

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EUGENE M. JULIAN, )  
 )  
 Plaintiff/ )  
 Counterclaim Defendant, )  
 )  
 v. ) Civil Action No. 1892-VCP  
 )  
 EASTERN STATES CONSTRUCTION )  
 SERVICE, INC., a Delaware corporation, )  
 and STEVEN BOMBERGER, )  
 )  
 Defendants, )  
 )  
 and )  
 )  
 RICHARD J. JULIAN and )  
 FRANCIS R. JULIAN, )  
 )  
 Defendants/ )  
 Counterclaim Plaintiffs, )  
 )  
 and )  
 )  
 EASTERN STATES DEVELOPMENT )  
 COMPANY, INC. and BENCHMARK )  
 BUILDERS, INC., )  
 )  
 Nominal Defendants. )

**MEMORANDUM OPINION**

Submitted: February 25, 2009  
Decided: May 5, 2009

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**PARSONS, Vice Chancellor.**

This action involves a continuing dispute among three brothers, Plaintiff, Eugene Julian (“Gene”), and Defendants, Francis and Richard Julian, (collectively, the “Julian Brothers”) who have been in business together since the 1960’s. This dispute already has been the subject of a two-day trial in this action. I issued a lengthy opinion addressing the multitude of issues raised in that trial on July 8, 2008.<sup>1</sup> As of 2005, the Julian Brothers owned three separate, but related, businesses—Eastern States Construction Service, Inc. (“ESCS”), Benchmark Builders, Inc. (“Benchmark”), and Eastern States Development Company, Inc. (“ESDC” or “the Company”), all governed by respective stockholder agreements, agreed to by the Julian Brothers. By 2001, relations among the Julian Brothers began to sour, culminating in Gene’s resignation at the age of sixty-one in December 2005.

When Gene resigned, an issue arose as to whether Gene, an ESDC stockholder, was required to sell his ESDC stock back to the Company pursuant to the operative ESDC agreement—the First Amendment to Agreement of Stockholders of ESDC (“2005 Amendment”). Gene filed suit seeking a judgment that, among other things, he could retain ownership of his ESDC stock. After a full trial, I concluded that the 2005 Amendment did not give Gene the right to retire prior to age sixty-two and retain his ESDC stock; thus, Gene was required to sell his stock in ESDC back to the Company.<sup>2</sup>

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<sup>1</sup> *Julian v. E. States Const. Serv. Inc.*, 2008 WL 2673300 (Del. Ch. July 8, 2008) (“First Trial Op.”). Unless otherwise noted, the background facts recited in this memorandum opinion are drawn from the First Trial Opinion.

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

Before the trial, Gene had filed a motion in limine to bifurcate this action, whereby the issue of the value of the ESDC stock would be deferred until a second trial, if necessary, and all discovery on the value of the ESDC stock would be stayed pending the outcome of the first trial. I granted that motion and the scope of the first trial was limited accordingly.

Following my opinion from the first trial, ESDC issued a check to Gene to purchase his ESDC stock, calculating the price using the 2005 Amendment. After Gene received the check, the parties disputed the proper ESDC stock price and filed competing Motions to Determine Values of the underlying ESDC properties. Defendants' reply brief on their Motion to Determine Values argued that the 2005 Amendment is no longer applicable due to three equitable defenses: unclean hands, equitable estoppel, and unjust enrichment. These defenses are based on the argument that although Gene knew of his pending retirement during the 2005 Amendment negotiations, he did not disclose that fact to his brothers and, therefore, should not be permitted to benefit from the 2005 Amendment. In response, Gene filed a second motion in limine to prevent Defendants from raising these defenses at this time. This case is now before me on that motion in limine.

In the second motion in limine, Gene argues that Defendants should be prevented from arguing against the applicability of the 2005 Amendment in the second phase of this bifurcated proceeding pursuant to the doctrines of res judicata, judicial estoppel, and waiver. Based on the doctrines of judicial estoppel and waiver, I find that Defendants are

precluded from arguing their equitable defenses as part of the second trial in this action. Thus, I grant Gene's second motion in limine.

## I. FACTS

The background facts of this case are laid out in my July 8, 2008 opinion following the first trial.<sup>3</sup> Thus, I will discuss only those facts relevant to the pending motion, some of which have not been recited previously.

