EFiled: Sep 07 2018 09:15AM EDT
Filing ID 62422779
Case Number 320,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEMINI REAL ESTATE ADVISORS, LLC, and GEMINI EQUITY PARTNERS, LLC, Delaware Limited Liability Companies, Defendants Below, Appellants v. WILLIAM T. OBEID, Plaintiff Below, Appellee.	)	No. 320, 2018 On Appeal from the Court of Chancery, C.A. No. 2017-0510-JTL

APPELLEE'S CORRECTED ANSWERING BRIEF

ASHBY & GEDDES
Catherine A. Gaul (No. 4310)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, Delaware 19899
(302) 654-1888

Attorneys for Plaintiff Below, Appellee William T. Obeid

Dated: August 30, 2018
Corrected on September 7, 2018

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

NATURE OF PROCEEDINGS[1]

Defendants' appeal depends on overturning settled legal precedent holding that fiduciaries should be given unfettered access to company records, and on successfully challenging the discretion exercised by the Court of Chancery in granting a fiduciary access to certain company records in accordance with factual findings made after trial. Because the Post-Trial Ruling (i) relied on settled law, (ii) found as a matter of fact that granting access to a manager and one-third owner would cause no harm to the company, and (iii) resulted in no abuse of discretion, Defendants' appeal must fail.

Trial in this action presented a narrow issue: Is Plaintiff Below, Appellee William T. Obeid ("Obeid"), as a manager of Gemini Real Estate Advisors, LLC ("GREA" or the "Company") and one-third owner of GREA and its related entity, Gemini Equity Partners, LLC ("GEP" and together with GREA, "Gemini" or "Defendants"), entitled to access financial information within the Company's control that is necessary to conduct an accounting of investor returns and Manager fees that are owed as a result of the sales of assets owned by Gemini's investor funds? At trial, Obeid proved that the information needed in order for him to conduct such an accounting is: (1) a copy of Excel-based workbooks prepared by the

[1] Unless otherwise noted, the definitions used by the Court of Chancery in its June 5, 2018 Post-Trial Ruling (the "Ruling") are used herein. In addition, Appellants' Opening Brief on Appeal is cited herein as "OB."

Company's former Chief Financial Officer calculating the Manager fees and investor returns; and (2) read-only access to the Company's accounting database with sufficient permission to view the financial information that backs up those calculations (collectively, the "Disputed Information").

Obeid also showed at trial that he needs the Disputed Information for two reasons: (1) in order to uphold the fiduciary duties he owes to the Company and to the investors in the entities that the Company manages by ensuring that the investors are receiving what they are actually owed and not being saddled with improper expenses; and (2) to determine, as a one-third owner of the Company, whether the Company has received the fees it is owed, whether those fees were properly calculated, and whether Obeid has received his one-third share.

Obeid and the Company's other two manager-members have been embroiled in litigation since July 1, 2014. Since that time, Obeid's only access to the Company's full financial information was through discovery in the New York litigation. Upon completion of document discovery in March 2016, however, Obeid's access to the financial information for the Company and the entities it manages was severely curtailed. After having his informal requests for information refused, Obeid issued a formal demand to inspect Gemini's books and records in order to uphold his fiduciary duties, investigate concerns about possible mismanagement, and value his membership interest.

Defendants claimed below that Obeid has been provided with all of the information he is entitled to under Delaware law and that, even if he were entitled to such additional information, he presents such a threat to the organization that he should be denied any access to the Disputed Information. Defendants, however, were never able to prove any current competitive conduct by Obeid or other threat to the organization that would warrant denying a fiduciary ongoing access to financial information, particularly given that the Company is being wound down. Nor were Defendants able to identify any concrete harm that would result from Obeid's hypothetical misuse of such historical financial information, which would be in violation of the confidentiality order under which Obeid agreed to condition his access.

In granting Obeid access to the Disputed Information, the Court of Chancery carefully considered the parties' pre- and post-trial briefs, trial testimony, and thousands of pages of exhibits in order to find that Obeid is entitled, as both a manager of the Company and as a member under the Company's operating agreement, to access the Disputed Information. The trial Court's well-reasoned post-trial decision is supported both by the evidence before it and its specific findings on the relative credibility of the witnesses. The judgment below should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held, based on the evidence presented at trial, that Defendants failed to carry their "substantial burden" to demonstrate that Obeid has an improper purpose in seeking the Disputed Information.

2. Denied. The Court of Chancery relied on settled legal precedent holding that fiduciaries should be given unfettered access to a company's records in granting Obeid read-only access to the Yardi database. The facts at trial established that the Company maintains and controls all of the entities' accounting information in the Yardi database. Access to the database is required in order to give Obeid, as a manager, access to true and full information regarding the status of the business and financial condition of the company, as permitted by 6 *Del. C.* § 18-305(a)(1). Likewise, the LLC Agreement grants Obeid access to the "[a]ll of the records and books of account of the Company, *in whatever form maintained*," which includes the Yardi accounts. Finally, Defendants never offered any evidence that they intended to cease using the Yardi database and only raised the possibility that the trial Court's order would "force" the Company to continuing maintaining the database after they lost on the merits. The Court of Chancery did not abuse its discretion or commit any error of law in granting Obeid access to the Yardi database.

