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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

DAVID GREENBERG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
LAND DELEOT; JOHNSON PHILLIPS;	)	
DJL PARTNERS, LLC;	)	
DJL PARTNERS MT. JULIET, LLC;	)	**Case No. 23-0978-BC**
DJL PARTNERS THOMPSON LANE;	)	
DJL PARTNERS WEST NASHVILLE, LLC;	)	
DJL PARTNERS MURFREESBORO, LLC;	)	
DJL PARTNERS COOL SPRINGS, LLC;	)	
DJL PARTNERS HUNTSVILLE, LLC;	)	
and DJL PARTNERS SARASOTA,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter came before the Court on August 8, 2024, upon the Plaintiff and DJL Entity Defendants' cross-motions for summary judgment. Each seek summary judgment on Plaintiff's breach of contract claim against the DJL Entities[1], asserting that there are no disputed material facts and the Court can rule in their favor as a matter of law. What is not before the Court are Plaintiff's claims against the individual defendants for interference and inducement of breach, breach of fiduciary duty and breach of contract. Both sets of parties to the motions provided the Court extensive briefing as well as factual materials including depositions, declarations, written correspondence between the parties and their appraisers/consultants, and the operable agreements. The Court has reviewed these materials, and taken into consideration the lengthy hearing with counsel, and finds as follows.

[1] For clarity, "DJL Entities" refers to: DJL Partners, LLC; DJL Partners Mt. Juliet, LLC; DJL Partners Thompson Lane; DJL Partners West Nashville, LLC; DJL Partners Murfreesboro, LLC; DJL Partners Cool Springs, LLC; DJL Partners Huntsville, LLC; and DJL Partners Sarasota.

UNDISPUTED MATERIAL FACTS

Plaintiff David Greenberg, and Defendants Land Deleot and Johnson Phillips, each own equal 1/3 shares of the DJL Entities. The DJL Entities operate six hair salons in Tennessee, Florida and Alabama. In the summer of 2022, the individual parties decided to part ways and entered an "Agreement As To Repurchase Of Greenberg Interests" setting out the terms of their agreement for Greenberg to sell to Deleot and Phillips (the "Repurchase Agreement"). The operable language, for the purposes of this litigation, involves how the valuation of the DJL Entities would be determined, as follows:

> 2. The purchase price for Greenberg's Interests in the DJL Entities shall be the "Fair Market Value per Unit." For purposes of this Agreement, the "Fair Market Value per Unit" shall mean an amount equal to 33.33% of the fair market value of the DJL Entities, viewing each of the DJL Entities as a going concern as of June 20, 2022, and determined as follows:
>
> (a) The Fair Market Value per Unit shall be determined by an appropriately certified and accredited appraiser of recognized regional standing with at least ten (10) years of experience in business valuations who shall be selected as follows:
>
> (i) Either Greenberg, Deleot and Phillips shall unanimously agree on an appropriately qualified appraiser within twenty (20) days of the Effective Date of this Agreement, who shall determine the Fair Market Value per Unit within thirty (30) days of such appraiser's appointment and whose determination of the Fair Market Value per Unit shall be final and binding on the Parties; provided, that the fees and expenses of such appraiser shall be borne 50% by Greenberg and 50% by the DJL Entities; or
>
> (ii) If Greenberg, Deleot and Phillips cannot unanimously agree on an appropriately qualified appraiser within twenty (20) days of the Effective Date of this Agreement, then each of Greenberg, on the one hand, and Deleot and Phillips, on the other, shall appoint a certified and accredited appraiser of recognized regional standing with at least ten (10) years of experience in business valuation (the "Greenberg Appraiser" and the "Deleot/Phillips Appraiser") within thirty (30) days of the Effective Date of this Agreement, and each of the Greenberg Appraiser and the Deleot/Phillips Appraiser shall determine the Fair Market Value per Unit, provided, that the fees and expenses of the Greenberg Appraiser shall be paid by Greenberg and the fees and expenses of the Deleot/Phillips Appraiser shall be paid by the DJL Entities. If the Greenberg Appraiser and the Deleot/Phillips Appraiser agree on the Fair Market Value per Unit for the DJL Entities, then their determination of the Fair Market Value per

