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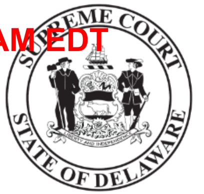

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LYNN TILTON, Defendant Below, Appellant, v. ZOHAR LITIGATION TRUST-B, Plaintiff Below, Appellee, and STILA STYLES, LLC, Defendant Below, Appellee.	))))))))))))))))	No. 242, 2022 Court Below: Court of Chancery C.A. No. 2021-0384-KSJM

APPELLEE ZOHAR LITIGATION TRUST-B'S ANSWERING BRIEF

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

C. Barr Flinn (#4092)
Emily V. Burton (#5142)
Alberto E. Chávez (#6395)
Kevin P. Rickert (#6513)
Nehama L. Hanoch (#6817)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Attorneys for Zohar Litigation Trust-B

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NATURE OF PROCEEDINGS

This is a Section 18-110 action. Plaintiff Below/Appellee Zohar Litigation Trust-B ("Zohar") filed its Verified Complaint on May 1, 2021.[1] Zohar's "sole request in its prayer for relief is for 'the Court [to] enter judgment declaring that under 6 *Del. C.* Section 18-110 Kevin Carey is the Manager of Stila . . . .'"[2]

The parties litigated this matter thoroughly. They engaged in months of fact discovery, culminating in a 35-page Pre-Trial Order ("PTO")[3] and simultaneous pre-trial briefs.[4]

Vice Chancellor Slights held a two-day trial on December 1 & 2, 2021.[5] The parties filed simultaneous opening and answering post-trial briefs.[6] The Court of

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[1] A0080. On August 2, 2022, by operation of the liquidation plan entered by the United States Bankruptcy Court for the District of Delaware, New Stila Holdco LLC succeeded to Zohar's interest in Stila and was deemed admitted as a member in Stila. *See* D.I. 23 ¶4. This cause of action was transferred to Zohar Litigation Trust-B. *Id.* As of August 2, 2022, New Stila Holdco LLC, Zohar's successor, is Stila's sole Common Member. *See id.* For purposes of this brief, Zohar III, Ltd., New Stila Holdco LLC, and Zohar Litigation Trust-B are included in the definition of "Zohar." Capitalized terms not defined herein follow the definitions assigned in the opinion under appeal, *Zohar v. Stila Styles, LLC*, 2022 WL 1744003 (Del. Ch. May 31, 2022) (AOB, Ex. A), cited hereinafter as "*Op.*"

[2] *Op.* at *5 n.53 (citing A0080).

[3] A0081, A0124.

[4] B030-111; B112-79.

[5] *Op.* at *7.

[6] B180-286; B287-382; B383-472; B473-562.

Chancery heard post-trial oral argument.[7] The Court of Chancery issued its Post-Trial Memorandum Opinion (the "Opinion") and entered its Final Order and Judgment (the "Judgment") for Zohar on May 31, 2022.[8]

On June 6, 2022, after Tilton refused to cede control of Stila, Zohar filed a Motion Pursuant to Rule 59(f) for Clarification or, in the Alternative, for Further Ruling to Address the Ultimate Issue Raised by this Action (the "Motion for Clarification"), requesting that the Court of Chancery confirm that Carey was Stila's Manager.[9] On July 11, 2022, the Court of Chancery issued a letter decision (the "Letter Decision"), clarifying that Zohar had validly appointed Carey as Stila's Manager.[10]

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[7] *Op.* at *7; *see* B566-685.

[8] *See Op.*; Final Order & Judgment (AOB, Ex. B), hereinafter "Judgment."

[9] *See* A0426-40.

[10] *See* AOB, Ex. C, hereinafter "Letter Decision."