3. Denied. The Court of Chancery did not abuse its discretion by requiring that Defendants provide updated versions of certain Excel workbooks to Obeid. That requirement falls within the scope of Obeid's demand, which sought any "modifications, additions or deletions to such Excel workbooks[.]" There is nothing ambiguous or improper about the request to provide "updated versions" of the responsive workbooks to Obeid is plainly contemplated by Obeid's demand. Defendants are required to provide only substantive updates to such workbooks where modifications, additions or deletions are made. Defendants can avoid any perceived concern about unintentionally violating the trial Court's order by instructing their consultant about the need to provide Obeid with any modifications, additions or deletions to those workbooks.

4. Denied. The Court of Chancery did not abuse its discretion in ordering Defendants to provide Obeid with certain Excel workbooks. In his supplemental demand, which is incorporated by reference into the Amended Complaint, Obeid sought: "access to a copy of ***any*** Excel-based workbooks prepared by William Stelma on behalf of GREA that calculate the investor returns and Manager promote fees owed as a result of the sales of assets owned by the fund entities[.]" Defendants took the position at trial that certain Excel workbooks satisfied this request in full. Obeid, however, disputed that the workbooks Defendants provided are the only workbooks that calculate the investor returns and Manager promote fees, and

testified at trial that there were other Excel workbooks used by GREA during his tenure that would also be responsive to his request, pointing to examples of those workbooks. There is nothing improper about requiring Defendants to produce additional workbooks if they exist.

STATEMENT OF FACTS

A. Obeid is a Manager of the Company, Which Uses the Yardi Database to Manage the Finances of the Entities.

GREA is a vertically integrated real estate development and management company that was formed by Obeid, Christopher La Mack ("La Mack") and Dante Massaro ("Massaro") to acquire, develop, finance, and operate commercial real estate investments, primarily consisting of hospitality and retail assets. (A1549). Obeid, La Mack, and Massaro are the only three members and managers of the Company, which is being wound down and all of its assets under management are being sold. (*See* OB 5).

GREA operated through special-purpose entities that were formed to acquire, for example, the underlying real estate. GREA also formed investor funds that would then invest in those acquisitions or projects. GREA acted as the manager of both the investor funds and the special purpose entities. (*See*, *e.g.*, A1871-73; A2020; A481; A479). In particular for purposes of this appeal, GREA serves as the manager of the following entities (collectively, the "Entities"): 33 Peck Slip Property Management LLC, 52 West 13th P, LLC, 52 West 13th Street Holding, LLC, Gem Hotel Union Square, LLC, Gemini 37 West 24th Street MT, LLC, Gemini 37 West 24th Street, LLC, Gemini Fund 5 Manager, LLC, Gemini Fund 5, LLC, Gemini New York Hospitality Fund, LLC, Gemini NYC Hotel, LLC, Gemini Opportunity Fund

I, LLC, Gemini Opportunity Fund III, LLC, Gemini Opportunity Fund IV, LLC, and Gemini Property Management, LLC. (A1558).

GREA is the sole owner of Gemini Property Management, LLC, which solely owns 33 Peck Slip Property Management LLC. (*Id.*). GEP is the sole owner of 33 Peck Slip Manager LLC. (*Id.*). Although GEP manages certain entities according to their organizational charts, GREA makes all decisions on behalf of those entities and maintains custody and control over the accounting and non-accounting records for such entities in the same manner as the Entities in which GREA has been formally designated the "Manager." (A2032-34).

GREA's fund entities (collectively, the "Funds") include Gem Hotel Union Square, LLC, Gemini Fund 5, LLC, Gemini New York Hospitality Fund, LLC, Gemini Opportunity Fund I, LLC, Gemini Opportunity Fund III, LLC, and Gemini Opportunity Fund IV, LLC. GREA, as Manager of the Funds, owes fiduciary duties to the members of the Funds. The operating agreements for the Funds specifically note that GREA has "a fiduciary responsibility for the safekeeping and use of all the funds and assets of the Company." (*See, e.g.*, B15; B54; B92).

Over the life of the Funds, the Funds' members are entitled to various distributions. (*See, e.g.*, A1872-74; B10; B49; B86). Likewise, GREA, as Manager of the Funds, has the potential to earn certain fees over the life of the Funds, including acquisition fees, leasing fees, financing fees, disposition fees, refinancing

fees, and promote fees. (*See, e.g.*, A1872, A1874; B11; B50; B87). GREA also has the ability and discretion to allocate general and administrative operating expenses to the Funds (the "Reimbursable Expenses"). (*See, e.g.*, A1873-74; B11-12; B50-51; B88).

Assets owned by the Funds have been sold or repaid, which has resulted in distributions being owed to the investors in the Funds. (*See, e.g.*, A1874-77; A492-500; A483-90; A2666). In addition, depending on the distributions that have been made to the investors, GREA also might be owed certain promote fees. (*See, e.g.*, B11; B50; B87; A2393; A1872, A1874-76). For example, La Mack and Massaro indicated in an update to Obeid that once the sale of the Jade Greenwich Village hotel closed, "Gemini will receive a substantial promote and disposition fee if the project closes – in excess of $2,000,000." (A2393).

