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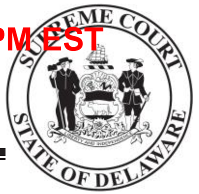

IN THE

Supreme Court of the State of Delaware

AMUR FINANCE COMPANY, INC. and AMUR FINANCE IV LLC,

Defendants-Below, Appellants,

v.

PINE RIVER MASTER FUND LTD. and PINE RIVER FIXED INCOME MASTER FUND LTD.,

Plaintiffs-Below, Appellees.

No. 7, 2018

COURT BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE, CONSOLIDATED
C.A. No. 2017-0145-JRS

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TABLE OF CONTENTS

Page

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 4

STATEMENT OF FACTS 10

A. The Parties Negotiate And Enter Into The Credit Agreement 10

B. The Parties Discuss The $94k Distributions As Negotiations Draw To A Close 12

C. Pine River Seeks To Prematurely Terminate The Credit Agreement As It Encounters Financial Difficulties 14

D. Pine River Seizes On The Agreed-To $94k Distributions As A Pretext For Ending The Credit Agreement 17

ARGUMENT 22

I. THE COURT OF CHANCERY ERRED IN GRANTING PINE RIVER'S MOTION FOR SUMMARY JUDGMENT ON COUNT IX 22

A. Question Presented 22

B. Scope of Review 22

C. Merits of Argument 22

1. Section 5.07(d) Does Not Bar The $94k Distributions 23

2. Section 5.07(f) Does Not Bar The $94k Distributions 30

3. Amur And Pine River's Course Of Dealing Confirms Amur's Interpretation Of Section 5.07 35

4. The Security Agreement Does Not Support The Court of Chancery's Holdings Of Breach And Event Of Default Regarding The $94k Distributions 37

5. Pine River Elected To Perform Under The Credit Agreement Despite The Alleged Breaches 41

CONCLUSION 44

TABLE OF AUTHORITIES

Cases **Page(s)**

Beggs v. Rossi,
145 F.3d 511 (2d Cir. 1998) 31

Bigda v. Fischbach Corp.,
898 F. Supp. 1004 (S.D.N.Y. 1995) 41, 42

In re Carol B. v. Sanford B.,
865 N.Y.S.2d 194 (N.Y. App. Div. 2008) 35

In re El Paso Pipeline Partners, L.P. Deriv. Litig.,
2014 WL 2768782 (Del. Ch. June 12, 2014)..19

ESPN, Inc. v. Office of The Comm'r of Baseball,
76 F. Supp. 2d 383 (S.D.N.Y. 1999) 42, 43

Evans v. Famous Music Corp.,
807 N.E.2d 868 (N.Y. 2004)..35

Fed. Ins. Co. v. Ams. Ins. Co.,
691 N.Y.S.2d 508 (N.Y. App. Div. 1999) 35-36

GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.,
36 A.3d 776 (Del. 2012) 22

Goldie v. Yaker,
432 P.2d 841 (N.M. 1967) 34

Hampton v. Turner,
2015 WL 1947067 (Del. Ch. Apr. 29, 2015)..27

Honeywell Int'l Inc. v. Air Prods. & Chems., Inc.,
858 A.2d 392 (Del. Ch. 2004) 43

Kamco Supply Corp. v. On the Right Track, LLC,
49 N.Y.S.3d 721 (N.Y. App. Div. 2017)...41, 43

Korosh v. Korosh,
953 N.Y.S.2d 72 (N.Y. App. Div. 2012)..33

In re Mortgs. Ltd.,
771 F.3d 1211 (9th Cir. 2014) 31

In re Motors Liquidation Co.,
447 B.R. 142 (Bankr. S.D.N.Y. 2011).. 33-34

Pepsi-Cola Bottling Co. of Asbury Park. v. Pepsico, Inc.,
297 A.2d 28 (Del. 1972) 36

Pine River Master Fund Ltd. v. Amur Fin. Co.,
2017 WL 4023099 (Del. Ch. Sept. 13, 2017)...17

Popkin v. Sec. Mut. Ins. Co. of N.Y.,
367 N.Y.S.2d 492 (N.Y. App. Div. 1975) 33

In re Residential Capital, LLC,
563 B.R. 477 (S.D.N.Y. 2016), *aff'd sub nom. Gray v. ResCap Borrower Claims Tr.*, 706 F. App'x 16 (2d Cir. 2017) 34

Smith v. Brown & Jones,
633 N.Y.S.2d 436 (N.Y. Sup. Ct. 1995)...27

T.L.C. W., LLC v. Fashion Outlets of Niagara, LLC,
875 N.Y.S.2d 367 (N.Y. App. Div. 2009) 35

U.S. Fid. & Guar. Co. v. Delmar Dev. Partners, LLC,
788 N.Y.S.2d 252 (N.Y. App. Div. 2005) 35

V.S. Int'l, S.A. v. Boyden World Corp.,
862 F. Supp. 1188 (S.D.N.Y. 1994) 42

Rules

Del. Ct. Ch. R. 54(b) 3, 20

Del. Ct. Ch. R. 56...2, 19

Other Authorities

19 AM. JUR. 2d *Corporations* § 2002 (2018)..31

BLACK'S LAW DICTIONARY (10th ed. 2014) 32

13 WILLISTON ON CONTRACTS § 39:32, *Election following breach* (4th ed.)..........41

NATURE OF PROCEEDINGS

Defendants-Appellants Amur Finance IV LLC ("Amur IV") and Amur Finance Company, Inc. ("AFC," and together with Amur IV, "Amur") are or were Borrower and Administrative Agent, respectively, under a Secured Revolving Credit Agreement dated August 5, 2013 (the "Credit Agreement"), for which Plaintiffs-Appellees Pine River Master Fund Ltd. and Pine River Fixed Income Master Fund Ltd. (together, "Pine River") are Lenders.

By late 2016, Pine River faced partner defections and a significant decline in assets under management in its hedge funds. Pine River sought to accelerate repayment of the approximately $150 million Pine River had lent Amur IV, which was not due until 2023. After failing to reach a business deal with Amur to modify the terms of the Credit Agreement, Pine River combed the Credit Agreement for ways to manufacture an Event of Default that would allow Pine River to demand immediate repayment or foreclose on Amur IV's assets, which consist primarily of debt and equity investments in other entities.

In February 2017, Pine River filed its verified complaint, alleging that Amur had breached the Credit Agreement and triggered various Events of Default. One month after filing suit, Pine River moved for summary judgment alleging that payments that Amur IV was making to AFC—in satisfaction of indemnities AFC had incurred prosecuting lawsuits advancing Amur IV's (and Pine River's)

interests under the Credit Agreement—constituted a breach and caused an Event of Default.

While the Court of Chancery was considering Pine River's motion—eventually holding that no Event of Default occurred—Pine River moved for summary judgment again. This time, Pine River claimed a breach and an Event of Default based on Amur IV's transfer of dividends on Amur Equipment Finance, Inc. ("Axis") preferred equity to AFC, which amounted to approximately $94,000 monthly (the "$94k Distributions"). Amur opposed, arguing, in part, that Pine River's motion should be denied on Rule 56(f) grounds because the parties had engaged in virtually no fact discovery (and none at all relating to the issues raised on summary judgment), and further development of the facts was appropriate in order to properly dispose of the issue.