PRELIMINARY STATEMENT

This action is a control dispute. It challenges one among a constellation of efforts by Tilton to keep control of property that was never hers over the objections of its owners.[11] This is far from the only instance in which Tilton engaged in intentional misconduct for her personal benefit.[12]

At trial, Zohar presented extensive evidence that the 2017 Transaction at the core of this case was a sham, effected to maintain Tilton's control of Stila after Stila's sole-Member, Zohar, terminated its collateral management contract with her in 2016.[13] Zohar presented three, independent grounds on which the 2017 Transaction is invalid:

First, Zohar argued that the 2017 Transaction is void because Tilton lacked authority as Manager to unilaterally transfer the right to appoint Stila's Manager from Zohar to Tilton's entity, Octaluna.

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[11] *Compare e.g., Zohar II 2005-1, Ltd. v. FSAR Holdings, Inc.*, 2017 WL 5956877, at *3 (Del. Ch. Nov. 30, 2017) (rejecting Tilton's claims to have caused numerous companies to grant her irrevocable proxies to vote their stock).

[12] *See, e.g.*, *In re Transcare Corp.*, 2020 WL 8021060, at *31 (Bankr. S.D.N.Y. July 6, 2020); *United States ex rel. Marsteller v. Tilton*, 556 F. Supp. 3d 1291, 1306-07 (N.D. Ala. 2021).

[13] The two-volume trial transcript spans 549 pages. A0288-A0425. The parties questioned six witnesses, including Zohar's expert witness, and jointly lodged 332 exhibits. *See id.*; *see also* Chancery D.I. 141. Zohar lodged eight deposition transcripts. Chancery D.I. 135.

Second, Zohar argued that Tilton's 2017 Transaction was a bad faith breach of the implied covenant of good faith and fair dealing because Tilton executed the transaction specifically to prevent Zohar from lawfully removing her as Stila's Manager.

Third, Zohar argued that the 2017 Transaction was not on market terms and therefore breached the provision of Stila's LLC Agreement governing related party transactions.

The Court of Chancery found Zohar's first argument—that the governance terms of the 2017 Transaction were void under Stila's LLC Agreement—fully dispositive of this case: "Tilton did not have the authority to amend the LLC Agreement to strip Zohar of its right to remove and replace the Manager and give that right to herself."[14] The court declined to reach Zohar's second and third arguments because "the outcome is dictated by the clear and unambiguous terms of Stila's LLC Agreement."[15] After Tilton claimed the outcome to be unresolved, the Court of Chancery issued the Letter Decision confirming that its Opinion and Judgment in Zohar's favor meant that Zohar was entitled to appoint Stila's Manager and had successfully appointed Kevin Carey.[16]

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[14] *Op.* at *16.

[15] *Id.* at *7.

[16] *See* Letter Decision at 8.

Tilton raises three grounds for appeal:

First, Tilton argues that, by exculpating her from certain liability, Section 5.17(b) of Stila's LLC Agreement bars this action.

The Court of Chancery correctly found Section 5.17(b) inapplicable to this *in rem* proceeding to identify Stila's Manager. As the Opinion explained, this action did not render anyone *liable*, however *liability* is defined.

Tilton's argument fails to address the basic tenet of contract interpretation that any waiver of rights must be clear and unequivocal. Tilton cannot explain how Section 5.17(b) of Stila's LLC Agreement *clearly and unambiguously* precludes any of the relief entered here when prior cases reading substantially the same language have reached the opposite conclusion.

Regardless, the effect of Tilton's interpretation would be absurd. She contends that the express terms of the LLC Agreement may not be enforced, leaving only the implied covenant of good faith and fair dealing to be enforced. Under Tilton's interpretation, Zohar cannot challenge Tilton's unilateral amendments to Stila's LLC Agreement because the LLC Agreement *explicitly* required the Member's approval to amend. Tilton's reading of Section 5.17(b) turns the concept of a written contract on its head.

