EFiled: Aug 11 2022 09:30PM EDT
Filing ID 67924649
Case Number 242,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LYNN TILTON, Defendant-Below, Appellant, v. ZOHAR III LIMITED, Plaintiff-Below, Appellee, and STILA STYLES, LLC, Defendant-Below, Appellee.	)	No. 242, 2022 On appeal from the Court of Chancery, C.A. No. 2021-0384-KSJM

APPELLANT'S OPENING BRIEF

Of counsel:
Monica K. Loseman
Gibson, Dunn & Crutcher LLP
801 California Street, Suite 4200
Denver, Colorado 80202
(303) 298-5784
mloseman@gibsondunn.com

and

Akiva Shapiro
Lee R. Crain
Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, NY 10166
ashapiro@gibsondunn.com

SMITH, KATZENSTEIN & JENKINS LLP
Kathleen M. Miller (No. 2898)
Robert K. Beste, III (No. 3931)
1000 West Street, Suite 1501
Wilmington, DE 19801
302-652-8400
kmiller@skjlaw.com
rkb@skjlaw.com

Attorneys for Defendant-Below/Appellant Lynn Tilton

August 11, 2022

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Exhibits

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

RULES

NATURE OF PROCEEDINGS

This is a control dispute. On one side is Lynn Tilton, a turnaround specialist who revitalizes struggling American companies to build value for the companies and her investors and in the process saves American jobs. Tilton rescued the prestige Stila cosmetics brand from death's door in 2009, creating Stila Styles, LLC ("Stila"). For more than 13 years, Tilton has been Stila's only Manager. She also holds Stila's Class A Membership Interests, which were issued via a transaction in which she infused $10 million of badly needed funding into Stila and received, *inter alia*, Manager-appointment rights (the "2017 Transaction").[1] As its sole Manager, Tilton took Stila from a foundering brand, just days away from liquidation, into a prestige powerhouse. Opposite Tilton is Zohar III, Limited ("Zohar"), an investment fund created by Tilton—but no longer controlled by her—and Stila's Common Member. Zohar sought to invalidate the 2017 Transaction and have its appointee declared Manager—effectively staging a corporate coup—via a 2021 written consent that was itself invalid because Zohar did not hold the sole Manager-appointment right.

Stila's LLC Agreement, executed in 2009, was designed to give maximum flexibility and broad authority and control to Stila's Manager—Tilton—to manage,

[1] Undefined capitalized terms have the meanings provided in the May 31, 2022 Memorandum Opinion (the "Opinion" or "Op.") (Ex. A). A copy of the Final Order and Judgment dated May 31, 2022 ("Judgment") (Ex. B), and the Letter Decision dated July 11, 2022 ("Letter Decision") (Ex. C) are also attached.

revitalize, and restore Stila. For example, the Manager was empowered to unilaterally amend the LLC Agreement in certain circumstances and had the right to create and issue new classes of membership interests in "her sole discretion…having such terms as she determines to be appropriate." A131 § 3.4.

After a two-day trial, the lower court issued a declaration that Tilton breached the LLC Agreement by granting the Class A Member the sole right to appoint the Manager. In so doing, the court invalidated that portion of the 2017 Transaction. The lower court, however, failed to enforce the clear language in the LLC Agreement that Stila's Manager (Tilton) will not be "liable" to Zohar for "any act or omission, including any breach of this Agreement"—which includes equitable relief arising out of a breach of contract claim. A140 § 5.17(b). That language (which has an exception not relevant here) tracks the broad exculpation the General Assembly permits LLCs to grant their managers in 6 *Del. C.* § 18-1101(e). The court, therefore, granted the very relief barred by the LLC Agreement. And the court's failure to apply the LLC Agreement's liability-elimination clause according to its plain terms was legal error.

Even assuming the only relief sought and granted was not barred by the LLC Agreement, the lower court erred in interpreting the LLC Agreement's plain meaning. Specifically, the court held that the portion of the 2017 Transaction granting the Class A Member the sole right to appoint Stila's Manager violated the

LLC Agreement and was therefore invalid. But the LLC Agreement expressly provided Tilton, as Stila's Manager, the authority to issue new classes of interests "having such terms as she determines to be appropriate." A131 § 3.4. The Agreement also expressly instructed that such terms are "deemed to be contained in th[e] Agreement for all purposes hereof"—that is, are treated as authorized amendments to the LLC Agreement. *Id.* Consequently, the 2017 Transaction is valid in full. Tilton (through the Class A Member)—not Zohar—had and has the sole right to appoint Stila's Manager, which she validly exercised in reappointing herself in 2020.

Nevertheless, the trial court held that Tilton's transfer of appointment power solely to the Class A Member via the 2017 Transaction constituted an unauthorized amendment to the LLC Agreement. The court thus invalidated that sole aspect of the 2017 Transaction and Tilton's exercise of that right in reappointing herself as Manager. But the court pointedly refused to grant Zohar the only relief it requested in its Prayer for Relief: a declaration that its appointee was Stila's Manager. Instead, the lower court acknowledged that the "the parties have not joined issue" on at least one issue critical to that determination—the effect of an amendment to the LLC Agreement ("Amendment 1") on Zohar's purported Manager-appointment powers. The lower court therefore declined to declare ***who*** holds appointment rights today. Instead, it held that "[t]he right to remove and appoint Stila's Manager…remains

with the person or entity that held such right prior to the 2017 Transaction," while leaving for future proceedings the resolution of who that "person or entity" might be. Op. 41.

When the Vice Chancellor retired, however, the case was reassigned to the Chancellor, who granted Zohar's post-trial motion brought under Rule 59(f) for, among other things, resolution of the "Ultimate Issue" in the case. *See* A426-440; Letter Decision. The Chancellor's ruling gave Zohar the exact relief it had been denied in the Opinion and Judgment: a declaration that Zohar's appointee was Stila's Manager. One lower court judicial officer thus effectively overruled the decision rendered by the judicial officer who heard the evidence at trial and issued a post-trial decision and judgment—a form of relief unknown under Rule 59(f). And in so ruling, the court granted relief without Zohar satisfying any of Rule 59(f)'s strict requirements. Further, the Letter Decision erroneously found Tilton had waived arguments relating to the effect of Amendment 1 by not litigating them at trial. But the parties had stipulated—and the court ordered—that this amendment was not "at issue in this Action." A89. Accordingly, the effect of Amendment 1 should have been left for resolution in another proceeding. And if anyone waived that argument, it was the party with the burden of proof—Zohar.

This Court should thus reverse the lower court and remand with instructions to enter judgment for Tilton or, in the alternative, vacate the Letter Decision and remand with instructions to reinstate the Judgment as originally entered.

SUMMARY OF ARGUMENT

1. Zohar's sole claim for relief against Tilton—and the only relief granted by the court below—was for an order finding that Tilton breached the LLC Agreement by exercising her authority as Stila's Manager to issue a new class of membership interests with the power to appoint and remove the Manager; that Tilton's reappointment as Stila's Manager was therefore invalid; and that Zohar's subsequent appointment of a different Manager was valid. But Section 5.17(b) of the LLC Agreement fully exculpates Tilton from all liabilities for any action she took as Manager, including any breach of the LLC Agreement or any breach of duty, with one exception not pleaded here. A140. That exculpatory clause tracks 6 *Del. C.* § 18-1101(e), which permits parties to an LLC agreement to "eliminat[e] any and all liabilities" of a Manager—which covers equitable relief arising out of a breach of contract claim. In contrast, corporations are limited to exculpation of their directors' "personal liability" for "monetary damages." 8 *Del. C.* § 102(b)(7). The General Assembly's decision not to so limit exculpation in the LLC context must be given effect in this case of first impression. The court below erred in holding that the exculpatory clause did not apply, allowing for adjudication of Zohar's equitable relief request against Tilton, a form of "liability" eliminated by the contract.

2. The 2017 Transaction created a new class of interests—the Class A Membership Interests—and, in exchange for a $10 million investment, expressly

granted that class the sole authority to appoint Stila's Manager. The 2017 Transaction was consistent with numerous provisions of the LLC Agreement, all of which confirm Tilton, in her "sole discretion," had the authority to create the Class A Membership Interests "having such terms as she determines to be appropriate." Tilton did just that. She created the Class A Membership Interests and provided them with the authority to appoint Stila's Manager, which power they validly exercised in reappointing Tilton as the Manager via the 2020 Written Consent. Zohar's later-in-time 2021 Written Consent purporting to remove Tilton and appoint a new Manager was thus invalid. The lower court erred in finding that the 2017 Transaction improperly amended the LLC Agreement in granting the appointment and removal power to the Class A Member, and was therefore void in part (along with the 2020 Written Consent). The LLC Agreement permitted amendments by the Manager where "expressly contemplated" in the LLC Agreement, and the provision giving Tilton authority to issue new classes of interests satisfied that requirement as it treated the terms of any such issuance as "deemed to be contained in this Agreement for all purposes hereof." A147 § 11.3; A131 § 3.4.

