the indemnification payments, were subject to the undertaking, and thus, Dr. Baldwin was required to repay only the advancement money.<sup>65</sup> This Court

---

<sup>58</sup> *Id.* ¶ 58.

<sup>59</sup> *See* Plaintiff/Counterclaim Defendant's Motion for Judgment on the Pleadings (D.I. 12).

<sup>60</sup> *See* Judicial Action Form (D.I. 20).

<sup>61</sup> *Baldwin*, 283 A.3d at 1112.

<sup>62</sup> *See* Order (D.I. 23); *see also New Wood Res. LLC v. Baldwin*, 2021 WL 3784258 (Del. Super. Aug. 23, 2021), *rev'd and remanded*, 283 A.3d 1099 (Del. 2022).

<sup>63</sup> *Baldwin*, 283 A.3d at 1112-13.

<sup>64</sup> *Id.* at 1113.

<sup>65</sup> *Id.*

also determined that LLC Agreement Section 8.2 did not contain an implied covenant of good faith and fair dealing that would require New Wood to make the Written Consent’s indemnification determination in good faith.<sup>66</sup> This Court additionally found that Dr. Baldwin did not plead a cognizable Counterclaim because the Counterclaim was asserted against New Wood rather than ACR—the entity that determined Dr. Baldwin failed to act in good faith.<sup>67</sup>

## ***2. Appeal to the Supreme Court***

On October 22, 2021, Dr. Baldwin appealed this Court’s ruling to the Supreme Court.<sup>68</sup> The Supreme Court held two arguments on this matter.<sup>69</sup> The Supreme Court determined that Dr. Baldwin asserted his Counterclaim against the correct party, New Wood. The Supreme Court reasoned that New Wood is the real party-in-interest because New Wood is the entity obligated to indemnify persons who meet the requirements under the LLC Agreement.<sup>70</sup> Additionally, the Supreme Court held that Section 8.2 contains an implied covenant of good faith and fair dealing, obligating New Wood to make the indemnification determination in good faith.<sup>71</sup>

The Supreme Court stated:

[A]lthough Baldwin’s pleadings lack specific facts as to New Wood’s conduct vis-à-vis the actual Written Consent entered into on April 23,

---

<sup>66</sup> See *New Wood Res. LLC*, 2021 WL 3784258, at \*6.

<sup>67</sup> *Id.* at \*5.

<sup>68</sup> See Notice of Appeal to Supreme Court (D.I. 33).

<sup>69</sup> *Baldwin*, 283 A.3d at 1120.

<sup>70</sup> *Id.* at 1115-16

<sup>71</sup> *Id.* at 1118.

2020, he does allege bad faith on the part of New Wood throughout the overall advancement proceedings. Albeit in a disorganized fashion, Baldwin has sufficiently pleaded enough to create an issue of fact as to New Wood's good faith in discharging its obligations under Section 8.2 and to overcome New Wood's contention that it was merely presented with, and acted on, a facially valid consent obtained by ACR.<sup>72</sup>

The Supreme Court reversed this Court's decision and remanded it for further proceedings, noting that "[w]hether Baldwin is able to prove that New Wood breached the implied covenant of good faith and fair dealing is for another day."<sup>73</sup>

### ***3. Remand to Superior Court***

After remand, the parties conducted written discovery and depositions of Mr. Bursky, Mr. Liebich, Dr. Baldwin, and Dr. Baldwin's son, Richard Baldwin.<sup>74</sup> After the parties conducted discovery, New Wood moved for summary judgment on Dr. Baldwin's Counterclaim and New Wood's breach of contract claim.<sup>75</sup> The Court heard oral argument on New Wood's Motion for Summary Judgment on June 14, 2023. This memorandum opinion addresses that Motion.

## **III. STANDARD OF REVIEW**

The Court "will grant summary judgment if, after viewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and

---

<sup>72</sup> *Id.* at 1123 (citations omitted).

<sup>73</sup> *Id.* at 1124.

<sup>74</sup> Answering Br. at 17.

<sup>75</sup> As discussed further below, New Wood contends this Court already found for New Wood on its breach of contract claim. The Court notes New Wood's position but will address the breach claim below.



the movant is entitled to judgment as a matter of law.”<sup>76</sup> On a motion for summary judgment, the Court: “(i) construes the record in the light most favorable to the non-moving party; (ii) detects, but does not decide, genuine issues of material fact; and (iii) denies the motion if a material fact is in dispute.”<sup>77</sup> The moving party bears the initial burden of showing that its motion is supported by the undisputed factual record.<sup>78</sup> If the moving party meets that burden, the burden shifts to the non-moving party to show a genuine issue of material fact remains for trial.<sup>79</sup>

Even though the Court construes the factual record in the light most favorable to the non-moving party,<sup>80</sup> the Court “will not indulge in speculation and conjecture; a motion for summary judgment is decided on the record presented and not on evidence potentially possible.”<sup>81</sup>

#### IV. PARTIES’ CONTENTIONS

New Wood filed its Motion for Summary Judgment on Dr. Baldwin’s Counterclaim and New Wood’s breach of contract claim. First, New Wood contends

---

<sup>76</sup> *CVR Refin., LP v. XL Specialty Ins. Co.*, 2021 WL 5492671, at \*8 (Del. Super. Nov. 23, 2021) (citing *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99-100 (Del. 1992)); *see also* Del. Super. Ct. Civ. R. 56.

