IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EUGENE M. JULIAN, Plaintiff/ Counterclaim Defendant, v. RICHARD J. JULIAN and FRANCIS R. JULIAN, Defendants/ Counterclaim Plaintiffs, and EASTERN STATES DEVELOPMENT COMPANY, INC., Nominal Defendant.	)	Civil Action No. 1892-VCP

OPINION

Submitted: November 20, 2009
Decided: March 22, 2010

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PARSONS, Vice Chancellor.

This Opinion reflects, I hope, the resolution of the final phase of one of several unduly contentious disputes among three brothers whose family owned a multitude of companies and who were in business together from the late 1960's until the end of 2005.[1] The current focus of this action is on the valuation of Eugene Julian's ("Gene") stock in Eastern States Development Company, Inc. ("ESDC"), one of three separate, but related, companies owned and operated by these brothers.[2] Specifically, this Court must interpret provisions of the stockholder agreement governing valuation of ESDC stock to determine, among other things, whether land held in joint venture entities or land subject to an option to buy constitute "real estate held by" ESDC within the meaning of the agreement, what "sales expenses" encompass, whether parties may challenge an MAI[3] appraisal obtained under the procedure prescribed in the agreement, as well as some ancillary issues.[4]

Having examined the language of the agreement in light of ESDC's business context and, when necessary, the agreement's drafting history and the course of the parties' performance under it, I hold that "real estate held by" ESDC includes land held

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1 Two other pending actions in this internecine, commercial debacle are *Julian v. Julian*, No. 4137-VCP (Del. Ch. filed Nov. 3, 2008) and *Julian v. Julian*, No. 4099-VCP (Del. Ch. filed Oct. 16, 2008).

2 Eastern States Construction Service, Inc. ("ESCS") and Benchmark Builders, Inc. ("Benchmark") complete this triad of businesses.

3 MAI stands for Member of the Appraisal Institute, a professional appraisal designation conferred by the Appraisal Institute.

4 I address these issues *infra* Part II.E.

by ESDC directly and indirectly through limited liability companies ("LLCs") in which ESDC is a part owner, but does not include options to purchase land. Additionally, I determine that "sales expenses," as referred to in the governing agreement, include only transfer taxes, sales commissions, and recording fees, where applicable, and that, as a result, Defendants are not justified in applying LLC discounts. Finally, I hold that even though this Court may modify or invalidate appraisals shown to be the product of fraud, bad faith, partiality, or deception, neither party has demonstrated such conduct in this case. Thus, the MAI appraisals submitted by each party must be considered according to the terms of the stockholder agreement.

I. BACKGROUND

A. Factual and Procedural History

In his Complaint, Gene named Francis R. Julian ("Francis"), Richard J. Julian ("Richard"), ESCS, and Steven Bomberger, Benchmark's president, as Defendants and ESDC and Benchmark as nominal Defendants.[5] Because many of the background facts of this case are set forth in my July 8, 2008 and May 5, 2009 Memorandum Opinions, I recite here only those facts relevant to disputes currently before me.[6]

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[5] For the sake of brevity, I refer to the Julian family members bearing the same surname by their first names. No disrespect is intended.

Additionally, I note that, under the Pretrial Order, Defendants ESCS, Benchmark, and Bomberger are no longer participating in this litigation. Pretrial Order 1-2.

[6] *Julian v. E. States Const. Serv. Inc.* (*Julian I*), 2008 WL 2673300, at *1-7 (Del. Ch. July 8, 2008); *Julian v. E. States Const. Serv. Inc.* (*Julian II*), 2009 WL 1211642, at *2-4 (Del. Ch. May 5, 2009).

In *Julian I*, issued after a two-day trial of the initial phase of this bifurcated proceeding,[7] I held that Gene must sell his ESDC stock to ESDC pursuant to the terms of the First Amendment to the Agreement of Stockholders ("Amended Stockholders Agreement") he entered into with Francis, Richard, and ESDC.[8] Additionally, in *Julian II*, I held that Defendants were precluded from challenging the validity of the Pricing Formula contained in the Amended Stockholders Agreement.

As of December 31, 2005 (the "Valuation Date"), Gene owned 113 of ESDC's 462 shares or 28.2% of the total outstanding ESDC stock. ESDC's net book value on the Valuation Date was $7,752,349.[9] Based on the decision in *Julian I*, Defendants provisionally compensated Gene for the value of his ESDC stock in 2005 by issuing him a check for $4,059,500 with the caveat that certain adjustments to that amount might be necessary.[10]

Now, in the second phase of this proceeding, the parties seek to resolve a number of disagreements over the value of Gene's ESDC stock as determined by a procedure for

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[7] When Gene filed this action on January 18, 2006, there were two major issues relating to Gene's ESDC stock: (1) whether Gene was required to sell his ESDC shares back to ESDC upon his resignation on December 31, 2005; and (2) if Gene was required to sell his ESDC shares, what was their value. Because the latter issue involved numerous parcels of real estate, among other complications, I granted Plaintiff's application to try the first issue separately. Accordingly, I tried the first portion of this bifurcated action over two days in September 2007.

[8] *Julian II*, 2009 WL 1211642, at *2-3.

[9] Pretrial Order 2.

[10] This check reflected $3,550,000 for Gene's ESDC stock as of December 31, 2005 and an interest payment of $547,804 through July 31, 2008. *Id.*

valuing ESDC stock specified in the Amended Stockholders Agreement (the "Pricing Formula"). On June 17-18, 2009, I conducted a two-day trial on the subject of these disagreements. This Opinion reflects my post-trial findings of fact and conclusions of law on those issues. As the circumstances leading up to the parties' amendment of the stockholder's agreement in 2005 provide an important backdrop for understanding the remaining disputes, I begin my discussion there.

Gene, Francis, Richard, and their sister, Janis Julian, entered into the original stockholders agreement on June 15, 2001.[11] This agreement provided that the purchase price of ESDC shares would be equal to "the adjusted net book value," which was defined as "the book value of the Company" as determined by the Company's independent accountant. In 2004, however, Francis and Richard sought to change the agreement so that the redemption value of ESDC stock would reflect the appreciation in assets "such as Glasgow Pines," held by ESDC.[12]

Defendants' desire to amend the stockholder agreement was prompted, at least in part, by a letter Francis received from CPA James A. Horty informing him, in response to questions from Francis, that the phrase "adjusted net book value" was widely understood in the business world to be "the book value on a company's balance sheet after assets and

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11 *Julian II*, 2009 WL 1211642, at *2-3.

12 PX 10 (correspondence regarding use of fair market value to determine value of ESDC stock).

liabilities are adjusted to market value."[13] After receiving this letter, Francis suggested to Gene that the stockholder agreement be amended to incorporate the true meaning of "adjusted net book value," indicating that such an amendment was particularly desirable "[f]or a company with a substantial non-depreciable asset base."[14] Richard echoed these thoughts, writing to Gene that "the 'adjusted net book value' of ESDC stock must be adjusted up to fair market value . . . on *all holdings* of" ESDC.[15] After some further discussion among the parties, the ESDC stockholders executed the Amended Stockholders Agreement on August 24, 2005.[16]

The Pricing Formula, as found in the Amended Stockholders Agreement, provides that

> [t]he 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 Company's 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

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13 *Id.* at EMJ 0213. Attached to the letter was a page entitled "International Glossary of Business Valuation Terms" that defined "Adjusted Book Value Method" as "a method within the asset approach whereby all assets and liabilities (including off-balance sheet, intangible, and contingent) are adjusted to their fair market values." *Id*. at EMJ 0214.