> Unit shall be final and binding on the Parties. If the Greenberg Appraiser and the Deleot/Phillips Appraiser cannot agree on the Fair Market Value per Unit for the DJL Entities for any reason within thirty (30) days of the last of them to be appointed, then such appraisers shall appoint another appropriately qualified, independent appraiser (the "Third Appraiser"), who shall determine the Fair Market Value per Unit within thirty (30) days of such Third Appraiser's appointment and whose determination of the Fair Market Value per Unit shall be final and binding on the Parties, provided, that the fees and expenses of the Third Appraiser shall be borne 50% by Greenberg and 50% by the DJL Entities.
>
> (b) In determining the Fair Market Value per Unit, the appraiser(s) shall view the DJL Entities as a going concern, without giving regard to any restrictions on transfer, and as if all securities of the DJL Entities convertible into, or exercisable or exchangeable for, equity securities of the DJL Entities had been so converted, exercised or exchanged, with no discounts being considered for minority ownership.
>
> (c) In determining the Fair Market Value per Unit, the appraiser(s) shall execute a non-disclosure agreement in form satisfactory to the Parties and not to use or disclose any confidential information of the Parties provided to such appraiser(s) in the course of his or her appraisal except for purposes of the appraisal.
>
> (d) The Parties agree to provide the appraiser(s) with all documents and information reasonably requested by the appraiser(s) for purposes of the appraisal contemplated herein, and all documents and information provided to the appraiser(s) shall be maintained in a secure electronic "data room" that shall be accessible by all the Parties and the appraiser(s).
>
> (e) Each of Greenberg, Deleot and Phillips agree to make themselves available as reasonably requested by the appraiser(s).

The Repurchase Agreement reflected that it was "jointly and fairly negotiated" and that the language "shall be construed as a whole according to its fair meaning and not strictly for or against any Party." *Id.* at ¶ 8. Further, that both sides had legal counsel who "fully advised" them of their "rights and responsibilities" and the legal effect of its terms. *Id.* at ¶ 9.

The parties to the Repurchase Agreement did not agree upon appraisers, rather they decided to have their own appraisers and engage in the process contemplated in 2(a)(ii). To update their agreement about fair market evaluation, and reflect the retention of two appraisers, they executed a First Amendment to the Repurchase Agreement effective October 3, 2022 (the "First

Amendment"). The First Amendment modified the Repurchase Agreement, in relevant part, as follows:

> 3. **Appraiser Selections**. Pursuant to Section 2(a)(ii) of the [Repurchase] Agreement, the Parties have each elected to select their own appraiser to determine the fair market value of the DJL Entities, and they are as follows:
>
> (a) The Greenberg Appraiser will be Glenn Perdue of Kraft Analytics, LLC, an affiliate of KraftCPAs, PLLC. . .
>
> (b) The Deleot/Phillips Appraiser will be Leo J. DeLisi, Jr. of DeLisi, Marvel & Ghree. . .
>
> 4. **Valuation of DJL Entities**. The Parties agree that the Greenberg Appraiser and the Deleot/Phillips Appraiser (the "Appraisers") will each prepare a valuation report setting forth the fair market value of the DJL Entities as of June 30, 2022 and value the DJL Entities as if they were a single business entity rather than each entity individually so that each of the Appraisers can prepare one report with a compiled appraised value which sets forth the fair market value of the DJL Entities and the Fair Market Value per Unit in order to determine the purchase price for the Greenberg's Interests as required by Section 2(a)(ii) of the [Repurchase] Agreement.

The First Amendment further reflected that the remainder of the Repurchase Agreement terms and conditions "remain unmodified and in full force and effect." *Id.* at ¶ 6.