<sup>77</sup> *CVR Refin., LP*, 2021 WL 5492671, at \*8 (citing *Judah v. Del. Tr. Co.*, 378 A.2d 624, 632 (Del. 1997); *Merrill*, 606 A.2d at 99; *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962)).

<sup>78</sup> *Id.* (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

<sup>79</sup> *Id.* (citing *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995)).

<sup>80</sup> *Id.* (citing *Judah*, 378 A.2d at 632).

<sup>81</sup> *In re Asbestos Litig.*, 509 A.2d 1116, 1118 (Del. Super. 1986) (citing *Rochester v. Katalan*, 320 A.2d 704, 708 n.7 (Del. 1974); *Chrysler Corp. v. New Castle Cnty.*, 464 A.2d 75, 85 (Del. Super. 1983)).

that Dr. Baldwin has no basis to obtain a declaration about the Mississippi proceeding because he is already seeking this declaration in the Court of Chancery.<sup>82</sup> Second, New Wood maintains that Dr. Baldwin has not presented any facts to dispute that the Written Consent was executed and acted on in good faith, which defeats Dr. Baldwin's Counterclaim and, in effect, also mandates a finding for New Wood on the breach of contract claim.<sup>83</sup>

Dr. Baldwin takes the opposite position. Dr. Baldwin's primarily contends that New Wood is not entitled to summary judgment because the evidence does not establish New Wood's good faith, but in fact suggests New Wood acted in bad faith.<sup>84</sup> Dr. Baldwin argues, *inter alia*, that Mr. Bursky and Mr. Liebich failed to cite any facts upon which the Written Consent is based and instead offered only conclusory statements and irrelevant complaints about job performance and unrelated litigation.<sup>85</sup> Dr. Baldwin withdrew the part of his Counterclaim relating to collecting fees from domesticating the Advancement Action judgment in Mississippi, because that claim is being litigated in the Court of Chancery.<sup>86</sup> In short, Dr. Baldwin maintains that the evidence does not support finding that New Wood acted in good faith.

---

<sup>82</sup> See Opening Br. at 13-14.

<sup>83</sup> See *id.* at 15-22.

<sup>84</sup> See Answering Br. at 20.

<sup>85</sup> See *id.* at 29-34.

<sup>86</sup> See *id.* at 2 n.1.

## V. DISCUSSION

### A. The Counterclaim

Dr. Baldwin's Counterclaim states:

Dr. Baldwin is entitled to a declaratory judgment that: (i) New Wood is required to pay Dr. Baldwin the attorneys' fees and costs he incurred in domesticating the [Advancement Action judgment in] Mississippi (including the discovery efforts Dr. Baldwin was required to engage in prior to New Wood paying the [j]udgment) in an amount to be proved at trial; (ii) Section 8.2 of the LLC Agreement contains an implicit term that any determination of a right to indemnification must be made in good faith; and (iii) the Written Consent by ACR was entered into in a bad faith attempt to avoid New Wood's indemnification obligations under Section 8.2 of the LLC Agreement.<sup>87</sup>

Dr. Baldwin withdrew part (i) of his Counterclaim.<sup>88</sup> With respect to part (ii) of the Counterclaim, the Supreme Court held that Section 8.2 contains an implicit term that any indemnification determination must be made in good faith.<sup>89</sup> Therefore, the only remaining issue to decide with respect to the Counterclaim is whether New Wood acted on the Written Consent in bad faith.<sup>90</sup>

New Wood contends that there is a rebuttable presumption that all persons act in good faith, and that Dr. Baldwin has no facts to dispute that the Written Consent

---

<sup>87</sup> Counterclaim ¶ 58.

<sup>88</sup> See Answering Br. at 2 n.1.

<sup>89</sup> See *Baldwin*, 283 A.3d at 1118 (“We hold that although a good faith requirement is not expressly stated in Section 8.2, it is implicit in Section 8.2’s language.”).

<sup>90</sup> See *id.* at 1124 (“Whether Baldwin is able to prove that New Wood breached the implied covenant of good faith and fair dealing is for another day.”); see also *Amirsaleh v. Bd. of Trade of City of New York, Inc.*, 2009 WL 3756700, at \*5 (Del. Ch. Nov. 9, 2009) (“[T]o prove a breach of the implied covenant [Dr. Baldwin] must demonstrate that [New Wood] acted in ‘bad faith.’”).

was executed and acted on in good faith.<sup>91</sup> Dr. Baldwin counters that Mr. Bursky and Mr. Liebich failed to cite any facts upon which the Written Consent is based and instead offered only conclusory and irrelevant statements concerning job performance and unrelated litigation.<sup>92</sup> Dr. Baldwin misapprehends who holds the burden to demonstrate bad faith.