Amur also submitted an affidavit in support of its opposition swearing that Pine River and Amur agreed that the $94k Distributions could flow through the Collections Account, that the $94k Distributions indeed flowed through the Collections Account for almost four years, and that Pine River never objected until June 2017, in an attempt to bring down the credit facility. Pine River did not offer any evidence disputing this fact—on reply or thereafter—even though individuals such as Cassie Myrho, who helped negotiate the Credit Agreement, are still employed by Pine River and could have easily submitted a sworn affidavit denying

Pine River's knowledge of, and acquiescence to, the $94k Distributions. On the basis of the $94k Distributions, Pine River seeks to terminate a $150 million facility more than five years prematurely, enabling Pine River to foreclose on the entirety of Amur IV's assets.

On October 12, the Court of Chancery granted Pine River's second summary judgment motion in part, finding that the $94k Distributions constituted an Event of Default.[1] The Court of Chancery's implementing order entered final judgment on Count IX of Pine River's complaint pursuant to Court of Chancery Rule 54(b) and provided for a stay of that judgment pending appeal (the "Order").[2] On January 3, 2018, Amur noticed this appeal with respect to Count IX.

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[1] Memorandum Opinion ("Op."), Exhibit A hereto.
[2] Exhibit B hereto.

SUMMARY OF ARGUMENT

I. The Court of Chancery erred by granting Pine River summary judgment on Count IX of the Amended Verified Complaint, which alleges that Amur IV breached the Credit Agreement by making the $94k Distributions. When Amur IV was created, AFC transferred ownership rights of the Axis preferred equity to Amur IV, but AFC retained the rights to the dividends. Those dividends were transferred to AFC monthly for nearly four years, since the inception of the Credit Agreement.

The trial court held that the $94k Distributions breached provisions in the Credit Agreement[3] that bar Amur IV from making "distributions in respect of its equity interests" (Section 5.07(d)) and from entering into transactions with affiliates (Section 5.07(f)). (Op. 37, 38). However, the Court of Chancery's ruling conflicts with the plain language of Sections 5.07(d) and (f).

1. **5.07(d).** With respect to Section 5.07(d), the Court of Chancery's holding was in error for four main reasons. *First*, Section 5.07(d) governs Amur IV's distributions on "*its* equity interests" (A600 (emphasis added)), which does not cover the $94k Distributions. Instead, by its terms, the phrase refers to Amur IV declaring dividends, engaging in stock buy-backs, or otherwise distributing

[3] Disputes arising under the Credit Agreement, whether based in contract or tort, are governed by New York law. (A618).

cash to equity holders of Amur IV's *own* stock. The $94k Distributions are dividends that Axis has declared on *Axis's* stock, which Amur IV received by virtue of its partial ownership of the Axis preferred equity. If Section 5.07(d) was meant to cover all of Amur IV's investments in equity instruments, rather than its own stock, then it would have said so expressly, rather than using the term "its equity interests." Indeed, each other place "equity interests" appears in the Credit Agreement clearly refers to shares *of* Amur IV, not shares *owned by* Amur IV. The term should have the same meaning in Section 5.07(d).

Second, interpreting Section 5.07(d) as the Court of Chancery did—as barring Amur IV from receiving and then distributing dividends on equities that Amur IV owns—would undermine the fundamental goals and proper functioning of the Credit Agreement. The purpose of the Credit Agreement was, in part, for Pine River to lend funds to Amur IV, and then for Amur IV to turn around and use those funds to invest in other companies (including investments in those companies' preferred equity). The dividends on such preferred equity investments were to be used to repay Pine River. But, under the Court of Chancery's construction of 5.07(d), this conduct would be barred, because when Amur IV receives dividends from those companies and passes them along to Pine River as payment, Amur IV is doing the same thing as the $94k Distributions—taking dividends declared by another company in which Amur IV is an equity holder and

distributing them to another entity. In short, the Court of Chancery's ruling would make it impossible for Amur IV to comply with the Credit Agreement and would deprive Pine River of a key source of repayment, contrary to the interests and intent of both parties.

Third, Amur IV has two primary types of investments—equity investments in affiliate companies and debt investments. The Court of Chancery's interpretation of "its equity interests" in Section 5.07(d) as capturing the equity investments Amur IV owns, not just Amur IV's capital structure, creates a pointless and arbitrary distinction between Amur IV's equity and debt investments. Amur IV would be severely restricted in its use of funds received from its equity investments (such as dividends), but would face no similar restriction on cash received from its debt investments (such as interest payments). This distinction has no basis in the Credit Agreement or logic.

Finally, Section 5.07(d) was amended in December 2014, and the amendment makes sense only if Section 5.07(d) is meant to apply solely to distributions Amur IV makes to its own equity holders on its own capital structure. The December 2014 amendment states that Amur IV can pay dividends "upon its Class B Units, and … its Class A Units." While Amur IV has Class A and Class B Units, other companies may title their equity interests differently, and the drafters

of the amendment to 5.07(d) could not have intended that what another company named its shares would affect Amur IV's ability to pay dividends.

Moreover, the December 2014 amendment states that distributions must be allowed by Amur IV's LLC Agreement, but *Amur IV's* LLC Agreement says nothing about whether *Axis*—or any other company in which Amur IV holds an equity investment—can declare dividends. Indeed, there is no reason Amur IV's LLC agreement would speak to another company's ability to declare dividends.

2. **5.07(f)**. The Court of Chancery's interpretation of Section 5.07(f) also was in error. 5.07(f) bars Amur IV from "mak[ing]," "enter[ing] into," or "amend[ing]" any transaction with an affiliate after the Credit Agreement was signed. But 5.07(f) does not apply to the $94k Distributions because each $94k Distribution did not constitute Amur IV entering into or making a transaction under 5.07(f).

The only transaction Amur IV made with respect to the $94k Distributions was the agreement that AFC would contribute the Axis equity to Amur IV, while AFC retained the right to the dividends. This agreement was made before the Credit Agreement was signed, and before the limits of Section 5.07(f) existed. Each individual instance of the $94k Distributions flowing to AFC was not Amur IV "mak[ing]," "enter[ing] into," or "amend[ing]" a new transaction with an

affiliate, any more than a debtor and creditor are entering into a new transaction each time the debtor makes a payment on the loan.

3. **Course of dealing**. Pine River and Amur's undisputed course of dealing shows that Amur's interpretation of Sections 5.07(d) and (f) is correct. Pine River has not—despite, as explained above, ample opportunities to do so—introduced any evidence undermining the fact that before the signing of the Credit Agreement, Amur and Pine River agreed that AFC's contribution of the Axis preferred equity to Amur IV would satisfy Amur IV's equity ratio and the $94k Distributions would flow through the Collections Account. Nor has Pine River disputed that the $94k Distributions occurred virtually every month for four years before Pine River ever objected (and only when such objection suited Pine River's business interests). The language of the Credit Agreement is clear that the $94k Distributions are no breach. But if there were any doubt, the pre-dispute practice of the parties dispels it.

4. **The Security Agreement**. The Court of Chancery further erred in resolving the interpretation of Section 5.07 by analyzing whether the $94k Distributions constitute Collateral under the Security Agreement, a separate agreement between Amur and the previous Collateral Agent, Deutsche Bank. Neither Section 5.07(d) nor (f) uses the term Collateral or has any connection to the term, and so the Court of Chancery's reliance on the document was improper.

Even if the Court of Chancery could have relied on the Security Agreement, the plain text of the document makes clear that the $94k Distributions are not Collateral, because the Security Agreement limits Collateral to property of Amur IV, including property acquired after the Security Agreement's execution, but the $94k Distributions do not and never have belonged to Amur IV.