William Stelma served as the Chief Financial Officer of GREA (also sometimes denoted as the Chief Accounting Officer) from 2010 until January 2018, when he ceased being a full-time employee of GREA. (B149-51). Stelma is currently a GREA consultant and remains responsible for all of the accounting functions for all of the GREA-related entities, including the retail, hospitality, fund, and corporate entities. (B149-51; A2022-23; A2642; A1559). There has been no audit of the financials for GREA or GEP for the past several years. (A2022).

All of the accounting information for the Entities, to the extent such information exists, is located within the Yardi database, which is controlled by GREA. (A1558; A2020, A2024-36; B150, B152-53; A1878). Yardi is a web-based commercial property and financial management platform that permits GREA to maintain, sort, and store in one database the accounting and financial information for all of the GREA-related entities. (A1558; A1878; B152; A2022).

Yardi is a "live" database in that it is not static and populates with new data all of the time. (B153). Stelma administers access to the Yardi database. It is possible to give a user read-only access and to restrict a user's access to specific accounts within the database. (*Id.*).

All of the non-accounting information for the GREA-related entities, such as organizational documents, tax returns, investor reports, property records (to the extent such information exists), is maintained on GREA's cloud-based server. (A2024-25). GEP does not have its own Yardi database or cloud-based server and any information related to GEP is located within GREA's Yardi database or cloud-based server. (A2025).

GREA had offices in New York and North Carolina, and now only has an office in North Carolina while it is in the process of being wound down. (A2024; A1888; A2643). GEP and the Entities do not have any office space or employees separate from GREA. (A2025).

B. Obeid's Books and Records Demand

In September 2016, Obeid began making informal requests for an accounting of the proceeds of sales of certain assets. (A1966). Obeid and his counsel persisted with those requests into 2017. (A2443; A2445). After receiving no response to his informal demands for an accounting, Obeid issued a demand letter to Defendants (the "Demand") pursuant to Section 18-305 of the LLC Act, Section 8.6.1 of the GREA Operating Agreement, and Section 18 of the GEP Operating Agreement. (A1986). The Demand sought inspection of certain financial information and investor communications from, in large part, January 2016 forward, which post-dates the close of fact discovery in the New York Action.

While Defendants initially refused to provide Obeid with any information in response to the Demand, Defendants ultimately produced certain documents throughout the course of the litigation, which significantly narrowed the information sought by Obeid at trial. Notably, however, the one thing that Defendants continued to refuse to provide is the one thing that Obeid had been seeking all along: the detailed financial information needed to conduct an accounting of the investor returns and Manager fees owed as a result of the sales of assets.

Prior to the originally scheduled trial, Obeid supplemented his Demand to request that GREA provide him with access to a copy of any Excel-based workbooks prepared by Stelma on behalf of GREA that calculate the investor returns and Manager

promote fees owed as a result of the sales of assets owned by certain of the Entities. Specifically, Obeid sought:

> access to a copy of any Excel-based workbooks prepared by William Stelma on behalf of GREA that calculate the investor returns and Manager promote fees owed as a result of the sales of assets owned by the fund entities, including the following entities: Gem Hotel Union Square, LLC; Gemini 305 West 39th Street, LLC; Gemini Fund 5, LLC; Gemini New York Hospitality Fund, LLC; Gemini NYC Hotel, LLC; Gemini Opportunity Fund I, LLC; Gemini Opportunity Fund III, LLC; and Gemini Opportunity Fund IV, LLC.

(A2236). In addition, Obeid further "demand[ed] that modifications, additions or deletions to such Excel workbooks be immediately furnished to him as such modifications, additions or deletions become available to GREA or its agents or representatives." (A2237).

In their original pretrial brief filed on December 1, 2017, Defendants claimed—***under oath***—that such Excel-based workbooks did not exist. (*See* B130 (Obeid requests "that Defendants provide a copy of an Excel-based spreadsheet(s) prepared by GREA employee William Stelma on behalf of GREA that calculates the investor returns and manager promote fees owed as a result of the sales of certain GREA assets. **These requested documents do not exist**.") (emphasis added) *and* B144-45 ("**Defendants' books and records do not contain an Excel-based spreadsheet that calculates the investor returns and Manager promote fees** owed as a result of the sales of the Greenwich Village Hotel, the Best Western Seaport Hotel, and the

Wyndham Flatiron Hotel.") (emphasis added)). After Obeid formally supplemented his Demand and amended his complaint, Stelma testified that such Excel-based workbooks ***do*** exist and that both La Mack and Massaro have access to such workbooks on Gemini's server. (*See* B150, B157-59).

On the evening of Friday, March 2, 2018, just a week before trial, Defendants made a supplemental production of documents that included an affidavit from Stelma, which attached native copies of six Excel files showing current and historical distributions and waterfall calculations for the fund entities. (A1557; A2714). The affidavit states that these Excel files provide Obeid with all of the information needed to review the distributions to the fund investors and to calculate whether a promote fee is owed to GREA. Tellingly, these are the *same* calculations that Obeid had been requesting for over a year and the *same* calculations that Defendants previously claimed—under oath—did not exist.