Perdue and DeLisi provided their respective valuations. Perdue's valuation of the DJL Entities was $3,228,165. DeLisi's valuation of the DJL Entities was zero ($0.00). Neither party was in agreement with the other party's valuation, and thus they were contractually required to exercise the 2(a)(ii) option in the Repurchase Agreement to retain a "Third Appraiser" to determine the value of Greenberg's interest in the DJL Entities. Neither the Repurchase Agreement nor the First Amendment contained any parameters about how the third appraisal would be done other than those set out above.

By agreement, Kurt Myers with Myers Valuation Associates, LLC was then selected to act as the Third Appraiser to determine the fair market value of the DJL Entities. Myers was recommended by Perdue, who knew him from prior projects. The parties executed an engagement

letter with Myers and his firm on January 16, 2023 (the "Engagement Letter"). The Engagement Letter contains multiple parts, one being the letter, and the others being Standard Terms and Conditions and Engagement Requirements ("Ground Rules") specific to this engagement and party relationship. The Engagement Letter is lengthy, but the portions that are relevant for the purposes of this motion are as follows:

> We will perform a valuation and prepare a Summary Report of our opinions and findings. Our report is intended to express a conclusion of value of the fair market value of One Member Unit in DJL Partners, LLC and its affiliates as of June 30, 2022 on a controlling interest basis, without consideration of discounts for lack of marketability or control. The term *fair market value* is defined as follows:
>
> > The price at which the property would change hands between a willing buyer and a willing seller, neither being under a compulsion to buy or sell and both having reasonable knowledge of the relevant facts.

…

> **Delivery and Timing**
> Our ability to deliver a report is dependent upon our timely receipt of the required information. We will use reasonable efforts to meet any reasonable deadlines, but we do not provide assurance on the ability to meet deadlines. To facilitate our efforts, we request that you keep us timely informed and coordinate our schedules for important dates, such as trial, discovery cutoff, depositions, settlement conferences, and so forth. We intend to begin work on the engagement by February 15 and complete our report by March 15, assuming we have received all requested information.

…

> **Challenges to the Admissibility of Expert's Opinion**
> Because of the adversarial nature of any dispute, it is common that parties in litigation challenge the admissibility of an expert's opinion. You hereby acknowledge that Myers Valuation Associates, PLLC is being retained because its professionals satisfy the necessary requirements of knowledge, skill, experience, training, or education.
>
> You acknowledge that the opinions rendered by Myers Valuation Associates, PLLC are our good faith opinions supported by a reasonable amount of research and analysis, but it is only the unbiased judgment of Myers Valuation Associates, PLLC…

…

1. Standards of Performance

Our work will be prepared in accordance with the standards promulgated by the AICPA. All staff associated with our work are subject to the AICPA Code of Professional Conduct. . .

…

3. Conflicts of Interest

We have undertaken a reasonable review of our records to determine our professional relationships with the persons or entities you identified in order to comply with the "Conflicts of Interest" interpretation (AICPA, *Professional Standards*, ET sec.1.110). We are not aware of any professional conflicts of interest of relationships that would, in our sole discretion, preclude us from performing the above work for you.

We have been engaged from time to time by other law firms, both locally and nationally, and it is possible that we are or may become engaged by firms representing clients adverse to your client in this matter. We are not restricted from working on other, unrelated engagements involving the parties and law firms involved in this matter; however, all confidential information gained in this matter will be kept confidential.

…

7. Myers Valuation Associates, LLC's Responsibilities, Representations, and Limitations.

We have no financial interest or contemplated financial interest in the business or property that is the subject of this engagement, and we have no personal interest or bias with respect to the parties involved. Our compensation is not contingent on an action or event resulting from the analyses or conclusions in, or the use of, this engagement.

We, and our agents, will take whatever actions are necessary or appropriate for us to conduct the litigation support engagement, but we will keep you informed of our actions and progress throughout this engagement. If for any reason we are unable to complete the litigation support engagement, we will not issue a report as a result of the engagement.

Our opinions will represent our professional, unbiased opinions based on the data we are able to obtain within a reasonable time, using our best efforts. We will not audit, review, or compile any financial statements, forecasts, or financial data as part of this litigation support engagement. As such, we will not express an opinion or provide any form of assurance on the financial data provided as part of this engagement.