It is well established that Delaware law presumes a person acts in good faith.<sup>93</sup> So to prove a breach of the implied covenant of good faith and fair dealing, Dr. Baldwin must demonstrate that New Wood acted in bad faith.<sup>94</sup> And to prove bad faith, Dr. Baldwin must demonstrate that New Wood’s “conduct was motivated by

---

<sup>91</sup> Opening Br. at 15.

<sup>92</sup> Answering Br. at 24.

<sup>93</sup> *Thomas v. King*, 99 A.2d 778, 781 (Del. 1953); *see also KE Prop. Mgmt. Inc. v. 275 Madison Mgmt. Corp.*, 1993 WL 285900, at \*7 (Del. Ch. July 27, 1993) (“There is a rebuttable presumption that all persons act honestly, properly, in good faith and without fraud.” (citing *Thomas*, 99 A.2d at 781)); *Amirsaleh*, 2009 WL 3756700, at \*4 (“[The] Court [of Chancery] has previously held that a breach of the implied covenant of good faith and fair dealing ‘implicitly indicates bad faith conduct.’” (quoting *Cont’l Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1234 (Del. Ch. 2000))).

<sup>94</sup> *Amirsaleh*, 2009 WL 3756700, at \*5. Dr. Baldwin’s counsel suggests that “bad faith” is defined as an “intentional dereliction of duty.” Answering Br. at 29 (citing *Goldstein v. Denner*, 2022 WL 1671006, at \*40 (Del. Ch. May 26, 2022)). The “intentional dereliction of duty” language arises in the fiduciary duty context. *See, e.g., Goldstein*, 2022 WL 1671006, at \*40-41 (discussing bad faith and “intentional dereliction of duty” in the breach of fiduciary duty context); *Lydonell Chem. Co. v. Ryan*, 970 A.2d 235, 240 (Del. 2009) (discussing “intentional dereliction of duty” and good faith in the breach of fiduciary duty context); *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 64 (Del. 2006) (“The precise question is whether the Chancellor’s articulated standard for *bad faith corporate fiduciary conduct—intentional dereliction of duty*, a conscious disregard for one’s responsibilities—is legally correct.” (emphasis added)). The current action concerns the implied covenant of good faith and fair dealing, not fiduciary duties. The Court employs caselaw from implied covenant cases for its bad faith standard. It will not consider the “intentional dereliction of duty” standard.

a culpable mental state.”<sup>95</sup> The term “‘bad faith’ is not simply bad [judgment] or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.”<sup>96</sup> Bad faith has been defined in many ways,<sup>97</sup> but in essence it means that New Wood’s conduct “must be driven by an improper purpose.”<sup>98</sup> Dr. Baldwin must present evidence to “rebut the presumption” of good faith; otherwise, summary judgment for New Wood is proper.<sup>99</sup>

**1. *Neither ACR’s Nor New Wood’s Actions Constitute Bad Faith.***

Mr. Bursky, President of ACR, was deposed for this case.<sup>100</sup> Dr. Baldwin’s counsel asked Mr. Bursky how ACR came to the determination that Dr. Baldwin did not act in good faith.<sup>101</sup> Mr. Bursky responded that ACR “carefully assessed the

---

<sup>95</sup> *Amirsaleh*, 2009 WL 3756700, at \*5; *see also id.* at \*5 n.24 (collecting cases discussing “bad faith” in the implied covenant context).

<sup>96</sup> *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 n.16 (Del. 1993) (citing *Bad Faith*, BLACK’S LAW DICTIONARY (5th ed. 1983)); *see also Baldwin*, 283 A.3d at 1118 n.110 (citing *Desert Equities* for the same proposition).

<sup>97</sup> *See, e.g., Amirsaleh*, 2009 WL 3756700, at \*5 n.24 (collecting cases).

<sup>98</sup> *Id.* at \*5.

<sup>99</sup> *KE Prop. Mgmt. Inc.*, 1993 WL 285900, at \*9 (citing *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991)). *KE Property Management Inc.* aptly states that an “allegation of bad faith ‘raises essentially a question of fact’, which means that such an allegation generally is sufficient to defeat a motion . . . for judgment on the pleadings”; but, where “the non-moving party bears the burden of persuasion at trial, as [Dr. Baldwin] does here as to overcoming the presumption of good faith, the non-moving party, after adequate opportunity for discovery, must introduce competent evidence, which, if true, would rebut the presumption or summary judgment will be granted against it.” *KE Prop. Mgmt. Inc.*, 1993 WL 285900, at \*9 (citing *Desert Equities, Inc.*, 624 A.2d at 1208-09; *Burkhart*, 602 A.2d at 59).

<sup>100</sup> *See* Exhibit (“Bursky Tr.”) (D.I. 71).

