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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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APPELLANTS' REPLY BRIEF

ROSS ARONSTAM & MORITZ LLP

Garrett B. Moritz (Bar No. 5646)
Nicholas D. Mozal (Bar No. 5838)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Defendants Below-Appellants Amur Finance Company, Inc. and Amur Finance IV LLC

Of Counsel:

Christopher D. Kercher
Marlo A. Pecora
Kathryn D. Bonacorsi
Thomas A. Bridges
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

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PRELIMINARY STATEMENT

Pine River's answering brief ("Answering Brief" or "AB") ignores most of the arguments in Amur's opening brief ("Opening Brief" or "OB")[1] and instead attacks straw men, including that Amur did not properly appeal supposed rulings below that there was no oral agreement regarding the $94k Distributions and that AFC does not own them. Putting aside Pine River's distortion of the Court of Chancery's actual rulings, Amur's arguments do not turn on the oral agreement or ownership. The question is whether the $94k Distributions breached 5.07(d) and 5.07(f) of the Credit Agreement.

Pine River failed to prove any such breach. The Court of Chancery's contrary ruling was based on erroneous interpretations of 5.07(d) and 5.07(f), conflicting with their plain meaning, which Pine River makes practically no attempt to defend.

[1] Terms not defined herein have the meanings in the Opening Brief.

ARGUMENT

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

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

Section 5.07(d) does not apply to the $94k Distributions—dividends Axis declared on Axis's stock: (1) 5.07(d)'s plain language does not prohibit distributions on equity interests held by Amur IV, and therefore does not bar transferring the $94k Distributions to AFC; (2) interpreting 5.07(d) as barring Amur IV from receiving and distributing dividends on equity interests Amur IV holds would undermine the Credit Agreement's purpose; (3) interpreting "its equity interests" in 5.07(d) as referring to equity investments Amur IV holds as opposed to the "equity interests" *of* Amur IV leads to absurd results; and (4) the December 2014 amendment to 5.07(d) further confirms Amur's interpretation. (OB 4-7, 23-30).

Pine River does not respond to these arguments or dispute that 5.07(d) applies only to dividends Amur IV declares on the "equity interests" in its capital structure. That is all that is necessary for this Court to reverse, because it is undisputed that the $94k Distributions were not dividends declared by Amur IV on the equity interests in its capital structure. In fact, because Amur IV is an LLC, the term "distribution" in 5.07(d) is essentially a synonym of "dividend"—the Delaware Code states that LLCs declare "distributions" as opposed to "dividends"

(declared by corporations). 6 *Del. C.* § 18-601 *et seq.*; A656 (LLC agreement referring to Amur IV's ability to make "distributions"). This statutory context makes even more clear that 5.07(d) applies to distributions Amur IV declares on its capital structure, *not* the pass-through of funds declared by another entity.

Rather than addressing Amur's arguments, Pine River raises the untrue and irrelevant argument that Amur misinterprets the opinion below.

First, Pine River asserts that the Court of Chancery held that 5.07(d) applies to the $94k Distributions "because *Amur IV owned the Axis Dividends*." (AB 28) (emphasis in original). But the Court of Chancery actually held: "It is undisputed that Amur IV *owns the Axis Preferred Stock* from which the $94k Distributions originate. As such, the distributions are 'distributions in respect of [Amur IV's] equity interests.'" (Op. 35) (emphasis added). The Court of Chancery relied on 5.07(d)'s reference to "in respect of" (Op. 35 n.101), and not, as Pine River suggests, Amur IV's supposed ownership of the dividends. (AB 28). The Court of Chancery made no finding about ownership of the $94k Distributions.[2]

In any event, the $94k Distributions were not "distributions in respect of [Amur IV's] equity interests." This language refers to dividends or distributions

[2] Nor could the Court of Chancery have done so. Almost no discovery has been conducted and only Amur put in evidence regarding the agreement. (OB 12, A737-38, A833-34). Pine River's only "evidence" to the contrary is attorney advocacy—it did not submit an affidavit despite still employing the relevant personnel. (AB 21 n.11; A936).

(or something similar, like stock redemptions or buybacks) that Amur IV declares on the equity interests in its own capital structure—which undisputedly does not include the $94k Distributions. The Court of Chancery's decision rested on the idea that 5.07(d)'s reference to "in respect of [Amur IV's] equity interests" meant not only Amur IV's own capital shares, but dividends of any shares Amur IV owns in other companies. (Op. 35 & n.101). Pine River's failure to even try to defend the Court of Chancery's interpretation of the key language in 5.07(d) is telling.