Second, Tilton argues that her authority as Stila's Manager permitted her to transfer the right to remove and appoint Stila's Manager from Stila's sole Member,

Zohar, to her entity, Octaluna. Specifically, Tilton claims that Section 3.4 of Stila's LLC Agreement permitted her to create and issue new Class A Interests to Octaluna, which replaced Section 5.8 of Stila's LLC Agreement (the Common Member's right to remove the Manager) and Section 11.3 (requiring that the Members approve any amendment) with a 2017 Written Consent reallocating all of those rights to Octaluna.

The Court of Chancery concluded that Section 3.4 of Stila's LLC Agreement did not permit such amendment. Although Section 3.4 does permit the Manager to create and issue new classes of Membership Interests, Section 11.3 of Stila's LLC Agreement required the Member's (Zohar's) approval for any amendment of the Agreement not expressly contemplated therein. The court noted that Section 4.8 (concerning distributions) expressly contemplates its amendment by the Manager; Section 4.8 states that it is subject to the terms of any new classes of interest made by the Manager pursuant to Section 3.4. Conversely, Section 5.8 (concerning removal and replacement of the Manager) includes no such clause. Thus, the Court of Chancery held that Stila's Manager could amend Section 4.8, but not Section 5.8 when issuing new classes of interest because only Section 4.8 included an express permission for the Manager to amend. On appeal, Tilton fails to rebut the point that her reading would render the clause in Section 4.8 subjecting it to the terms of any new issuance superfluous.

Third, Tilton argues that the Court of Chancery abused its discretion by clarifying that its Opinion and Judgment provided that Zohar could appoint Stila's Manager.

The Court of Chancery did not abuse its discretion in granting Zohar's Motion for Clarification. Tilton's refusal to relinquish control of Stila, in the face of judgment in Zohar's favor, demonstrated the need to clarify the Opinion and Judgment. Even if the court had decided matters not resolved in the Opinion, that additional relief is also permitted under Rule 59(f) without regard to whether the Opinion was in error.

This Court should affirm the Court of Chancery's Opinion, the Judgment, and the Letter Decision.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that Section 18-110 cases, such as this action, are *in rem* proceedings and that Section 5.17(b) of Stila's LLC Agreement, which exculpates certain liability, did not preclude this action or the relief granted. Tilton's contrary interpretation of Section 5.17(b) is both incorrect and absurd.

2. Denied. The Court of Chancery correctly held that Section 3.4 did not empower Tilton to unilaterally amend Section 5.8 of Stila's LLC Agreement. Section 11.3 of Stila's LLC Agreement requires Member approval for any amendment not expressly contemplated within the LLC Agreement. Neither Section 5.8, governing the removal and replacement of Stila's Manager, nor the definition of Manager expressly contemplates unilateral amendment by Stila's Manager of those provisions. Thus, Tilton's authority to issue or create new classes of Membership Interests did not authorize her to strip Stila's Member of its franchise and to entrench herself.

3. Denied. The Court of Chancery did not abuse its discretion in clarifying its Opinion and Judgment to confirm that Tilton had conceded that Section 5.8 of Stila's initial LLC Agreement controlled the right to appoint Stila's Manager in the absence of the 2017 Transaction at issue in this case.

STATEMENT OF FACTS

A. THE BEGINNINGS OF ZOHAR AND STILA

Tilton formed Zohar in 2007, as the third in the series of Zohar Funds, designed to invest in various distressed companies (the "Portfolio Companies").[17] The Zohar Funds' investors had contractual rights to oust Tilton and retake control of the Zohar Funds under specified circumstances.

In 2009, Tilton learned that Stila's assets were for sale.[18] At that time, she was Zohar's Collateral Manager. Tilton invested Zohar's, and only Zohar's, capital to acquire Stila's assets, and oversaw the formation of Stila to operate them.[19]

From Stila's formation, Zohar has always been Stila's sole Common Member; Zohar was also Stila's sole Series A Preferred Member until 2016, when the Series A Preferred was redeemed in full in 2016.[20] Neither Tilton, nor Octaluna, was a Member of Stila prior to the 2017 Transaction at issue in this case.[21]

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[17] *Op.* at *2; A0386-87.

[18] *Op.* at *2.