Obeid testified at trial that there are other summary waterfall calculations prepared by Stelma for all the fund entities that explicitly calculate the Manager promote fees that have not been provided by Defendants. (*See* A1882-83). In addition, the Excel files that have been provided do not permit Obeid to conduct an accounting of the sources and uses of funds. What Obeid needs in order to conduct that accounting is access to GREA's Yardi database, which contains all of the relevant financial information of the Entities.

When Obeid was the Operating Manager of GREA he, like La Mack and Massaro, had full access to the Yardi database. (B153). Perhaps more importantly, Obeid had access to Stelma, the company's CFO, who could access whatever financial information was needed from Yardi for review and analysis. (B155-56). During his deposition, La Mack claimed that he and Massaro decided after the litigation started between the parties to turn off all member access to Yardi and to rely solely on Stelma to provide members with the financial information that Stelma deemed appropriate to share. La Mack acknowledged that he and Massaro could have asked Stelma for additional financial information if they had wanted it, but claims they never did so. (A2021, A2042). Stelma, however, testified that he was sure La Mack and Massaro have asked him for financial reports generated from the Yardi system at various times. (B154). Moreover, La Mack and Massaro have access to Gemini's server and can readily access the financial information saved by Stelma to the server, while Obeid has no such access. (B155, B161-62, B167-68). Obeid, unlike La Mack and Massaro, does not have access to either Stelma or Gemini's server and thus has no way to access the more detailed information that is available to them.

Access to Yardi is needed to allow Obeid to conduct a full cash accounting of all reserves, escrows, and disbursements of the funds from the assets sold in the bankruptcy proceedings and that are continuing to be sold as GREA is wound down (*i.e.*, an accounting of the sources and uses of the funds), including schedules that

would reflect any disbursements paid outside of closing with the proceeds from such sales. It would also allow Obeid to calculate the amount of the disposition and promote fees earned by GREA from the sales of such assets. Gemini's production did not include general ledgers for any of the Entities that were owed funds (though they were requested), and those are necessary to confirm that the sale proceeds have been distributed to the investors, and to calculate the promote fees payable to GREA resulting from such distributions. (B161). Obeid thus needs access to the Yardi database in order to determine whether GREA has fulfilled its fiduciary duties to the equity investors in its opportunity funds.

Moreover, while the quarterly investor reports provide actual and projected distributions to the investors, those reports do not indicate whether a promote fee has been earned by or paid to GREA (*see* B160-61, B163), and it is clear that GREA should have earned a substantial promote fee from the sales of the Jade Greenwich Village Hotel and the Wyndham Garden Flatiron. (*See*, *e.g.*, A2393). Nevertheless, despite the written acknowledgement by La Mack and Massaro that such fees are due and payable, Obeid has not received a single dollar in promote fees.

Obeid is concerned that Gemini is comingling investor funds and failing to distribute all of the investor proceeds. This concern stems from the repeated refusals to provide Obeid with these calculations when that information is readily available and maintained by Stelma. (*See* A1985; A2443; A2445; A1880; A1882). It also

stems from Obeid's concerns that La Mack and Massaro are burying payments in transactions that may appear legitimate in the general ledger, but which are, in reality, insider or impermissible payments. (*See* A649 ($95,042.18 payment to Bridgeton's counsel, McDermott Will & Emery); A1880-81).

In addition, Obeid is concerned that the amount of general and administrative expenses charged to the Funds remains very high despite the fact that the Funds' have been sold and GREA is being wound down and has significantly reduced nearly all of its overhead costs, if not eliminated them completely. (A1887-88, A1891).

Given these concerns, Obeid needs access to the Yardi accounting platform, which will allow him to run his own reports that break down transactions by vendor, categories, etc., and then allow him to look at the underlying journal entries for any suspicious transactions or to confirm that various totals reported to Obeid are correct. (*See* A1875-78, A1883, A1885, 1887-88, A1890-92).

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY FOUND THAT DEFENDANTS FAILED TO PROVE ANY IMPROPER PURPOSE SUFFICIENT TO DEFEAT OBEID'S BROAD INSPECTION RIGHTS AS A MANAGER.

A. Question Presented

Was the Court of Chancery clearly wrong in finding that Defendants failed to prove any improper purpose sufficient to defeat Obeid's broad inspection rights as a manager? A342-53; B190-206.

B. Standard of Review

Factual finding are reviewed "with a high level of deference[,]" and "will not be set aside on appeal unless they are clearly wrong and the doing of justice requires their overturn." *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005) (footnotes omitted). Furthermore, "[w]hen factual findings are based on determinations regarding the credibility of witnesses. . . the deference already required by the clearly erroneous standard of appellate review is enhanced." *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000).