14 *Id*. at EMJ 0211. I understand the latter comment to reflect the fact that most of ESDC's asset base consisted of interests in real estate, which generally are not depreciable.

15 *Id*. (emphasis added).

16 T. Tr. 66 (Gene). Citations in this form are to the transcript of the third trial in this action held on June 17-18, 2009. Additionally, where the identity of the witness is not clear from the text, it is indicated parenthetically, as in this case.

> normally employed by the Company **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**.[17]

Additionally, the Formula establishes the method and procedure for resolving disagreements about the fair market value of "real estate held by" ESDC. It states:

> 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.[18]

Many of the points of contention between the parties in the current dispute pertain to the meaning of the terms "real estate held by the Company" and "sales expenses" in the Pricing Formula and to details regarding the prescribed dispute resolution mechanism. As the pending disputes also focus on several pieces of property and LLC interests held by ESDC, however, I next briefly describe the nature of ESDC's business and its various relevant assets.

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17 *See Julian II*, 2009 WL 1211642, at *2-3 (emphasis added).

18 *Id*.

1. The business of ESDC and its assets

As a real estate developer, ESDC acquires raw, undeveloped land and improves it by "putting infrastructure in"[19] and having the land subdivided and rezoned.[20] ESDC then sells these developed commercial and residential lots to commercial users and builders.[21] ESDC typically acquires land through one of three methods: outright purchase, through a joint venture with other developers,[22] or exercising options to purchase land.[23]

When acquiring land through partnership with other developers, ESDC frequently forms LLCs or enters joint ventures for the purpose of purchasing, developing, and selling the land. After completion of the project, the entity formed to carry the project

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19 Infrastructure includes items such as roads, sewers, curbs, and utilities connections. T. Tr. 103 (Nickel), 253 (McKennon).

20 T. Tr. 15-17, 22 (Gene).

21 T. Tr. 22 (Gene).

22 ESDC maintained a good reputation in the real estate industry due largely to its "good track record" in rezoning, recordation, development, and sales. T. Tr. 20 (Gene), 321 (Richard Julian, Jr.).

23 These three methods were depicted differently in ESDC's financial statements during the period when Gene was President of ESDC. *See* PX 1-6 (ESDC Financial Statements for each year from 2000 to 2005); T. Tr. 9-10 (Gene) (indicating that, until his resignation in 2005, Gene was President of ESDC). Specifically, land obtained through outright purchase is categorized as "Land Held for Development," land acquired through partnership with other developers is labeled an "investment" and itemized individually in a note to the financial statements, and options to purchase land are listed under "Other Assets" as "Deposits on purchase of land." *See* PX 6, 2005 ESDC Financial Statement.

out is often liquidated.[24] This business practice led to ESDC holding interests in five relevant LLCs as of the Valuation Date, namely, Glasgow Pines JV LLC ("Glasgow Pines JV"),[25] Little Falls Village II, LLC ("Little Falls II"),[26] New Milton Village LLC ("New Milton Village"),[27] Central Delaware Business Park ("Central DE"),[28] and 2026 Ventures LLC ("2026 Ventures").[29]

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24 T. Tr. 20 (Gene).

25 ESDC holds a 51% interest in Glasgow Pines JV, which owns the buildings and improvements making up a shopping center. Glasgow Pines JV leases the real estate on which the shopping center is located from ESDC. *See* T. Tr. 36-38 (Gene), 336 (Richard, Jr.); PX 21, Glasgow Pines JV LLC Agreement, § 16.2. Gene claims that ESDC has power to force a sale of the LLC, even if its partner does not wish to sell. While technically true, Defendants argue that such a sale can only be effectuated through a contractual put/call option entitling ESDC to name a price at which it would sell its interest, triggering the right of the minority holder to either buy ESDC's interest or sell its own interest to ESDC at that price. T. Tr. 339 (Richard, Jr.); PX 21 § 16.2.

26 ESDC holds a 50% interest in Little Falls II which, in turn, owns a tract of real estate. Little Falls II holds this tract for the purpose of selling the individual improved building lots to a residential builder. T. Tr. 41-46 (Gene); PX 20.

27 New Milton Village owns a 140-acre parcel of residentially-zoned land and is owned entirely by 1630 Ventures, LLC ("1630 Ventures"), a company in which ESDC holds a one-third interest. T. Tr. 25, 27 (Gene); PX 18, 1630 Ventures LLC Agreement; DX 1, ESDC Overall Valuation Report, at DEF 016546.

28 ESDC holds a 50% interest in Central DE which owns ten improved lots in an industrial park. T. Tr. 32-33 (Gene), 334-35 (Richard, Jr.); PX 19, Central DE LLC Agreement.

29 ESDC holds a one-third interest in 2026 Ventures, which, as of the Valuation Date, held an option to purchase Vines Creek Village, an approximately 23-acre tract of land. *See* PX 12, 24; T. Tr. 51-53 (Gene). In 2007, 2026 Ventures exercised that option and acquired title to Vines Creek Village. PX 24.

The valuation of ESDC also requires consideration of numerous pieces of property it holds directly. Many are not the subject of significant dispute; others, including Milltown Village, Videre Woods, Elk Mills,[30] Cann Village, and First State Golf Center, are. To the extent relevant, I discuss these specific properties in the portions of the Analysis *infra* relating to them.

B. Parties' Contentions

The parties raise a plethora of issues in this action relating to numerous pieces of property and other interests held by ESDC. Essentially, however, this Court must answer three primary questions: First, what constitutes "real estate held by" ESDC; second, what discounts or "sales expenses" may be deducted from the fair market value of ESDC's real estate; and third, whether, and on what grounds, one party may challenge the MAI appraisal submitted by the other. Additionally, I must address four ancillary issues: (1) whether the parties entered into an agreement stipulating to the value of Little Falls II; (2) whether Gene can "accept" Defendants' MAI appraisal for Videre Woods after obtaining his own MAI appraisal; (3) whether the fair market value of Milltown Village can be reduced based on a contracted sale price with Benchmark; and (4) whether Gene may adjust the book values of certain LLCs.

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[30] Elk Mills is a 237-acre parcel of land located in Elkton, Maryland. ESDC sought to develop a residential subdivision with lots for approximately 240 detached single-family homes. As of the Valuation Date, ESDC had filed its application for plan approvals, but had not yet obtained all of the final approvals necessary for development. T. Tr. 54-61 (Gene); PX 26.

In answer to these questions, Gene contends that "real estate held by" ESDC includes not only property owned by ESDC directly, but also property held indirectly through LLCs and other joint ventures in which ESDC has a stake and land subject to an option to purchase held by ESDC. Second, Gene argues—and Defendants agree—that, as with a review of facts found by an arbitrator, this Court may only overturn the findings in a particular MAI appraisal if the appraisal is the subject of "fraud, bad faith, or deception."[31] Third, Gene asserts that no transfer tax should be deducted from Glasgow Pines because, even if the LLC interests were sold, ESDC would retain ownership of the land under Glasgow Pines. Gene further claims that no sales commissions should be deducted on residential properties because ESDC did not use brokers for the sale of residential lots to builders and that no discounts for land held by an LLC are contemplated by the Pricing Formula. As to the ancillary issues, Gene argues that the parties never stipulated to the value of Little Falls II and that, because ESDC did not submit an MAI appraisal for that piece of property, Defendants must accept his appraisal. Gene also suggests that even though he obtained his own MAI appraisal for Videre Woods, he did not submit it into evidence and, therefore, is not bound by that appraisal. Finally, Gene avers that Defendants cannot submit a below-market price appraisal based on a self-dealing, insider contract regarding Milltown Village because the Pricing Formula requires that the property be valued at its "fair market value."