3. The lower court abused its discretion in granting Zohar's post-judgment motion for reargument under Court of Chancery Rule 59(f). The Vice Chancellor issued a detailed, 41-page post-trial Opinion that declined to grant the only relief Zohar requested—a declaration that Zohar's designated manager is the Manager of

Stila—and instead instructed that the "right to remove and appoint Stila's Manager…remains with the person or entity that held such right prior to the 2017 Transaction," while leaving for another proceeding the resolution of who that "person or entity" might be. Op. 41. It did so because "the parties ha[d] not joined issue" on issues necessary to resolve that question, and because there was another action between the parties "pending before the Bankruptcy Court" in which this question could be adjudicated. *Id.* 40. Yet, on Zohar's Rule 59(f) motion, the Chancellor—taking over the case after the retirement of the Vice Chancellor who presided at trial and issued the Opinion—granted the exact relief the post-trial Opinion had denied. But neither Zohar nor the Court of Chancery identified any overlooked rule or law, evidence misapprehended, or new evidence not available at the time the Vice Chancellor issued his Opinion and Judgment, as Rule 59(f) requires. The Letter Decision reached this result primarily based on an erroneous finding that Tilton had waived an argument that the parties had mutually decided was not for the court to resolve, on which Zohar had the burden of proof, and that the post-trial Opinion had expressly not reached—the "effect(s) of Amendment No. 1" of the LLC Agreement. Op. 41. Thus, the Court of Chancery should not have granted the Rule 59(f) motion and should have let the post-trial Opinion stand. To the extent this Court does not reverse the judgment below in its entirety, it should vacate the Rule 59(f) ruling and reinstate the original Opinion and Judgment.

STATEMENT OF FACTS

I. Tilton Designed Zohar to Minimize Constituency Conflict.

Tilton created the Zohar Funds, of which Zohar was one, as a group of innovative collateralized loan obligation (CLO) funds. Op. 3-4. Tilton is the ultimate owner of the Zohar Funds. A198. From the time of Zohar's formation in 2007 until early 2016, Zohar's Collateral Manager was Patriarch Partners XV, LLC, another Tilton entity. Op. 5. Through the Zohar Funds and other entities she created and controlled, Tilton pursued a strategy of investing in distressed companies and, through active management, building value in those "portfolio companies." A387; A389; *see also* A359. Stila is one such company. Zohar held an interest in Stila and many other portfolio companies. A369.

The investment strategy Tilton pursued via the Zohar Funds was based on her experience as to the causes of distressed loan investment failure. As Tilton testified, distressed companies require sufficient liquidity to stay afloat during the restructuring process; that it can take years, not months, to restructure a "deeply distressed" business; and that successful investments in distressed businesses can be derailed by "constituency conflict." A387. Constituency conflict occurs when investors have different goals for a distressed business or fight over value instead of working together to build value. A389. For example, certain co-investors that have more interest in present value than "the potential to build value" can push for a quick

sale. A387. That conflict therefore cuts short the long-term process of turning a company around, which reduces value and returns for all investors over time. *Id.*

Tilton's investment approach with the Zohar Funds drew on these lessons. In particular, Tilton aimed to reduce the friction caused by constituency conflict through structuring the investments and the governance documents so that Tilton, as manager of each portfolio company, was vested with "broad authority and broad discretion to manage" the restructuring of the portfolio companies. A387; A389.

II. Stila's Formation and LLC Agreement.

Stila is a prestige color cosmetics company, which sells "everything from lipstick and mascara to eyeshadows." A391. Following the 2008 financial crisis, Stila Corp. was in decline and had been "basically shuttered" after being foreclosed upon when, in April 2009, Tilton was advised that Stila Corp. and its affiliates' assets were available for purchase. A388; A390-391. Tilton agreed to purchase substantially all of those assets. Op. 4.

In purchasing these assets, Tilton followed the investment strategy she had developed with the Zohar Funds. She submitted a letter of intent and once her bid was accepted, Tilton determined that Zohar would make a loan to Stila for the purchase of Stila Corp.'s assets. A388. On April 15, 2009, Stila was formed and the LLC Agreement was executed on April 17, 2009. A388; Op. 6. The asset

purchase closed on April 22, 2009. Op. 7. Zohar issued a senior secured $7 million term loan and a $5 million revolving credit note to Stila. *Id.* at 7.

Tilton caused Stila's Common Membership Interests to be recorded in Zohar's name so that it would benefit from any profit if Stila were eventually sold. A125 § 1.1; A151; A390. Zohar, identified in Stila's LLC Agreement as the initial Common Member and Series A Preferred Member, did not pay any consideration for either membership interest, and neither membership interest was bundled nor issued in consideration for Zohar's financing of Stila. A125 § 1.1; A151; A390. Created pursuant to Tilton's "sole authority," the Series A Preferred Member was entitled to semi-annual distributions, culminating in a final return of $3.5 million on the stated redemption date. A133-135 §§ 4.8-4.12; A135-140 §§ 5.1-5.17; A151; A390.

Like the agreements governing other Zohar portfolio companies, Stila's LLC Agreement was drafted to give Tilton maximum discretion and authority. A389. Stila is a Manager-managed LLC. A135 § 5.1; A136 § 5.4; A389. And Tilton, named the sole Manager, had authority to "make all decisions and take all actions" for Stila, "[e]xcept for situations in which the approval of the Members [was] required" by the LLC Agreement, certificate of formation, or law. A136 § 5.4. Section 5.4 of the LLC Agreement provided a nonexclusive list of specific powers reserved to the Manager in her sole discretion, which included the power to "creat[e]

and issu[e] other classes of Membership Interests." A136-137. That power was also reiterated in Section 3.4 of the LLC Agreement. *See* A131 ("The Manager may from time to time in her sole discretion authorize and direct the creation and issuance of other classes of Membership Interests…which terms will be reflected in a written consent of the Manager."). Except where expressly noted in the LLC Agreement, "Members [would] not participate in the management, operation or control" of Stila. A135 § 5.1.

To complement the LLC Agreement's broad grant of discretion to Tilton and to further the control strategies to avoid constituency conflict, the agreement waived the Manager's liability to Stila, any Member, or any other party to the LLC Agreement for "any act or omission, including any breach of th[e] Agreement or any other breach of a duty (fiduciary or otherwise)." A140 § 5.17(b); A389; *see also* 6 *Del. C.* § 18-1101(c). Doing so reduced transaction costs and allowed the Manager to take bold action to revive a company and a brand that had previously been essentially defunct. It also addressed the concern that Tilton, wearing multiple hats, could be hamstrung in her turnaround efforts by a claim of self-interest in carrying out her multiple roles. The Manager's discretion in managing Stila was not unbounded however. Although the LLC Agreement eliminated the Manager's liability to Stila or its Members for any liabilities arising out of breach of contract or breach of duty, A140 § 5.17(b), the Manager could still be held liable for any "bad

faith violation of the implied contractual covenant of good faith and fair dealing," 6 *Del. C.* § 18-1101(e). Zohar never asserted such a violation.

III. The 2011 LLC Agreement Amendment Altered the Process for Replacing Stila's Manager.

Section 5.8 of Stila's 2009 LLC Agreement outlined the procedure for the removal or replacement of the Manager, which at the time was a power held by the Common Members. Section 5.8 originally read:

> The Common Members, upon a vote of a Majority-in-Interest of the Common Members, may, at any time and with or without cause, remove and replace the Manager. The Manager may resign at any time. Such resignation will be made in writing and will take effect at the time specified therein, or if no time be specified, at the time of its receipt by any Common Member. The acceptance of a resignation is not necessary to make it effective, unless expressly so provided in the resignation. A Majority-in-Interest of the Common Members will select a replacement for any Manager who resigns.

A137.

In May 2011, Zohar, as Stila's Common and Series A Preferred Member, adopted Amendment 1 to the LLC Agreement, which changed the Manager removal and appointment process in Section 5.8 by deleting its first and last sentences. A153. Specifically, Amendment 1 eliminated the sentence that gave Stila's Common Members the sole power to remove a Manager by majority vote. A153. Amendment 1 also deleted the provision of Section 5.8 that gave the Common Members the sole power to select the replacement for any Manager, if the Manager resigned or was removed. *Id*. After Amendment 1 took effect, Section 5.8 addressed solely the

Manager's authority to "resign at any time" and the process for Manager resignation. *See id.*; *see also* A137 § 5.8.