5. **Election of Remedies**. Finally, even if the $94k Distributions were a breach, Pine River was aware of them for years, and had elected its remedy of continuing to perform under the Credit Agreement, rather than terminating it. The election of remedies doctrine provides that if one party to a contract breaches, the other has a choice of terminating the contract or accepting continued performance while reserving the right to seek damages. Here, when Pine River has elected to continue performing under the contract in response to any purported breaches, including by receiving payments for four years, it cannot now change course and elect to terminate the contract based on those past breaches.

STATEMENT OF FACTS

A. The Parties Negotiate And Enter Into The Credit Agreement

AFC is a diversified investment company with investments and operations in several core sectors, including aviation, general equipment, energy, shipping and logistics, and industrials. (A226). Amur IV is a special purpose vehicle created by AFC to make loans to, and investments in, businesses and assets in the transportation and commercial equipment financing and leasing industries. (A228).

Pine River is a Minnesota-based hedge fund. (A250). Pine River enjoyed substantial success investing in distressed mortgage-backed securities in the aftermath of the financial crisis. (A251). In 2012, it entered into a successful investment with Mostafiz ShahMohammed, founder and CEO of AFC, prompting the parties to contemplate a longer-term relationship. (A227). The parties discussed the formation of that relationship throughout 2013, and eventually entered into the Credit Agreement. (A227-29).

The Credit Agreement established a credit facility for which Amur IV was formed. (A228-29). Amur IV's main purpose was to borrow funds from Pine River through the Credit Agreement (an "Advance") and then invest those funds in opportunities identified by AFC and approved by Pine River (the entities into

which Amur IV made investments, the "Operating Companies"),[4] creating additional leverage those entities could use to expand their businesses. (A227-29, A253). Amur IV's investments were primarily either debt investments—making loans to the Operating Companies—or equity investments, including preferred shares that came with a right to dividends and certain other rights. (A227-28, A267). The returns on Amur IV's investments would be paid to an account established by the Credit Agreement (the "Collections Account") and then distributed pursuant to the Credit Agreement, including to Pine River as debt service. (A601-04). Pine River was paid what it was owed through the Collections Account monthly. (A603-04).

The parties envisioned a long-term relationship—the Credit Agreement has a maturity date of 2023. (A579-80). This term was essential to AFC, because it was necessary to afford the Operating Companies time to put the investments to work to grow their businesses and generate returns. (A244).

An Administrative Agent was appointed under the Credit Agreement, with responsibilities such as preparing monthly reports describing monies received from the Operating Companies, the amount Amur IV must pay Pine River or other entities for that month, and other developments under the Credit Agreement (the

[4] Under Section 2.03 of the Credit Agreement, the decision to invest in an Operating Company using an Advance required the unanimous approval of AFC's Board of Directors, on which Pine River had a seat. (A252, A585-86).

"Administrator Reports"). (A257-58, A602-03). AFC was named as the Administrative Agent under the Credit Agreement. (A575).

B. The Parties Discuss The $94k Distributions As Negotiations Draw To A Close

As negotiations establishing the Credit Agreement came to an end, the parties encountered difficulties in closing the deal. (A832-33). One provision in the Credit Agreement required that 7.5% of Amur IV's total assets consist of funds or property Amur IV did not receive as Advances from Pine River under the Credit Agreement. (A578). Initially, AFC intended to contribute common stock of Axis that it owned to satisfy the 7.5% equity ratio provision. (A832-33). This common stock did not have rights to dividends. (A833-34). Other Axis common stockholders had a right of first refusal as well as a co-sale right, which the parties realized could create complications in the future. (A833, A840-44).

Shortly before the Credit Agreement was executed, the parties discussed how to solve this problem. (A834). Mr. ShahMohammed, on behalf of Amur, and members of the Pine River team, including Matthew Dundon, agreed that, instead of AFC contributing the Axis common stock to Amur IV to satisfy the equity ratio requirement, AFC would contribute its preferred shares in Axis to Amur IV. (A833-34). While the preferred shares had no right of first refusal, the shares did have rights to monthly dividends. (*Id.*). The $94k Distributions—which AFC owned—would flow through the Collections Account to AFC. (*Id.*).

In addition to the equity ratio discussed above, Pine River demanded that it have a security interest in certain of Amur IV's assets, and therefore the ability to foreclose if Amur IV defaulted. (A832). This was accomplished through the Security Agreement, which grants the Collateral Agent—on behalf of Pine River—a security interest as follows:

> To secure the Secured Obligations, [Amur IV] hereby assigns and pledges to the Collateral Agent for the benefit of [Pine River], and hereby grants to the Collateral Agent for the benefit of [Pine River], a first priority perfected security interest in, to and under, the following, **whether now owned or hereafter from time to time acquired**: (a) all right of [Amur IV] in and to the Interest Reserve Account, the Collections Account and each other Account established under the Credit Agreement, (b) all cash, investment property, investments, securities, instruments, investment property or other property … at any time or from time to time on deposit in or credited to any such Account, (c) all of the Assets and all rights to payment and other Proceeds from time to time received, receivable or otherwise distributed in respect of such Assets, (d) all income, payments and proceeds of any and all of the foregoing, and (e) all other Assets of the Grantor, wherever located and whether now owned or hereafter acquired or arising, and all proceeds thereof, in each case for the benefit of the Secured Parties (the "Collateral.") (A674) (emphasis added).

The Security Agreement defines "Assets" as:

> **all right, title and interest of** [Amur IV] in and to the following property with each term having the definition provided in Article 9 of the [Uniform Commercial Code] accounts, chattel paper, commercial tort claims, consumer goods, deposit accounts, documents, equipment, farm products, general intangibles,

> instruments, inventory, investment property, letter of credit rights, letters of credit and money, **whether now owned or hereafter acquired**. (A671) (emphasis added).

Therefore, the Collateral Agent—on Pine River's behalf—holds a security interest in effectively all property of Amur IV, with the caveats that this property: (1) was "now owned or hereafter acquired" by Amur IV in order to be Collateral; and (2) must be one in which Amur IV has a "right, title and interest." If Amur IV has no right, title or interest to property, or Amur IV does not own or acquire property, it is not Collateral.

C. Pine River Seeks To Prematurely Terminate The Credit Agreement As It Encounters Financial Difficulties

In 2016, Pine River's fortunes took a turn for the worse, and it realized it needed the capital lent to Amur IV under the Credit Agreement to satisfy a rising tide of investor redemptions. (A245-47). In February 2016, Pine River asked Amur IV to return a portion of the Advances, well before the maturity date. (A239). To accommodate Pine River, Amur proposed reorganizing the credit facility. (*Id.*). Pine River agreed and Amur proposed a revised structure that maintained the Credit Agreement's remaining term. (*Id.*). And, following Pine River's approval and request, Amur began (at its own expense) drafting documents reflecting the modification. (*Id.*). Suddenly, and without explanation, Pine River decided not to proceed with the reorganization. (*Id.*).

At roughly the same time, years before the maturity date, Pine River: (1) exercised its option to prematurely cut Amur IV off from further borrowing under the Credit Agreement, despite having made no allegations of breach or impropriety (*Id.*); and (2) began to announce that each of the Lenders under the Credit Agreement were going to be liquidated. (A238, A245-47).

In October 2016, as its assets under management continued their precipitous decline, Pine River sent a notice that an Event of Default—meaning Pine River would be able to accelerate the debt and foreclose on the Collateral—"may have occurred." (A214-15, A270-71, A301-02). Amur responded that the purported Event of Default was baseless, and Pine River's Co-Chief Investment Officer later admitted that the purported Event of Default did not give Pine River a basis to accelerate the debt. (A214-15, A270-71).