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[31] Plaintiff's Post-Trial Reply Brief ("PRB") 25; Defendants' Answering Post-Trial Brief ("DAB") 33. Similarly, I refer to Plaintiff's Opening Post-Trial Brief as "POB."

Defendants counter that, under the Pricing Formula, only land directly held by ESDC can be considered "real estate held by" ESDC and that all sales expenses, including transfer taxes, sales commissions on residential properties, costs to complete, and discounts on property held through an LLC—if it is valued at all—must be deducted from the fair market value of such property. Defendants also argue that the value of Little Falls II is subject to the price specified in a binding agreement and that, even if that agreed price is not controlling, Defendants should be allowed to submit an MAI valuation to be averaged with Gene's. Finally, Defendants contend that Gene is bound under the Pricing Formula to submit his MAI appraisal for Videre Woods and that the fair market value of Milltown Village must be subject to the sale price established in the contract between Benchmark and ESDC.

II. ANALYSIS

A. Standard for Contract Interpretation

The questions before me largely turn on the Court's interpretation of the terms of the Pricing Formula. Hence, I begin with a brief recitation of some relevant and well-known principles of contract interpretation.

"When interpreting a contractual provision, the court's ultimate goal is to determine the parties' shared intent."[32] Because Delaware adheres to the objective theory

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[32] *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008) (citing *Matulich v. Aegis Commc'ns Gp., Inc.*, 2007 WL 1662667, at *4 (Del. Ch. May 31, 2007).

of contract interpretation,[33] the court initially looks to the contract itself in an effort to give effect to the "clear language" of that document.[34] The words of the contract will be deemed ambiguous only where the language is susceptible to two or more reasonable interpretations.[35]

When faced with contractual ambiguity, the court's "primary search" remains to find the parties shared intent or common meaning.[36] To determine the meaning of doubtful language, however, the court also may consider objective evidence, "including the overt statements and acts of the parties, the business context, the parties' prior dealings, and industry custom."[37] The Restatement of Contracts (Second) suggests that,

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33 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007).

34 *In re Buonamici*, 2008 WL 3522429, at *7 (Del. Ch. Aug. 11, 2008) (citing *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 171 (Del. Ch. 2005)).

35 *Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2009 WL 3161643, at *6 (Del. Ch. Sept. 30, 2009) (citing *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)); *see also Wilm. Firefighters Ass'n, Local 1590 v. City of Wilm.*, 2002 WL 418032, at *10-11 (Del. Ch. Mar. 12, 2002) (citing *E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985)); *Sassano*, 948 A.2d at 462 (noting that the language of the contract is the most objective indicia of the parties' intent).

36 *Wilm. Firefighters Ass'n*, 2002 WL 418032, at *10-11 (citing *E.I. du Pont*, 498 A.2d at 1113).

37 *Id*. (citing *Bell Atl. Meridian Sys. v. Octel Commc'ns Corp.*, 1995 WL 707916, at *5 (Del. Ch. Nov. 28, 1995)).

in this search, courts should consider the parties' course of performance as "the most persuasive evidence of the [meaning of the] parties' agreement."[38]

With these principles in mind, I turn to the issues arising from the parties' differing interpretations of the language of the Pricing Formula.

B. Meaning of "Real Estate Held By" ESDC

The Pricing Formula provides that the purchase price of each share of ESDC's stock is the "adjusted net book value" of ESDC divided by the total number of issued and outstanding shares of ESDC stock. The Formula defines "adjusted net book value" as the book value of ESDC "adjusted to reflect the difference between the book value of **any real estate held by** [ESDC] and the fair market value of such real estate net of sales expenses."[39] The Amended Stockholder Agreement does not define "real estate held by" ESDC, and the parties offer reasonable, but contrasting, interpretations as to whether real estate held by a joint venture entity or land subject to an option to purchase held by

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38 *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 n.29 (Del. Ch. May 5, 2008) (citing RESTATEMENT OF CONTRACTS (SECOND) § 202 cmt. g (2008) ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. . . . Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or waiver by one party."); *id.* § 202(4) ("any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.")); *see also City of Wilm. v. Wilm. FOP Lodge # 1*, 2004 WL 1488682, at *7 (Del. Ch. June 22, 2004) ("[C]ourse of performance . . . may be used to aid a court in interpretation of an ambiguous contract, [or] it may also be used to supply an omitted term when a contract is silent on an issue.").

39 *See supra* note 17 (emphasis added).

ESDC constitutes "real estate held by" ESDC. Addressing these questions in turn, I hold that real estate owned by the joint venture entities at issue here falls within that category, but that land subject to an option to purchase does not.[40]

1. Real estate held by a joint venture entity

Whether real estate held by a joint venture entity involving ESDC constitutes "real estate held by" ESDC, as that phrase is used in the Pricing Formula, represents the most significant question in this phase of the litigation, at least in terms of the amount of money at stake. As previously noted, the answer affects the valuation of five LLCs of which ESDC is a member.

Regarding this question, Gene contends that the history of the negotiation and drafting of the Pricing Formula, as well as the parties' course of conduct in carrying out the provisions of that Formula, indicate that real estate held in a joint venture entity should be valued as "real estate held by" ESDC. Defendants counter that the plain language of the Pricing Formula provides no mechanism for adjusting the value of ESDC's interest in joint venture entities and that, even if "real estate held by" ESDC is an ambiguous phrase, the drafting history of the Formula and the general inability of ESDC to force the LLCs to liquidate their interests in the property in question support Defendants construction of that language.[41] Additionally, Defendants assert that, even if

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[40] I discuss the parties' arguments regarding whether land held in LLCs and other joint ventures is subject to any type of discount *infra* Part II.C.3.

[41] ESDC generally did not have unilateral power to sell real property owned by the LLCs. T. Tr. 320 (Richard, Jr.).

the Pricing Formula somehow called for the fair market valuation of investments in joint venture entities, Gene failed to provide MAI appraisals of the value of such assets.

Having carefully considered the language of the contract in the context of the surrounding circumstances, I hold that the reference to "real estate held by" ESDC is ambiguous. Further, based on extrinsic evidence "bearing upon the objective circumstances relating to the background of the" Amended Stockholder Agreement,[42] I find that the parties intended to include real estate held by joint venture entities in which ESDC has an interest within the phrase "any real estate held by" ESDC and that the ESDC stock must be valued accordingly.

The phrase at issue consists of two parts: "any real estate" and "held by." "Real estate" is synonymous with "real property," which Black's Law Dictionary defines as "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land."[43] While this definition is important in my discussion of options to purchase land held by ESDC,[44] neither party denies that real estate titled in a joint venture entity constitutes "real estate" under that definition. Instead, the parties dispute focuses on the meaning of the phrase "held by." Black's Law Dictionary defines the verb "hold," in relevant part, as "[t]o possess by lawful title" and

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42 *U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *10 (Del. Ch. June 6, 1996).

43 BLACK'S LAW DICTIONARY 1255 (8th ed. 2004).

44 *See infra* Part II.B.1.b.

"[t]o possess or occupy";[45] Merriam Webster's Dictionary defines "hold" as "to have possession or ownership of or have at one's disposal."[46]

Defendants argue that because a member of a limited liability company "has no interest in specific limited liability company property,"[47] real estate titled in a joint venture entity cannot be said to be "held by" ESDC.[48] Gene responds by suggesting that land held indirectly by ESDC through joint ventures fits within the phrase "any real estate held by" ESDC as naturally and consistently as land titled in ESDC directly. This argument finds support in ESDC's long-term practice of acquiring property through joint ventures as well as by direct purchase. Because both parties provide plausible interpretations of the disputed language, it is difficult to determine the proper interpretation of that language.[49] In fact, I cannot determine from the language of the Pricing Formula alone whether the parties intended to exclude land titled in LLCs in which ESDC held an interest—which represented a significant amount of ESDC's real estate assets—from the valuation process outlined in that provision.