Amendment 1 also added a new Section 5.18 to the LLC Agreement to govern Stila's Manager-appointment process. A152-153. In relevant part, new Section 5.18 eliminated the Common Members' sole authority to appoint and replace managers, by providing that "no Member" may "remove or replace an existing Manager or appoint any additional Manager" without "the consent of each Series A Preferred Member," "[i]n addition to any other consent required" by the LLC Agreement or by law. *Id.* Thus, after Amendment 1, the unanimous consent of the Series A Preferred Member and every other duly admitted "Member" was required for removal or appointment of the Manager. *Id.* The LLC Agreement, meanwhile, defines "Member" as anyone who executed the Agreement as a member (i.e., Zohar), and anyone "hereafter admitted to the Company as a member" (i.e., Octaluna III, LLC ("Octaluna"), the Class A Member admitted in 2017). A128 § 1.1; Op. 12-13.

The parties stipulated that Amendment 1's validity was not disputed in this action. A89.

IV. Tilton Led Stila's Growth Trajectory.

Upon closing the asset purchase, Tilton began the process of rebuilding Stila into a profitable company. For instance, she brought on an entirely new team that

created and executed a plan to expand Stila's distribution and manage inventory and financial processes. A391-392.

Even with these critical changes, Stila was a capital-intensive business. Prestige cosmetics companies like Stila are expected to "innovate four times a year," shipping new products to retailers and consumers each season. A391. And within the prestige beauty market, Stila has a reputation for "first-to-market innovation" and "very high-quality products." *Id.* Maintaining that reputation requires substantial working capital to ensure that new products are constantly cycling through development, testing, manufacturing, and distribution. *Id.*

Under Tilton's leadership—both as Manager from its inception in 2009 and as chief executive officer since 2012—Stila exploded into a period of long-term growth. Net sales more than doubled in its first two years, from just over $15 million in 2009 to more than $31 million in 2010. A286. The company continued in "growth mode" through 2017, growing at a rate of about twenty percent year-over-year, with net sales that year reaching almost $96 million. *Id.*; Op. 10.

V. Stila's Changing Capital Needs in 2017.

As Stila grew, it continued to require commensurately greater amounts of working capital to continually develop, test, manufacture, and distribute products each season—now on an expanded scale. A399; Op. 10-12.

Additionally, Stila's cash needs were affected by its obligation, under the LLC Agreement, to make annual tax distributions to Tilton. *See* Op. 11-12 & n.46. Due to Stila's capital shortages in the early years, Tilton deferred the distributions owed to her from 2009 to 2015. *See id*. Through tax year 2015, Stila's deferred tax distributions owed to Tilton grew to nearly $22 million. *Id*.

In 2016, after Tilton stepped down as collateral manager (through her Patriarch entities) of all Zohar Funds, a new collateral manager was appointed. Unfortunately, the relationship soured with the new collateral manager, as did the relationship with Zohar Funds' Trustee, and Tilton was not provided the information she needed to file the Zohar Funds' tax returns as their owner and taxpayer. Thus, she was forced to end Zohar's tax status as a disregarded entity (e.g., she made a "check-the-box" election). A401-402. Converting from a disregarded entity meant Tilton was no longer able to defer her personal tax obligations, as she had done for many years prior (using other tax attributes to defer taxes). As a result of checking-the-box, all deferred taxes became due all at once in tax year 2016. A402. Accordingly, Tilton could no longer allow Stila to continue to defer its tax distributions.

These developments led Tilton to understand in the fall of 2017 that Stila would need a cash infusion to provide the business with enough working capital to continue growing and to pay tax distributions. A417; *see also* Op. 11-12.

VI. The 2017 Transaction, Class A Membership Interests, and Octaluna Investment.

On November 13, 2017, Tilton, as Stila's Manager, executed a series of agreements—a written consent, a subscription agreement, and a joinder—which together formed the 2017 Transaction. Op. 12-13. The 2017 Transaction created a new class of interests in Stila—the Class A Membership Interests. Tilton's goal in creating these interests was to solve Stila's year-end cash needs. Tilton authorized the creation of the Class A Membership Interests, and Stila issued those interests to Octaluna, a Tilton affiliate that was also the sole holder of Zohar's preference shares. A136 § 5.4; A137 § 5.6; A160-164; Op. 12-13; *see also* A156-157; A165-172. The Class A Membership Interests carried a right to be repaid at five times its $10 million contribution and were granted certain governance rights including, as relevant here, "the sole right to…[r]emove or replace an existing Manager or appoint any additional Manager." A161.[2]

Octaluna's contribution was earmarked for use "for working capital," and for other uses "determined and approved by the Manager." *Id.* Following that investment, Stila's actual cash for November and December 2017 still fell

[2] In 2019, the Class A Membership Interests were transferred to another Tilton affiliate, Ark II CLO 2001-1, Ltd. ("Ark II"). A173-175.

substantially below monthly projections.[3] But without the November 2017 transaction, the shortfall would have amounted to much more. *See* A287.

VII. Zohar's Bankruptcy and Challenges to Tilton's Role as Stila's Manager.

On March 11, 2018, Zohar filed for bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware. Op. 8. The bankruptcy filing occurred in the midst of a number of litigated disputes involving the Zohar Funds. *See* A90-93. Shortly after the petition date, in order to "focus on the monetization of the Portfolio Companies" and avoid the additional friction of ongoing litigation, Tilton and Zohar agreed to a "Standstill" of the litigation between them, which lasted until October 2019. A96. Five months later, on March 9, 2020, Zohar filed a vitriolic Adversary Complaint in the Bankruptcy Court, which, *inter alia*, challenged the validity of the November 2017 transaction that created the Class A Membership Interests in Stila. A176; A275.

The Adversary Complaint did not explicitly challenge Tilton's position as Manager of Stila. Nevertheless, worried about the damage to the portfolio companies caused by the very constituent conflicts she had hoped to avoid, and reacting to the "vitriol" exhibited by the Zohar Funds in the Adversary Complaint, on March 21, 2020, Tilton submitted a letter of resignation as Manager of Stila and

[3] Due to this ongoing capital shortage, Tilton continued to allow Stila to defer the 2009-2015 tax distributions and is still owed almost $22 million in deferred tax payments. *See* Op. 11 n.46.

certain other portfolio companies to Zohar's independent director, Joseph Farnan, and Chief Restructuring Officer, Mike Katzenstein. A418. On March 26, 2020, Tilton rescinded her resignation. A419. She then confirmed her position as Manager by signing a written consent on behalf of Ark II, as Stila's sole Class A Member, reappointing herself as Stila's Manager on April 1, 2020 (i.e., the 2020 Written Consent). A280-281; A419. She continued in that role for more than a year when, on April 30, 2021, Zohar executed its own written consent, as Stila's Common Member, purporting to appoint its competing Manager of Stila (i.e., the 2021 Written Consent). A284-285.

VIII. Procedural History.

On May 1, 2021, Zohar filed this action asserting only one cause of action, for breach of the LLC Agreement, and sought only a declaration that its selected manager "is the Manager of Stila." A80. Tilton removed the action to federal court in light of the ongoing bankruptcy proceedings. Op. 16. The Bankruptcy Court then remanded the case to the Court of Chancery. *Id.*

The Vice Chancellor conducted a two-day trial on December 1-2, 2021. The parties submitted pre- and post-trial briefs and presented post-trial argument. On May 31, 2022, the court issued the Opinion and entered its Judgment in which it concluded that the 2017 Transaction which created and issued the Class A Membership Interests was void in part—specifically, "[t]o the extent" the

transaction "amend[ed] the LLC Agreement to strip Zohar of its right to remove and replace the Manager and gave that right to [Tilton]"—and that the 2020 Written Consent reappointing Tilton as Stila's Manager was void as a result. Op. 40-41. The court declined, however, to issue the declaration Zohar sought—i.e., that its purported appointee was Stila's duly appointed Manager. Instead, the court held that "[t]he right to remove and appoint Stila's Manager…remains with the person or entity that held such right" before the partially voided 2017 Transaction. *Id.* The court did not decide who that "person or entity" was.