On January 18, 2006, Gene filed this action seeking a judgment allowing him to continue his ownership of stock in ESCS, Benchmark, and ESDC. Two major issues specific to the ESDC stock were: (1) whether Gene was required to sell his ESDC shares back to ESDC upon his resignation on December 21, 2005; and (2) if Gene was required to sell his ESDC shares, what was their value. These questions posed different issues, depended on separate and extensive facts, and were logically interrelated in that the ESDC valuation question would need to be answered only if Gene was required to sell his ESDC shares back to the Company. Citing those circumstances, Gene filed his first motion in limine on May 1, 2007, to bifurcate this case and limit the issues to be tried in the first portion of the case so as to "exclude evidence of the value of the stock of Eastern States Development Company."<sup>4</sup>

At argument on the first motion in limine on June 5, 2007, the Court and the parties discussed the inefficiencies of requiring Gene to expend resources on discovery

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<sup>3</sup> *Id.* at \*1-7.

<sup>4</sup> Gene's May 1, 2007 Mot. in Limine at 1.

relating to possibly unnecessary valuation issues. To avoid those potential inefficiencies, I bifurcated the action for separate trials, excluded arguments regarding the valuations of the ESDC properties from the first trial, and stayed discovery on those valuations until after the first trial. I concluded that “[t]here should be a limitation of the issues in this case, the discovery in this case such that it does not include the value of the properties of ESDC.”<sup>5</sup> I ruled that “the valuations of the individual properties that are managed by ESDC or under development by that company will not be an issue” in the first trial.<sup>6</sup> Regarding the nature of the issues being bifurcated, I also stated that an issue for the first portion of this litigation could be if “somebody thinks that some provision other than what I just read under the contract [*i.e.*, the 2005 Amendment] or just referred to governs how you determine the price, then we ought to . . . hear what that argument is, because it’s a contract interpretation kind of view.”<sup>7</sup>

The first portion of the bifurcated trial was held over two days in September 2007. During the trial, a history of the various Julian Brothers businesses was constructed. Regarding ESDC, the parties stipulated that on June 15, 2001, Gene, Francis, Richard, and their sister, Janis, together with ESDC entered into an Agreement of Stockholders of ESDC (“Initial Agreement”).<sup>8</sup> The relevant portion of the Initial Agreement states:

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<sup>5</sup> Tr. of June 5, 2007 Oral Argument (“Tr.”) at 10.

<sup>6</sup> *Id.* at 16.

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

<sup>8</sup> First Trial Op. at \*3.

The purchase price for each share of the Company's stock shall be equal to the adjusted net book value of the Company divided by the total number of issued and outstanding shares of the Company stock at the time of the sale. For this purpose, the "adjusted net book value" shall be the book value of the Company determined by the independent accountant normally employed by the Company.<sup>9</sup>

On August 24, 2005, the same parties along with two new stockholders entered into a First Amendment to the Initial Agreement, referred to herein as the "2005 Amendment."<sup>10</sup> The relevant portion of the 2005 Amendment regarding valuation of ESDC stock contains the language of the Initial Agreement plus the following additional language, beginning with a clause inserted at end of the last sentence:

. . . as adjusted to reflect the difference between the book value of any real estate held by the Company and the fair market value of such real estate net of sales expenses. The fair market value of the Company's real estate shall be determined by a qualified MAI real estate appraiser named by the Company and the cost of such appraisal shall be paid by the Company. In the event a Selling Stockholder or a deceased Stockholder's legal representative, as the case may be, is not satisfied with the fair market value of the Company real estate as determined by the appraiser selected by the Company, that party, at its expense, may appoint a second qualified MAI real estate appraiser and the fair market value of the Company real estate shall be computed as the average of the values determined by the two (2) real estate appraisers.<sup>11</sup>

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<sup>9</sup> Initial Agreement ¶ 3.

<sup>10</sup> First Trial Op. at \*3.

<sup>11</sup> 2005 Amendment ¶ 3.

After the first trial, in my July 8, 2008 opinion, I held that Gene was required to sell his ESDC stock to ESDC. On August 1, 2008, ESDC issued a check to Gene for \$4,059,500 to purchase his ESDC stock.<sup>12</sup> In valuing the ESDC stock, Defendants calculated the price pursuant to the 2005 Amendment.<sup>13</sup> At the time of this calculation and until November 2008, all parties and this Court proceeded on the premise that the 2005 Amendment governed.