<sup>101</sup> *Id.* at 160:5-12, 162:9-11.

track record” of Dr. Baldwin’s behavior pre- and post-exit from WPV, and ACR assessed Dr. Baldwin’s claims in the multiple lawsuits between the relevant parties.<sup>102</sup> From that assessment, ACR determined in the Written Consent that Dr. Baldwin did not act in good faith and was not entitled to indemnification. Dr. Baldwin takes Mr. Bursky’s deposition responses and claims that the Written Consent was executed in bad faith, because it was based on irrelevant facts.<sup>103</sup> Specifically, Dr. Baldwin emphasizes that Section 8.2 of the LLC Agreement requires that the determination of good faith (or lack thereof) must be based on facts relating to the action for which Dr. Baldwin sought indemnification.<sup>104</sup> Dr. Baldwin maintains that the “action” at issue for purposes of indemnification is the Delaware Plenary Action.<sup>105</sup>

Even assuming that Dr. Baldwin’s interpretation of Section 8.2 is correct, ACR’s considerations underlying the Written Consent do not amount to bad faith. Bad faith “is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.”<sup>106</sup> While one could argue negligence from these facts, or that ACR was just plain wrong in its

---

<sup>102</sup> *See id.* at 162:12-163:20. This is consistent with New Wood’s supplemental interrogatory responses. *See* Opening Br., Ex. 13 at 4-7.

<sup>103</sup> *See* Answering Br. at 34.

<sup>104</sup> *See id.* at 31.

<sup>105</sup> *See id.* at 36.

<sup>106</sup> *Desert Equities, Inc.*, 624 A.2d at 1208 n.16 (citing *Bad Faith*, BLACK’S LAW DICTIONARY); *see also Baldwin*, 283 A.3d at 1118 n.110 (citing *Desert Equities* for the same proposition).

assessment, no reasonable jury could find bad faith from them. Further, no other facts exist in this record to show, for instance, that Mr. Bursky harbored any personal animus or intentionally sought to harm Dr. Baldwin, when he executed the Written Consent as President of ACR. It should be emphasized that at this stage of the proceedings discovery is complete and the record is set. The current record is the well from which the parties must dip to present evidence supporting or buttressing their respective positions. There is no evidence presented from the record to suggest that ACR executed the Written Consent with “furtive design or ill will.”

There is also no evidence to support the contention that New Wood acted in bad faith when it relied on ACR’s Written Consent. Mr. Liebich, former CEO of WPV and New Wood’s 30(b)(6) witness, testified that ACR made the determination that Dr. Baldwin failed to act in good faith, and New Wood acted based on that determination.<sup>107</sup> Dr. Baldwin does not explain how New Wood’s act of reliance on ACR’s Written Consent constitutes bad faith under Delaware law.

Further, Dr. Baldwin’s interrogatory responses do nothing to support his bad faith contention. In February 2023, Dr. Baldwin’s counsel responded to New Wood’s “First Set of Interrogatories and First Requests for Production of Documents.”<sup>108</sup> Interrogatory number one asked Dr. Baldwin to identify “each and

---

<sup>107</sup> See Opening Br., Ex. 16 at 100:24-101:7.

<sup>108</sup> See *id.*, Ex. 7.

every factual basis” for the contention that the Written Consent was not executed in good faith.<sup>109</sup> Dr. Baldwin responded in pertinent part:

By way of further answer, on August 10, 2020 the Court of Chancery held a final hearing on the issue of Dr. Baldwin’s right to indemnification . . . , and on August 26, 2020 the Court issued its final Order . . . , which in combination with its prior Order awarded Dr. Baldwin the combined sum of \$867,211.03. During the entirety of these proceedings, and including during the oral argument on August 10, [New Wood] never disclosed to the Court of Chancery its purported “resolution” of April 23, 2020 [*i.e.*, the Written Consent] that Dr. Baldwin had been acting in “bad faith” and was never entitled to indemnification or advancement at all. Moreover, [New Wood] raised the argument in this Court that its resolution was never subject to any “good faith” standard, an argument that the Delaware Supreme Court squarely rejected in its written opinion of August 16, 2022.<sup>110</sup>

The contents of the above answer do not rise to a showing of bad faith by ACR or New Wood. New Wood’s tactical decision to not raise the Written Consent as an argument in the Court of Chancery does not constitute bad faith. The same is true for New Wood’s position during argument in this Court or the Supreme Court. Bad faith requires “conduct [] motivated by a culpable mental state” that is “driven by an improper purpose.”<sup>111</sup> These tactical decisions do not establish the “conscious doing of a wrong because of dishonest purpose or moral obliquity.”<sup>112</sup> Instead, these

---

<sup>109</sup> *Id.*, Ex. 7 at 3.

<sup>110</sup> *Id.*, Ex. 7 at 4.

<sup>111</sup> *Amirsaleh*, 2009 WL 3756700, at \*5 (citation omitted).

<sup>112</sup> *Desert Equities, Inc.*, 624 A.2d at 1208 n.16 (citing *Bad Faith*, Black’s Law Dictionary).



are merely tactical and strategic decisions. A reasonable jury could not find that these tactical decisions constitute “bad faith.”<sup>113</sup>

The discovery record further cuts against Dr. Baldwin’s position. New Wood’s counsel asked Dr. Baldwin, during a deposition, if Dr. Baldwin had any basis “to assert that Mr. Bursky didn’t execute” the Written Consent “in good faith.”<sup>114</sup> Dr. Baldwin responded that he “ha[d] no idea what Mr. Bursky did” and that Dr. Baldwin had “no basis to answer that question.”<sup>115</sup>

While Dr. Baldwin has presented multiple conclusory arguments that ACR and New Wood acted in bad faith, Dr. Baldwin has presented no *evidence* of bad faith by ACR or New Wood with respect to executing and acting on the Written Consent. Absent that anchoring evidence of bad faith related to the Written Consent, Dr. Baldwin’s claim cannot withstand summary judgment.