Tilton moved for a stay of the Judgment and to maintain the Status Quo Order while her appeal was pending. Zohar filed a motion styled as a motion for "clarification" pursuant to Rule 59(f), in the alternative, for a "further ruling addressing the ultimate issue in this matter." Following the Vice Chancellor's retirement, this action was assigned to the Chancellor, who issued a Letter Decision resolving the parties' competing post-trial motions on July 11, 2022. The Letter Decision denied Tilton's motion for a stay—except insofar as it extended the stay by two weeks to permit Tilton to make a stay application to this Court—granted Zohar's motion, and declared that Zohar's appointee, Kevin Carey, "is Stila's Manager." Letter Decision 8, 13. The Letter Decision did not mention—let alone consider—the requirements of Rule 59(f).

Tilton timely appealed. She then moved for a stay in this Court and to expedite her appeal. This Court granted the motion to expedite and granted the motion to stay for two weeks to permit Tilton to seek a status quo order in the lower court during the appeal, but otherwise denied the motion to stay. The lower court granted Tilton's status quo order motion with modifications. With the expiration of this Court's stay pending appeal, Zohar's appointee is now the Manager, subject to the August 11, 2022 status quo order.

ARGUMENT

I. Zohar Waived Any Right to Bring This Action.

A. Question Presented:

Whether Section 5.17(b) of the LLC Agreement bars claims for equitable relief arising out of a purported breach of contract where the agreement provides Tilton shall not "be liable" to Zohar for "any act or omission, including any breach of this Agreement," with one exception not pleaded here. This issue is preserved. Op. 17 & n.72; Tilton Post-Trial Opening Br. (D.I. 152) 45-49; Tilton Pre-Trial Br. (D.I. 131) 31-48.

B. Scope of Review:

This Court "review[s] questions of law and contractual interpretation, including the interpretation of LLC agreements, *de novo*." *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 816 (Del. 2018). "A trial court's construction of a statute" is also "reviewed by this Court *de novo*." *State Farm Mut. Auto. Ins. Co. v. Clarendon Nat'l Ins. Co.*, 604 A.2d 384, 387 (Del. 1992).

C. Merits of Argument:

Section 5.17(b) of the LLC Agreement bars Zohar's claim for equitable relief, which sought and obtained the invalidation of a portion of the 2017 Transaction. Section 5.17(b) provides in relevant part:

> ***None*** of (i) ***the Manager***, (ii) any Member, (iii) any director, officer, partner, equity holder, [etc.]…***will be liable*** to the Company, the Manager, [or] any Member…***for any act or omission, including any***

> ***breach of this Agreement or any breach of a duty (fiduciary or otherwise)***…, even if the act or omission furthers such [party's] own interest, unless such act or omission constitutes a bad faith violation of such [party's] implied contractual covenant of good faith and fair dealing….

A140 (emphases added). Section 5.17(b) therefore exculpates Tilton from ***all*** liability—including for equitable relief—in actions brought by Stila's members, including Zohar. This provision, along with Sections 3.3 and 5.17(a), eliminates all contractual and fiduciary duties of Stila's Manager and ***fully exculpates*** Tilton of ***all liabilities*** to Zohar, except for a claim for bad faith violation of the implied covenant, which Zohar never asserted. Op. 13 & n.53, 40. Section 5.17(b) therefore prohibits Zohar from bringing a breach of contract claim against Tilton or obtaining a declaration invalidating the Manager's actions based on a purported breach of the Agreement—a form of liability. The lower court reversibly erred in allowing this case to proceed to the merits and in granting Zohar this relief.

In failing to give effect to this broad liability-eliminating language, the court ignored 6 *Del. C.* § 18-1101(e), on which Section 5.17(b) is based. That provision of the LLC Act states:

> A limited liability company agreement may provide for the limitation or ***elimination of any and all liabilities*** for breach of contract and breach of duties (including fiduciary duties) of a member [or] manager…provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

6 *Del. C.* § 18-1101(e) (emphasis added).[4] That is exactly what Section 5.17(b) does—it eliminates all liabilities Stila's Manager could have "for any act or omission," except for "a bad faith violation of the implied contractual covenant of good faith and fair dealing." Yet the lower court concluded this action for a declaratory judgment does not constitute the type of "liability" contemplated by LLC Agreement Section 5.17(b) and LLC Act Section 18-1101(e).

Statutes are to be read according to their plain meaning, *Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 227-28 (Del. 2010), and Section 18-1101(e)'s plain terms are clear. That provision permits parties to an LLC agreement to exculpate a manager for "***any and all*** liabilities," including for equitable and *in rem* relief. 6 *Del. C.* § 18-1101(e) (emphasis added). Dictionary definitions, upon which this Court often relies, confirm that plain-text reading. *See Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2022 WL 2149437, *13 (Del. June 15, 2022). Webster's defines "liable" as "bound or obligated according to law or ***equity***." *Liable*, Webster's Third New International Dictionary of the English Language Unabridged ("Webster's Third") (emphasis added). Similarly, "liability" includes "an obligation or duty which is owed by one person to another ***to refrain from some course of conduct*** injurious to the latter ***or to perform some act or to do something*** for the benefit of

[4] This critical provision of the LLC Act, though discussed at length in the parties' submissions below, is absent from the opinions below.

the latter and for breach of which the law gives a remedy to the latter (as damages, ***restitution, specific performance, injunction***)." *Liability*, Webster's Third (emphases added).

Black's Law Dictionary is the same. It notes that "liability," while sometimes used to note a financial obligation, also means a "legal responsibility…enforceable by ***civil remedy***." *Liability*, Black's Law Dictionary (11th ed. 2019) ("Black's") (emphasis added). "In one sense it is the synonym of duty…If a duty rests upon a party, society is now ***commanding performance*** by him…." *Id.* (emphasis added and citation omitted). "Responsibility," in turn is the "quality, state or condition of being duty-bound, ***answerable***, or accountable," while "civil remedy" is defined as "[t]he means of ***enforcing a right*** or preventing or redressing a wrong; legal ***or equitable relief***." *Responsibility*, Black's (emphasis added); *Remedy*, Black's (emphases added). And "duty," of course, includes "equitable duty," defined as a "duty enforceable in a court of chancery or in a court having the powers of a court in chancery." *Duty*, Black's.

Courts, too, have long recognized the term "liable" includes equitable relief. In *Arnold v. Society for Savings Bancorp, Inc.*, for example, this Court, referring to separate litigation involving a corporation, explained "that there had been an injunction proceeding in which the director defendants ***were potentially liable for equitable relief***." 678 A.2d 533, 535 n.2 (Del. 1996) (emphasis added); *see also*

U.S. v. Late Corp. of the Church of Jesus Christ of Latter-Day Saints, 150 U.S. 145, 149 (1893); *Bodley v. Taylor*, 9 U.S. 191, 222-23 (1809); *Yucis v. Sears Outlet Stores, LLC*, 813 F. App'x 780, 786-87 (3rd Cir. 2020); *In re RegO Co.*, 623 A.2d 92, 96 (Del. Ch. 1992); *Hunt v. DelCollo*, 317 A.2d 545, 550 (Del. Ch. 1974). Accordingly, Section 5.17's elimination of all duties and exculpation of all liabilities for such duties and breaches of the LLC Agreement, as Section 18-1101 permits, included exculpation for any liability or consequences otherwise enforceable in law or equity. That includes Zohar's action under Sections 18-110 and 18-111.

The LLC Act's legislative history confirms the substantial breadth of Section 18-1101(e) (and thus Section 5.17(b) of the LLC Agreement). Even before the General Assembly in 2004 gave LLCs and limited partnerships ("LPs") the power to eliminate all liabilities managers or general partners might owe, this Court recognized an LP agreement can limit available remedies to money damages; that is, ***eliminate all equitable remedies***. *See Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175-76 (Del. 2002). But the General Assembly went further when enacting Section 18-1101(e) to the LLC Act and its LP Act counterpart. Along with other amendments, Section 18-1101(e) provided for the possibility that alternative entities could not only completely "eliminat[e]" fiduciary duties, but also "full[y]…exculpat[e]" members and managers for "***any and all liabilities***" other than a bad faith violation of the implied covenant. 6 *Del. C.* § 18-1101; *Auriga Cap.*

Corp. v. Gatz Props., LLC, 40 A.3d 839, 851 (Del. Ch. 2012), *aff'd*, 59 A.3d 1206 (Del. 2012) (emphasis added); *see also* H. Justin Pace, *Contracting Out of Fiduciary Duties in LLCs: Delaware Will Lead, but Will Anyone Follow?*, 16 Nev. L.J. 1085, 1116-17, 1123 (2016). Moreover, in a decision rendered after the 2004 amendments to the LLC and LP Acts, this Court implicitly recognized LPs (and by extension, LLCs given the similar governing statutes) could exculpate members from equitable remedies. *See Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 258 (Del. 2017) (noting equitable relief available under an LP agreement that exculpated liability only "for monetary damages").[5]