After ESDC's provisional payment, disputes arose as to the price and proper valuation of the ESDC stock, requiring the parties to file competing motions to determine the value of the underlying properties of ESDC. Gene's brief focused on the properties to be valued, the application of rezoning to the properties, and the proper approach for handling sales commissions and capital gains tax on the stock price. In their answering brief, Defendants argued for the first time that three affirmative defenses require use of the valuation procedure specified in the Initial Agreement, rather than the 2005 Amendment: unclean hands, equitable estoppel, and unjust enrichment. Nothing in Defendants' pleadings or any other communication before this answering brief suggested that the 2005 Amendment was affected by any of these defenses. Yet, Defendants contend the defenses render the 2005 Amendment inapplicable to the ESDC stock valuation.

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<sup>12</sup> By agreement of the parties, Gene's acceptance of this check does not affect his right to challenge the adequacy of the amount paid in future proceedings. *See* Defs.' Mot. to Determine Values Ex. A ¶ 2 ("ESDC acknowledges that Eugene M. Julian may continue to dispute the amount of this payment . . .").

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



In briefing their unclean hands argument, Defendants urge the Court to deny Gene the benefit of the 2005 Amendment because he knew that he would be leaving ESDC at the end of 2005 but did not disclose that fact when the Amendment was negotiated. Therefore, according to Defendants, Gene should not gain any possible advantage from his lack of candor. Defendants cite no case law or other authority for their position.

Defendants' second affirmative defense, equitable estoppel, is similar. They argue that the Court must use its discretion to craft an appropriate equitable remedy as Gene failed to disclose the fact he knew he was leaving ESDC while the 2005 Amendment was being negotiated. Defendants, again, cite no case law for their proposition nor do they provide a roadmap regarding their logic.

Defendants' third affirmative defense is unjust enrichment. Their motion conclusorily asserts that Gene will be unjustly enriched if he "receives the full amount of the purchase price as determined in Plaintiff's Motion to Set Values."<sup>14</sup> In their answering brief, Defendants aver that Gene knew he was going to retire when the 2005 Amendment was being negotiated and did not disclose this information. Rather, they contend, this was "part of Gene's secret plan,"<sup>15</sup> and he should not receive any benefits stemming from the 2005 Amendment. Thus, Defendants argue the 2005 Amendment, in its entirety, should not apply and the Court should use, instead, the "net adjusted book value" as defined in the Initial Agreement to determine the ESDC stock price.

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<sup>14</sup> Defs.' Mot. to Determine Values at 8.

<sup>15</sup> Ans. Br. of Defs. in Opp'n to Pl.'s Mot. in Limine ("DAB") at 8.

In response to Defendants’ three equitable defenses, Gene filed a second motion in limine to prohibit Defendants from arguing that the 2005 Amendment should not be enforced based on them. Gene argues that any challenges to the 2005 Amendment should have been made in the first trial. He contends that principles of res judicata, judicial estoppel, and waiver<sup>16</sup> preclude Defendants’ belated attempt to set aside the 2005 Amendment. Defendants deny that they wish to have the 2005 Amendment declared invalid; rather, they “seek only to have the Court consider what they believe to have been Gene’s inequitable conduct in bringing about the [2005 Amendment].”<sup>17</sup> Because it pervades the parties’ arguments, I begin my review of Gene’s motion in limine by considering whether Defendants are asking this Court to reinterpret or rescind the 2005 Amendment.

## II. ANALYSIS

### A. Are Defendants Seeking a Reinterpretation or Rescission of the 2005 Amendment?

Defendants ask this Court to “limit the determination of the value of [Gene’s] stock to the ‘net adjusted book value’ as defined in the original shareholders’

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<sup>16</sup> In Gene’s brief he references a fourth argument, *i.e.*, that “Defendants are too late to rescind the amendment to the ESDC Agreement.” Gene’s Dec. 30, 2008 Mot. in Limine at 16. Gene, however, does not develop this argument and elsewhere in his brief states only that the three principles of res judicata, judicial estoppel, and waiver apply. *Id.* at 5. Moreover, this fourth argument appears to mimic a waiver argument. For these reasons, I address only the three defenses Gene actually developed in his briefing.

<sup>17</sup> DAB at 12.

agreement”<sup>18</sup> and not apply the 2005 Amendment in determining the net adjusted book value. They contend that equity requires this result because Gene had a secret plan whereby he knew he was going to resign when the 2005 Amendment was negotiated and improperly failed to disclose his intent. Thus, according to Defendants, Gene should be precluded from deriving any possible benefit from the 2005 Amendment. Nevertheless, Defendants aver that they are asking only for a reinterpretation, not a rescission, of the 2005 Amendment. Gene disagrees and argues that Defendants seek to rescind the 2005 Amendment in the second phase of this bifurcated trial. For the reasons below, I agree with Gene and find that Defendants are seeking to rescind the 2005 Amendment.