***2. Even If ACR’s Actions Could Be Viewed as Bad Faith, There Is No Evidence of Bad Faith by New Wood.***

Even assuming *arguendo* that ACR’s actions rose to the level of bad faith, there is *no* evidence that New Wood colluded with, or had any knowledge of, ACR’s actions. In other words, there is no evidence that New Wood had any knowledge

---

<sup>113</sup> See *Gap 41 Ventures, L.L.C. v. Snehyasmeena Corp.*, 2020 WL 95857, at \*1 (Del. Super. Jan. 8, 2020) (“Summary judgment is only appropriate if [the claim] lack[s] evidentiary support such that no reasonable jury could find in its favor.” (citing *Hecksher v. Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1200-05 (Del. 2015); *Edmisten v. Greyhound Lines, Inc.*, 2012 WL 3264925, at \*2 (Del. Aug. 13, 2012))).

<sup>114</sup> Opening Br., Ex. 8 at 73:20-23.

<sup>115</sup> *Id.*, Ex. 8 at 74:3-4, 74:11-12.

leading New Wood to doubt ACR's determination that Dr. Baldwin failed to act in good faith. For instance, Mr. Liebich, New Wood's 30(b)(6) witness, stated at his deposition: "The determination that [Dr. Baldwin] acted in bad faith was made by our majority member, ACR."<sup>116</sup> Mr. Liebich further stated that "[t]he finding of bad faith was made by, as I said earlier, ACR. . . . [T]he [de]termination [sic] of bad faith pursuant to Section 8.2 in the LLC [A]greement was made by ACR. That's where that determination was made."<sup>117</sup> Even further, in answering questions about ACR's assessment, Mr. Liebich stated that "I'm not a party to ACR, nor was I involved in the conversations with ACR."<sup>118</sup> Mr. Liebich's testimony remains un rebutted, and no evidence exists to show that New Wood was aware of ACR's decision-making process. Moreover, no evidence exists to show that New Wood had any reason to doubt ACR's determination in the Written Consent.

Dr. Baldwin must present evidence of *New Wood's* bad faith for his implied covenant claim to survive summary judgment.<sup>119</sup> Dr. Baldwin asserted his

---

<sup>116</sup> *Id.*, Ex. 16 at 100:24-25.

<sup>117</sup> *Id.*, Ex. 16 at 105:12-18.

<sup>118</sup> *Id.*, Ex. 16 at 105:21-22. While Mr. Liebich stated that he "believe[d] [Dr. Baldwin] has acted in bad faith," that does not mean that New Wood knew what ACR did. *See id.*, Ex. 16 at 101:15.

<sup>119</sup> *See Amirsaleh*, 2009 WL 3756700, at \*5 ("[T]o prove a breach of the implied covenant [counterclaim] plaintiff must demonstrate that [counterclaim] defendant[] acted in 'bad faith'"); *see also KE Prop. Mgmt. Inc.*, 1993 WL 285900, at \*9 (noting on summary judgment that party asserting bad faith must overcome the presumption of good faith and "must introduce competent evidence which, if true, would rebut the presumption or summary judgment will be granted against it" (citation omitted)).

Counterclaim against New Wood, not ACR.<sup>120</sup> Further, Dr. Baldwin’s implied covenant claim is premised on the LLC Agreement, to which New Wood is a party, not ACR.<sup>121</sup> Dr. Baldwin executed the undertaking pursuant to the LLC Agreement.<sup>122</sup> And, in the words of the Supreme Court, “[a]lthough [Dr.] Baldwin has alleged bad faith on the part of ACR, ACR is not a party.”<sup>123</sup>

Even assuming there is evidence of ACR’s bad faith, which ultimately the Court does not find, that is not enough. Dr. Baldwin must present evidence of New Wood’s bad faith. Dr. Baldwin has not done so.<sup>124</sup>

***3. The Court Is Not Permitted to Independently Determine Whether Dr. Baldwin Acted in Good Faith.***

It is important to note that the Court cannot make an independent determination regarding whether Dr. Baldwin acted in good faith. The LLC Agreement does not permit it. Delaware law does not permit it.

Section 8.2 of the LLC Agreement governs the good faith determination procedure which states in pertinent part:

[N]o Person shall be entitled to indemnification hereunder unless it is found (in the manner described below in this Section 8.2) that, with respect to the matter for which such Person seeks indemnification, such Person acted in good faith and in a manner that he or she reasonably believed to be in or not opposed to the best interest of the Company[.]

---

<sup>120</sup> See Counterclaim.

<sup>121</sup> See Answering Br., Ex. B at preamble.

<sup>122</sup> See Opening Br., Ex. 2.

<sup>123</sup> *Baldwin*, 283 A.3d at 1121.

<sup>124</sup> Additionally, the LLC Agreement does not contain a provision permitting New Wood to reassess ACR’s determination in the Written Consent.