C. Merits of the Argument

Defendants do not dispute that Obeid, as a manager, has made out a *prima facie* case for access to the Company's books and records. OB 18. In order to defeat that *prima facie* showing, Defendants—as the Court of Chancery correctly noted—"had to carry the 'rather substantial burden of proving that the plaintiff's demand to

inspect books and records in his capacity as a . . . manager is not motivated by a proper purpose.'" Ruling 5 quoting *Bizzari v. Suburban Waste Servs., Inc.*, 2016 WL 4540292, at *1 (Del. Ch. Aug. 30, 2016). Defendants failed to carry that substantial burden based on the evidence presented at trial. *Id.* at 6.

Defendants were required to identify specific, concrete harm that would befall the Company upon disclosure of the Disputed Information to Obeid. *See* Ruling 5 ("'[T]he mere prospect of harm to a corporate defendant' does not satisfy the burden." quoting *Compaq Comput. Corp. v. Horton*, 631 A.2d 1, 4 (Del. 1993)); ("[T]he defendant must produce 'concrete evidence' that the requesting fiduciary 'will use privileged information to harm the Company in violation of his fiduciary duties.'" quoting *Kalisman v. Friedman*, 2013 WL 1668205, at *5 (Del. Ch. Apr. 17, 2013)). Instead of identifying such future harm with the required specificity, Defendants have cited isolated historical actions by Obeid that are being litigated in the Federal Action, and which fail to substantiate Defendants' fear that any harm will occur, especially given that the Company is winding down.[2]

[2] In contrast, the defendants in *Bizzari* carried their "substantial burden" of proving the fiduciary's improper purpose by demonstrating that the director was a current threat to the business given his attempts to purposefully damage the company's interests by engaging in direct competition, attempting to poach the company's employees, and informing the company's banks and credit agencies of its alleged financial instability. 2016 WL 4540292, at **1, 3, 8-9. The company suffered tangibly from this conduct, and the director's untruthful trial testimony coupled with his refusal to be bound by a confidentiality order led the court to hold

Moreover, Obeid was given access to the Yardi database during discovery in the Federal Action and no harm befell Gemini as a result of such access. There is no reason to think that granting Obeid similar access—particularly where Obeid has agreed to a confidentiality order that limits his use of such information—would present any risk of actual harm to Gemini now. Likewise, Obeid's agreement to the confidentiality order undermines any argument that he is using this action as an end-run around discovery in the Federal Action given that the only way he could use information obtained through this action in the Federal Action is if the courts in *both* actions permit its use.

Likewise, Obeid's provision of the Ruling to the District Court does not evidence any improper motive. Plaintiff's counsel in the Federal Action has a continuing duty to inform the District Court of developments that may impact pending litigation. *See Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 604 (2d Cir. 2016) ("Despite counsel's 'continuing duty to inform the Court of any development which may conceivably affect [the] outcome' of litigation, the County failed to notify the district court of the proposal until 2011, when it moved for summary judgment." quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring); *Coliniatis v. Dimas*, 848 F. Supp. 462, 468-9 n.4 (S.D.N.Y. 1994)

---

that broad production of books and records, as would usually be available to a director, would only enable the director to further breach his fiduciary duties. *Id*.

("The Court reminds the parties of their continuing duty to fully inform the Court of the applicable law."). As the Court of Chancery noted, there is "nothing suspicious" about Obeid's provision of the decision to the District Court as "[t]hat is what litigants should do" to ensure that the judge remains informed. June 26, 2018 Order Denying Defendants' Motion for Reargument or to Alter or Amend Judgment ("June 26 Order") 2-3.

Defendants also mischaracterize Plaintiff's letter to the District Court. In that letter, Plaintiff's counsel did not represent that "the access issues" before the Court of Chancery were "identical" to the claims being litigated in the Federal Action. Instead, Plaintiff's counsel represented that the parties presented "identical" arguments in the two actions and that they were providing the Ruling "because it is new and relevant to Obeid's pending motion seeking reconsideration." A1629.

Nothing in the District Court's summary judgment decision requires overturning the Court of Chancery's decision. As the Vice Chancellor noted in his order denying Defendants' motion for reargument, "there is no inconsistency" between the two rulings as "the legal issues do not match up as to their elements or purposes" and "a denial of summary judgment involves a different procedural standard than a trial." June 26 Order 4. Defendants, however, claim that by surviving a motion for summary judgment, they have shown that Obeid is a threat to Gemini sufficient to defeat his ongoing informational rights. Yet that argument ignores the

fact La Mack and Massaro's counterclaims arising out of Obeid's purported interference with Gemini's business and alleged misuse of Gemini's funds were dismissed for lack of standing to the extent those claims asserted derivative harm. *See Obeid on behalf of Gemini Real Estate Advisors LLC v. La Mack*, 2017 WL 1215753, at *6-7 (S.D.N.Y. Mar. 31, 2017). Accordingly, the summary judgment opinion addresses only individual harm to La Mack and Massaro and not harm to Gemini as an entity, and thus has no bearing on whether Obeid is such a threat to the Company that he should be denied ongoing access to the Company's information even though he remains a fiduciary.

On appeal, Defendants would have this Court second guess the Court of Chancery's factual findings after trial, but those findings are supported by the record and were not clearly wrong. The trial court's decision should be affirmed.