In determining the ESDC stock price, Defendants wish to apply the Initial Agreement in place of the 2005 Amendment. In the first trial, however, Defendants argued and this Court found that the 2005 Amendment applies. At no time, until Defendants filed their Motion to Determine Values on November 21, 2008, did any party suggest that the Initial Agreement should apply to the valuation. Far from asking for a mere reinterpretation of the 2005 Amendment, Defendants seek to have that Amendment disregarded and the Initial Agreement reinstated, at least for purposes of the property valuation. Accepting Defendants’ argument effectively would invalidate or rescind the 2005 Amendment. Defendants’ attempt to downplay the relief they seek as merely a reinterpretation or construction of the 2005 Amendment is tortured and unpersuasive. The question presented by Gene’s second motion in limine, therefore, is whether

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<sup>18</sup> *Id.* at 14.

Defendants preserved the right to defer until the second trial the argument that the Court should disregard the 2005 Amendment in valuing the ESDC properties based on a theory of unclean hands, equitable estoppel, or unjust enrichment.

**B. May Defendants Raise the Defenses of Unclean Hands, Equitable Estoppel, and Unjust Enrichment in the Second Phase of this Bifurcated Proceeding?**

Gene answers this question in the negative based on the doctrines of res judicata, judicial estoppel, and waiver. I turn next to each of those arguments.

**1. Res Judicata<sup>19</sup>**

The elements of res judicata are well established. A party claiming that res judicata bars a defense in a subsequent action must demonstrate that:

- (1) the court making the prior adjudication had jurisdiction;
- (2) the parties in the present action are either the same parties or in privity with the parties from the prior adjudication;
- (3) the prior adjudication was final;
- (4) the causes of action were the same in both cases or the issues decided in the prior action were the same as those raised in the present case; and
- (5) the issues in the prior action were decided adversely to the party's contention in the instant case.<sup>20</sup>

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<sup>19</sup> Delaware courts have used the terms res judicata and claim preclusion interchangeably and distinguish them from collateral estoppel and issue preclusion. The Restatement (Second) of Judgments also contrasts claim preclusion and the narrower concept of issue preclusion. The section on Scope states: “The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower principle—that one who has *actually litigated* an issue should not be allowed to relitigate it—underlies the issue of issue preclusion.” *Advanced Litig., LLC v. Herzka*, 2006 WL 4782445, at \*8 n.54 (Del. Ch. Aug. 10, 2006); *see also Hendry v. Hendry*, 2006 WL 1565254, at \*8 n.77 (Del. Ch. May 26, 2006).

<sup>20</sup> *Hendry*, 2006 WL 1565254, at \*8 (internal citations omitted).

Res judicata constitutes an absolute bar to all claims or defenses that were litigated or which could have been litigated in the earlier proceeding.<sup>21</sup>

There is no dispute as to each of the first two factors. This Court has jurisdiction over this entire case and the parties in this portion of it are the same as those in the first trial. The parties do dispute, however, whether the adjudication in the first portion of this bifurcated trial was final.

Gene argues that a final judgment was entered pursuant to Rule 54(b) and, thus, res judicata “bars further claims by the same parties based on the same cause of action.”<sup>22</sup> Defendants aver that res judicata requires two separate lawsuits, not simply a bifurcated trial.<sup>23</sup> They further argue that the trial has not been completed and the parties are entering the second phase of the same lawsuit.<sup>24</sup> Neither position is entirely correct. The Court did direct the entry of a final judgment under Rule 54(b) as to a number of the claims presented in the first trial.<sup>25</sup> No final judgment was entered, however, as to paragraph 2 of the Judgment, which addresses Gene’s stock in ESDC.

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<sup>21</sup> See *id.* at \*8 (citing *RSS Acq. Inc. v. Dart Group Corp.*, 1999 WL 1442009, at \*3 (Del. Super. Dec. 30, 1999)); see also Restatement (Second) of Judgments § Scope. Res judicata “constitutes an absolute bar to a subsequent action on the same claim as to the parties and their privies on all theories which were litigated or which could have been litigated in the earlier proceeding.” *TransWorld Airlines, Inc. v. Hughes*, 317 A.2d 114, 118 (Del. Ch. 1974) (internal citations omitted).

<sup>22</sup> Pl.’s Reply Br. at 3.