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45 BLACK'S LAW DICTIONARY 749 (8th ed. 2004).

46 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 592 (11th ed. 2003).

47 6 *Del. C.* § 18-701; *see also Poore v. Fox Hollow Enters.*, 1994 WL 150872, at *2 (Del. Super. Mar. 29, 1994); *Credit Suisse Sec. (USA) LLC v. W. Coast Opportunity Fund, LLC*, 2009 WL 2356881, at *3 (Del Ch. July 30, 2009).

48 Defendants also argue that real estate held through joint ventures need not be written up to its fair market value because Gene did not submit MAI appraisals of ESDC's interests in those entities.

49 *See supra* notes 22-23.

Consequently, I next look to the drafting history of the Pricing Formula and the parties' conduct in interpreting and performing under that provision to determine whether they intended "real estate held by" ESDC to include land held indirectly by ESDC through various LLCs.

a. Drafting history of the Pricing Formula

As discussed in the background section of this Opinion, before the parties amended the original stockholder agreement, Francis received a letter from his CPA informing him that the phrase "adjusted net book value," which appeared in the then-current version of the stockholder agreement, was generally defined as "the book value on a company's balance sheet after assets and liabilities are adjusted to market value."[50] Francis then suggested to Gene that the stockholder agreement should be amended to incorporate this definition. Francis wrote that such an amendment was particularly desirable "[f]or a company with a substantial non-depreciable asset base."[51] In a letter to Gene on the same topic, Richard stated that "the 'adjusted net book value' of ESDC stock must be adjusted up to fair market value . . . on *all holdings* of" ESDC.[52] These discussions ultimately led to the Pricing Formula.

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50 PX 10 at EMJ 0213. Attached to the letter was a page entitled "International Glossary of Business Valuation Terms" that defined "Adjusted Book Value Method" as "a method within the asset approach whereby all assets and liabilities (including off-balance sheet, intangible, and contingent) are adjusted to their fair market values." *Id*. at EMJ 0214.

51 *Id*. at EMJ 0211.

52 *Id*. (emphasis added).

Regarding this drafting history, Gene argues that, because the ESDC balance sheet included the book value of its LLC holdings, Francis and Richard must have intended to include real estate held by ESDC through those LLCs in the valuation of ESDC stock when they asked Gene to amend the Stockholder Agreement to value the stock based on the fair market value of ESDC's assets. Defendants counter that, even though the 2004 correspondence may suggest that Richard and Francis were not averse to a formula that adjusted all balance sheet assets to fair market value, it does not show clearly that the parties intended to have the Pricing Formula include all such assets because the only properties specifically mentioned in that correspondence are pieces of real estate owned directly by ESDC.

The initial proposal to adjust all balance sheet items to fair market value obviously differs from the final Pricing Formula agreed to, which adjusts only the value of real estate held by ESDC. The relevant correspondence between Francis, Richard, and Gene, however, strongly suggests that the parties intended "adjusted net book value" in the Pricing Formula to include *all* of ESDC's real estate, whether held directly or indirectly. The fact that those assets made up the vast majority of ESDC's business, and, hence, of its value, further supports this conclusion, as does ESDC's longstanding practice of acquiring and holding land through joint venture relationships.

Thus, the drafting history of the Pricing Formula suggests that the parties intended "any real estate held by" ESDC to include land held indirectly by ESDC through its various joint ventures.

b. Parties' course of performance

Additionally, the parties' course of performance under the Pricing Formula confirms that they intended indirectly held real estate to be marked up to fair market value as well.

While "backward-looking evidence gathered after the time of contracting" is not always helpful in determining the parties' contractual intent,[53] the parties' course of performance may be some of "the most persuasive evidence of the [meaning of the] parties' agreement."[54] In this case, Defendants' performance under the Pricing Formula suggests that they intended to include land held by ESDC indirectly through LLCs within the meaning of "any real estate held by" ESDC. Specifically, Defendants (1) included the value of real estate held indirectly by ESDC in LLCs in their July 31, 2008 calculations regarding the adjusted net book value owned by Gene as of the Valuation Date,[55] (2) told McKennon, when they hired him to appraise the value of real estate held by ESDC, to value "the real property held through the LLCs" and not to evaluate the partnership interests,[56] and (3) stipulated on May 6, 2009 to the fair market values of several pieces of real estate held through LLCs, including Central DE, Glasgow Pines JV,

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53 *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 n.11 (Del. 1997).

54 *See Pers. Decisions, Inc. v. Business Planning Sys., Inc.*, 2008 WL 1932404, at *1 (Del. Ch. May 5, 2008) (citing RESTATEMENT OF CONTRACTS (SECOND) § 202 cmt. g (2008)).

55 PX 33-34; T. Tr. 287-88 (McKennon).

56 PX 32; T. Tr. 284 (McKennon).

and New Milton Village, indicating that they intended such values to be included in determining the value of Gene's ESDC stock interest.[57] In light of these actions, I find that Richard and Francis understood and intended that land held by ESDC through LLCs was included within the phrase "any real estate held by" ESDC. Consequently, I reject Defendant's argument that the fair market value of land so held should be excluded from the valuation of Gene's ESDC stock.

2. Land subject to an option to purchase

The next question before me is whether land for which ESDC has only an option to purchase constitutes "real estate held by" ESDC. This question only affects the valuation of Vines Creek. Gene argues that, according to customary real estate practices, property subject to an option to purchase must be considered property "held by" ESDC and included in the calculation of ESDC's stock value. Gene further asserts that the events that gave rise to the Pricing Formula, including the parties' prior conduct, support this interpretation.[58] Defendants, however, deny that an option contract is "real estate,"

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57 PRB Ex. A.

58 In this regard, Gene claims the intended purpose of the Amended Stockholder Agreement is "to ensure the ESDC stock price reflects the full value of all land held by ESDC." POB 25. Gene also testified that he always considered options held by ESDC to be part of its real estate assets because ESDC was "the equitable owner and . . . controlled the property." T. Tr. 21.

contending instead that it is merely an executory interest that may be exercised at some point in the future to purchase real property.[59]

Because an option to purchase property does not fit within the plain meaning of "real estate," I hold that Gene is not entitled to have his stock value adjusted based on the fair market value of Vines Creek. As noted above, "real estate" is "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land."[60] This Court will not manufacture an ambiguity where one does not exist. Here, nothing in the record suggests that I reasonably may consider an option to purchase property to be "real estate" within the meaning of the Pricing Formula. Rather, an option contract to purchase land merely grants its holder the *right* to purchase property under the conditions established in that contract, which right the holder may or may not exercise. Indeed, the evidence shows that ESDC's exercise of an option to purchase property is not a foregone conclusion in that, historically, ESDC has let multiple options it held terminate without exercising them.[61]

I find, therefore, that ESDC did not hold Vines Creek directly or indirectly within the meaning of the Formula on the Valuation Date. Thus, Vines Creek is not "real estate held by" ESDC and need not be marked up to fair market value.

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59 *See Heritage Homes of De La Warr, Inc. v. Alexander*, 2005 WL 2173992, at *2 n.7 (Del. Ch. Sept. 1, 2005).