II. THE COURT OF CHANCERY CORRECTLY FOUND THAT OBEID IS ENTITLED TO ACCESS THE YARDI DATABASE.

A. Question Presented

Did the Court of Chancery abuse its discretion in determining that Obeid is entitled to read-only access to the Yardi Database? A340, A342-345, 348-50; B182-88, B206-07.

B. Standard of Review

"[T]his Court reviews the Court of Chancery's 'determination of the scope of relief available in a . . . books and records action for abuse of discretion.' The standard of review this Court applies to the Court of Chancery's exercise of statutorily conferred discretion is highly deferential." *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1271–72 (Del. 2014). A "trial court's conclusions of law, including its interpretation of a statute, are reviewed *de novo*…." *United Techs. Corp. v. Treppel*, 109 A.3d 553, 557 (Del. 2014).

C. Merits of the Argument

Defendants argue that Obeid should not be granted read-only access to the Company's Yardi database because (i) a corporate database does not fall under any of the permissible categories of documents provided in Section 18-305(a) of the LLC Act; (ii) Obeid has all of the information he needs and such detailed financial information should not be provided to Obeid as a "hostile" party; (iii) the operating

agreements do not contemplate granting access to the Yardi database; and (iv) the requirement to provide access to Yardi acts as an impermissible mandate that GREA continue to use the database. *See* OB 21-28. Each of these arguments fails, as set forth below.

First, Defendants cannot dispute that all of the accounting information for the Entities is located in the Company's Yardi database. *See* Statement of Facts, Section A, *supra*. Section 18-305(a)(1) permits access to "[t]rue and full information regarding the status of the business and financial condition of the limited liability company[,]" while subsection (6) includes "[o]ther information regarding the affairs of the limited liability company as is just and reasonable." 6 *Del. C.* § 18-305(a)(1) & (6). Just because the financial information is located through SaaS on a cloud-based server does not mean it does not qualify as part of the books and records of the Company. Information is not stored in the manner it was historically, but Sections 18-305(a)(1) and (6) are sufficiently broad to include the financial information that is stored in the Company's Yardi database. Obeid cannot have "true and full information regarding the status of the business and financial condition" of the Company without access to the Yardi database.

Second, that Defendants provided Obeid with access to certain historical financial information during the course of the litigation is insufficient to defeat his right to access the Yardi database because (i) a manager is entitled to unfettered

access to the company's information, and (ii) what was provided does not permit Obeid to conduct the accounting of sources and uses of funds. As the Court of Chancery noted, "Obeid 'is a fiduciary and in order to meet his obligation as such he must have access to books and records; indeed he has a duty to consult them.'" Ruling 7 quoting *Henshaw v. Am. Cement Corp.*, 252 A.2d 125, 128 (Del. Ch. 1969). Moreover, the "court will not second guess Obeid's business judgment about the information that he needs. . . . A director's right of access is 'essentially unfettered in nature.'" *Id.* quoting *Kalisman*, 2013 WL 1668205, at *3 (quoting *Schoon v. Troy Corp.*, 2006 WL 1851481, at *1 n.8 (Del. Ch. June 27, 2006).

For this reason, the authority relied upon by Defendants is inapposite as the cited case involved a *member's* access to information and not a manager of the company, as is at issue here. *See* OB 23 citing *Sanders v. Ohmite Holdings, LLC*, 17 A.3d 1186, 1194 (Del. Ch. 2011). Furthermore, while it may be true that Obeid has received some information regarding Gemini, he does not have sufficient information to determine whether the Company has received the fees that it is owed nor does the provided information allow Obeid to conduct an accounting of the Reimbursable Expenses or how they are allocated to the various Funds.

Likewise, the summary updates provided to Obeid require him to take La Mack and Massaro's word on all Gemini updates and information. Obeid needs to look beyond summary financial information in order to determine what actually

happened to the millions that are owed to Gemini's investors. "Only by viewing supporting documents, instead of only the line item total on a financial statement, can [Obeid] determine whether the transactions are acts of corporate waste or mismanagement." *Dobler v. Montgomery Cellular Holding, Co.*, 2001 WL 1334182, at *5 (Del. Ch. Oct. 19, 2001). It is the decision-making documents that will provide the answers that Obeid seeks and, thus, he must have access to them. *See id.* (granting access to internal corporate memorandums, e-mails, letters and other documents reflecting decision-making of corporation as essential to purpose of determining propriety of suspect advancements by corporation).

Obeid has the right to make his own decisions, based on the supporting documents, as to whether the suspect actions were proper. *See Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997). Access to Yardi is necessary to allow Obeid to conduct a full cash accounting of all reserves, escrows, and disbursements of the funds from the hotels sold in the bankruptcy proceedings (*i.e.*, an accounting of the sources and uses of the funds), including schedules that would reflect any disbursements paid outside of closing with the proceeds from these sales. It would also allow Obeid to calculate the amount of the disposition and promote fees earned by Gemini from the sales of assets. As noted in Section I.C, *supra*, Defendants failed to prove that Obeid is currently "hostile" to the Company

or presents any real threat that would be sufficient to defeat his right to access the Yardi database.