Second, Pine River asserts that "[t]he Court of Chancery fully understood that the purpose of Section 5.07(d) was to preserve Amur IV's property – the 'equity cushion' and 'Collateral[.]'" (AB 29). But Pine River cannot square its argument with the plain meaning of 5.07(d). Moreover, Pine River concedes that 5.07(d) does not concern Collateral (AB 34), and does not explain how the $94k Distributions satisfy the "equity cushion." In any event, each time Amur IV took out an Advance, Pine River confirmed that the "equity cushion" was satisfied, despite knowing Amur IV was not retaining the $94k Distributions. (A833-34, A841-44).

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

Pine River also fails to confront Amur's argument regarding the plain language of 5.07(f). In particular, 5.07(f) does not bar "transactions" between Amur IV and an affiliate—it bars Amur IV from "enter[ing] into or mak[ing]"

transactions with an affiliate. (OB 30-35). Amur IV did not "enter into or make … any transaction" within the meaning of 5.07(f) if the transaction occurred before the Credit Agreement. *Id.* And Pine River does not dispute that the only "transaction" Amur IV entered into relating to the $94k Distributions was the agreement that AFC would contribute the Axis preferred equity to Amur IV to satisfy the equity ratio while retaining the right to the dividends (the $94k Distributions), which would flow through the Collections Account to AFC. (OB 7-8, 31-32).

The Court of Chancery did not and could not decide from the existing record when Amur IV entered into that transaction, and Amur produced substantial evidence showing that the transaction occurred *before the execution of* the Credit Agreement. (OB 12, 31; A737-38, A833-34). Therefore, when the $94k Distributions flowed through the Collections Account, Amur IV was not "enter[ing] into or mak[ing]" a transaction but rather fulfilling a pre-Credit Agreement transaction.

Pine River's only response is that the Court of Chancery "rejected all arguments based upon the supposed oral side agreement," which Amur supposedly failed to appeal. (AB 30). But this is incorrect. The Court of Chancery's holding regarding the oral agreement was that it cannot amend the Credit Agreement. (Op.

45). The Court of Chancery *did not* hold that the above-described oral agreements did not occur.

Relatedly, Pine River's reliance on the Credit Agreement's integration clause, Section 9.06, is unavailing: (1) even if the oral agreement is unenforceable, the $94k Distribution discussion *still occurred*, and Amur IV was not entering into or making a new transaction each time the $94k Distributions were transferred, because there was no new formation of a relationship as required by 5.07(f) (OB 34); (2) the oral agreement does not amend and is not inconsistent with the Credit Agreement, so it is not barred by 9.06, *Denenberg v. Schaeffer*, 29 N.Y.S.3d 387, 387 (N.Y. App. Div. 2016) (evidence of oral agreement admissible where it "has no effect to vary, contradict or supplement the terms of a later agreement containing the general merger clause"); *Long Island Trust Co. v. Int'l Institute for Packaging Ed., Ltd.*, 344 N.E.2d 377, 379 (N.Y. 1976) (allowing evidence of an oral agreement which "in no way contradict[ed] the express terms of the written agreement"); and (3) Pine River's narrow interpretation of 9.06 would implausibly bar consideration of other documents not inconsistent with the Credit Agreement, like the Security Agreement.[3]

[3] Similarly, Pine River's narrow interpretation of Section 9.06 would not only bar AFC's retention of the $94k Distributions, it would also bar AFC's donation—*made at the same time and as part of the same agreement*—of the Axis

Pine River also concedes that the Court of Chancery's interpretation of "enter into or make … any transaction" would render redundant other portions of 5.07(f) (OB 32-33), but argues that "the doctrine against superfluities may not be used to vary the plain meaning of a provision." (AB 30-31). But, Amur's argument regarding the plain language does not vary the meaning of 5.07(f) and avoids redundancy. At the very least, and as in the Delaware cases cited by Pine River, the contract is ambiguous and so discovery is necessary.

Finally, Pine River makes a conclusory argument that the $94k Distributions are "payments" to AFC, and so are barred by 5.07(f). (AB 32). But, Amur IV was not making a "payment" by transferring the funds to AFC—the funds *always* belonged to AFC, and, as Pine River does not dispute, no "obligation" was satisfied through the $94k Distributions.[4]

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

Pine River agrees that the parties' undisputed course of dealing may be used to interpret ambiguities in the Credit Agreement, but argues that Amur has not asserted the Credit Agreement is ambiguous. (AB 33-34). That is false. Amur

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preferred stock to satisfy Amur IV's equity ratio. Yet, Pine River does not contend that the donation of the Axis preferred stock was ineffective.