[19] *Id.* at *2-3.

[20] *See id.* at *3.

[21] *See id.* at *5.

B. STILA'S LLC AGREEMENT

In her capacity as Zohar's Collateral Manager, Tilton unilaterally controlled the drafting of Stila's LLC Agreement.[22]

The Court of Chancery found the relevant provisions in Stila's LLC Agreement to be unambiguous.[23] Thus, the court did not rely on any extrinsic evidence in interpreting them.[24] The following provisions from Stila's LLC Agreement have particular relevance to this action:

1. Section 5.8 – Removal; Resignation

The Court of Chancery ruled in Zohar's favor on the basis of Section 5.8 of Stila's LLC Agreement. Section 5.8 states:

> Removal; Resignation. 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. . . . A Majority-in-Interest of the Common Members will select a replacement for any Manager who resigns.

The Court of Chancery found that "Section 5.8 of the Initial LLC Agreement grants the right to remove and replace the Manager to the then existing Common Member, i.e., Zohar."[25]

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[22] A0088 ¶32.

[23] *Op.* at *7, *8.

[24] *See generally id.* at *11-15.

[25] *Id.* at *13.

2. Section 5.18 – Unanimous Voting

In May 2011, Tilton caused Zohar to execute Amendment No. 1 to the LLC Agreement.[26] Amendment No. 1 struck the first and last sentences from Section 5.8[27] and created a new Section, 5.18, which provided in relevant part that:

> In addition to any other consent required in this Agreement or provided by law or regulation but notwithstanding anything else in this Agreement to the contrary, no Member may take any of the following actions without the consent of each Series A Preferred Member:
>
> (a) remove or replace an existing Manager or appoint any additional manager; provided that, any Manager may resign at any time, effective immediately upon notice to any Series A Preferred Member."[28]

Stilas's only Series A Member was Zohar.[29] The Series A was redeemed in full in 2016. In the PTO, the parties agreed, "[n]either Amendment No. 1 nor Amendment No. 2 are at issue in this Action."[30] The Letter Decision confirmed that

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[26] *Id.* at *3; *see also* A0152-55 (Amendment No. 1).

[27] *Op.* at *12 (citing A0153). The first and last sentences of Section 5.8 are: "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. . . . A Majority-in-Interest of the Common Members will select a replacement for any Manager who resigns." A0137.

[28] A0152.

[29] *Op.* at *3.

[30] A0089 ¶38.

Tilton had waived any argument based on Section 5.18.[31] Hence, Amendment No. 1 should not affect the outcome of this appeal.[32]

3. Section 11.3 – Amendments to the Agreement or Certificate

Section 11.3 governs amendments to Stila's LLC Agreement. It states in pertinent part that:

> Except for any amendments otherwise expressly contemplated herein and except as otherwise provided by law, this Agreement and the Certificate may be amended or modified from time to time only by the Members.

The Court of Chancery found that Section 11.3 "clearly provides that if the Manager is not expressly given the authority to amend a provision of the LLC Agreement unilaterally, then the amendment must be approved by the Members."[33]

4. Section 3.4 – Classes of Membership Interests; and Section 5.4 – Management by Manager

Tilton argues that Sections 3.4 and 5.4 of Stila's LLC Agreement provide her with express authority to amend any provision in Stila's LLC Agreement when issuing new classes of Membership Interests.[34]

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[31] Letter Decision at 8.

[32] *See* A0065 ¶¶25-27.

[33] *Op.* at *11.

[34] AOB at 38-41.

Section 3.4 states, in relevant part:

> [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.

The Court of Chancery found that "[t]here is nothing in 3.4 that even remotely suggests it authorizes the Manager, acting alone, to eliminate governance or consent rights enjoyed by the Members."[35]

Section 5.4 states, in relevant part:

> Except for situations in which the approval of the Member is required by the Certificate, this Agreement or nonwaivable provisions of applicable law . . . the Manager may make all decisions and take all actions for the Company not otherwise provided for in this Agreement, including the . . . creating and issuing [of] other classes of Membership Interests . . . .