<sup>23</sup> DAB at 11.

<sup>24</sup> *Id.* at 12.

<sup>25</sup> See J. Order entered July 22, 2008 ¶ 10.

“[A] valid and personal judgment is one which reaches and determines ‘the real or substantial grounds of the action or defense as distinguished from matters of practice, procedure, jurisdiction, or form.’”<sup>26</sup> This Court can direct final judgment as to fewer than all the claims in a case. Under Court of Chancery Rule 54(b), “the Court may direct the entry of a final judgment upon 1 or more but fewer than all of the claims or parties only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment.”<sup>27</sup>

After I issued my opinion on the first portion of this bifurcated case, the parties submitted a form of judgment agreed upon as to form. That judgment was entered on July 22, 2008, and expressly stated it was final under Rule 54(b) as to: (1) the ESCS stock price; (2) Francis Julian, Richard Julian, and Steven Bomberger’s joint and several liability to reimburse Benchmark Builders; and (3) Francis and Richard Julian’s payment of certain attorneys’ fees and costs.<sup>28</sup> I did not grant final judgment, however, pertaining to Gene’s ESDC stock and “retain[ed] jurisdiction to determine the precise value of that ESDC stock if the parties cannot agree on that value.”<sup>29</sup> No final judgment pursuant to Rule 54(b) was entered, therefore, on the merits of the dispute underlying Gene’s second

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<sup>26</sup> *TransWorld*, 317 A.2d at 119 (quoting *Clegg v. United States*, 112 F.2d 886, 887 (10th Cir. 1940)).

<sup>27</sup> Ct. Ch. R. 54(b).

<sup>28</sup> J. Order ¶ 8.

<sup>29</sup> *Id.* ¶ 2.

motion in limine. Hence, Gene cannot satisfy the third element of res judicata, and I reject his attempt to preclude Defendants new defenses based on res judicata.

## 2. Judicial Estoppel

Defendants urge this Court to “interpret the [2005 Amendment] so as to limit the determination of the value of his stock to the ‘net adjusted book value’ as defined in the original shareholders’ agreement.”<sup>30</sup> Defendants argue that they can rely on the Initial Agreement as opposed to the 2005 Amendment because they “did not take a legal position in the first phase of the bifurcated proceeding that is inconsistent with the[ir] equitable argument.”<sup>31</sup> Gene counters that Defendants relied upon the 2005 Amendment throughout these proceedings and, thus, are now judicially estopped from taking a position contrary to their previous position. I agree with Gene.

“Judicial estoppel prevents a litigant from advancing an argument that contradicts a position previously taken by that same litigant, and that [a court] was persuaded to accept as the basis for its ruling.”<sup>32</sup> Judicial estoppel “is an equitable doctrine designed to protect the integrity of the judicial process by ‘prohibiting parties from deliberately changing positions according to the exigencies of the moment.’”<sup>33</sup>

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<sup>30</sup> DAB at 14.

<sup>31</sup> *Id.* at 16.

<sup>32</sup> *In re Silver Leaf LLC*, 2004 WL 1517127, at \*2 (Del. Ch. June 29, 2004) (quoting *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at \*3 (Del. Ch. July 13, 1998)).

<sup>33</sup> *In re Silver Leaf*, 2004 WL 1517127, at \*2 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001)).

[S]everal factors [that] typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case [are] whether the party's later position is "clearly inconsistent" with its earlier position, whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled, and whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.<sup>34</sup>

In *Brown v. T-Ink, LLC*,<sup>35</sup> the defendant represented in the early stages of the action that it would not proceed on a fraud claim. This representation contributed to the court's decision to deny a preliminary injunction. Later in the proceedings, the defendant attempted to reargue fraud but was judicially estopped from doing so because of its previous representation and the court's reliance upon that representation.

In this case, Defendants applied the 2005 Amendment throughout these proceedings. Defendants relied on the 2005 Amendment in the beginning of this action in their counterclaim and again in connection with the trial, citing the 2005 Amendment both in their pre- and post-trial briefing.<sup>36</sup> After the trial, Defendants also relied on the

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<sup>34</sup> *In re LJM Co-Inv., LP*, 866 A.2d 762, 782 n.64 (Del. Ch. 2004) (quoting *In re Silver Leaf*, 2004 WL 1517127, at \*2 n.9).

<sup>35</sup> 2007 WL 4302594 (Del. Ch. Dec. 4, 2007).