In November 2016, following its failed declaration of an Event of Default, Pine River demanded that AFC resign as Administrative Agent, and appointed Lighthouse Management Group, Inc. ("Lighthouse") as the replacement. (A215-16, A272). Lighthouse was unprepared (or otherwise failed) to assume the responsibilities of being the Administrative Agent in December 2016, January 2017, and February 2017. (A218-20, A275-76). And so the parties agreed that AFC would prepare Administrator Reports for December and January. (A218-19). For February 2017, Lighthouse failed to prepare an Administrator Report and,

because Amur IV required direction of how much to pay Pine River and others from the Collections Account monthly (or face a potential Event of Default allegation by Pine River), AFC performed the calculations that month and directed Amur IV's payments. (A218-20, A275-76).

Pine River took issue with AFC's February 2017 actions, arguing that AFC and Amur IV had somehow breached the Credit Agreement by taking the steps necessary to pay Pine River. (A220-21, A521-24). Lighthouse, presumably at Pine River's direction, did not prepare an Administrator Report for February, reasoning that Amur IV would either miss a payment, which Pine River would characterize as a breach triggering an Event of Default, or force AFC to prepare the calculations, which Pine River would also use to claim breach and an Event of Default. (A276).

On February 23, 2017, Pine River sued Amur IV, claiming that an Event of Default had occurred because of, *inter alia*, the February distribution, and moved for summary judgment on that claim (and one other) on March 31. (A70-71, A535-536). Amur opposed (A115-18), and to maintain the status quo until the Court of Chancery's ruling, the parties entered into a stipulation and order governing the distribution of payments under the Credit Agreement for the

pendency of the dispute (the "April Order") (A107-114). The Court of Chancery decided that there was a breach but no Event of Default.[5]

While the Court of Chancery's summary judgment ruling was pending, Pine River began to look for other ways to obtain cash to which it was not immediately entitled. In June, and contrary to the April Order, Pine River instructed Lighthouse to calculate the monthly Administrator Report payments in a different manner than how the parties had been calculating them for over four years. (A329-35, A352-415). The change sent Amur IV's monthly payments to Pine River skyrocketing. (A329-35). Lighthouse directed Amur IV to pay Pine River over $1 million more that month than called for by the Credit Agreement. (*Id.*).

Amur IV sought in vain to convince Pine River and Lighthouse that the new calculations were baseless. (*Id.*). In July, Lighthouse and Pine River again directed Amur IV to overpay Pine River by more than $1 million. (A335-41). In response, Amur had no choice but to move to enforce the April Order. (A303-04).

D. Pine River Seizes On The Agreed-To $94k Distributions As A Pretext For Ending The Credit Agreement

Pine River responded to Amur's motion to enforce by turning it into yet another summary judgment motion (before discovery, even though Amur had requested that the parties enter into a discovery schedule months before) on an

[5] *Pine River Master Fund Ltd. v. Amur Fin. Co.*, 2017 WL 4023099 (Del. Ch. Sept. 13, 2017).

unrelated issue, the $94k Distributions. (A416-17). Although the $94k Distributions were untethered to Lighthouse and Pine River's directions of gross overpayment, Pine River argued that the $94k Distributions violated both the April Order and the Credit Agreement, amounting to a breach and an Event of Default. (A452-56). While Pine River attempted to tie the $94k Distributions to Amur's motion to enforce by alleging that Pine River had just "discovered" the $94k Distributions in June 2017 (A430), the facts present a very different story.

From the inception of the Credit Agreement, the $94k Distributions flowed through the Collections Account to AFC. (A834-36). Not only was Pine River aware of the $94k Distributions through the parties' discussions surrounding the Axis preferred stock, but the $94k Distributions were apparent on the face of every Collections Account bank statement (the "Account Statements"). (A756-67). Deutsche Bank, Pine River's Collateral Agent, received those Account Statements every month since the Credit Agreement was executed. (A752).

The first time Pine River objected to the $94k Distributions was in June 2017, when Pine River was seeking a means to bring down the credit facility and foreclose on the debt. (A834-36). Pine River moved for summary judgment on the $94k Distributions in August 2017 (on the heels of Amur's motion to enforce) and Amur opposed. (A452-56, A737-47). Amur's opposition rested in part on the grounds that the parties had engaged in virtually no discovery—no depositions, no

interrogatories, no requests for admission, and only a relative handful of documents exchanged—and that Pine River's motion raised factual issues. (A188-206, A744-47, A851-53).[6]

Oral argument was held on this issue (among others) on September 12, 2017. (A893-1027). On October 12, the Court of Chancery issued its opinion and held that the $94k Distributions constituted a breach under Sections 5.07(d) and (f) of the Credit Agreement. (Op. 37-38).

Section 5.07(d) states that Amur IV shall not: "[m]ake any distributions in respect of its equity interests or directly or indirectly purchase, redeem, or otherwise acquire or retire any of its equity interests or any warrants, options, or similar instruments to acquire the same; other than any such payment permitted to be made to Parent in accordance with Section 6.04." (A600). Section 5.07(f) states that Amur IV shall "not make any payment to or sell, lease, transfer or otherwise dispose of any of its properties or assets to, or purchase any property or assets from, or enter into or make or amend any transaction, contract, agreement,

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[6] *See, e.g.*, *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2014 WL 2768782, at *9 (Del. Ch. June 12, 2014) ("When confronted with a Rule 56 motion, the court may, in its discretion, deny summary judgment if it decides upon a preliminary examination of the facts presented that it is desirable to inquire into and develop the facts more thoroughly at trial in order to clarify the law or its application.") (citing *Cerberus Int'l, Ltd. v. Apollo Mgmt.*, 794 A.2d 1141, 1150 (Del. 2002) ("trial courts should act … with caution in granting summary judgment … [and] the trial court may … deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.")).

understanding, loan, advance or guarantee with, or for the benefit of, any Affiliate of Borrower," except when certain conditions have been met. (A601).

The Court of Chancery held that 5.07(d) was violated when Amur IV took possession of the Axis preferred equity, because that equity became Amur IV's "equity interests" as that term is used in Section 5.07(d). Therefore, according to the Court of Chancery, when Amur IV transferred the $94k Distributions to AFC, their true owner, it was making a distribution in respect of Amur IV's equity interests. (Op. 35-37). The trial court also held that the $94k Distributions were "transactions" with AFC, and therefore violated Section 5.07(f). (Op. 37-38).

In so holding, the Court of Chancery relied heavily on the idea that the $94k Distributions were Collateral within the meaning of the Security Agreement, and therefore Pine River had a security interest in them. (Op. 38-43, Op. 40 n.115). In addition, the trial court held that the oral contract between Amur and Pine River permitting the flow of the $94k Distributions through the Collections Account could not amend the Credit Agreement (despite Amur not advancing that argument), because of the Credit Agreement's clause requiring that all amendments be in writing. (Op. 43-45). The Court entered partial final judgment under Court of Chancery Rule 54(b), and stayed the judgment pending appeal. (Ex. B). This appeal followed.

Meanwhile, a third round of summary judgment motions, along with motions to dismiss, are currently being briefed in the Court of Chancery. No discovery has occurred in this case since the handful of documents exchanged in April 2017.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN GRANTING PINE RIVER'S MOTION FOR SUMMARY JUDGMENT ON COUNT IX

A. Question Presented

Did the Court of Chancery err in ruling on summary judgment that Amur IV breached Sections 5.07(d) or (f) of the Credit Agreement by allowing the $94k Distributions to flow through the Collections Account to AFC? This question was raised below (A453-55, A737-38, A741-43, A1009-10), and considered by the Court of Chancery (Op. 34-45).