[5] The Court of Chancery has erroneously assumed in passing that the term "liability" in Section 18-1101(e) only permits the elimination of monetary damages. *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 663-64 (Del. Ch. 2012). But the court discussed Section 18-1101(e) only in dictum, and *Feeley* is not an accurate reflection of Delaware law on the issue. In *Feeley*, the court examined whether an LLC agreement restricted managers' default fiduciary duties and found it did not. *Id.* at 663. In discussing the difference between eliminating an underlying duty and exculpating a party for liability for that duty, the court assumed—in dicta and beyond the parties' arguments—that Section 18-1101(e) would only eliminate liability for monetary damages. *Id.* at 664. In support of this assumption, the court cited two cases. Both applied the exculpatory provisions from the statute for ***corporations***, *id.* at 664, a different statute with different text, *see infra* pp.28-31. Similarly, in *DG BF, LLC v. Ray*, the Court considered claims that sought exclusively monetary relief and found that the claims failed because managers were exculpated from monetary liability only. 2021 WL 776742, *9 (Del. Ch. Mar. 1, 2021). That was correct: the LLC agreement there "eliminat[ed]" only "the ***personal liability*** of each Manager ***for monetary damages***." *Id.* *13 & n.91 (emphases added). *DG BF* cited *Feeley*'s dictum, but neither court was faced with whether 18-1101(e) permits exculpation for equitable relief as Zohar seeks here.

Differences between the broad liability-elimination language used by the General Assembly in the LLC Act and the narrower language used in the Delaware General Corporation Law ("DGCL") are powerful evidence that the phrase "any and all liabilities" in Section 18-1101(e) as to LLCs does not mean merely personal liability for monetary damages, and instead applies to equitable relief such as that sought by Zohar. Specifically, DGCL Section 102(b)(7) only permits corporations to "eliminat[e] or limit[] the ***personal*** liability of a director…***for monetary damages*** for breach of fiduciary duty…" (emphases added). In contrast, the LLC Act permits an LLC to "eliminat[e] [] ***any and all liabilities*** for breach of contract and breach of duties (including fiduciary duties) of a member [or] manager." 6 *Del. C.* § 18-1101(e). "[A]ny and all liabilities" in Section 18-1101(e) must mean something different from and broader than "personal liability…for monetary damages" in DGCL Section 102(b)(7). *See MaD Invs. GRMD, LLC v. GR Cos.*, 2020 WL 6306028, *5 (Del. Ch. Oct. 28, 2020) ("similar but different" phrases in statutes should be read to indicate "distinct meaning" (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170 (2012))).

To hold otherwise—as the lower court did in finding that the LLC Agreement's liability-elimination clause "is not implicated here" because Zohar does not seek to "hold Tilton personally liable for damages or other remedies," Op. 28—would do violence to the text of Section 18-1101(e) and render "personal" and

"monetary damages" mere surplusage in DGCL Section 102(b)(7). *Cf. Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 344 (Del. 2012) ("[T]he General Assembly 'is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction.'" (citation omitted)). Such a construction would also contravene the LLC Act itself, which instructs that courts should "give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." 6 *Del. C.* § 18-1101(b). This Court should therefore confirm that when the General Assembly used "***any and all liability***" in Section 18-1101(e)—rather than "***personal liability…for monetary damages***" in Section 102(b)(7)—that language was intended to mean something distinct and broader: nonmonetary relief. The General Assembly knew how to (but did not) write a narrower provision. And the LLC Agreement tracks the broad language of Section 18-1101(e).

The differences between DGCL Section 102(b)(7) and LLC Act Section 18-1101 (and the LP analog in 6 *Del. C.* § 17-1101) are a purposeful part of a larger policy decision as to how Delaware entities are structured and governed. That policy places different restrictions on corporate entities (with shareholders) than on entities like LLCs (which often have a smaller number of more sophisticated investors). As the Court of Chancery explained recently in *Totta v. CCSB Financial Corp.*:

> Section 102(b)(7), however, only eliminates the availability of monetary damages; it does not eliminate the underlying duty of care

> nor the possibility of other forms of relief…The sharp contrast between the extent to which fiduciary duties can be eliminated through private ordering in the alternative entity context [i.e., LLCs] versus in the corporate context is one of the defining features that distinguishes alternative entities from corporations….

2022 WL 1751741, *16-17 (Del. Ch. May 31, 2022). *Totta* even cites language from Section 102(b)(7)'s commentary, which notes that "[t]his provision would have no effect on the availability of equitable remedies, such as injunction or rescission, for breach of fiduciary duty." *Id.* *16 n.185. Section 18-1101(e) contains no such limitations. As the Court of Chancery recognized in *Kelly v. Blum*, "[w]hile somewhat analogous to 8 *Del. C.* § 102(b)(7), which authorizes a corporation to adopt provisions limiting liability for a director's breach of the duty of care, Section 18-1101(e) goes further by allowing broad exculpation of ***all*** liabilities for breach of fiduciary duties—including the duty of loyalty." 2010 WL 629850, *11 (Del. Ch. Feb. 24, 2010).

The General Assembly's choice in drafting Section 18-1101(e) makes sense. LLCs are "creatures of contract," and Delaware gives parties "broad discretion to use an LLC agreement to define the character of the company and the rights and obligations of its members," including determinations on "***the potential liabilities of the parties***." *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 880-81 (Del. Ch. 2009) (emphasis added). As this Court has recognized, the LLC Act's "basic approach" "is to permit [members] to have the broadest possible discretion in

drafting their [LLC] agreements and to furnish answers only in situations where the [members] have not expressly made provisions in their [LLC] agreement." *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999) (citation omitted). The LLC Act therefore "lets contracting parties modify or even eliminate any ***equitable fiduciary duties***, a more expansive constriction than is allowed in the case of corporations." *Auriga Cap. Corp.*, 40 A.3d at 849 (emphasis added).

Elf is instructive here. There, a plaintiff sued under Sections 18-110(a) and 18-111 to remove an LLC's manager and interpret and enforce an LLC Agreement. 727 A.2d at 289, 295. While this Court agreed those statutes by default permitted the Court of Chancery to hear such disputes, it found "no reason why the members cannot alter the default jurisdictional provisions of the statute[s]" through their contract. *Id.* at 295. "[B]ecause the policy of the Act is to give the maximum effect to the principle of freedom of contract and to the enforceability of LLC agreements, ***the parties may contract to avoid the applicability of Sections 18-110(a) [and] 18-111***." *Id.* (emphasis added).

As *Elf* recognized, Section 18-110 is "permissive" in that it provides that the "Court of Chancery ***may*** hear and determine the validity of any admission, election, appointment, removal or resignation of a manager of a limited liability company, and the right of any person to become or continue to be a manager of a limited liability company." *Id.* at 296; 6 *Del. C.* § 18-110(a). "[T]he legislature's use of

'may' connotes the voluntary, not mandatory or exclusive, set of options," and only "mandatory statutory provisions" will invalidate members' agreements. *Elf Atochem N. Am., Inc*, 727 A.2d at 292, 296. The parties did exactly what *Elf* recognized they could do: they waived the applicability of Section 18-110 in the circumstances presented here.[6]

In ruling that Section 5.17(b) of the LLC Agreement does not bar Zohar's claim, the lower court relied exclusively on cases addressing the extent of a court's authority to adjudicate control disputes under Section 18-110 and its corporations analog, DGCL § 225, finding that as long as the court had jurisdiction to hear this control dispute, the claim-elimination clause of the LLC Agreement could not be given effect. That was error. Tilton is not challenging the jurisdiction of the Court of Chancery; rather, she argues that the LLC Agreement bars the only relief Zohar seeks, and that its sole cause of action must therefore be dismissed. Delaware courts have repeatedly recognized LLC agreements can "displace otherwise applicable default provisions in [the LLC] Act," including equitable remedies. *In re Coinmint, LLC*, 261 A.3d 867, 890 (Del. Ch. 2021); *see also id.* at 889 ("The [LLC Act]…contains relatively few mandates, and it explicitly assures that contractual

[6] *Elf* involved a forum-selection agreement and partially relied on Section 18-109(d), which was subsequently amended. But its logic holds here.

arrangements will be given effect to the fullest permissible extent."). That is what occurred here.