<sup>36</sup> *See* Answer to Second Am. Compl. and Countercl. at 12 ("On August 24, 2005, Gene, Francis, Richard, Janis L. Julian, Amelia Julian and Richard Julian, Jr., together with ESDC, entered into the First Amendment to Agreement of Stockholders . . ."); *id.* at 13 (stating that "it was the understanding of Gene, Francis and Richard that Gene was required to sell his stock [pursuant to] . . . Paragraph 1 of the ESDC Agreement, as amended"); Defs.' Pre-Trial Br. at 24 (referring to the "ESDC Agreement, as amended" in Defendants' discussion of the



2005 Amendment to support their method of interest calculation and in the related determination of Gene's ESDC stock price.<sup>37</sup> Only after the focus of these proceedings shifted to the issues for the second trial did Defendants argue that portions of the ESDC stock valuation should be determined pursuant to the Initial Agreement.<sup>38</sup> Defendants' current position of not applying the 2005 Amendment is clearly inconsistent with their prior position that the 2005 Amendment controls.

If I accepted Defendants' position it also would mean that Defendants, even if unintentionally, misled this Court in the first portion of this litigation as they continuously applied the 2005 Amendment throughout this action and only now seek its rescission. Before their November 21, 2008 motion, Defendants consistently took the position that the 2005 Amendment applies.<sup>39</sup> Defendants argued in favor of the 2005 Amendment throughout the first trial and failed to provide any notice to Gene or the

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adjusted net book value and the proper valuation date for Gene's ESDC stock); Defs.' Post-Trial Br. at 26-27 (comparing the differences in stock valuation in two other companies owned by the Julian Brothers to the "ESDC Agreement, as amended").

<sup>37</sup> See Tr. of Jan. 18, 2008 Post-Trial Argument at 66 (Defendants drew the Court's attention to the 2005 Amendment regarding rates of interest); Defs.' Mot. to Determine Values Ex. A (using the "Stockholder Agreement Amended 8/24/05" to calculate amount owed to Gene for his ESDC stock).

<sup>38</sup> DAB at 14.

<sup>39</sup> See *supra* notes 37 and 38.

Court that they considered all or any part of that Amendment invalid or unenforceable due to unclean hands, equitable estoppel, or unjust enrichment.<sup>40</sup>

Moreover, contrary to Defendants' argument, the Court's decision to grant Gene's first motion in limine and bifurcate, for purposes of discovery and trial, the issues relating to the value of the various properties owned by ESDC provides no basis for allowing Defendants to proceed with their dilatory equitable defenses to the application of the 2005 Amendment. While in granting bifurcation I acknowledged the possibility that the second trial might include some unforeseen issue of contract interpretation, Defendants' belated attack on the validity of the 2005 Amendment falls well outside the scope of that potential exception. The following statement in the First Trial Opinion makes clear this Court's understanding of the limited scope of the second phase of this proceeding.

Some limited additional proceedings may be necessary to reduce these rulings to a final judgment in terms of, for example, the precise value of the stock to be resold. I would expect the . . . ESDC shares to be valued as of December 31, 2005, and that value to be converted to a present value as of the date of judgment based on the interest rate prescribed in . . . the First Amendment to the ESDC Agreement [*i.e.*, the 2005 Amendment] of "the prime rate of interest then charged by banks in Wilmington, Delaware" for Gene's ESDC stock.<sup>41</sup>

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<sup>40</sup> Defendants advanced an unclean hands argument in the first trial in opposition to Gene's challenge to the Benchmark bonuses. That argument, however, is unrelated to the equitable defenses currently raised by Defendants. *See* Defs.' Pre-Trial Br. at 32-33.

<sup>41</sup> First Trial Op. at \*20 n.108.

If Defendants wished to preserve the equitable defenses they now seek to assert, they should have brought them to the attention of the Court and Gene before the first trial. The factual allegations on which the new defenses rest overlap significantly with the evidence adduced in the first trial. In such circumstances, it would provide an unfair advantage to one side in litigation, such as Defendants here, if that side unilaterally could hold a defense based on overlapping facts until the second half of a bifurcated proceeding without giving the Court or the opposing side an opportunity to consider whether such a deferral would further convenience, avoid prejudice, or be conducive to expedition and economy, as contemplated by Rule 42(b). Yet, that is exactly what Defendants did.