B. Scope of Review

The Supreme Court reviews *de novo* a trial court's interpretation of a contract, and its grant of summary judgment. *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

C. Merits of Argument

The Court of Chancery held that the $94k Distributions violated two provisions of the Credit Agreement, Sections 5.07(d) and 5.07(f). (Op. 34-38). Both rulings conflict with the plain language of the Sections, and the trial court's interpretation would lead to anomalous results and defy the parties' understanding of that language, as evidenced by their course of dealing.

1. Section 5.07(d) Does Not Bar The $94k Distributions

Section 5.07(d) states that Amur IV shall not: "[m]ake any distributions in respect of its equity interests or directly or indirectly purchase, redeem, or otherwise acquire or retire any of its equity interests or any warrants, options, or similar instruments to acquire the same; other than any such payment permitted to be made to Parent in accordance with Section 6.04." (A600). Pine River interprets "its equity interests" to mean the equity investments *held* by Amur IV, such as preferred equity in the Operating Companies, rather than Amur IV's own capital structure. The Court of Chancery adopted Pine River's interpretation in error. Amur's interpretation, whereby Section 5.07(d) does not prohibit the $94k Distributions, is correct, for four reasons.

First, the plain language of Section 5.07(d) does not bar the transfer of the $94k Distributions to AFC. This section applies to "distributions in respect of its equity interests," and because "its" refers to Amur IV, the provision covers distributions on the equity interests only of Amur IV itself or its capital structure—i.e., Amur IV's capital shares. The Court of Chancery focused on the words "in respect of" (Op. 35 n.101), but the object of those words is "its equity interests," and thus "in respect of" does not change the scope of the clause beyond the equity interests of Amur IV.

The $94k Distributions are not distributions in respect of Amur IV's equity interests, but rather dividends on Axis's preferred shares, and therefore in respect of Axis's equity interests. Simply put, there is a difference between shares *owned* by a company and shares *of* such company. If the parties had intended to include the former, they would have simply referred to all property owned by Amur IV. By instead referring to Amur IV's "equity interests," 5.07(d) covers only Amur IV's equity units. Indeed, every other place that the Credit Agreement uses the term "equity interests," the term concerns Amur IV's equity units.[7] Similarly, there are other instances where the Credit Agreement uses the term "investments" to include Amur IV's equity investments, just as it could have in Section 5.07(d), had the drafters intended for its requirements to apply to distributions in respect of equity shares Amur IV owns.[8]

This interpretation is further supported by the fact that 5.07(d) bars Amur IV from "purchas[ing], redeem[ing], or otherwise acquir[ing] or retir[ing] any of its equity interests." But under Pine River's interpretation, where "its equity

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[7] *See* A577 (defining "Change of Control" with reference to "the failure of Parent to own and control, directly or indirectly, 100% of the *equity interests of Borrower*") (emphasis added); *see also* A603 ("The permissible basis for and the amount of any dividend or distribution upon, or repurchase or other retirement of, any *equity interests in the Borrower*.") (emphasis added).

[8] *See* A583 (defining "Total Assets" to include "investments which Borrower owns"); *see also* A597 (explaining how the Parent may reach the Equity Ratio by contributing "investments").

interests" refers to equity investments *owned* by Amur IV, 5.07(d) would bar Amur IV from purchasing equity investments *it already owns*. It is not possible for Amur IV to purchase equity investments it already owns, rendering Pine River's interpretation nonsensical.

Second, interpreting the phrase "distributions in respect of its equity interests" as applying to equity investments that Amur IV *owns* as opposed to distributions in respect of Amur IV's own equity would lead to absurd results and make it effectively impossible for Amur IV to comply with the Credit Agreement. Pine River's argument, adopted by the Court of Chancery, is that 5.07(d) is implicated when Amur IV owns equity, receives dividends on that equity, and transfers those dividends to any third party. (A453-54). But this interpretation runs contrary to the purpose of the Credit Agreement, and indeed undermines its proper functioning.

As discussed above, Amur IV used the Advances from Pine River to make both debt and equity investments in various Operating Companies. One such equity investment was in Amur JMW Aviation Holdings LLC ("AJMWA"). (A267). Amur IV used an Advance from Pine River to purchase preferred stock in AJMWA, which came with the right to dividends. (*Id.*). Amur IV passes those

dividends along to Pine River to repay the Advance.[9] Since the AJMWA Asset was acquired, and continuing to this day, Amur IV has received many a dividend from AJMWA on its preferred stock investment, and distributed that dividend to Pine River, without complaint from Pine River.

But Pine River's interpretation of 5.07(d) would lead to a situation where, each time Amur IV receives a dividend from AJMWA or any other investment it made with an Advance under the Credit Agreement, the Credit Agreement simultaneously directs Amur IV to pay those dividends to Pine River, and bars it from doing so because it would constitute an Event of Default for Amur IV to distribute dividends received on equity shares it owns to a third party, such as Pine River. Amur IV's interpretation does not lead to such absurd results, because if the phrase "its equity interests" in 5.07(d) means the capital structure of Amur IV, then 5.07(d) does not bar Amur IV from receiving dividends on, for example, the AJMWA preferred equity and transferring them to Pine River through the waterfall. Courts regularly refuse to adopt interpretations which lead to absurd

[9] *See* A601-02 (defining "Available Collections" to include "all monies received … pursuant to the … contracts constituting the Assets") and A603-04 (mandating that all Available Collections are remitted through a waterfall, including to Pine River).

results.[10] This Court should similarly reject Pine River's absurd interpretation, which Amur IV's reading of 5.07(d) avoids.

When Amur pointed out this absurdity in moving to stay the judgment pending appeal, Pine River argued that "5.07(d) explicitly permits such payments [to Pine River] through the Credit Agreement's payment waterfall." (A1044). This is incorrect. Although 5.07(d) restricts distributions in respect of Amur IV's own equity, it also contains a caveat: "other than any such payment permitted to be made to Parent in accordance with Section 6.04." (A600). Pine River is not Amur IV's Parent, and so the carve-out in 5.07(d) is not relevant to Pine River at all. The only priority of Section 6.04's waterfall that is directed at Amur IV's Parent is the ninth priority, which does not mention the Lender whatsoever.

For this reason, if 5.07(d) was meant to apply to dividends on stock Amur IV owns, as opposed to dividends in respect of Amur IV's own equity, then it would provide a carve-out not only for Amur IV's Parent, but for the Lender as well. That would permit, for example, the distributions of AJMWA's dividends to

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[10] *Hampton v. Turner*, 2015 WL 1947067, at *3 (Del. Ch. Apr. 29, 2015) ("The Court also avoids interpretations that produce absurd results to which the parties would not have agreed."); *Smith v. Brown & Jones*, 633 N.Y.S.2d 436, 442 (N.Y. Sup. Ct. 1995) (stating that when interpreting a contract, "[a]n unreasonable interpretation or an absurd result should be avoided"). The Credit Agreement is governed by New York law. (A619).

Pine River as discussed above. But neither 5.07(d)—nor 6.04—provides for an exception for Pine River.

Third, the Court of Chancery's interpretation of 5.07 would create an inexplicable distinction between debt and equity investments. As explained above, the Court of Chancery read 5.07(d)'s reference to Amur IV's "equity interests" as regulating Amur IV's equity investments in other companies. But Amur IV's investments are either debt investments or equity investments. Thus, the Court of Chancery's interpretation of Section 5.07(d) arbitrarily restricts Amur IV's ability to take actions with respect to the returns on its equity investments, because those returns would constitute "distributions in respect of [Amur IV's] equity interests," but imposes no such restriction on the returns from the debt investments. Such a distinction finds no support in the text, structure, or purpose of the Credit Agreement.