Nor is it of any moment that a Section 18-110 proceeding is *in rem*, for the same reasons, and contrary to the lower court's reasoning. Indeed, Delaware courts have repeatedly enforced provisions of LLC agreements that waive members' rights to bring other *in rem* proceedings, like those for judicial dissolution.[7] By voiding a portion of the 2017 Transaction based on a purported breach of the LLC Agreement, the lower court altered Tilton's rights and imposed a form of equitable liability on her vis-à-vis Zohar based on an "act or omission, including [a] breach of [the LLC] Agreement." *Contra* A140 § 5.17(b). Even though this constituted only partial relief, it was an imposition of liability nevertheless, and one which the court could not do in the face of a clear liability-eliminating provision in the LLC Agreement. That it relied on Section 18-110 does not change the basic nature of the relief granted.

---

[7] *See Huatuco v. Satellite Healthcare*, 2013 WL 6460898, *1, 6 (Del. Ch. Dec. 9, 2013), *aff'd*, 2014 WL 2566155 (Del. June 5, 2014) (Section 18-802, which provides the court "may" judicially dissolve an LLC, is a "default right which the parties may eschew by contract," rejecting public policy argument to the contrary); *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318 (Del. Ch. Aug. 19, 2008) (only a few provisions of the LLC Act may never be waived, including the implied contractual covenant); *see also Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D/ June 21, 2002*, 2017 WL 3575712, *11 (Del. Ch. Aug. 18, 2017), *aff'd*, 2018 WL 1887769 (Del. Apr. 20, 2018) (dissolution proceeding is an *in rem* action).

Finally, to the extent Zohar argues it would be unfair or impractical to give effect to the General Assembly's carefully chosen legislative text and policy by barring its claim, the LLC Act (like the LP Act) "reflects the doctrine of *caveat emptor*, as is fitting given that investors…have countless other investment opportunities available to them that involve less risk and/or more legal protection." *Kelly*, 2010 WL 629850, *10 n.67 (discussing LP Act) (citation omitted). Parties are free to negotiate liability-elimination clauses narrower than permitted by the LLC Act; Zohar did not. Nor are LLC members left unprotected when they agree to LLC agreements containing exculpatory clauses as broad as those permitted under the LLC Act. A manager may still be liable for bad faith violations of the implied covenant of good faith and fair dealing—an important and meaningful backstop. *See, e.g.*, *Miller v. HCP Trumpet Invs., LLC*, 2018 WL 4600818, *1 (Del. Sept. 20, 2018); *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008); *CMS Inv. Holdings, LLC v. Castle*, 2015 WL 3894021, *16 (Del. Ch. June 23, 2015). But Delaware law honors broad LLC agreement liability-elimination clauses. *See, e.g.*, *Kelly*, 2010 WL 629850, *10-11. Those clauses meaningfully decrease transaction costs and, as they did here, provide managers critical discretion to take actions for a company's and its members' benefit.

In sum, the Court of Chancery erred in refusing to apply the liability-elimination clause in Section 5.17(b) of the LLC Agreement, as modeled off Section

18-1101(e). Section 5.17(b) and Section 18-1101(e) are broader than DGCL 102(b)(7), and bar the relief Zohar obtained below.

II. The 2017 Transaction Was Consistent with the LLC Agreement.

A. Question Presented:

Whether the Court of Chancery erred in holding the 2017 Transaction was void to the extent it amended the LLC Agreement's Manager-appointment process. This issue is preserved. Op. 29-36 & nn.110, 127; Tilton Post-Trial Opening Br. (D.I. 152) 69-73; Tilton Post-Trial Reply Br. (D.I. 161) 48-54.

B. Scope of Review:

This Court "review[s] questions of law and contractual interpretation, including the interpretation of LLC agreements, *de novo*." *CompoSecure*, 206 A.3d at 816.

C. Merits of Argument:

The trial court erred in holding the 2017 Transaction invalid to the extent it granted Tilton's affiliate Octaluna the sole right to appoint Stila's Manager. The 2017 Transaction created Class A Membership Interests and issued them to Octaluna. A160-164. The Class A Membership Interests received certain governance rights including "the sole right to…[r]emove or replace an existing Manager or appoint any additional Manager." A161. In consideration for these new interests and governance rights, Octaluna contributed $10 million to Stila. Tilton affiliate Ark II (as transferee) then exercised those rights in reappointing Tilton as Manager in April 2020. But on April 30, 2021—just days before commencing this action—Zohar, Stila's Common Member—executed the 2021 Written Consent,

purporting to appoint its own Manager, in conflict with the rights granted the Class A Membership Interests by the 2017 Transaction. The 2017 Transaction was validly effectuated by Stila's Manager pursuant to authorities set forth in the LLC Agreement. The Court of Chancery erred in endorsing Zohar's unlawful coup.

Delaware courts construe LLC agreements like any other contract. *See Godden v. Franco*, 2018 WL 3998431, *8 (Del. Ch. Aug. 21, 2018). "When interpreting a contract, the Court will give priority to the parties' intentions as reflected in the four corners of the agreement." *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). "In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein." *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985). "The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan." *GMG Cap. Invs.*, 36 A.3d at 779.

Here, the LLC Agreement confirms in at least four separate but interrelated provisions that Tilton had authority to execute the 2017 Transaction, which amended Stila's Manager-appointment process through the issuance of a new class of membership interests. Zohar's attempt to remove Stila's Manager and replace it with Zohar's appointee must fail.

First, Section 11.3 provides in relevant part that "this Agreement…may be amended or modified from time to time only by the Members" "***[e]xcept for any amendments otherwise expressly contemplated herein.***" A147 (emphasis added). Section 11.3 therefore confirms the Manager ***can*** amend the LLC Agreement so long as amendments were "expressly contemplated herein"—i.e., "expressly contemplated" in the LLC Agreement. The Oxford English Dictionary defines "contemplate," as relevant here, as "to take (an event, situation, etc.) into account as possible." *Contemplate*, Oxford English Dictionary (3d ed. 2003), *available at* Oxford English Dictionary Online (last visited Aug. 3, 2022). The American Heritage Dictionary of the English Language likewise defines "contemplate" as "[t]o have in mind as an intention or possibility." *Contemplate*, The American Heritage Dictionary, https://ahdictionary.com/word/search.html?q=contemplate (last visited Aug. 3, 2022). In other words, the Manager may amend any provision of the LLC Agreement where such amendments are noted in the LLC Agreement as a "possibility."

Second, Sections 3.4 "expressly contemplate[s]" the exact action taken in the 2017 Transaction and its amendment of the LLC Agreement. A131. Section 3.4 states:

> The ***Manager*** may from time to time ***in her sole discretion*** authorize and direct the creation and issuance of other classes of Membership Interests ***having such terms as she determines to be appropriate***, ***which terms*** will be reflected in a written consent of the Manager and

> ***will be deemed to be contained in this Agreement for all purposes hereof***.

A131 (emphases added).

Section 3.4 first provides that the Manager may "in her sole discretion" "create[] and issue[]" new classes of Membership interests. That's exactly what Tilton did in the 2017 Transaction: she conferred on Octaluna the Class A Membership Interests in exchange for its $10 million cash infusion into Stila. A160-164. Section 3.4 also gives Tilton authority to issue those membership interests having "such terms as she determines to be appropriate." She did that, too. In issuing Class A Membership Interests in exchange for Octaluna's investment, she conferred on Octaluna Manager-appointment rights. *Id.* Finally, Section 3.4 confirms those new membership interest terms "will be deemed to be contained in this Agreement for all purposes hereof." A131. In other words, the LLC Agreement expressly considers the possibility of amendment via issuance of new interests with new terms. The reference to "which terms…will be deemed to be contained in this Agreement," moreover, indicates that these new membership interests are expected to have substantive rights, including those that would alter other interests' rights and otherwise require amendment of the Agreement.

The authority Section 3.4 confers on Tilton is intentionally broad, consistent with her constituency conflict avoidance strategy. She has the authority to create membership interests containing "such terms" as she deems appropriate "in her sole

discretion." As Delaware courts have recognized, providing officeholders with authority to take actions in their "sole discretion" gives them the power to perform the task at issue "as [they see] fit," "unfettered" by any considerations other than the implied covenant of good faith and fair dealing. *Miller v. HCP Trumpet Invs., LLC*, 2018 WL 4600818, *1 (Del. Sept. 20, 2018); *Brick v. Retrofit Source, LLC*, 2020 WL 4784824, *5 (Del. Ch. Aug. 18, 2020).