Allowing Defendants to argue in the second trial that the Initial Agreement regarding ESDC, and not the 2005 Amendment, provides the standard for valuing Gene's ESDC stock also would impose an unfair detriment on Gene. As indicated in Gene's Motion to Determine Values, he and his counsel already have begun to value the ESDC properties in question under the 2005 Amendment. If the Court permits Defendants to assert their new equitable defenses, Gene presumably will have to have his experts develop alternative valuations for each of the approximately twenty properties using the Initial Agreement. In addition, the parties will have to expend time and resources briefing the new defenses and otherwise preparing for trial on them.

In summary, all the relevant factors regarding judicial estoppel favor Gene and support precluding Defendants from arguing that the 2005 Amendment should not apply to the valuation proceedings in this case. Defendants argued in favor of the 2005 Amendment throughout this action, never mentioned, until November 21, 2008, that the

2005 Amendment should not apply, and caused the Court to issue an opinion stating that the 2005 Amendment applies.<sup>42</sup> For all of these reasons, Defendants are judicially estopped from arguing that the 2005 Amendment should not apply to the ESDC property valuations based on unclean hands, equitable estoppel, or principles of unjust enrichment.

### 3. Waiver

To establish waiver, one must show that the other party “voluntarily and intentionally relinquished a known right.”<sup>43</sup> The asserting party must prove that the waiving party had actual or constructive notice of this known right.<sup>44</sup> “A party cannot both accept the benefits which accrue under a contract on the one hand and shirk its

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<sup>42</sup> See *Zirn v. VLI Corp.*, 1994 WL 548938, at \*2 (Del. Ch. Sept. 23, 1994) (“Once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears.”).

<sup>43</sup> *Danvir Corp. v. City of Wilm.*, 2008 WL 4560903, at \*7 (Del. Ch. Oct. 6, 2008).

<sup>44</sup> See *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at \*7 n.40 (Del. Ch. May 5, 2008) (citing 13 *Williston On Contracts* § 39:34 (4th ed. 2000)) (noting in dicta that constructive knowledge is sufficient to effect a waiver); *Smith-Morlock v. Harleysville Ins. Co.*, 2007 WL 316390, at \*5 (Del. Ch. Jan. 23, 2007); *AT&T v. Clarendon Am. Ins. Co.*, 2008 WL 222583007, at \*6 n.39 (Del. Super. June 25, 2008) (“[T]he court must find by clear and convincing evidence that the waiving party had actual or constructive notice of its right.”); see also 17 *Couch On Insurance* § 239:107 (3d ed. 2008) (“It must generally be shown by the party claiming a waiver that the person against whom the waiver is asserted had, at the time, knowledge, actual or constructive, of the existence of his or her rights or of all the material facts upon which they depended . . .”).

disadvantages on the other.”<sup>45</sup> Waiver also implies knowledge of relevant material facts.<sup>46</sup>

Gene argues that Defendants have waived their right to argue for rescission of the 2005 Amendment because they acquiesced in and affirmed the application of the Amendment before, during, and after the first trial. Defendants contend that waiver does not apply because they merely seek to have this Court reinterpret the 2005 Amendment, not rescind it. As previously noted, that argument is not persuasive. Instead, I view Defendants as attempting to rescind the 2005 Amendment. To prove waiver, Gene must show that Defendants were aware of the grounds they now advance to avoid the 2005 Amendment, and of the underlying facts, and knowingly relinquished their right to argue that the Amendment should be rescinded on those grounds.

In ruling on the first motion in limine, I indicated that the second trial generally would be limited to determining the specific values of the properties in issue. I stated that “[t]here should be a limitation of the issues in this [first portion of the] case, [and] that discovery . . . [should] not include the value of the properties of ESDC.”<sup>47</sup> In addition, I noted that the first trial would not address “the valuations of the individual properties that are managed by ESDC or under development by that company.”<sup>48</sup>

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<sup>45</sup> *Cianci v. JEM Enter., Inc.*, 2000 WL 1234647, at \*12 (Del. Ch. Aug. 22, 2000).

<sup>46</sup> *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1984).

<sup>47</sup> Tr. at 10.

<sup>48</sup> *Id.* at 16.

In ruling on the first motion in limine, I also acknowledged the possibility of entertaining arguments at a later time regarding interpretation of the relevant agreements; however, I limited that possibility to issues that were not yet evident.<sup>49</sup> Thus, the parties were on notice that the second phase of this proceeding might include arguments regarding the proper interpretation of agreements regarding the valuation of Gene's stock. But, the effective rescission of the 2005 Amendment which Defendants currently seek does not fall within that ambit.