On the other hand, under Amur IV's interpretation of 5.07(d), Amur IV's ability to declare dividends on its own equity—or take other actions with respect to its own capital structure, such as stock buybacks or redemptions—is regulated, but the returns on both Amur IV's debt and equity investments are treated similarly. Such an interpretation does not create the arbitrary distinction accepted by the Court of Chancery, and instead serves the sensible purpose of preventing Amur IV

from paying its equity holders outside of what is otherwise permitted in the Credit Agreement.

Finally, the December 2014 amendment to 5.07(d) further demonstrates that the Section does not pertain to the $94k Distributions but rather to the capital structure of Amur IV. Amur IV has two types of equity interest—Class A Units and Class B Units. (A655). The December 2014 amendment permits Amur IV to "pay dividends [] upon *its Class B Units*, and related tax gross-up dividends upon *its Class A Units*" and speaks only in the language of Amur IV's capital structure, explicitly addressing dividends which Amur IV may want to declare itself—as opposed to those it may receive from another entity whose equity Amur IV happens to own. (A649-50) (emphasis added).

Similarly, the December 2014 Amendment only allows a "distribution[] in respect of [Amur IV's] equity interests" if it is permitted under *Amur IV's* LLC Agreement. (*Id.*). Amur IV's LLC Agreement cannot govern whether *another entity* whose stock Amur IV owns, such as Axis, can declare dividends, but only whether *Amur IV* can declare dividends upon its own shares.

Moreover, the amendment allows Amur IV to pay "dividends upon its Class B Units, and related tax gross-up dividends upon its Class A Units," under certain conditions. (*Id.*). Pine River argues that "its equity interests" means the equity interests Amur IV owns—therefore, "its Class B Units" and "its Class A Units"

means the Class A or Class B Units of *other companies* that Amur IV owns. Under Pine River's definition, Amur IV's ability to make distributions upon its equity interests depends in part on the nomenclature that other companies, in which Amur IV owns equity (such as Axis), use for their shares of stock. If Axis does not name its stock Class A and Class B, but rather Class C or Class D, Amur IV would be prohibited from paying dividends on those stocks, an interpretation that makes no sense.

2. Section 5.07(f) Does Not Bar The $94k Distributions

Section 5.07(f) likewise does not bar Amur IV from passing the $94k Distributions to AFC. The Court of Chancery's contrary holding, that the $94k Distributions constituted Amur IV entering into a transaction with an affiliate, was in error, for three reasons.

First, 5.07(f), titled "Transactions with Affiliates," states that Amur IV shall "not make any payment to or sell, lease, transfer or otherwise dispose of any of its properties or assets to, or purchase any property or assets from, or enter into or make or amend any transaction, contract, agreement, understanding, loan, advance or guarantee with, or for the benefit of, any Affiliate of Borrower." Amur IV did

not "enter into," "make," or "amend" any transaction when passing the $94k Distributions to AFC.[11]

The only transaction Amur IV entered into relating to the $94k Distributions with AFC—the agreement that AFC would contribute the preferred equity in Axis to Amur IV so that Amur IV could meet its equity ratio, while AFC retained the right to the Axis preferred equity dividends, the $94k Distributions—was prior to execution of the Credit Agreement. The subsequent monthly receipt of the $94k Distributions by AFC did not constitute Amur IV making or entering into any transaction, but rather the fulfillment of a transaction that had already been entered into.[12]

Section 5.07(f) captures this distinction, as is made clear by the terms used—"enter into or make or amend"—each of which concerns the *formation* of a

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[11] The Court of Chancery found that the $94k Distributions violated Section 5.07(f) because they constituted Amur IV entering into a transaction with an affiliate. (Op. 37 n.96).

[12] *In re Mortgs. Ltd.*, 771 F.3d 1211, 1216 (9th Cir. 2014) ("Obviously, if [a] party succeeds in obtaining a stay, it is impossible for third parties to enter into transactions with the estate … ."); *Beggs v. Rossi*, 145 F.3d 511, 512 (2d Cir. 1998) (holding that the mere ownership of a vehicle did not constitute a "transaction" for purposes of the Fair Debt Collection practices Act); 19 AM. JUR. 2d *Corporations* § 2002 (2018) ("Thus, where a corporation entered into a contract for land at an exorbitant price, the wrong was consummated at the time the contract was entered into and was not made a continuing one by the fact that the corporation was later making payments under the contract. Likewise, the wrong was committed at the time of the granting of options which a shareholder complained of, rather than at the time those options were exercised.").

transaction or the *alteration* of an existing transaction, not the continuance of one. "Enter" means "[t]o become a party to," and "make" means "[t]o cause (something) to exist."[13] In order for 5.07(f) to apply, therefore, Amur IV must either *cause* a new transaction to exist, or it must *become* a party to a new or already-existing transaction.

Black's also defines "Make" as "to acquire (something) <to make money on execution>,"[14] but Amur IV was not "acquiring" a "transaction" each time it passed the $94k Distributions to AFC. Giving effect to the requirement that Amur IV "make" or "enter into" a transaction for 5.07(f) to apply makes sense, especially in light of the absurd results and superfluity a contrary interpretation would yield.

Indeed, the Court of Chancery's interpretation of "transaction" as barring any flow of funds between Amur IV and an affiliate would render the separate prohibitions in 5.07(f), against sales to affiliates, purchases from affiliates, and payments to affiliates, all surplusage, as each necessarily includes the flow of funds and is therefore subsumed within the trial court's interpretation of "transaction." The clause can only be harmonized by interpreting the "enter into or

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[13] *Enter*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("To become a party to <they entered into an agreement>"); *id. Make* ("1. To cause (something) to exist <to make a record>").

[14] *Id.*

make or amend" clause as exactly what it says—forming or changing transactions, not continuing them.

And consistent with the purpose of the Credit Agreement, between 2013 and 2016, Amur IV regularly invested in or lent money to Operating Companies, some of which were affiliates. (A468-69). Many of these arrangements contemplate those affiliates making regular payments to Amur IV—either dividends (like AJMWA), or payments on loans. Under Pine River's interpretation, every time funds flow between Amur IV and an affiliate, Amur IV would be making or entering into a transaction that falls under the purview of 5.07(f).

Second, and relatedly, Section 5.07(f) not only bars Amur IV from "enter[ing] into or mak[ing]" transactions with affiliates, but also any "contract, agreement, understanding, loan, advance or guarantee." The Credit Agreement should be interpreted in light of the overall context,[15] and an individual member of a list should be interpreted in light of its company.[16]

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[15] *See, e.g.*, *Korosh v. Korosh*, 953 N.Y.S.2d 72, 74 (N.Y. App. Div. 2012) ("[T]he court also should examine the entire contract.").

[16] *See, e.g.*, *Popkin v. Sec. Mut. Ins. Co. of N.Y.*, 367 N.Y.S.2d 492, 495 (N.Y. App. Div. 1975) ("'Noscitur a sociis' is an old fundamental maxim which summarizes the rule both of law and of language that associated words explain and limit each other. In effect, it is a rule of construction whereby the meaning of a word in a provision may be ascertained by a consideration of the company in which it is found and the meaning of the words which are associated with it."); *In re Motors Liquidation Co.*, 447 B.R. 142, 148 (Bankr. S.D.N.Y. 2011) ("[W]ords

Each of the other items in this provision of 5.07(f)—"contract, agreement, understanding, loan, advance or guarantee"—requires a coming together of two parties to establish an ongoing relationship. The phrase "enter[ing] into or mak[ing] … any transaction" should be read similarly to "enter[ing] into or mak[ing] … any … contract," and one only enters into or makes a contract once, not each time an act is taken pursuant to a contract.