. . . The finding of the standard of conduct required above shall be made (a) by a majority vote of all of the Managers who are not parties to such Proceeding even though less than a quorum or (b) if there are no such Managers, or if such Managers so direct, by independent legal counsel in a written opinion or (c) by holders of a Majority of the then-outstanding Units (determined without regard to any Members that are parties to such Proceeding).<sup>125</sup>

Recently, in a related action, the Court of Chancery examined Section 8.2 and noted that its “language is similar to [Delaware General Corporation Law] Section 145(d), with one crucial difference: it specifically omits Section 145(d)’s reference to ‘unless ordered by a court.’”<sup>126</sup> DGCL Section 145(d) relates to indemnification and states that determinations on indemnification shall be made in one of four enumerated ways, “unless ordered by a court.”<sup>127</sup> The Vice Chancellor expounded on the above, stating:

Section 8.2’s applicable standard-of-conduct condition decision-making process roughly mirrors [DGCL] Section 145(d), with one quite notable exception. The drafters of Section 8.2 omitted the key phrase . . . “unless otherwise ordered by a court . . . .” Applying the plain terms of Section 8.2, then, it is clear to me that [Dr. Baldwin’s and OCI’s] request for indemnification via a fees-on-fees award [in the Court of Chancery] would be improper at this time since Section 8.2 identifies the decision-makers for entitlement to indemnification and, in this posture, I [i.e., a court] am not among them. Unlike [DGCL] Section 145(d), the contracted-for language of Section 8.2 quite specifically

---

<sup>125</sup> Answering Br., Ex. B. § 8.2.

<sup>126</sup> See Supplemental Authority, Ex. A at 7:16-19 (D.I. 73) [hereinafter Chancery Ruling]. For context, this quote is from a transcript of a telephonic bench ruling by Vice Chancellor Cook in a related action, captioned as: *Richard F. Baldwin and Oak Creek Investments, LLC, v. New Wood Resources LLC, Winston Plywood & Veneer LLC, and WPV Holdco LLC*, C.A. No: 2022-1059-NAC. The bench ruling occurred on June 12, 2023, and the Vice Chancellor ruled that Dr. Baldwin was not entitled to advancement in this action in Superior Court. See *id.* at 3:20-4:6.

<sup>127</sup> See 8 *Del. C.* § 145(d) (2023).

does not include the “unless otherwise ordered by the court” language. In considering this, then, I cannot ignore the Written Consent and the conditions that generated the [W]ritten [C]onsent.<sup>128</sup>

“Delaware ‘is a freedom of contract state, with a policy of enforcing the voluntary agreements of sophisticated parties in commerce.’”<sup>129</sup> Other sections of the LLC Agreement contemplate judicial determinations.<sup>130</sup> If the Court injected itself into Section 8.2’s good faith determination, the Court would nullify the explicit language of other LLC Agreement sections. Doing so would disregard long established Delaware precedent requiring the Court to “construe the agreement as a whole, giving effect to all provisions therein.”<sup>131</sup> If the parties intended that the good faith determination be made by a court, they could have written it into the LLC Agreement.<sup>132</sup> The fact that Section 8.2 roughly mirrors DGCL Section 145(d),

---

<sup>128</sup> Chancery Ruling at 23:10-24:2.

<sup>129</sup> *Terrell v. Kiromic Biopharma, Inc.*, -- A.3d --, 2023 WL 3237142, at \*7 (Del. May 4, 2023) (quoting *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at \*6 (Del. Ch. May 5, 2008), *aff’d*, 970 A.2d 256 (Del. 2009)).

<sup>130</sup> *See, e.g.*, Answering Br., Ex. B. §§ 8.1 (employing the language “as determined by a final, nonappealable order of a court of competent jurisdiction” in the “Exculpation” provision), 12.1(c) (employing the language “entry of a decree of judicial dissolution of the Company” in the “Dissolution” provision).

<sup>131</sup> *See, e.g.*, *E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) (citation omitted); *see also Sonitrol Hldg. Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992) (“Under general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless.” (citation omitted)); *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) (“We will read a contract as whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.” (citation omitted)).

<sup>132</sup> *See Sarraf 2018 Fam. Tr. v. RP Holdco, LLC*, 2022 WL 10093538, at \*9 (Del. Super. Oct. 17, 2022) (noting that in an unambiguous contract, when a party sought relief that was not in the language of the contract, the Court would not write it in post hoc, and further noting that if “the parties intended such a result, they could have written it into the” contract).

except that Section 8.2 excludes the language “unless ordered by a court,” suggests that the parties contemplated judicial review and decided against it. Thus, it would be a stark deviation from this jurisdiction’s adherence to freedom of contract principles if the Court were to override the clear terms of the LLC Agreement and exercise judicial review of Dr. Baldwin’s actions.<sup>133</sup>