…

Engagement Requirements ("Ground Rules")

First, Mr. Kurt Myers will, as the third appraiser, provide a Conclusion of Value of the DJL Entities. The standard of value will be fair market value without discounts for marketability or control. The buyout will be the pro-rata portion of that fair market value without discounts.

…

Third, Mr. Myers can use whatever methods of valuation he determines to be appropriate, for a business like DJL Partners, LLC.

…

Fifth, Messrs. Phillips, Deleot, Greenberg and Shawn Madden are free to communicate with Mr. Myers as they see fit. Mr. Myers can accept or reject such input or communications as he sees fit.

Sixth, Mr. Delisi and Mr. Perdue may communicate with Mr. Myers, but may do so only if Mr. Myers initiates the communication.

Myers began his work sometime after February 15, 2023. He met with Greenberg via Zoom to obtain information about the DJL Entities. He also met with Sean Madden, the Chief Executive Officer of the DJL Entities, for 1.5 to 2 hours. Myers found Madden well-versed on the financial aspects of the DJL Entities.

On April 21, 2023, Perdue initiated contact with Myers about the status of his report. After that contact, Myers scheduled meetings with Perdue and DeLisi to engage in a substantive discussion about the valuation of the DJL entities. He spoke with each of them for about 30 to 60 minutes.

Deleot and Phillips, individually and through Madden and their counsel, repeatedly asked for an opportunity to meet with Myers. Myers did not believe it was necessary for him to speak with them because he did not believe they could provide more information than Madden had

already provided to him. Rather than respond to these requests, other than one email to "put off" Madden, Myers did not respond, either to accept or reject the invitation.

On June 9, 2023, Myers submitted a preliminary valuation report (the "Myers Valuation Report") by email to Winston Evans (as counsel for Greenberg) and to Talbott Ottinger (as counsel for Deleot, Phillips and the DJL Entities). In his email, he stated:

> I have attached a "Preliminary" copy of the valuation report for DJL Partners. It is the finished product but I mark it "Preliminary" while it is in a discussion process. That way, if you all see some sort of statement of fact or some other issue that needs to be corrected, we can do that while it is still "Preliminary." Once we've all reviewed it and questions have been answered, I will re-issue a "Final" without the Preliminary watermark on it.

In the Myers Valuation Report, he identified the value of the DJL Entities at $2,750,000 based upon a consideration of them as one enterprise.

On June 12, 2023, Ottinger sent an email to Myers stating "Kurt – we are reviewing and will be in touch with our consolidated comments to this preliminary report."

On June 20, 2023, Ottinger sent another email to Myers, this one stating "Kurt – attached hereto are some comments to the Preliminary Report you circulated. Let me know if we should schedule a call to go over so we can make sure everything makes sense." He attached an 8-page document with comments and feedback on the Myers Valuation Report.

During this same period Evans, on behalf of Greenberg, was emailing with Myers and Ottinger about the Myers Valuation Report being finalized so they could proceed with a closing. He also, on June 23, 2023, provided a report prepared by Perdue responding to the report from Ottinger on behalf of Deleot/Phillips/DJL Entities, reiterating his request that the Myers Valuation Report be finalized.

Also on June 23, 2023, Myers responded to Ottinger's email and the 8-page report, concluding "I understand that you may not agree with some of my responses above. But hopefully

you understand my position as it relates to the issues for which you have raised concerns. It has been my pleasure to provide this service for DJL."

Greenberg and Myers consider the Myers Valuation Report to be final. The DJL Entities dispute that it is final. The DJL Entities identify problems with the Myers Valuation Report they assert are manifest mistakes that preclude a grant of summary judgment to Greenberg. Through expert John Cacchiotti they identified deficiencies, some of which he acknowledges result from a difference in professional judgment and some of which he classified as mistakes made by Myers, two of which he classifies as manifest mistakes - treatment of deferred rent and adjustments made for the loss of eight tenants.

The DJL Entities also identify Myers' valuation of the DLJ Entities together, rather than individually, as a purported breach of the Repurchase Agreement and First Amendment.