Providing this type of substantial discretionary authority furthers the LLC Agreement's fundamental purpose. *See Myers v. Myers*, 408 A.2d 279, 281 (Del. 1979); *Bank of New York Mellon v. Commerzbank Cap. Funding Tr. II*, 2011 WL 3360024, *7 (Del. Ch. Aug. 4, 2011); *Haft v. Haft*, 671 A.2d 413, 417 (Del. Ch. 1995); *see also* 6 *Del. C.* § 18-1101(b) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract."). When Stila was created in 2009, its assets had just been purchased from lenders following a foreclosure. A88; A390, 441:16-22. The company was new; its brand in shambles. *See* A390-391. The LLC Agreement was therefore written precisely to give Stila's new Manager the flexibility to revive the company, including, if appropriate, bringing in new members—and granting them rights worth paying for—to ensure adequate infusions of cash. *See* A387. That's exactly what the 2017 Transaction was designed to do: Issue membership interests in exchange for needed cash.

Third and *fourth*, Section 5.4 grants the Manager broad powers, including specifically "creating and issuing…classes of Membership Interests." A136 § 5.4(a). And Section 5.6 states, in relevant part: "The Manager may take ***any action*** she is required or permitted to take in furtherance of her responsibilities hereunder in a meeting or by written consent." A137 (emphasis added).

The 2017 Transaction tracks Section 5.6. When Tilton executed the 2017 Transaction, she was Stila's Manager. A127 § 1.1. Likewise, the transaction was "in furtherance of her responsibilities hereunder." In 2017, Stila needed cash, and it needed it fast. *See* A330, 169:10-21. As Section 5.4 provides, Tilton had the duty to "maintain[] or caus[e] to be maintained the assets of the Company," A136 § 5.4(d); "collect[] sums due the Company," *id.* § 5.4(e); "acquir[e], utilize[e] for Company purposes…any asset of the Company," *id.* § 5.4(g); and "borrow[] money or otherwise commit[] the credit of the Company for Company activities," *id.* § 5.4(h). Indeed, she had the authority to "make ***all*** decisions and take ***all*** actions for the Company not otherwise provided for in this Agreement." *Id.* § 5.4 (emphases added). Issuing new membership interests to procure necessary capital falls within the broad delegation of authority the LLC Agreement conferred on Tilton. *See Zimmerman v. Crothall*, 62 A.3d 676, 715-16 (Del. Ch. 2013) (provision identical to Stila LLC Agreement Section 5.4 conferred authority to take actions "not explicitly addressed" in operating agreement). The 2017 Transaction was therefore

an "action" taken by the "Manager" pursuant to her responsibilities under the LLC Agreement and is fully valid and effective.[8]

In sum, the 2017 Transaction—including its conferral of sole authority on Octaluna to appoint Stila's Manager—was authorized by multiple provisions of the LLC Agreement. The 2017 Transaction is valid and enforceable in full. Zohar—a Common Member only—had no authority to appoint its own Manager in 2021, as it purported to do just a day before commencing this proceeding.

In finding the 2017 Transaction to be partially void, the Court of Chancery made three legal errors. We address each in turn.

First, the trial court construed Section 11.3 too narrowly. As discussed, Section 11.3 permits the Manager to unilaterally adopt any LLC Agreement amendment "expressly contemplated herein." A147. The lower court did not evaluate the text of that provision—let alone the agreement's purpose and other terms—and instead adopted Zohar's cramped construction under which Section 11.3 permits the Manager to amend the LLC Agreement only "if the Manager is…expressly given the authority to amend" in the text of the amended provision itself. Op. 30-31. But that is not what Section 11.3 says. Rather, it gives the

[8] Of course, under the express terms of the LLC Agreement, Tilton had authority to issue a new class of membership interests containing "such terms as she determine[d] to be appropriate" even if Stila did not need the infusion of capital. A131 § 3.4.

Manager broad latitude to adopt any amendment that the LLC Agreement "expressly contemplate[s]"—that is, takes into account as possible. A147 § 11.3. And the LLC Agreement does just that with respect to the challenged aspect of the 2017 Transaction by granting the Manager the authority to issue new classes of membership interests with terms that amend the Agreement ("which terms…will be deemed to be contained in this Agreement for all purposes hereof"). A131 § 3.4. The trial court's cramped reading of Section 11.3 also disregards the purpose of the LLC Agreement and the broad authority conferred on Tilton to revitalize Stila—critical components of the original LLC Agreement. This Court should reject the Court of Chancery's unduly narrow construction of Section 11.3.

Second, the trial court erred in concluding Section 5.8 (or Section 5.18)—the Manager-appointment provisions—cannot be amended by the Manager unilaterally. Nothing in those provisions suggests the parties believed those sections could never be amended by the Manager on her own. As discussed above, multiple other provisions in the LLC Agreement confirm the opposite.

Contrary to the trial court's conclusions, a holding that the Manager can amend Section 5.8 (or 5.18) under appropriate circumstances does not render language elsewhere in the LLC Agreement mere surplusage. The Court of Chancery noted that Section 4.8—which addresses distributions—provides that it is "[s]ubject to…the terms of any class of Membership Interest created pursuant to the last

sentence of Section 3.4." Op. 35-36. The court concluded the absence of similar "subject to" language in Section 5.8 suggests that provision is somehow unamendable by the Manager. *Id.* at 36.

But the Court of Chancery misunderstood the relationship between Sections 4.8 and 3.4. Unlike Section 3.4, Section 4.8 does not grant (let alone limit) any substantive authority to amend. A133-134. Section 4.8 says nothing about amending the LLC Agreement. Rather, Section 4.8 merely establishes consequences for what happens to distributions after the Manager takes certain actions—i.e., issues new membership interests. Section 4.8 merely confirms that ***if*** the Manager creates a new class of interests and the terms of those interests affect distributions, then those new membership terms override the distribution formula in Section 4.8. Tilton's construction of Section 3.4 therefore does not render any language in Section 4.8 surplusage.

Third, the court erred in concluding that generalized policy pertaining to the "sanctity of the franchise" overrode the LLC Agreement's text and purpose. Nothing in the LLC Agreement designates the "sanctity of the franchise" as the lodestar of contractual construction. Instead, the LLC Agreement must be construed consistent with ***its*** distinct purposes, *see Myers*, 408 A.2d at 281, and the parties' governing intent at the time of contracting, *Bank of New York Mellon*, 2011 WL 3360024, *7. That intent was to give Tilton the tools necessary to revitalize Stila

and provide the resources necessary to rescue it from the dust heap. For that reason, Section 3.4's plain text should be enforced broadly—not constrained by an ill-defined policy nowhere mapped to the LLC Agreement's text. And that text allows the Manager in her "sole discretion" to issue new membership interests on "terms as she determines to be appropriate." A131 § 3.4.

III. The Court of Chancery's Letter Decision Disregarded the Constraints Imposed on Rule 59(f) Motions.

A. Question Presented:

Whether the Court of Chancery, after taking over this case following the Vice Chancellor's post-trial Opinion, abused its discretion in granting Zohar's Rule 59(f) motion, and the ultimate relief the Vice Chancellor had expressly denied, where (i) neither Zohar's motion nor the court's Letter Decision addressed the heavy burden borne by a Rule 59(f) movant or the requirements for meeting it, (ii) the nature of the relief the court granted lies outside the scope available under Rule 59(f), and (iii) the decision was based on an erroneous finding of waiver. This issue is preserved. *See generally* Letter Decision; Tilton Br. in Opp. to Rule 59(f) Mot. 6-10 (A446-450).

B. Scope of Review:

This Court reviews the grant of a motion under Rule 59(f) for the abuse of discretion. *Lankford v. Lankford*, 157 A.3d 1235, 1244 (Del. 2017) (reversing decision below).

C. Merits of Argument:

After hearing two days of testimony, reviewing the parties' extensive post-trial briefing, and hearing oral argument, the Vice Chancellor expressly declined to reach the "ultimate" question of which "person or entity" held the right to appoint Stila's Manager before the 2017 Transaction, and thus whether Zohar's purported

appointee was the Manager. Op. 40-41. To be sure, Zohar had *sought* a declaration that its appointee was Stila's Manager, which was the *only* relief sought in the Complaint's Prayer for Relief. *Id.* at 40; A80. But the Vice Chancellor refused to grant that request.

In declining to rule on this "ultimate" issue, the Vice Chancellor explained "the parties ha[d] not joined issue" sufficiently to resolve that question. Op. 41 n.140. He also recognized there was another action between the parties in Bankruptcy Court in which this question could be adjudicated. Op. 39 n.139. Specifically, while the parties here stipulated to the validity of Amendment 1—and consequently to the amendments to Section 5.8 and insertion of a new Section 5.18—they also stipulated the impact of Amendment 1 was not "at issue" in this litigation and not before the court. A89. Questions raised by Amendment 1 were left for another proceeding including, for example, whether (1) any party could appoint a new Manager without further amendment of the LLC Agreement given that Section 5.18 required the Series A Preferred Member to consent to the appointment of a Manager but the Series A Preferred interests were redeemed and retired by 2016;[9] and (2) the Class A Member's consent was required to appoint a

[9] *See* Letter Decision 6 (noting that pursuant to the Amendment 1, "Stila's Manager could not be removed or replaced without the consent of a non-existent series of Stila membership interests").