Separately, although not raised by any of the parties in their briefing, the Court finds it pertinent to address a recent Supreme Court decision—*Terrell v. Kiromic Biopharma, Inc.*<sup>134</sup> In *Terrell*, a former director sought declaratory and injunctive relief against a corporation regarding the meaning of a stock option agreement and an option grant notice.<sup>135</sup> Dr. Terrell was compensated for his work at Kiromic Biopharma, Inc. through three stock-option grants.<sup>136</sup> The third option grant notice contained provisions that Kiromic interpreted to mean that the two previous grants were supplanted by the third.<sup>137</sup> Dr. Terrell disagreed.<sup>138</sup> The stock option agreement vested a “committee,” made up of at least one Kiromic director, with the authority to interpret the stock option agreement.<sup>139</sup> The committee determined that

---

<sup>133</sup> *Terrell*, -- A.3d --, 2023 WL 3237142, at \*7 (“Delaware ‘is a freedom of contract state, with a policy of enforcing the voluntary agreements of sophisticated parties in commerce.’” (quoting *Pers. Decisions, Inc.*, 2008 WL 1932404, at \*6)).

<sup>134</sup> -- A.3d --, 2023 WL 3237142 (Del. May 4, 2023).

<sup>135</sup> *Id.* at \*1.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at \*2.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at \*2, \*4.

its authority to interpret the stock option agreement extended to interpreting the option grant notices.<sup>140</sup> The committee concluded that the third option grant notice superseded and nullified the previous two grants, but offered no basis for its reasoning.<sup>141</sup> The Court of Chancery deferred to the committee's determination and dismissed Dr. Terrell's claim on the basis that it lacked subject matter jurisdiction.<sup>142</sup>

Dr. Terrell appealed the Court of Chancery's ruling and argued that it erred by failing to review the committee's determination before dismissing his claim.<sup>143</sup> The Supreme Court held that the Court of Chancery erred by failing to review the committee's determination.<sup>144</sup> The Supreme Court found that even though the Court of Chancery determined that the stock option agreement's interpretation provision was not an arbitration provision, but more like an expert determination,<sup>145</sup> that expert determination was reached by relying on contract interpretation principles, and, ultimately, resulted in a legal determination by the committee.<sup>146</sup>

Hence, the Supreme Court held that review of the expert determination, which was based on legal conclusions reached by the committee, required a *de novo* review

---

<sup>140</sup> *Id.* at \*3.

<sup>141</sup> *Id.*

<sup>142</sup> *See id.* at \*4.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at \*9 (“Because [the interpretation provision] is an expert determination, not an arbitration [provision], and because it requires the Committee to reach legal determinations, not issue findings of fact within its area of expertise, the Court of Chancery is not required to defer to the Committee’s conclusions.”).

<sup>145</sup> *See id.* at \*5-6.

<sup>146</sup> *Id.* at \*6-7.

of the interpretation of the relevant agreements.<sup>147</sup> Simply put, *Terrell* states that a court must review a committee’s (or some other similar decision-maker’s) contract-interpretation-based legal conclusions *de novo* if the appropriate circumstances arise.

Those circumstances are not present here. This action between Dr. Baldwin and New Wood is distinct from *Terrell*. In this case, the LLC Agreement vested ACR, as a holder of a majority of then-outstanding units, with the authority to determine whether Dr. Baldwin acted in good faith and, thus whether Dr. Baldwin was entitled to indemnification. Importantly, “Good faith” is defined in the LLC Agreement:

[N]o Person shall be entitled to indemnification hereunder unless it is found (in the manner described below in this Section 8.2) that, with respect to the matter for which such Person seeks indemnification, such Person *acted in good faith and in a manner that he or she reasonably believed to be in or not opposed to the best interests of the Company*.<sup>148</sup>

Thus, ACR did not make a legal interpretation of the LLC Agreement, nor did it reach a legal conclusion, because good faith is defined in the LLC Agreement. Further, ACR did not make an expert determination. Instead, it made a factual determination based on a contractually defined standard and found only that Dr. Baldwin’s actions were not in the best interests of New Wood. Therefore, the basis for judicial review, set out in *Terrell*, does not apply here.

---

<sup>147</sup> *Id.* at \*9.

<sup>148</sup> Answering Br., Ex. B § 8.2 (underlining in original) (italics added).



This Court reviewed whether ACR and New Wood acted in bad faith by executing and acting on the Written Consent. The Court has determined that New Wood did not engage in a concerted course of bad faith with ACR. *Terrell* does not sanction judicial override of the LLC Agreement to engage in *de novo* review of ACR's determination that Dr. Baldwin acted in bad faith. Hence, the "parties are stuck with what they bargained for."<sup>149</sup>

With discovery complete, there is no evidence in the record for a reasonable trier of fact to conclude that New Wood acted in bad faith. Dr. Baldwin cannot rebut the presumption that New Wood acted in good faith. As a result, New Wood's Motion for Summary Judgment on the Counterclaim is **GRANTED**.

### **B. The Breach of Contract Claim**

This Court originally granted New Wood's 12(c) motion on its breach of contract claim against Dr. Baldwin and against Dr. Baldwin on his Counterclaim.<sup>150</sup> On appeal, the Supreme Court addressed "the narrow issue of whether the LLC Agreement contains an implied covenant of good faith that would require this determination of a Person's entitlement to indemnification to be made in good faith."<sup>151</sup> The Supreme Court held that there is an implied covenant, so it reversed

---

<sup>149</sup> See *Senior Hous. Cap., LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at \*3 (Del. Ch. May 13, 2013); see also *Terrell*, 2023 WL 3237142, at \*8 (quoting *Senior Hous. Cap., LLC*, 2013 WL 1955012, at \*3).