Finally, the DJL Entities assert that Myers breached the Engagement Letter terms that are conditions precedent to enforcement of the Repurchase Agreement. Specifically, they claim: i) Myers breached by failing to meet with Deleot and Phillips to obtain their input; ii) Purdue's contact with Myers about the status of the report was a violation of the contact rules; iii) there were conflicts of interest resulting from prior dealings between Myers, Perdue and Greenberg that would have prevented retention of Myers had they been known; and iv) the Report was not timely prepared pursuant to the Engagement Letter and Repurchase Agreement terms.

LEGAL ANALYSIS

Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

of law." Tenn. R. Civ. P. 56.04. In *Rye v. Women's Care Center of Memphis, MPLLC*, the Tennessee Supreme Court set forth Tennessee's summary judgment standard:

> [I]n Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense.

477 S.W.3d 235, 250 (Tenn. 2015).

When evaluating motions for summary judgment, courts must decide: "(1) whether a *factual* dispute exists; (2) whether the disputed fact is *material* to the outcome of the case; and (3) whether the disputed fact creates a g*enuine* issue for trial." *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993) (emphasis in original). A "material fact" is one that "must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Id.*, at 215. Irrelevant or unnecessary facts are not material. *Rye*, 477 S.W.3d at 251. A "genuine issue" exists when "a reasonable jury could return a verdict in the nonmoving party's favor." *Byrd*, 847 S.W.2d at 215. "If the evidence and inferences to be reasonably drawn from the evidence would permit a reasonable person to reach only one conclusion, then there are no material factual issues in dispute and the question can be disposed of as a matter of law." *Id.* (internal 6 citations omitted). Conversely, "[i]f reasonable minds could justifiably reach different conclusions based on the evidence at hand, then a genuine question of fact exists." *Id.*

Where the moving party does not bear the burden of proof at trial, the moving party must either affirmatively negate an essential element of the non-moving party's claim or demonstrate that the non-moving party's evidence at the summary judgment stage is insufficient to establish the claim or defense. *Rye*, 477 S.W.3d at 264. Summary judgment is proper in virtually any civil case that can be resolved on the basis of legal issues alone. *CAO Holdings, Inc. v. Trost*, 333 S.W.3d 73, 81 (Tenn. 2010).

Plaintiff's Breach of Contract Claims Against DJL Entities

In Count IV of the Complaint, Greenberg asserts, in paragraphs 91-92, that the DJL Entities have breached their obligation under the Repurchase Agreement and First Amendment to purchase his interests for $916,666.67. It is this claim for which both sets of moving parties assert entitlement to summary judgment. It is undisputed there was a contract between the parties – the Repurchase Agreement, as amended by the First Amendment. The issue is whether Greenberg has demonstrated the terms of the contract were met and the DJL Entitles were obligated to act thereunder, or whether the DJL Entities have demonstrated it was not met and thus the claim should be dismissed.

The other contract that is relevant for consideration is the Myers Engagement Letter, as it established the obligations between the parties and the third appraiser to set the business value.

The interpretation of a contract is a question of law and not a question of fact. *Mark VII Transp. Co. v. Responsive Trucking, Inc*., 339 S.W.3d 643, 647–48 (Tenn. Ct. App. 2009) (citing *Pitt v. Tyree Org., Ltd.*, 90 S.W.3d 244, 252 (Tenn. Ct. App. 2002)). It is well established in Tennessee case law that courts must interpret contracts to ascertain and give effect to the intent of the contracting parties consistent with legal principles. *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc*., 566 S.W.3d 671, 688 (Tenn. 2019); *Wallis v. Brainerd Baptist Church*, 509 S.W.3d 886, 899 (Tenn. 2016); *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 659 (Tenn. 2013); *Clark v. Sputniks, LLC*, 368 S.W.3d 431, 441 (Tenn. 2012); *Allmand v. Pavletic*, 292 S.W.3d 618, 630 (Tenn. 2009); *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006); *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999) (citing *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975)); *see also Colonial Pipeline Co. v. Nashville & E. R.R. Corp.*, 253 S.W.3d 616, 621 (Tenn. Ct. App. 2007).