Manager where Amendment 1 removed the Common Member's sole right to appoint Managers and instead referenced appointment by any "Member." A152.

Zohar filed its post-judgment motion specifically challenging the Vice Chancellor's decision to not reach the "ultimate issue" identified in Zohar's Complaint. A426; A439. Zohar identified no legal precedent the Opinion overlooked nor any facts the Vice Chancellor had misapprehended. *See Chrin v. Ibrix Inc.*, 2012 WL 6737780, *2 (Del. Dec. 13, 2012). Following reassignment to the Chancellor, she granted Zohar's motion in the Letter Decision that conferred on Zohar the exact relief the Vice Chancellor denied. But the Letter Decision also did not identify the standard applicable to Zohar's Rule 59(f) motion, let alone identify any law previously overlooked or any material misunderstandings of fact as Rule 59(f) requires. *See* Letter Decision 3-8. That was reversible error.

A party moving for post-trial Rule 59(f) relief bears a heavy burden and must meet exacting requirements. *Neurvana Medical, LLC v. Balt USA, LLC*, 2019 WL 5092894, *1 (Del. Ch. Oct. 10, 2019). Motions for reargument are denied "unless the movant establishes that the court overlooked a decision or principle of law that would have controlling effect or misapprehended the facts or the law so the outcome of the decision would be different." *In re TransPerfect Global, Inc.*, 2021 WL 2030094, *1 (Del. Ch. May 21, 2021). "Mere disagreement with the court's

resolution of a matter is not sufficient" to carry the movant's "heavy burden." *Id*.[10] Motions for clarification are reviewed under the same standard. *Naughty Monkey, LLC v. MarineMax Ne., LLC*, 2011 WL 684626, *1 (Del. Ch. Feb. 17, 2011). These critical protections preserve Delaware's interest in finality of judgments and prevent parties from draining judicial resources by seeking to relitigate issues that have been resolved. *Cf. Glinert v. Wickes Cos.*, 1992 WL 165153, *3 (Del. Ch. July 14, 1992) ("A movant bears a heavy burden of proof in order 'to protect the finality of judgments against efforts to turn the vicissitudes of litigation into grounds for more litigation still.'" (discussing Rule 60(b) motion for relief from judgment)).

Neither Zohar's motion nor the Letter Decision even purported to address Rule 59(f)'s exacting requirements. *See generally* A426-440; Letter Decision. The Chancellor's Letter Decision instead effectively reviewed the Opinion *de novo* and overruled it by deciding the "ultimate issue" the Vice Chancellor had refused to reach: that Zohar's appointee was Stila's Manager. Letter Decision 3-8. The court below even characterized the "final sentence of the Opinion" as the "jumping-off

[10] *See also Perryman v. Stimwave Tech. Inc.*, 2021 WL 608266, *1 (Del. Ch. Feb. 17, 2021) ("Mere disagreement with the Court's decision is insufficient—such relief must be sought through appeal, not reargument."); *In re Happy Child World, Inc.*, 2020 WL 7240714, *2 (Del. Ch. Dec. 9, 2020) ("[A] motion for reargument may not rehash old arguments or invent new ones."); *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 975581, *1 (Del. Ch. Mar. 4, 2010) ("[A] motion for reargument is 'not a mechanism for litigants to relitigate claims already considered by the court,' or to raise new arguments that they failed to present in a timely way." (citation omitted)).

point" for Zohar's reargument motion and noted that this sentence "frame[d] the question central to resolving [Zohar's] Motion: Who held [the removal and appointment] power before the 2017 Transaction." Letter Decision 3. But a "further ruling," A426; A440, to reach an issue raised in the action and denied by the court is not a form of relief permitted under Rule 59(f). The court below erred in granting it.

The court granted Zohar this "ultimate issue" by holding Tilton had waived an argument the parties stipulated was not to be litigated in this case: the "effect(s)" of Amendment 1. Op. 41 n.140. Specifically, the parties stipulated that "the LLC Agreement was amended [] via" Amendment 1 but that Amendment 1 was not "at issue in this Action." A89. The Vice Chancellor recognized that *neither* party had addressed how Amendment 1 impacts who can appoint Stila's Manager. Op. 33 n.124. And although the Vice Chancellor contemplated that failure to raise 5.18 "could be deemed a waiver" of reliance on that section, *id.*, he held that because "the parties have not joined issue on the effect(s) of Amendment No. 1 on the validity of the 2021 Written Consent," he would "not venture down that road without a map." Op. 41 n.140. Post-Judgment, however, the Chancellor went further. She decided "the conduct that the Vice Chancellor found 'could be deemed' a waiver of Tilton's argument was in fact a waiver." Letter Decision 8. The Chancellor cited no procedural authority for overruling the Vice Chancellor on this issue. Consistent

with the parties' pre-trial stipulation and the original post-trial Opinion, the court should have left the question of the effect of Amendment 1, and the ultimate question of who must consent to the appointment of a Manager, for another proceeding.[11]

This Court need go no further to reverse and vacate the Letter Decision and restore the parties to their positions after the Opinion and Judgment were issued and entered. But if the Court reaches the Letter Decision's merits, it should find that the Letter Decision—specifically, the conclusion that Tilton waived reliance on Section 5.18—was an abuse of discretion, for two reasons.

First, the parties stipulated that Amendment 1 was valid and would not be litigated in this action. A89. Given that stipulation, Tilton not raising it in her briefs cannot be held against her and certainly does not constitute a waiver. *Second*, the Court of Chancery abused its discretion in construing the parties' omission on Section 5.18 solely against Tilton. *Neither* party briefed the effect of Section 5.18

[11] At the appropriate time, Tilton will show that under Amendment 1 Zohar lacks authority to unilaterally appoint a Manager and that its 2021 Written Consent purporting to do so is invalid. Amendment 1 removed language in Section 5.8 that gave the Common Member sole appointment and removal power and instead established that the Series A Preferred Member must consent to any appointment or removal. A152-153. Thus, until the LLC Agreement is further amended to remove the Series A Preferred consent requirement—which can be accomplished by consent of the Common (Zohar) and Class A (Ark II) Members—no new Manager can be removed or appointed. Tilton remains the Manager. In addition, Amendment 1 indicates that every "Member" (which now includes the Class A) has a role in Manager appointment. Thus, the "person or entity" who holds the appointment power is all three Members of Stila—Series A Preferred, Common, and Class A.

(until Zohar raised it in its Rule 59(f) motion), consistent with their pre-trial stipulation. Op. 33. To the extent there was any waiver, it should be construed against Zohar, not Tilton, as the plaintiff bore the burden of proof here. The court's decision to construe against Tilton the parties' agreement that Amendment 1 was not at issue in this action is a clear abuse of discretion.

In sum, the Letter Decision reassessed the Opinion and Judgment inconsistently with Rule 59(f) and granted relief unavailable under that rule. Even if it was proper to consider the substance of Zohar's procedurally inadequate motion (it was not), the lower court abused its discretion in finding Tilton had waived reliance on Amendment 1, which was the only basis on which it found that Zohar holds sole appointment rights. If this Court declines to reverse entirely, *see supra* Arg. Pts. I & II, it should vacate the Letter Decision and return the parties to their positions under the Opinion and Judgment, with the issue of who holds the Manager-appointment power reserved for other proceedings during which the impact of Amendment 1 can be fully litigated.

CONCLUSION

Appellant Lynn Tilton respectfully requests that this Court reverse the May 31 Opinion and Final Judgment and remand with instructions to enter judgment for Tilton or, in the alternative, vacate the Court of Chancery's Letter Decision and remand with instructions to enter the original judgment (Ex. B, Judgment).

August 11, 2022

SMITH, KATZENSTEIN & JENKINS LLP

/s/ Kathleen M. Miller

Kathleen M. Miller (No. 2898)
Robert K. Beste, III (No. 3931)
1000 West Street, Suite 1501
Wilmington, DE 19801
302-652-8400
kmiller@skjlaw.com
rkb@skjlaw.com

Attorneys for Defendant-Below/Appellant Lynn Tilton

Of counsel:
Monica K. Loseman
Gibson, Dunn & Crutcher LLP
801 California Street, Suite 4200
Denver, Colorado 80202
(303) 298-5784
mloseman@gibsondunn.com

and

Akiva Shapiro
Lee R. Crain
Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, NY 10166
ashapiro@gibsondunn.com