Nor does the existence of the Federal Action defeat Obeid's inspection rights here. Defendants' argument ignores that Obeid continues to be both a manager and member of GREA, and thus has ongoing rights to information despite the existence of other litigation. Pending litigation in and of itself does not serve as a bar to Obeid's inspection rights either as a member or manager. *See, e.g.*, *Compaq*, 631 A.2d at 5 (inspection of books and records granted to stockholder despite active litigation against company brought by stockholder and others and the stockholder sought stocklist in order to recruit additional plaintiffs); *Carapico v. Phila. Stock Exch., Inc.*, 791 A.2d 787, 792 (Del. Ch. 2000) (member entitled to inspection of books and records regarding changes occurring at the company even though various litigation was occurring between the member and the company). Indeed, as the Vice Chancellor noted in his order denying reargument,

> that familiar rule applies most strongly when an equity holder seeks books and records for the purposes of bringing a lawsuit, then decides he has sufficient information about the entities to file the lawsuit. This case involved a manager seeking information about entities where he has an ongoing obligation to manage those entities. The Delaware courts decided long ago that the existence of litigation in that setting did not cut off the inspection right.

June 26 Order 3 (internal citations omitted). Accordingly, the existence of the

Federal Action in and of itself does not bar Obeid's right to the Disputed Information.

Third, Obeid is entitled to access Yardi under Section 8.6.1 of the GREA Operating Agreement because it provides members access to "[a]ll of the records and books of account of the Company, *in whatever form maintained*," which is sufficiently broad to include the Yardi database.[3] There is no dispute that GREA maintains its accounting information and the information of the Entities in Yardi. *See* Statement of Facts, Section A, *supra*. Likewise, GREA has control over the Entities' financial information such that the Yardi accounts for the Entities constitute the records and books of account of GREA. *See id.* The evidence thus "established that the Company 'is holding the books of the subsidar[ies] or has control or possession over those books.'" Ruling 8-9.

Finally, Defendants contend that granting Obeid access to Yardi would constitute an impermissible edict to continue maintaining the Yardi database. Obeid does not dispute that the Company is winding down, but there was no evidence at trial that the wind-down would be completed anytime in the near future, nor was there any evidence offered that the Company had plans to cease using the Yardi database. Contrary to the authority cited by Defendants, the evidence at trial showed

[3] Obeid never asserted below that the GEP operating agreement was sufficient to give him access to the Yardi database given that Defendants never contested that GREA controls all of the financial information of GEP and the other Entities at issue.

that the Yardi database *does* exist and it *is* being used by Defendants. The trial court's decision is not requiring the Company to create something that does not already exist.

Moreover, Obeid was always clear that he was requesting *ongoing* access to the Yardi database given that he was seeking any "modifications, additions or deletions" to such information, which could only be provided through continuing access to the database. *See* A2236. More importantly, Defendants understood that was Obeid's request given that their statement of issues to be litigated at trial included whether Obeid was entitled to "ongoing, read-only access to GREA's Yardi database[.]" *See* A1548, A1561-62, A1564. Defendants raised several arguments why that should not be permitted, but never raised the strawman that granting ongoing access would impermissibly require the Company to maintain the database against its wishes until after the Court issued the Post-Trial Ruling and the parties were negotiating over the form of the Final Order. *See* A1588, A1722-23.

For these reasons, the Court of Chancery did not abuse its discretion in granting Obeid ongoing, read-only access to the Yardi database, and the decision should be affirmed.

III. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN REQUIRING DEFENDANTS TO PROVIDE OBEID WITH ANY UPDATED VERSIONS OF CERTAIN WORKBOOKS.

A. Question Presented

Did the Court of Chancery abuse its discretion in ordering Defendants to provided updated versions of certain Excel workbooks? A1759-61; B35.

B. Standard of Review

See Section II.B, *supra*.

C. Merits of the Argument

Defendants argue that the Court of Chancery abused its discretion by ordering that the Company provide Obeid with "updated" versions of the Excel workbooks already provided because it is impossible for Defendants to comply with such an order. *See* OB 27-28. There is nothing ambiguous or impossible, however, about the requirement to provide "updated versions" of the responsive workbooks to Obeid, and the Court of Chancery's decision should be affirmed.

In his supplemental Demand, Obeid sought: "access to a copy of ***any*** Excel-based workbooks prepared by William Stelma on behalf of GREA that calculate the investor returns and Manager promote fees owed as a result of the sales of assets owned by the fund entities," including "modifications, additions or deletions to such Excel workbooks[.]" A2236-37 (emphasis added). Plainly, Obeid was requesting—and the Final Order requires—production of substantive updates to such workbooks

where modifications, additions or deletions are made. *See* A1882-83. As a manager with an ongoing fiduciary obligation to the Company and the investors in the Funds that the Company manages, Obeid is entitled to receive substantive updates that might have an impact on the investors or on the fees that the Company should be receiving as the result of additional sales of assets as the business continues to be wound down. *Id.*.