60 BLACK'S LAW DICTIONARY 1255 (8th ed. 2004).

61 DX 12; Tr. 197-98 (Enderle).

C. Meaning of "Sales Expenses"

Defendants seek to deduct a transfer tax from the value of Glasgow Pines JV and a sales commission from the value of several pieces of residential property owned by ESDC. Defendants also urge the Court to apply a "partial interest discount" to the value of land held by ESDC through its joint venture entities and deduct construction "costs to complete." According to Gene, the Amended Stockholder Agreement does not authorize the deduction of either of these items. To resolve these disputes, I first examine the Amended Stockholder Agreement to determine the meaning of the phrase "sales expenses."

As to items that may be deducted from the fair market value of a piece of property, the Pricing Formula provides only that the "adjusted net book value" shall be the "difference between the book value" of ESDC real estate and "the fair market value of such real estate **net of sales expenses**."[62] Gene subjectively understands "sales expenses" to include "the expenses that show up on the settlement sheet . . . [a]nd generally . . . that's the sales commissions and the transfer tax and maybe some recording fees."[63] When Gene and his brothers added this phrase to the Amended Stockholder Agreement, however, they did not discuss exactly what expenses it would include.[64]

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62 *Julian II*, 2009 WL 1211642, at *2-3 (emphasis added).

63 T. Tr. 15.

64 T. Tr. 66 (Gene).

Defendants offered no evidence supporting a different definition of "sales expenses" and openly accepted Gene's definition.[65] Hence, I, too, accept Gene's definition and hold that the phrase "sales expenses," as used in the Pricing Formula, includes sales commissions, transfer taxes, and recording fees, where applicable.

Having settled on this definition, however, I still must determine several other issues. Those are: whether Glasgow Pines JV is subject to real estate transfer taxes; whether sales commissions were paid on residential properties held by ESDC; and whether the Pricing Formula allows ESDC to discount the value of property held by an LLC or deduct other costs not included in the definition of "sales expenses."

1. Real estate transfer taxes on Glasgow Pines JV

Defendants argue that Gene's valuations improperly failed to deduct "real estate transfer taxes"; yet, they provided no specifics.[66] But, from their submissions to the Court, it appears Defendants contend that Gene should have deducted a transfer tax from the value of Glasgow Pines JV. Thus, I focus on that entity.[67]

Gene argues that no transfer tax can be deducted from the value of Glasgow Pines JV because 30 *Del. C.* §§ 5401-5415 (the "Transfer Tax Statute") does not apply to the

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65 DAB 33.

66 DAB 33.

67 To the extent Defendants argue that Gene did not properly deduct a transfer tax from the value of other properties, I consider this argument waived because Defendants failed to raise it in a clear and timely fashion.

sale of an interest in an LLC that does not itself hold title to the disputed real estate.[68] Essentially, through this argument, Gene suggests that the buildings and improvements owned by Glasgow Pines JV do not constitute "real estate" for purposes of the Transfer Tax Statute. In doing so, however, Gene undercuts his earlier argument that the value of Glasgow Pines JV must be marked up to fair market value because ESDC indirectly holds real estate through its interest in Glasgow Pines JV.

Because Gene has not shown that Glasgow Pines JV should be treated differently than the other LLC interests owned by ESDC, from which a transfer tax has been deducted, I hold that a transfer tax also should be deducted from the calculation of the fair market value of Glasgow Pines JV.

2. Sales commissions on residential properties

The parties dispute the propriety of deducting a sales commission with respect to nine residential properties: Rothwell Village, Stonefield, Videre Spot Lots, Elk Mills, Videre Woods, New Milton Village, Little Falls II, Cann Village, and Milltown Village. Defendants stipulated to take out any "brokerage commission" as to Cann Village and Milltown Village, however, because the lots in these two properties "were to be sold under a contract between ESDC and Benchmark."[69]

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68 *See supra* note 25; T. Tr. 35 (Gene). Glasgow Pines JV holds title to the buildings and improvements making up the Sunset Station Shopping Center and leases the land under that shopping center from ESDC.

69 T. Tr. 4-5 (Counsel for Defendants).

As to the remaining properties in question, Gene avers that ESDC did not use brokers on the sale of residential lots to builders and, thus, no sales commission should be deducted from the fair market value of those properties.[70] Indeed, "no sales agents were used for" the sale of residential properties.[71] Defendants did not rebut this testimony; instead, they challenge Gene's argument as "non-textual." There is no dispute that "sales commissions" fall within the definition of "sales expenses."[72] Nevertheless, if the parties would not have expected to pay any commissions on residential properties, no such expense should be deducted. Because Gene adduced evidence that sales commissions generally were not paid on residential properties and Defendants failed to introduce any persuasive evidence to the contrary, I find that all such deductions must be eliminated as to the properties in contention.[73]

3. Discounts on property held by ESDC through joint venture entities

Having determined that "real estate held by" ESDC includes land held through interests in joint venture entities,[74] the question remains whether the Court should apply a

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70 T. Tr. 39-40, 47, 53 (Gene). Gene testified that "in the development industry . . . residential-improved properties . . . were sold directly to the home builder or the home builder developer." T. Tr. 40.

71 T. Tr. 62 (Gene).

72 *See supra* Part II.C.

73 Thus, Defendants may not deduct a sales commission for Rothwell Village, Stonefield, Videre Spot Lots, Elk Mills, Videre Woods, New Milton Village, Little Falls II, Cann Village, or Milltown Village.

74 *See supra* Part II.B.1.

discount to the value of such land to reflect the inability of ESDC unilaterally to sell that property. This question affects valuation of Glasgow Pines JV, New Milton Village, Little Falls II, Central DE, and 2026 Ventures.

Gene contends that the plain language of the Amended Stockholder Agreement allows only for deduction of sales expenses from the fair market value of ESDC real estate and does not contemplate any "partial interest discount" for land held by ESDC through an LLC. In support of their contrary view, Defendants rely on the opinion of their valuation expert that the value of land held through a joint venture entity must be discounted to reflect the fact that ESDC did not have a free hand to sell the property.[75]

Based on my review of the language of the Pricing Formula and the evidence and arguments presented by the parties, I am convinced that the parties did not intend any "partial interest" or other discount to apply to valuation of real property held by ESDC. Rather, they opted to deduct only "sales expenses" from the fair market value of such property. The fact that Defendants did not even suggest a partial interest discount until relatively late in this proceeding reinforces this conclusion. Thus, I reject Defendants' effort to discount the value of land held by ESDC through its joint venture entities.

4. Other costs

Other open issues pertain to the valuation of Porter Road Business Park, where Defendants seek to deduct from the property's stipulated fair market value $800,100 in construction costs "to complete" the project, and Stonefield, where Gene seeks to alter

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[75] T. Tr. 310 (McKennon).

the book value of the property reflected on the ESDC balance sheets. Gene contends that the Pricing Formula does not permit deduction of the alleged costs to complete because (1) they are not "sales expenses" and (2) the parties already stipulated to the fair market value of both properties. Defendants respond that they were entitled to deduct the "cost to complete" from Porter Road Business Park's stipulated value because that value represents the fair market value of Porter Road Business Park as completed. Additionally, Defendants argue that the deduction from the book value of Stonefield reflected on ESDC's balance sheet was determined by ESDC's accountant and Gene has no right under the Pricing Formula to challenge that determination.