[4] *Payment*, BLACK'S LAW DICTIONARY (10th ed. 2014) (primary definition: "[p]erformance of an obligation by the delivery of money … accepted in … discharge of the obligation.").

argued both in the Opening Brief and below *in the alternative* that the Credit Agreement is ambiguous, necessitating discovery. (OB 18-19, 36; A744-45). Regardless, "[t]he determination of ambiguity lies within the sole province of the court." *Osborn ex rel. Osbon v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

Pine River also mistakenly argues that the no-waiver provision of the Credit Agreement bars consideration of the course of dealing. (AB 33). But course of dealing has nothing to do with waiver, and Amur is not arguing that Pine River waived its rights. Rather, Pine River's failure to object to the $94k Distributions for years is strong evidence that Pine River understood it never had a right to the $94k Distributions in the first place. Finally, Pine River's contention that there is no evidence proving its years-long knowledge of, agreement to, and acquiescence in the $94k Distributions (AB 34) is wrong and will be further refuted through discovery. *Infra* at 11-12.

D. Pine River Concedes That The Court Below Improperly Analyzed Whether The $94k Distributions Were Collateral.

Though the Court of Chancery found otherwise, neither 5.07(d) nor 5.07(f) conditions itself on Pine River having a security interest in the assets at issue. Neither provision even refers to Collateral or Assets. Pine River *concedes* this fact, but summarily dismisses it as "irrelevant." (AB 34). Through its concession, Pine River implicitly admits that the Court of Chancery erred in analyzing whether the $94k Distributions were Collateral. (OB 38).

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

Pine River's claim is also barred by the election of remedies doctrine. (OB 41-43). *First*, Pine River argues that the Credit Agreement forecloses an election of remedies defense. (AB 37-38). But Pine River cites no case holding that parties can contract around the election of remedies doctrine. Election of remedies is not rooted in contractual language, but the policy consideration that "obvious uncertainty and concomitant unfairness … would result from allowing a party to treat its agreement as both 'broken and subsisting.'" *ESPN, Inc. v. Office of Comm'r of Baseball*, 76 F. Supp. 2d 383, 392 (S.D.N.Y. 1999). And it addresses the "fundamental problem [that] when a party terminates after continuing the contract for a period of time[,] the party's legal justification for termination has disappeared." *Id.*

For example, in *Apex Pool Equipment Corp. v. Lee*, the court held that election of remedies applied, despite a contractual provision that "Apex may terminate this agreement *at any time* … upon the occurrence of" certain events. 419 F.2d 556, 558 (2d Cir. 1969) (emphasis added). Likewise, in *ESPN*, the court first ruled that a broad no-waiver provision did not address the doctrine, but went on to hold in the alternative that "to read the no-waiver provision as allowing Baseball to now terminate the contract based on breaches that occurred almost two years ago would violate important principles of contract law," 76 F. Supp. 2d at

391-92, evidencing that its decision did not rest on contract language, but on principles of contract. *See Bigda v. Fischbach Corp.*, 849 F. Supp. 895, 901 (S.D.N.Y. 1994) (holding New York law did "not afford plaintiff th[e] option" of claiming "he was entitled both to continue his performance … and to pursue damages").

Even if parties could contract around the election of remedies doctrine, the provisions Pine River relies on, 7.01 and 7.02 (AB 37-38), are insufficiently specific to have done so. Neither explicitly disclaims Amur's ability to raise an election of remedies defense. At most, they suggest that Pine River can call an Event of Default ("EOD") when it learns of that EOD notwithstanding the passage of time, so long as it has not knowingly elected an inconsistent remedy in the meantime. The language is similar to that in *Apex*, which did not prevent an election of remedies defense.

Further, election of remedies is a common law doctrine, *ESPN*, 76 F. Supp. 2d at 388; AB 38 n.18, and the Court should require express language before finding abrogation of well-established common law doctrines. *RW Power Partners, L.P. v. Va. Elec. & Power Co.*, 899 F. Supp. 1490, 1502 (E.D. Va. 1995) ("In sum, the language … does not abrogate the common law principle … clearly … . Yet, that is what must be done if a contract is to abrogate a principle which is so fundamentally embedded in the common law."); *cf. Andreason v. Royal Pest*

Control, 72 A.3d 115, 124 (Del. 2013) (discussing the same principle in the area of statutory interpretation).