Each provision must be construed in light of the entire agreement, and the language in each provision must be given its natural and ordinary meaning. *Mark VII Transp. Co.*, 339 S.W. 3d at 647–48; *see also Buettner v. Buettner*, 183 S.W.3d 354, 359 (Tenn. Ct. App. 2005). Moreover, Tennessee courts "'give primacy to the contract terms, because the words are the most reliable indicator—and the best evidence—of the parties' agreement when relations were harmonious, and where the parties were not jockeying for advantage in a contract dispute.'" *Individual Healthcare Specialists, Inc*., 566 S.W.3d at 694 (quoting Feldman, 21 Tenn. Practice § 8:14).

When terms of a contract are not ambiguous, issues of contract interpretation are regularly considered issues of law. *Strategic Acquisitions Grp., LLC v. Premier Parking of Tennessee, LLC*, No. E2019-01631-COA-R3-CV, 2020 WL 2595869, at *4 (Tenn. Ct. App. May 22, 2020) *(*citing *Bourland, Heflin, Alvarez, Minor & Matthews, PLC v. Heaton*, 393 S.W.3d 671, 674 (Tenn. Ct. App. 2012)). If the written instrument is unambiguous, the Court must interpret it as written rather than according to the unexpressed intention of one of the parties. *Id.* at *4; *see also Sutton v. First Nat'l Bank*, 620 S.W.2d 526 (Tenn. Ct. App. 1981).

A Court's role in reviewing an appraisal award is very limited, as explained in *Williston on Contracts*:

> Absent fraud or mistake, the price fixed by agreed appraisers is conclusive on the parties. Although an excessively large or an unreasonably small price involves some element of penalty or forfeiture, this fact in itself is not enough to overcome the express terms of the contract, at least absent fraud, gross mistake, or arbitrary conduct that is completely outside what the parties could have reasonably contemplated.

14 *Williston on Contracts* § 42:29 (4th ed.). Courts that have considered this standard have generally described it as a required showing of "manifest mistake" which is a mistake "of such character that the…appraiser would have corrected it had it been called to his attention." *See Lakewood Mfg. Co. v. Home Ins. Co.*, 422 F.2d 796, 798 (6th Cir. 1970).

Another important contract interpretation concept for the Court to consider at summary judgment is whether all terms of the Myers Engagement Letter were "conditions precedent" such that failure to strictly adhere to them mitigate Deleot and Phillips' duty to pay Greenberg consistent with the Myers Report. A "condition precedent in the law of contracts may be a condition which must be performed before the agreement of the parties shall become a binding contract *or it may be a condition which must be fulfilled before the duty to perform an existing contract arises.* As such, no liability arises under the contract until such time as the condition precedent is fulfilled." *Allison v. Hagan*, 211 S.W.3d 255, 260 (Tenn. Ct. App. 2006) (citing 17A C.J.S. *Contracts* § 338) (emphasis original) (certain internal citations omitted). One obvious circumstance is when the appraiser fails to follow the contractual process that was agreed to by the parties. *See Trotter v. State Farm Fire & Casualty Co., Inc.*, 2008 WL 11342581, at *5 (E.D. Tenn. May 6, 2008) (denying summary judgment for defendant seeking enforcement of appraisal where there were factual issues as to whether defendant and appraisers failed to follow contractual appraisal process in determining insurance loss).

Given these facts and relevant legal considerations, the Court finds that while there are some facts that the DJL Entitles argue are disputed or material which are not, there are some disputed material facts that prevent entry of summary judgment for either party. As to facts that are either undisputed or immaterial, the Court finds:

1. Myers intended the Myers Report to be final on or about June 23, 2023. The DLJ Entities do not agree with the Myers Report, and have raised questions about his adherence to the Engagement Letter terms, and his methodology, which the Court will address below. However, as of that date, the Myers Report was final and to argue otherwise is not credible to the Court. The Court finds, as a matter of fact and law, that it was final as of that date.