While the trial Court's ruling would require Defendants to instruct their former CFO, who is now acting as a third-party consultant under their control, about the existence of the Final Order and the need to keep La Mack and Massaro informed of any modifications, additions or deletions to specific Excel workbooks, nowhere does the ruling require Defendants to "constantly monitor" Stelma in order to let Obeid know every time Stelma accesses the documents at issue. Defendants' professed concern that they will technically violate the Final Order if they fail to inform Obeid of changes to the workbooks' metadata rings particularly hollow given that Obeid explained at trial what he was seeking, and further confirmed his expectation in his response to Defendants' motion to stay. *See* A1882-83; A1760.

There is nothing remarkable or impermissible about an order permitting inspection of books and records that requires some oversight and discretion on the part of the Company and the individuals it has empowered to control that process. Compliance with the Final Order is not impossible, and it should be affirmed.

IV. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN ORDERING DEFENDANTS TO PROVIDE OBEID WITH "COMPARABLE" WORKBOOKS.

A. Question Presented

Did the Court of Chancery abuse its discretion in ordering that Defendants provide Obeid with any Excel workbooks that summarize the distributions to investors in Funds, or fees earned by the Company as manager of the Funds, and/or which forecasts such distributions and fees? A336, A340, A1759-61; B207.

B. Standard of Review

See Section II.B, *supra*.

C. Merits of the Argument

The Court of Chancery did not abuse its discretion by ordering Defendants to provide Obeid with any Excel workbook prepared on behalf of the Company that summarizes the distributions to investors in the Funds, or fees earned by the Company as manager of the Funds, and/or which forecasts such distributions and fees (*e.g.*, any current workbook comparable to JX 116 (A2284) or JX 117 (A3556)). Defendants claim that the trial Court abused its discretion in granting Obeid such access to comparable workbooks because it allegedly awards relief that Obeid did not seek at trial and is too vague to carry out. *See* OB 29-31. There was, however, no abuse of discretion because the access granted by the Final Order falls within the

scope of Obeid's Demand and the claims litigated at trial, and is not impermissibly vague.

In his supplemental Demand, which is incorporated by reference into the Amended Complaint, Obeid sought: "access to a copy of ***any*** Excel-based workbooks prepared by William Stelma on behalf of GREA that calculate the investor returns and Manager promote fees owed as a result of the sales of assets owned by the fund entities[.]" A2236. Defendants took the position at trial that certain Excel workbooks satisfied this request in full. *See* A737, A739. Obeid, however, disputed that the workbooks Defendants provided are the only workbooks that calculate the investor returns and Manager promote fees, and testified at trial that there were other Excel workbooks used by the Company during his tenure that would also be responsive to his request, pointing to examples of those workbooks (*e.g.*, A2284 (JX 116) and A3556 (JX 117)). *See* A336; A1882-83.

Defendants claim that if only Obeid had requested the comparable documents in a "timely fashion," Defendants could have used the discovery process and further inquired at trial to understand the parameters of Obeid's request. The original trial was postponed in order to permit just that. Defendants did not provide the Excel workbooks they claim satisfy his request until March 2, 2018 *after* Obeid's deposition was taken on March 1, 2018. *See* A2239. Moreover, Obeid testified *at trial* that there were other workbooks that he was seeking. *See* A1882-83. There is

nothing in the pretrial order that prohibits Obeid from seeking other versions of the Excel workbooks, and thus Defendants could not have been surprised that Obeid requested in his proposed final order that Defendants provide any comparable workbooks to what was already provided.

There is nothing improper about requiring Defendants to produce additional workbooks if they exist. Obeid's request is not impossibly vague. He gave concrete examples of the types of workbooks that he believes exist and the calculations that are in those workbooks. According to Defendants' argument, no company would ever be required to exercise discretion or oversight in providing responsive books and records. It is not at all unusual, however, for a books and records order to grant a requestor access to categories of documents, and it is then up to the Company to determine the specific documents that are responsive. Likewise here, the Company is being required to exercise normal discretion and oversight in providing Obeid with any workbooks comparable to JX 116 and JX 117. If the requested workbooks exist, then the Final Order requires their production, and the Court of Chancery did not abuse its discretion in so ordering.

CONCLUSION

For the foregoing reasons, Plaintiffs Below, Appellee William T. Obeid respectfully requests that this Court deny the appeal and affirm the Court of Chancery's ruling.

ASHBY & GEDDES

/s/ Catherine A. Gaul

Catherine A. Gaul (No. 4310)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, Delaware 19899
(302) 654-1888

Attorneys for Plaintiff Below, Appellee William T. Obeid

Dated: August 30, 2018
Corrected on September 7, 2018

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2018 a copy of Appellee's Corrected Answering Brief was caused to be served upon the following counsel of record by File & Serve*Xpress*:

Douglas D. Herrmann, Esq.
Christopher B. Chuff, Esq.
PEPPER HAMILTON LLP
Hercules Plaza, Suite 5100
1313 Market Street, PO Box 1709
Wilmington, DE 19899-1709

/s/ Catherine A. Gaul
Catherine A. Gaul (#4310)