The parties filed an Amended Stipulation as to the Fair Market Value of Certain ESDC Properties ("Amended Stipulation") on May 6, 2009. This Stipulation established the "fair market values" for several pieces of ESDC property, but does not indicate whether the parties meant those stipulated amounts to represent the value of each piece of property as completed or as it existed on the Valuation Date (December 31, 2005) or some other value. The Amended Stipulation, however, did explicitly preserve Defendants' right to argue that such values need to be reduced by "the estimated value of sales expenses, improvements, *uncompleted improvements*, warranty costs and anticipated expenses, loans and any taxes."[76] Based on this reservation as to "uncompleted improvements," therefore, Defendants clearly have the right to contend

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[76] PRB Ex. A, Amended Stipulation (emphasis added).

that the "costs to complete" Porter Road Business Park should be deducted from the stipulated value of that property.

To succeed on this argument, Defendants must present evidence that the parties intended the value of the properties listed in the Amended Stipulation to represent their value as completed and then show how the costs they seek to deduct relate to the completion of the property. Yet, Defendants failed to present any such evidence as to either of those points. Indeed, though the parties stipulated to the values of thirteen properties, Defendants only seek to deduct completion costs from Porter Road Business Park. Because Defendants failed to meet their burden to show that there is something unique about Porter Road Business Park justifying the deduction of "costs to complete" from the stipulated value of that property, I hold that Defendants may not deduct such costs.

Further, regarding the book value of Stonefield, Defendants correctly argue that Gene has no right under the Pricing Formula, or any other part of the Amended Stockholder Agreement, to alter the book value listed for a specific piece of property on the ESDC balance sheet.[77] Consequently, the book value of Stonefield as determined by ESDC's accountant must stand.

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[77] DX 11.

D. Basis on Which One Party may Reject an MAI Appraisal Submitted by the Other

As part of their effort to compensate Gene for the value of his ESDC stock, Defendants and ESDC submitted MAI appraisals of ESDC's real estate prepared by Robert McKennon and, in one case, Jeffrey Merrick.[78] Under the dispute resolution mechanism prescribed in the Pricing Formula, Gene submitted his own MAI appraisals on several pieces of property prepared by Douglas Nickel. Now, Gene urges the Court to disregard the appraisal of Elk Mills submitted by Merrick and approved by McKennon, and Defendants seek to invalidate Nickel's appraisals of Cann Village, First State Golf Center, Milltown Village, Vines Creek, and Elk Mills. As discussed below, the dispute resolution mechanism provided for in the Pricing Formula is analogous to an arbitration; therefore, I have limited my examination of each appraisal to determining whether it was the product of fraud, bad faith, partiality, or deception. Further, because none of the parties showed the existence of any of those circumstances, I have no reason to overturn any of the MAI appraisals submitted by either party.

The Pricing Formula provides that the fair market value of ESDC's real estate "shall be determined by a qualified MAI real estate appraiser."[79] If a Selling Stockholder is not satisfied with the appraisal obtained by ESDC, that Stockholder may obtain his

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78 Merrick appraised Elk Mills because McKennon, Defendants' appraiser for most of the relevant property, was not licensed to appraise property in Maryland. T. Tr. 256 (McKennon).

79 *See supra* note 18.

own MAI appraisal and the fair market value of the property "shall be computed as the average of the values determined by" those two appraisals.[80] As the Amended Stockholder Agreement provides no mechanism for resolving disputes over the validity of a particular MAI appraisal, the question arises whether, and under what circumstances, one party may challenge an appraisal submitted by another.

Gene and Defendants all agree that, when contracting parties submit disputed issues to third-party resolution of the kind contemplated by the Pricing Formula, that resolution has a binding effect similar to that of an arbitration award.[81] I concur, particularly here where the parties established a quick, clear, binding, and relatively simple dispute resolution mechanism, presumably to prevent costly litigation. Arbitration admittedly differs from a contractually-defined appraisal process in some respects.[82]

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80 *Id*.

81 *See* POB 27 (citing *Closser v. Penn Mut. Fire Ins. Co.*, 457 A.2d 1081, 1087 (Del. 1983) ("[W]e construe the appraisal provisions of the [insurance] policy, if invoked, to provide a mandatory form of arbitration, precluding recourse to the courts.")); DAB 30 (same); *see also New Castle Cty. v. Atl. Aviation Corp.*, 1980 WL 273619, at *1 (Del. Ch. June 19, 1980) (finding an appraisal process involving three appraisers, one appointed by each party and the third appointed by the other two, "similar to arbitration.").

82 *See* 4 AM. JUR. 2d Alternative Dispute Resolution § 3 (2004) ("An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties upon which award a judgment may be entered, whereas an agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action before the court."). Such differences have led some Delaware courts to suggest that the ability to review contractually-provided appraisals is greater than the ability to review arbitration awards. *See Morris, Nichols, Arsht & Tunnell v. R-H Int'l., Ltd.*, 1987 WL 33980, at *4 (Del. Ch.

Nevertheless, when the parties establish a binding dispute resolution procedure similar to arbitration, courts typically should not interfere with the decision resulting from that procedure other than in the most egregious circumstances, *i.e.*, situations similar to those where the Delaware Uniform Arbitration Act ("DUAA") allows a court to modify or vacate an arbitral award.[83] Moreover, both Gene and Defendants explicitly acknowledged in this case that an MAI appraisal may only be discarded or altered by the Court where there is evidence that the appraisal is the product of fraud, bad faith, partiality, or deception.[84]

Dec. 29, 1987) ("[T]his Court has held that an appraisal procedure is not the equivalent of arbitration and that this Court is not limited in its review of an appraisal as it would be in the case of arbitration."); *Collison v. Deisem*, 265 A.2d 57, 59 (Del. Ch. 1970) (citing *Ruckman & Hansen, Inc. v. Del. River & Bay Auth.*, 244 A.2d 277 (Del. 1968)) ("The policy of our law is to enforce the decision of arbitrators and their decision, in the absence of fraud, is final and will not be re-examined by a court. But this case does not involve arbitration and it is worth pointing out that such a proceeding differs fundamentally from appraisal.").

83 Specifically, under the DUAA, this Court may vacate an arbitral award only if (1) the award was procured by fraud or other undue means, (2) the arbitrator exhibited clear partiality or corruption, (3) the arbitrator exceeded or imperfectly executed his authority, (4) the arbitrator refused to appropriately postpone a hearing, hear material evidence, or guarantee adequate notice or due process, or (5) no valid arbitration agreement existed, the terms of that agreement were not complied with, or the arbitrated claim was barred by a time limitation. 10 *Del. C.* § 5714. Similarly, the Court may modify an arbitral award only where (1) there was an evident miscalculation of figures or other mistake in the description of a person, place or thing referred to in the award, (2) the arbitrators ruled on a matter not submitted to them, or (3) the award is imperfect in a matter of form, not affecting the merits of the controversy. *Id.* § 5715.

84 *See* POB 27; DAB 30.

Thus, I now examine the parties' challenges to the merits of the five disputed MAI appraisals to see whether any of those appraisals resulted from fraud, bad faith, partiality, or deception.

1. Elk Mills

Gene contends that Defendants' MAI appraisal of Elk Mills must be rejected because Defendants did not fully inform their appraiser regarding the status of the regulatory and development approvals for Elk Mills, thereby causing a significant undervaluation of that property. According to Gene, the Elk Mills valuation resulted from Defendants' "bad faith," "manipulat[ion] of the system," and "frustrat[ion of] the proper implementation of the dispute resolution provision."[85] Defendants dismiss these criticisms as hollow rhetoric because Gene provided no evidence to show that Defendants failed to inform their appraiser about the status of ESDC's applications for approvals relating to Elk Mills. I agree with Defendants on this point.