Additionally, even assuming Defendants are seeking only an interpretation of the 2005 Amendment, they knew the facts necessary to assert the three equitable defenses they now advance at or before the time of the first trial in September 2007. On May 1, 2007, at Gene's deposition, Gene admitted that he made his final decision to leave ESDC some three to six months before his formal resignation in December 2005.<sup>50</sup> Indeed, Defendants relied on this fact in their Post-Trial Brief to counter Gene's Benchmark and ESCS waiver argument in the first trial, stating:

[Gene] provided only 22 days notice of his retirement. He provided only 22 days notice, despite the fact that he had made the decision three (3) to six (6) months before he delivered his December 9, 2005 letter. Further, Gene admits he provided his brothers, Francis and Richard, with no

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<sup>49</sup> *Id.* at 18.

<sup>50</sup> *See* Gene's Dec. 30, 2008 Mot. in Limine Ex. B, Eugene Julian 5/1/2007 Dep., at 48 (Pl.'s Ex. A). If Gene actually decided to resign only three months before December 9, 2005, the factual premise for Defendants' new equitable defenses would fail, because Gene's decision would not have preceded the execution of the 2005 Amendment in August 2005.

advance notice of his intention to resign or retire prior to his December 9, 2005 letter.<sup>51</sup>

Hence, Defendants knew about the relative timing of Gene's decision to resign or retire and the other facts germane to their rescission argument before the first trial. By granting the first motion in limine, I did not leave open the possibility of a wholesale attack on the applicability of the 2005 Amendment in the second trial. Rather, I ruled that the issue in the second trial, if it were necessary, would be the value of Gene's ESDC stock.

Specifically, I bifurcated the trial and related discovery to avoid having the parties expend their resources attempting to value the ESDC stock, when that exercise might prove to be unnecessary.<sup>52</sup> That was essentially the relief Gene's first motion in limine sought.<sup>53</sup> Consequently, any arguments unrelated to the valuations of the individual ESDC properties should have been presented in the first trial—including any challenge by Defendants to the applicability of any portion of the 2005 Amendment. Nothing prevented Defendants from arguing against the 2005 Amendment at the first trial or at least providing notice of their intent to raise such defenses in advance of that trial; yet, they chose not to challenge the Amendment at that time.<sup>54</sup>

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<sup>51</sup> Defs.' Post-Trial Br. at 9.

<sup>52</sup> If I found in the first trial that Gene was correct and that he was not required to sell his shares, the current ESDC stock value would have been irrelevant.

<sup>53</sup> Gene's May 1, 2007 Mot. in Limine at 1.

<sup>54</sup> For example, Defendants could have sought leave to amend their pleadings before the first trial to add the defenses of unclean hands, equitable estoppel, and unjust enrichment as to the 2005 Amendment. They then could have moved to bifurcate those issues, as well, for consideration in the second phase of this proceeding.

Furthermore, Defendants relied on the 2005 Amendment, not only before and immediately after the trial, but also ten months after the trial, when, on July 31, 2008, Defendants applied the 2005 Amendment to calculate ESDC's stock price.<sup>55</sup> In making that calculation, Defendants used the "Stockholder Agreement Amended 8/24/05."<sup>56</sup>

Because Defendants knew the relevant facts at the time of the first trial and made no effort to present their challenges to the 2005 Amendment then or even to put Gene or the Court on notice that they intended to assert such a defense at any time, Defendants have waived their right to argue that the valuation provisions of the Initial Agreement should be used instead of those in the 2005 Amendment. Although Defendants had the opportunity to argue against the 2005 Amendment in the first trial and had actual or, at a minimum, constructive knowledge about the relevant evidence, they chose, instead, to rely on that Amendment throughout this litigation, until they changed course in November 2008. Despite having been on notice of the parameters of the bifurcated trial, Defendants now seek to use Gene's first motion in limine as a loophole to inject into the case new defenses that could and should have been argued previously. In these circumstances, I hold Defendants have waived their right to argue against applying the 2005 Amendment to determine the value of Gene's ESDC stock.

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<sup>55</sup> Defs.' Mot. to Determine Values Ex. A.

<sup>56</sup> *Id.*



### **III. CONCLUSION**

For the foregoing reasons, Gene's second motion in limine is granted, based on the doctrines of judicial estoppel and waiver. Defendants are precluded from arguing against the applicability of all or any part of the 2005 Amendment based on their averments of unclean hands, equitable estoppel, and unjust enrichment.

**IT IS SO ORDERED.**