<sup>150</sup> See *New Wood Res.*, 2021 WL 3784258, at \*1.

<sup>151</sup> *Baldwin*, 283 A.3d at 1102.

and remanded the case back to this Court. Notably, the Supreme Court did not address New Wood’s breach of contract claim. New Wood contends this Court’s prior ruling on the breach of contract claim stands and is not at issue now.<sup>152</sup> Based on the procedural history of this case, the Court tends to agree.<sup>153</sup> Nonetheless, the Court briefly addresses New Wood’s breach of contract claim.

The elements of a breach of contract claim are: “(1) the existence of a contractual obligation; (2) a breach of that obligation; and (3) damages resulting from the breach.”<sup>154</sup>

Here, the LLC Agreement and Dr. Baldwin’s undertaking created a valid contract between New Wood and Dr. Baldwin.<sup>155</sup> New Wood provided Dr. Baldwin \$541,664.99 in advancement.<sup>156</sup> ACR, and in effect New Wood, later determined that Dr. Baldwin was not entitled to that money via the Written Consent,<sup>157</sup> and Dr. Baldwin did not repay that money to New Wood when New Wood requested it.<sup>158</sup> Dr. Baldwin therefore breached his contractual obligation to repay New Wood. New

---

<sup>152</sup> See Plaintiff/Counterclaim Defendant’s Reply Brief (“Reply Br.”) at 9 n.12 (D.I. 72).

<sup>153</sup> The breach of contract claim was not an issue raised by the parties in their respective briefs to the Supreme Court. See *Richard Baldwin v. New Wood Resources LLC*, No. 303,2021 (D.I. 15, D.I. 19, D.I. 20).

<sup>154</sup> *Buck v. Viking Hldg. Mgmt. Co. LLC*, 2021 WL 673459, at \*3 (Del. Super. Feb. 22, 2021) (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

<sup>155</sup> See *Baldwin*, 283 A.3d at 1104 (“Section 8.3 conditions [Dr. Baldwin’s] receipt of advancement on: (1) delivery of the written affirmation by [Dr. Baldwin] . . . , and (2) execution of a written undertaking to repay all advanced amounts if it is ultimately determined that [Dr. Baldwin] is not entitled to indemnification.”).

<sup>156</sup> See *id.* at 1110.

<sup>157</sup> See Answering Br., Ex. A; *Baldwin*, 283 A.3d at 1109.

<sup>158</sup> *Baldwin*, 283 A.3d at 1109.

Wood suffered damages from the breach in the amount of \$541,664.99 that New Wood advanced to Dr. Baldwin.

Based on this Court's ruling on the Counterclaim, Dr. Baldwin has no valid remaining defenses to his breach. To be sure, Dr. Baldwin's second affirmative defense to New Wood's breach claim is that "New Wood's claims are barred because at all relevant times hereto Dr. Baldwin acted in good faith and in a manner that he reasonably believed to be in or not opposed to the best interest of New Wood."<sup>159</sup> As explained above, the LLC Agreement contains no provision for this Court to decide whether Dr. Baldwin acted in good faith. Instead, that decision is to be made by (1) a manager vote, (2) a written opinion by independent legal counsel, or (3) a member vote.<sup>160</sup> Because that decision was made pursuant to a valid member vote, Dr. Baldwin has no viable affirmative defense. And, as determined above, Dr. Baldwin's Counterclaim fails, and he has no claim to counter his breach.

Therefore, New Wood's Motion for Summary Judgment on the breach of contract claim is **GRANTED**.

---

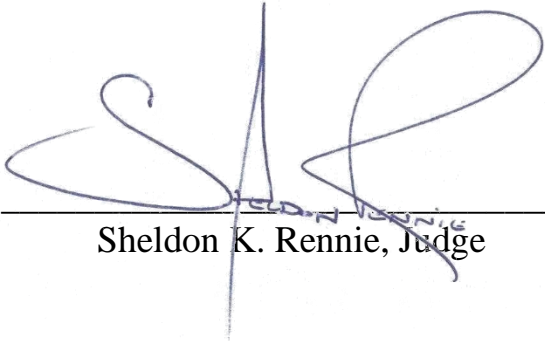
<sup>159</sup> Counterclaim at 13. Dr. Baldwin's two other affirmative defenses are inapplicable because one is covered by his Counterclaim, and the other is based on offset for domesticating the Advancement Action judgment in Mississippi. *See id.*

<sup>160</sup> *See* Answering Br., Ex. B § 8.2.

## VI. CONCLUSION

Summary Judgment on New Wood's Breach of Contract claim and on the Counterclaim is **GRANTED**. Dr. Baldwin shall repay the \$541,664.99 advanced to him, together with applicable prejudgment interest. Counsel for New Wood shall submit a proposed order to this effect by August 11, 2023.

**IT IS SO ORDERED.**



Sheldon K. Rennie, Judge