While ESDC's valuation of Elk Mills does not mention the application approvals Gene refers to,[86] Gene did not prove that Defendants withheld information from Merrick about the status of the applications. Indeed, McKennon informed Merrick that "there had been some development plans filed" and that Merrick would need to get more information on them from Richard and Francis.[87] Even if Merrick failed to obtain any

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85 POB 28, 30-31.

86 DX 7 at DEF 2-00005.

87 T. Tr. 302.

additional information about relevant plans, Gene did not show that such failure resulted from fraud, bad faith, or deception on the part of any of the Defendants. Moreover, it appears to have been known as of the Valuation Date and at the time of the appraisal that the Elk Mills property was not within a sewer district under the applicable county master plan. Therefore, I have no basis to disregard Merrick's valuation of Elk Mills under the limited review of appraisals allowed in the circumstances of this case.

2. Defendants' challenges to the appraisals of Cann Village, Milltown Village, First State Golf Center, Vines Creek, and Elk Mills

Defendants, in turn, urge the Court to disregard five of Gene's appraisals because they do not meet MAI standards. Specifically, Defendants assert that Nickel, Gene's appraiser, used inflated valuation methods, made improper assumptions regarding the properties, and improperly relied on noncomparable sale transactions. According to Defendants, these errors should cause the Court to invalidate these appraisals or, alternatively, order Gene to correct them. In defense of the challenged appraisals, Gene accuses Defendants of improperly second-guessing those of Nickel's conclusions with which they disagree and argues that, in any event, this Court has no authority to review the substance of Nickel's decisions.

Just as with Gene's contentions regarding Elk Mills, Defendants have not adduced any evidence of bad faith, fraud, partiality, or deception on the part of Nickel or Gene. Absent such evidence, I have no reason to tamper with the results of the parties' chosen dispute resolution process, even though another appraiser may have proceeded differently

or reached a different conclusion than Nickel.[88] Thus, I decline to invalidate or modify any of the challenged appraisals submitted by the parties. The fair market value of the properties in question—for purposes of valuing Gene's ESDC stock—must be determined by averaging the appraised values submitted by each party.

E. Ancillary Issues

1. Whether the parties stipulated to the value of Little Falls II

Gene argues that Defendants must accept Gene's $2.8 million appraisal of Little Falls II because the parties never agreed to a stipulated value for that property and Defendants failed to offer their own appraisal.[89] Specifically, Gene claims that while he proposed a stipulated value of $2.5 million, Defendants responded with a counteroffer that terminated his offer, after which Gene obtained his own appraisal. Defendants contend, however, that they accepted Gene's proposal to stipulate to a $2.5 million value on April 1, 2009 and that Gene is now bound by that value.

An offer to stipulate that is accepted by the other party will create a binding, enforceable contract.[90] No such contract arose in this case, however. On February 13,

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88 *See, e.g., Kuhn v. Hess*, 2000 WL 1336780, at *1 (Del. Ch. Aug. 16, 2000); *Ruggiero v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 499459, at *6 (Del. Ch. June 23, 1999) ("[A]rbitration practice is designed as an alternative dispute resolution mechanism and is intended to expedite, streamline, and efficiently resolve disputes in a manner which saves prospective litigants time and expense.").

89 T. Tr. 272-73 (McKennon).

90 *See Rockwell v. Rockwell*, 681 A.2d 1017, 1021 (Del. 1996); *Rowe v. Rowe*, 2002 WL 1271679, at *4 (Del. Ch. May 28, 2002).

2009, Gene offered to stipulate to a $2.5 million value for Little Falls II.[91] On March 24, 2009, Defendants responded with a counteroffer that Gene did not accept.[92] Defendants then attempted to accept Gene's original $2.5 million offer by email on April 1.[93] But, as a matter of law, Defendants' March 24 counteroffer terminated their power to accept Gene's February 13 offer to stipulate to the value of Little Falls II.[94]

Though admitting that the counteroffer terminated the original offer, Defendants contend that Gene renewed his offer to stipulate by responding that his proposed value was "still $2.5 million."[95] Defendants, however, have not shown by a preponderance of the evidence that Gene revived his offer before Defendants' purported "acceptance" on April 1, 2009, or at any time thereafter. Thus, the parties did not agree to stipulate to the value of Little Falls II. Further, I hold that Defendants are estopped from submitting an

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91 PX 11.

92 *Id*.

93 *Id*.

94 *See PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1015 (Del. Ch. 2004) ("In order to constitute an 'acceptance,' a response to an offer must be on identical terms as the offer and must be unconditional. A response to an offer that is not on the terms set forth by the offeror constitutes a rejection of the original offer and a counteroffer.") (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 59, 202 (1981)); RESTATEMENT OF CONTRACTS (SECOND) § 39 (2008) ("An offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.").

95 PX 11.

appraisal for Little Falls II at this late date and that Gene's MAI appraisal of that property at $2.8 million is, therefore, controlling.

2. Whether Gene may "accept" an appraisal provided by ESDC after obtaining his own

In regard to this issue, Gene claims that McKennon's appraisal of Videre Woods was "somewhat confusing" and that, thinking McKennon's value too low, he obtained his own appraisal. After realizing that ESDC's appraisal was approximately $1.8 million higher than he originally thought, Gene decided not to introduce evidence of his appraisal at trial. Instead, he sought to "accept" ESDC's original appraisal and disregard his own. Defendants contend that, under the Pricing Formula, Gene forfeited his right to "accept" ESDC's appraisal when he obtained his own appraisal of the same property.

The Pricing Formula provides that a Selling Stockholder may choose to accept ESDC's submitted appraisal or, if it is unhappy with that appraisal, may appoint its own MAI appraiser, at its expense. If the Selling Stockholder obtains its own appraisal, the Formula states that the fair market value "shall be the average of the values determined by" the two appraisers.[96] I do not read this part of the Formula as meaning that, after obtaining its own MAI appraisal on a particular piece of property, the Selling Stockholder has reached a "point of no return" and must submit that appraisal. Rather, I interpret the Formula's dispute-resolution mechanism to mean that the averaging procedure only comes into play if the Selling Stockholder submits its appraisal to ESDC, not upon the

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[96] *See supra* note 18.

appointment of a separate appraiser. As Defendants do not argue that Gene actually submitted his appraisal to ESDC under the Pricing Formula, the gross fair market value of Videre Woods is the value set forth in ESDC's appraisal.

3. Whether the fair market value of Milltown Village may be reduced based on a contracted sale price with Benchmark

ESDC's appraisal report for Milltown Village places the fair market value of the real estate "as is" at $6.4 million.[97] The report, however, also lists the value of the real estate at $4.1 million based on the terms of a land sale contract with Benchmark. Gene contends that the $6.4 million value must be used because the Pricing Formula requires that real estate be valued at its fair market value, "not the amount set by a self-dealing, insider transaction."[98] Gene contends that a "contract price" differs from the market price, particularly in a self-dealing transaction. In response, Defendants assert that the fair market value of property encumbered by a contract must reflect the terms of that contract. Thus, Defendants claim the $4.1 million value is the only one Gene can accept.

While the price set in a contract with a bona fide, arms-length purchaser may provide evidence of a property's fair market value,[99] the price set in an insider contract with a related company typically does not. Related companies entering a sale contract

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97 DX 8.