The only transaction made relating to the $94k Distributions was the agreement that AFC would contribute Axis preferred shares to satisfy Amur IV's equity ratio and that AFC would retain ownership of the dividend rights from the Axis preferred shares, which would flow through the Collections Account to AFC. That agreement occurred before the Credit Agreement was executed, and the individual pass-throughs of the $94k Distributions from Amur IV to AFC were not new instances of Amur IV "enter[ing] into or mak[ing]" transactions.[17]

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in a list, while meaning different things, should nevertheless be read to place limits on how broadly some of those words might be construed.").

[17] *See Goldie v. Yaker*, 432 P.2d 841, 843 (N.M. 1967) (noting distinction between "entering the contract" and "carrying out the contract once it was entered"); *In re Residential Capital, LLC*, 563 B.R. 477, 493-94 (S.D.N.Y. 2016) ("Significant here, the issuing of a mortgage is a pure real estate transaction that falls outside the CSPA's scope. Mortgage servicing, and the pursuit of foreclosure, fall outside the CSPA. These are instead collateral services that are solely associated with the sale of real estate and are necessary to effectuate a pure real estate transaction.") (quotations and citations omitted), *aff'd sub nom. Gray v. ResCap Borrower Claims Tr.*, 706 F. App'x 16 (2d Cir. 2017).

Finally, putting aside the fact that the $94k Distributions were not Amur IV "entering into or making" a transaction, they do not fall within any other prohibition of 5.07(f). The $94k Distributions were not Amur IV transferring its property or assets to an affiliate—the $94k Distributions were always AFC's.

3. Amur And Pine River's Course Of Dealing Confirms Amur's Interpretation Of Section 5.07

While the Credit Agreement is clear that Sections 5.07(d) and (f) do not prohibit the $94k Distributions,[18] it is also telling that the $94k Distributions have flowed through the Collections Account to AFC since the inception of the Credit Agreement, with no objection from Pine River, until Pine River was desperately attempting to manufacture an Event of Default.

"[T]he best evidence of the intent of the parties to a contract is their conduct after the contract is formed." *T.L.C. W., LLC v. Fashion Outlets of Niagara, LLC*, 875 N.Y.S.2d 367, 369 (N.Y. App. Div. 2009) (quotations and citations omitted);[19] *see also Fed. Ins. Co. v. Ams. Ins. Co.*, 691 N.Y.S.2d 508, 512 (N.Y. App. Div.

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[18] Nor does the Security Agreement, as demonstrated *infra*.

[19] *See also In re Carol B. v. Sanford B.*, 865 N.Y.S.2d 194, 194 (N.Y. App. Div. 2008) ("The parties' course of conduct under a contract is persuasive evidence of their agreed intention.") (citation omitted); *Evans v. Famous Music Corp.*, 807 N.E.2d 868, 872-73 (N.Y. 2004) (turning to course of dealing to interpret ambiguous contract); *U.S. Fid. & Guar. Co. v. Delmar Dev. Partners, LLC*, 788 N.Y.S.2d 252, 254 (N.Y. App. Div. 2005) ("In resolving [an] ambiguity, we look to extrinsic evidence relevant to the parties' intent, and recognize that the 'subsequent conduct of the parties [may] be used to indicate their intent.'") (internal citation omitted).

1999) ("Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.") (quoting *Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118 (1913)).

To the extent the Court finds the Credit Agreement ambiguous in any respect—and if the Court does find ambiguity, the matter should be remanded so that the issue can be resolved following discovery—Amur and Pine River's course of performance with respect to the $94k Distributions is relevant to interpreting the document. Amur's interpretation of 5.07(d) and (f) is not only consistent with the plain text of the Credit Agreement and the purpose of the credit facility as a whole, but consistent with how Amur and Pine River have always treated the $94k Distributions. As discussed *supra* at 12-13 (A833-34), Pine River knew about the $94k Distributions for over four years before raising any objection. Pine River's long-standing acceptance of the $94k Distributions belies the idea that the parties intended that the $94k Distributions would breach the Credit Agreement.[20]

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[20] *See, e.g.*, *Pepsi-Cola Bottling Co. of Asbury Park. v. Pepsico, Inc.*, 297 A.2d 28, 31-33 (Del. 1972) (holding that failure to object for years is strong course-of-dealing evidence).

4. The Security Agreement Does Not Support The Court of Chancery's Holdings Of Breach And Event Of Default Regarding The $94k Distributions

The Court of Chancery found that the $94k Distributions breached Sections 5.07(d) and (f) in part because it reasoned that the $94k Distributions "are Collateral" under the Security Agreement[21] and that 5.07(d) and (f) "serve to protect the Collateral for the Pine River Loan. Therefore, the Credit Agreement's provisions, including the negative covenants set forth in Sections 5.07(d) and (f), are applicable to the $94k distributions." (Op. 42-43).

The Court of Chancery reasoned that because it interpreted 5.07(d) and (f) as preventing Amur IV from diminishing the Collateral available to Pine River upon an Event of Default, and because the $94k Distributions are Collateral under the Security Agreement's definition, it therefore made sense to apply the prohibitions in 5.07(d) and (f) to the $94k Distributions. The Court of Chancery's reliance on the Security Agreement was in error, for three reasons.

First, the Court of Chancery relied on the Security Agreement's definition of Collateral—"all other Assets[22] of [Amur IV], wherever located and whether now

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[21] Collateral is not defined in the Credit Agreement. It is only defined in the Security Agreement.

[22] Assets is a defined term in both the Credit Agreement and the Security Agreement, although the documents define the term differently. *See* A576 (Credit Agreement defining "Assets" to include various financial assets acquired by Amur IV and their proceeds); A671 (Security Agreement defining "Assets" to mean "all

owned or hereafter acquired or arising, and all proceeds thereof" (Op. 42)—in making its decision. But neither 5.07(d) nor (f) conditions itself on the assets at issue being covered by Pine River's security interest. Sections 5.07(d) and (f) do not refer to Collateral or Assets even though other Sections of 5.07—for example, 5.07(a)—do. As such, the Court of Chancery's discussion of Collateral and the Security Agreement was irrelevant to the question before it: whether the $94k Distributions violated Sections 5.07(d) or (f).

Second, even if 5.07(d) and (f) concerned themselves with the Collateral discussed in the Security Agreement, the $94k Distributions do not fall within the Security Agreement's definition of Collateral or Asset. Under Section 2.01 of the Security Agreement Amur IV grants a security interest in the Collateral. Collateral is defined to include many different types of property of Amur IV, from its bank accounts to income from Amur IV's investments, but in all cases qualified by "whether now owned or hereafter from time to time acquired."

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right, title and interest of" Amur IV to a somewhat broader list of categories such as deposit accounts, consumer goods, and commercial tort claims, including Assets as defined in the Credit Agreement).

Section 2.01 Grant of Security.