Holding that 7.01 and 7.02 are sufficient to abrogate the common law election of remedies doctrine would introduce exactly the sort of uncertainty into contractual relations that the doctrine is meant to prevent, and give Pine River the benefit of a right it did not bargain for. *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 16 N.E.3d 1165, 1172 (N.Y. 2014).

Second, Pine River argues that the no-waiver provision in the Credit Agreement forecloses an election of remedies defense. (AB 38). But it does not dispute that election of remedies and waiver are different, and a no-waiver provision will not prevent a party from raising an election of remedies defense. (OB 43).

Third, Pine River also argues that because Amur IV made various "No Default" representations and did not notice an EOD based on the $94k Distributions, election of remedies does not apply. (AB 38-39). But the doctrine does not concern the subjective state of mind of the (allegedly) breaching party, but the actions taken by the non-breaching party. *Grocery Haulers, Inc. v. C & S Wholesale Grocers, Inc.*, 2012 WL 4049955, at *16 n.3 (S.D.N.Y. Sept. 14, 2012) (court allowed the party to add a defense of election of remedies after the plaintiff "obtained new information during [a] deposition … that it believed relevant to an

election of remedies defense."). The underlying rationale holds—and if anything, is even stronger—where the counter-party does not believe they are in breach.

Fourth, Pine River argues that it did not know about the $94k Distributions "until Lighthouse recently discovered them." (AB 39). This is untrue. Unrebutted evidence demonstrates Pine River's knowledge, including Mr. ShahMohammed's sworn affidavit confirming that he and Pine River "agreed that the dividends would be sent to the Collections Account, from where they would immediately be transferred to AFC" and his reference to documentary corroboration—including correspondence and quarterly disclosures—of the same. (OB 12; A835-36).

Amur recently submitted exemplar quarterly disclosures to the court below. AR4 Column N, AR8 Column N; AR19 Column N; AR23 Column N. These disclosures are not in the record, but it is in the interests of justice for this Court to consider them in light of Pine River's implication that Amur is misleading this Court. (AB 40). Pine River's argument that Mr. ShahMohammed's statements regarding the quarterly disclosures are inadmissible hearsay (AB 40) is wrong. Mr. ShahMohammed was on the emails sending these disclosures and evidencing Pine River's knowledge—indeed, analysis—of the same.

Pine River's knowledge is further evidenced by the Account Statements—showing the $94k Distributions—it received at least by December 2016. (A769-

829). In addition, every month since the Credit Agreement's execution, Pine River's Collateral Agent received the Account Statements. (OB 18).

In any event, Pine River's argument that Amur does not have the facts to prove election of remedies misses the point, demonstrating only that Pine River's motion should have been denied under Rule 56(f). (A188-206, A744-47, A851-53).

Finally, Pine River argues that Amur waived this argument. (AB 35-36). But Pine River does not dispute that the Court of Chancery addressed the issue. (Op. 43-45 (considering Pine River's awareness of the $94k Distributions, and acquiescence to the same)). It is an established principle of appellate procedure that arguments not raised by the parties but considered by the trial court are ripe for appellate review. *Reddy v. MBKS Co., Ltd.*, 945 A.2d 1080, 1086 (Del. 2008) (considering issue raised *sua sponte* below because "parties were not heard on this specific issue"); *Lawson v. Preston L. McIlvaine Constr. Co.*, 552 A.2d 858 (Del. 1988) (Table) (issue "properly before this Court on appeal" where raised *sua sponte* by judge); *see also Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009).

CONCLUSION

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

ROSS ARONSTAM & MORITZ LLP

By: /s/ Garrett B. Moritz
Garrett B. Moritz (Bar No. 5646)
Nicholas D. Mozal (Bar No. 5838)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Defendants Below-Appellants Amur Finance Company, Inc. and Amur Finance IV LLC

Of Counsel:

Christopher D. Kercher
Marlo A. Pecora
Kathryn D. Bonacorsi
Thomas A. Bridges
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

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CERTIFICATE OF SERVICE

I, Garrett B. Moritz, hereby certify that on April 24, 2018, I caused true and correct copies of the *Public Version of Appellants' Reply Brief* to be served through File & Serve*Xpress* on the following counsel of record:

C. Barr Flinn
Lakshmi A. Muthu
YOUNG CONAWAY STARGATT
& TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801

/s/ Garrett B. Moritz
Garrett B. Moritz (Bar No. 5646)