2. The Court disagrees with the DJL Entities' argument that the First Amendment's paragraph 4 specification that they be valued as a single business entity by the initial appraisers should be inferred to mean that the third appraiser should not do that. The language set forth in the documents do not support such an argument and it is illogical to have the first two appraisers do it that way but the third appraiser do it otherwise. It would prevent any reasonable comparison among them and presupposes that the first valuation method is somehow incorrect, even though it is mandated they be evaluated as one entity. When the First Amendment was executed, the parties had decided to hire competing appraisers and were focused on how that work was to be performed. There is no indication they were expecting to need a third appraiser and the absence of inclusion of this specification as to a third appraiser cannot be assumed to mean that appraisal, if necessary, would be done differently. The Court finds it stretches credulity to argue as much.

3. Although the Repurchase Agreement contemplated a third appraiser finish his or her work within thirty days, the Engagement Letter, which was executed after and specifically with Myers and as a condition of his work, states he would "use reasonable efforts to meet any reasonable deadlines" but makes no promises. The Court does not find that failure to finish the project by March 15 to be a breach of any agreement.

4. Deleot and Phillips state in their declarations that they "would not have agreed to hire Myers" if they knew of his "conflicts" with prior engagements. The Myers Engagement Letter appropriately and adequately addresses conflicts of interest. Based on the information in the record, the Court does not perceive any professional conflict of interest to have existed based upon prior engagements Deleot's and Phillips' concerns notwithstanding. This is not a "fact" that the Court considered material or as raising a valid legal challenge to the Myers Report.

There are, however, disputes of fact the Court does find material and which prevent entry of summary judgment for either party. Those are:

1. Whether Perdue's communications to Myers, without Myers initiating the communications, after execution of the Engagement Letter was a material breach of those terms.

2. Whether some, but not all, of Cacchiotti's criticisms of the Myers Report identify material mistakes that prevent acceptance of the appraisal. As discussed above, the Court does ***not*** find the criticism regarding valuation of the DJL Entities as a single business to be in breach of the Repurchase Agreement and First Amendment, nor could it be a material mistake since it is specified for use by Perdue and DeLisi. However, the DJL Entities do raise other valuation methods, specifically the deferred rent issue and that of the $123,000 adjustment for eight tenants who were purportedly "lost," as mistakes that would materially impact the appraisal.[2]

Any other issues that are raised in the parties' briefing are apparently not material and were not raised by the DJL Entities at oral argument. As to the above items, however, the DJL Entities' arguments are sufficiently substantive as it relates to Myers and his valuation considerations that they prevent entry of summary judgment for either party.

CASE MANAGEMENT

The Court's Order at summary judgment leaves the parties without a resolution as to the value of Greenberg's share of the DJL Entities. The parties have undoubtedly spent a significant amount of money employing experienced and talented appraisers who have used different methodology and information to arrive at values that greatly vary. The parties appear no closer to resolution than they were in the summer of 2022 when they decided to part ways. This case will

[2] The DJL Entities also argue that Myers' refusal to meet with Deleot and Phillips was a material breach of the Engagement Letter terms. Based on the clear language in the Engagement Letter that allowed Myers to disregard input or communications from them, and the language in the Repurchase Agreement that the owners "agree to make themselves available as *reasonably requested by the appraiser(s)*" (emphasis added), the Court does not find this amounts to a material breach. However, this fact is relevant to the Court's consideration of whether manifest mistakes were made and could have been corrected if Myers had communicated with Deleot and Phillips prior to issuing the report.

have to go to an evidentiary trial involving competing expert witnesses unless the parties resolve it between them prior to trial.

The Court sets the next Rule 16 Scheduling Conference for **August 26, 2024 at 1:30 p.m.** The parties are to come prepared to discuss what discovery, if any, remains to be done in this matter, whether they are considering alternative dispute resolution, and to set a bench trial.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that both summary judgment motions are DENIED.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the parties will appear through counsel for a Rule 16 Scheduling Conference on August 26, 2024 at 1:30 p.m.

It is so ORDERED.

s/Anne C. Martin

ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

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