98 POB 32.

99 *Rudnitsky v. Rudnitsky*, 2001 WL 1671149, at *7 (Del. Ch. Dec. 20, 2001) ("The only evidence of the property's fair market value, *i.e.*, what a willing seller will sell and what a willing buyer will offer for it, is that the real estate was under contract to a bona fide purchaser for $500,000.").

may have any number of reasons, financial or otherwise, for choosing to allocate the benefits and burdens of that transaction between the parties to the contract as they do. As a result, such an allocation may not reflect market realities and generally would not constitute reliable evidence of the fair market value of the property being sold. But in this case, Gene stood on both sides of the contract in question and, as a continuing Benchmark shareholder,[100] stands to benefit if the contract favors Benchmark more than ESDC. In response to this contention, Gene avers that contracts similar to the one between ESDC and Benchmark for the sale of Milltown Village were later "adjust[ed] . . . to a fair value in the rising real estate market of 2005."[101] Gene has not adduced evidence, however, that such an adjustment was ever made to the value of the contracted sale price for Milltown Village. Moreover, it would be difficult for ESDC to increase the contract price to Benchmark now, because Gene would only be on the Benchmark side of that transaction and could be adversely affected by the change. Thus, I hold that the $4.1 million appraisal of Milltown Village submitted by ESDC is appropriate and should be averaged with the $4.3 million appraisal submitted by Gene.

4. Whether Gene may adjust the book values of certain LLCs submitted by Defendants

At trial and again at argument, Gene urged the Court to make certain adjustments to the book values of four LLCs in which ESDC held an interest: New Milton Village,

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100 *Julian I*, 2008 WL 2673300, at *20.

101 PRB 17 (citing T. Tr. 48-52 (Gene)).

Little Falls II, Glasgow Pines JV, and Central DE. For instance, Gene argues that Defendants included expenditures totaling $840,280 in the book values of two properties that were already accounted for when ESDC paid Gene the unadjusted book value of his interest in ESDC.[102] Defendants oppose making any adjustments to the contested amounts because they represent the book values of ESDC's percentage interest in the properties held by each of these entities and Gene has provided no evidence supporting the adjustments he seeks to these numbers. I find Defendants' argument persuasive.

Gene bears the burden of showing the basis for any deviation from the value of property held by these LLCs as reflected on the LLC's books. In this instance, however, Gene did not meet his burden. Although Gene conclusorily alleged that Defendants "double counted" certain charges, he did not present any expert testimony or other probative evidence regarding the proper handling of ESDC's interests in the LLCs at issue.[103] Gene simply did not address the intricacies of such indirect interests from an accounting standpoint and failed to show that any adjustments should be made to the book value of the property offered by Defendants. Therefore, I will use the unadjusted book values of New Milton Village, Little Falls II, Glasgow Pines JV, and Central DE submitted by Defendants.

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102 *See supra* note 10.

103 *See* T. Tr. 220-25 (Enderle).

III. CONCLUSION

For the foregoing reasons, I hold as follows: First, real estate held by ESDC indirectly through its LLCs does constitute "real estate held by" ESDC for the purpose of valuing Gene's ESDC stock under the Pricing Formula, while options to purchase land do not; second, Defendants may not deduct transfer taxes from Glasgow Pines JV or sales commissions from the residential properties listed in Part II.C.2; third, Defendants may not apply partial interest discounts to the value of ESDC land held in LLCs, nor may they deduct "costs to complete" from the stipulated fair market value of Porter Road Business Park; fourth, Gene may not alter the book value of Stonefield as represented on ESDC's balance sheet; fifth, the value of Little Falls II is $2.8 million; sixth, the value of Videre Woods is the value of the appraisal submitted by ESDC; seventh, the value of Milltown Village must be calculated by taking the average between the $4.1 million price set in the contract with Benchmark and the $4.3 million appraisal submitted by Gene; and eighth, because Gene has not shown a need for adjustments to the book value of New Milton Village, Little Falls II, Glasgow Pines JV, or Central DE attributable to ESDC's interest in those LLCs, I accept the book value of the property of those LLCs submitted by Defendants.

Consequently, Gene is entitled to receive $4,182,228 as an adjustment to net book value to reflect the difference between the book value of that real estate and its fair market value net of sales expenses. I determined this amount using the calculations set forth in Exhibit A to this Opinion. Counsel for Plaintiff shall submit, on notice, a

proposed form of final judgment reflecting these rulings within ten days of the date of this Opinion.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EUGENE M. JULIAN, Plaintiff, v. RICHARD J. JULIAN and FRANCIS R. JULIAN, Defendants/ Counterclaim Plaintiffs EASTERN STATES DEVELOPMENT COMPANY, INC., Nominal Defendant,	)	Civil Action No. 1892-VCP

EXHIBIT A

1. Porter Road Business Park:

Fair Market Value:	$2,496,000	[Stipulated value]
Book Value:	($2,049,176)	
Sales Commission (5%):	($124,800)	
Transfer Tax (1.5%):	($37,440)	
Net Proceeds:	$284,584	

2. Rothwell Village:

Fair Market Value:	$3,100,000	[Stipulated value]
Book Value:	($1,793,588)	
Transfer Tax:	($46,500)	
Net Proceeds:	$1,259,912	

3. Stonefield:

Fair Market Value:	$95,000	[Stipulated value]
Book Value:	($200,199)	
Transfer Tax:	($1,425)	
Net Proceeds:	$(106,624)	

4. Videre Spot Lots:

Fair Market Value:	$400,000	[Stipulated value]
Book Value:	($178,011)	
Transfer Tax:	($6,000)	
Net Proceeds:	$215, 989	

5. Milltown Village:

Fair Market Value:	$4,200,000	[Average value of appraisals]
Book Value:	($2,977,618)	
Transfer Tax:	($63,000)	
Net Proceeds:	$1,159,382	

6. Christiana Golf Center:

Fair Market Value:	$300,000	[Average value of appraisals]
Book Value:	($3,024)	
Sales Commission:	($15,000)	
Transfer Tax:	($4,500)	
Net Proceeds:	$277,476	

7. Elk Mills:

Fair Market Value:	$3,275,000	[Average value of appraisals]
Book Value:	($141,276)	
Transfer Tax:	($49,125)	
Net Proceeds:	$3,084,599	

8. Cann Village:

Fair Market Value:	$5,693,054	[Average value of appraisals]
Book Value:	($3,569,430)	
Transfer Tax:	($85,396)	
Net Proceeds:	$2,038,228	

9. Videre Woods:

Fair Market Value:	$4,657,272	[Value of ESDC appraisal]
Book Value:	($3,364,760)	
Transfer Tax:	($69,860)	
Net Proceeds:	$1,222,652	

10. New Milton Village:

Fair Market Value:	$2,067,930	[ESDC Share of stipulated value]
Book Value:	($1,923,223)	
Transfer Tax:	($31,019)	
Net Proceeds:	$113,688	

11. Little Falls II:

Fair Market Value:	$1,400,000	[ESDC Share of stipulated value]
Book Value:	($510,874)	
Transfer Tax:	($21,000)	
Net Proceeds:	$868,126	

12. Glasgow Pines JV:

Fair Market Value:	$5,049,000	[ESDC Share of stipulated value]
Book Value:	($2,192,154)	
Sales Commission:	($252,450)	
Transfer Tax:	($75,735)	
Net Proceeds:	$2,528,661	

13. Central DE:

Fair Market Value:	$1,656,250	[ESDC Share of stipulated value]
Book Value:	($630,014)	
Sales Commission:	($82,813)	
Transfer Tax:	($24,844)	
Net Proceeds:	$918,579	

14. Total Net Proceeds:

Net Proceeds (Contested Properties):	$13,865,252
Net Proceeds (Uncontested Properties)[104]:	$965,341
Total Net Proceeds:	$14,830,593
Gene's Share (28.2%):	$4,182,228

[104] Includes 500 Porter Road, B&C Island, and Glasgow Pines Land.