(a) To secure the Secured Obligations, the Grantor hereby assigns and pledges to the Collateral Agent for the benefit of the Secured Parties, and hereby grants to the Collateral Agent for the benefit of the Secured Parties, a first priority perfected security interest in, to and under, the following, whether now owned or hereafter from time to time acquired: (a) all right of the Grantor in and to the Interest Reserve Account, the Collections Account and each other Account established under the Credit Agreement, (b) all cash, investment property, investments, securities, instruments, investment property or other property (including all "financial assets" within the meaning of Section 8-102(a)(9) of the UCC) at any time or from time to time on deposit in or credited to any such Account, (c) all of the Assets and all rights to payment and other Proceeds from time to time received, receivable or otherwise distributed in respect of such Assets, (d) all income, payments and proceeds of any and all of the foregoing, and (e) all other Assets of the Grantor, wherever located and whether now owned or hereafter acquired or arising, and all proceeds thereof, in each case for the benefit of the Secured Parties (the "Collateral").

The "now owned or hereafter from time to time acquired" qualification—which applies to all subsections of Section 2.01—is important, because the $94k Distributions are owned by AFC, not Amur IV (and Amur IV never acquired them), and therefore do not fall within the parameters of Section 2.01.

The same is true with respect to the Security Agreement's definition of Assets, defined as "all right, title and interest of [Amur IV] in and to" a number of different items. (A671). While the shares of Axis preferred equity are an Asset (under the Security Agreement), Amur IV never had any "right, title, [or] interest" in or to the $94k Distributions.[23]

Finally, the Court of Chancery erred in reasoning that even if Amur IV did not own the $94k Distributions, they are still "proceeds" of the Axis preferred

[23] Pine River does not dispute that the $94k Distributions are not Assets as that term is used in the Credit Agreement. (Op. 21 n.60).

shares, and therefore Section 2.01 applies. (Op. 41-42). Each subsection of Section 2.01—including the statement in 2.01(e) that "all other Assets of [Amur IV], wherever located … and all proceeds thereof"—is modified by the umbrella phrase "whether now owned or hereafter from time to time acquired." In order for a term (including "proceeds") discussed in any of 2.01's subsections to constitute Collateral under 2.01, it must be owned or acquired by Amur IV. Amur IV never owned or acquired the $94k Distributions, and therefore could not have granted a security interest in them.

5. Pine River Elected To Perform Under The Credit Agreement Despite The Alleged Breaches

Even if there were a breach here, Pine River elected its remedy by continuing to perform for years rather than declaring an Event of Default based on the $94k Distributions. Under New York law, when a breach occurs, a party can declare a breach or choose to continue with the contract, but if it chooses the latter, it cannot thereafter seek to terminate the contract based on the prior breach.[24]

This rule applies here. Pine River elected to continue participating under the contract and continued to receive benefits from Amur IV for four years. If Pine River truly believed the $94k Distributions amounted to a breach of the Credit Agreement, Pine River could have either elected to terminate the contract or continue performing and seek damages. Pine River chose to perform under the contract—making Advances, approving programs and not objecting to the $94k Distributions. Pine River should not be allowed to change its mind and seek to

[24] *Kamco Supply Corp. v. On the Right Track, LLC*, 49 N.Y.S.3d 721, 725, 728 (N.Y. App. Div. 2017) ("[B]y electing early on to continue the agreements despite the … breach of the [agreement, the non-breaching party] waived their right to terminate the agreements based on that initial breach," despite a provision saying that "[n]o waiver of any provision of this Agreement … shall be effective" unless in writing.) (internal citations omitted); *Bigda v. Fischbach Corp.*, 898 F. Supp. 1004, 1013-14 (S.D.N.Y. 1995) (although a clause requiring waivers be in writing may prevent waiver of a termination right unless written, election of remedies may still apply); 13 WILLISTON ON CONTRACTS § 39:32, *Election following breach* (4th ed.) ("The doctrine of election and that of waiver should not be confused; an election is not a waiver of any rights under the contract but rather a choice between two inconsistent rights following a breach of the contract.").

terminate because of the $94k Distributions, when it has elected to keep the contract alive.[25]

Pine River therefore cannot now object to the $94k Distributions that flowed through the Collections Account before June 2017.[26]

The Court of Chancery rejected reliance on Pine River's failure to declare a breach, or object, earlier because "Amur IV cannot be heard to argue that Pine River's acquiescence to Amur IV's prior $94k distributions out of the Collections Account constitutes a waiver of its right to enforce Section 5.07." (Op. 45). However, election of remedies is an issue separate from whether Pine River

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[25] *ESPN, Inc. v. Office of The Comm'r of Baseball*, 76 F. Supp. 2d 383, 387-90 (S.D.N.Y. 1999) (explaining that, after a purported breach, the non-breaching party "can elect to terminate the contract and recover liquidated damages or it can continue the contract and recover damages solely for the breach. A party can indicate that it has chosen to continue the contract by continuing to perform … or by accepting the performance of the breaching party. Once a party elects to continue the contract, it can never thereafter elect to terminate the contract based on that breach[.]"); *see also id.* (further explaining that, in the election of remedies context, no-waiver provisions do not apply: "[e]lection has no effect on the parties 'rights' under the agreement, nor does it in any way limit the party's 'right' to pursue available remedies. Rather it demands that the party exercise its rightful remedies in a consistent and binding manner. The party must either terminate or continue, but not both. Nor may the party choose one avenue and then change its mind.") (quoting *Bigda*, 898 F. Supp. at 1011-12).

[26] *Bigda*, 898 F. Supp. at 1012 ("Since Bigda continued to collect his paychecks and perform his duties … he elected to continue his contract in the face of all breaches that had occurred."); *V.S. Int'l, S.A. v. Boyden World Corp.*, 862 F. Supp. 1188, 1196 (S.D.N.Y. 1994) (continued performance under contract constituted election not to terminate).

waived its right to object to the $94k Distributions through its actions, or lack thereof.

Courts have recognized that a "no waiver" provision does not allow a party to elect to continue with a contract and then seek to terminate in defiance of the law of election of remedies.[27] Indeed, such an interpretation would wrongly allow a party to hold in reserve for years the right to terminate a contract at any moment while reaping the benefits of that contract. There is no justification in law or in the Credit Agreement for such an inequitable result.

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[27] *ESPN*, 76 F. Supp. 2d at 388-89 ("The doctrines of waiver and election of remedies are complementary rather than competing common law contract principles. … In contrast to a waiver of contractual rights, an election is simply a choice among remedies by the party; it is a decision by that party as to how it should proceed in the wake of the breaching party's nonperformance. In other words, an election is not a waiver of any rights under the contract but rather a choice between two inconsistent remedies for breach of the contract.") (quoting *Bigda*, 898 F. Supp. at 1014); *Honeywell Int'l Inc. v. Air Prods. & Chems., Inc.*, 858 A.2d 392, 419-20 (Del. Ch. 2004) ("Air Products argues that the 'no waiver' provision in the Agreement preserves its right to terminate based on past breaches, but under the election of remedies doctrine even the presence of such a provision in a contract does not alter the rule that '[a] party cannot elect to continue with the contract, continue to receive benefits from it, and thereafter bring an action for rescission or total breach.'") (applying New York law) (quotation omitted) (reversed in part on other grounds, 872 A.2d 944); *Kamco*, 49 N.Y.S.3d at 730 (rejecting argument that no oral-waiver provision precluded finding of election of remedies).

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Chancery's grant of summary judgment on Count IX in favor of Pine River, and remand for further proceedings in the Court of Chancery.

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CERTIFICATE OF SERVICE

I, Garrett B. Moritz, hereby certify that on March 6, 2018, I caused true and correct copies of the foregoing *Public Version of Appellants' Opening Brief* to be served through File & Serve*Xpress* on the following counsel of record:

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