The Court of Chancery held that the Manager's ability to create and issue a new class of Membership Interests through Section 5.4 does not allow Section 5.8 to "be construed as expressly authorizing the Manager to amend it unilaterally."[36]

If neither Section 3.4 nor Section 5.4 of the LLC Agreement authorized Tilton to amend Section 5.8 of the LLC Agreement, Tilton had no authority to effect the

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[35] *Op.* at *14.

[36] *Id.* at *13.

2017 Transaction. The Court of Chancery found that the 2017 Transaction was not merely voidable, but void, for this want of authority.[37]

5. Sections 4.8 – Distributions Generally

The Court of Chancery cited Section 4.8 of Stila's LLC Agreement in support of its conclusion that Section 3.4 did not authorize Tilton to amend Section 5.8 of the LLC Agreement. Section 4.8, governing distributions, begins with the clause "[s]ubject to . . . the terms of any class of Membership Interest created pursuant to the last sentence of Section 3.4 . . . ."[38] The Court of Chancery found that this language in Section 4.8 would be surplusage if Section 3.4 alone constituted the express permission for amendment by the Manager, as required by Section 11.3.[39]

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[37] *Id.* at *15.

[38] Section 7.2 similarly expressly permits amendment by the Manager: "[T]he Manager will reflect each Transfer and admission . . . by preparing an amendment to this Agreement . . . ."

[39] *Op.* at *13 (quoting Section 4.8).

6. Sections 4.10, 5.4, 5.5, 5.8, 5.14, 10.2, and 11.3 – Restrictions on the Manager's Authority

Tilton claims Stila's LLC Agreement's intent was to provide the Manager with maximal authority.[40] The Agreement rebuts this: it contains multiple express limitations on the Manager's powers. Among other provisions:

Section 5.14 "Conflicts of Interest," limits the Manager's authority to engage in self-dealing transactions: "[t]he Company may transact business with the Manager, . . . <u>provided</u> that the terms of those transactions are no less favorable than those the Company could reasonably be expected to obtain from unrelated third parties."[41]

Section 5.4 "Management by Manager," subordinates the Manager's authority to the Members' rights: "[e]xcept for situations in which the approval of the Members is required by the Certificate, this Agreement or nonwaivable provisions of applicable law, and subject to the provisions of Section 5.5 . . . ."[42]

Section 5.5 "Restrictions on Actions by Manager," subordinates the Manager's authority to the LLC Act: "[t]he Manager will not cause the Company

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[40] AOB at 10, 11.

[41] A0139 (emphasis in original).

[42] A0136.

to do any of the following without complying with any applicable requirements of the Act . . . ."[43]

Section 4.10 "Limitations on Distributions," restricts the Manager's authority to make distributions pursuant to Section 4.8: "no distribution pursuant to this Agreement will be made if such distribution would result in a violation of the Act;" and "no distribution will be made if such distribution would violate the terms of any agreement or any other instrument to which the Company is a party."[44] "As soon as such distribution is no longer prohibited by this Section 4.10, the Manager will cause the Company to distribute the lesser of (a) the Cash Available for Distribution and (b) the amount of the distribution that was prohibited by this Section 4.10."[45]

Section 5.8 permits the Common Members to remove and replace the Manager at will; it does not permit the Manager to appoint a replacement.[46]

Section 10.2 "Dissolution," requires the Members to vote to dissolve and wind up the company; it does not permit dissolution by the Manager.[47]

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[43] *See* A0137.

[44] A0134.

[45] *Id.*

[46] A0137.

[47] A0146.

7. Section 5.17(b) – No Fiduciary Duty; Duties of the Members and the Manager

Perhaps recognizing that neither Section 3.4 nor 5.4 permits the Manager to unilaterally disenfranchise Stila's sole-Member, Tilton claims that Section 5.17(b) precludes this action entirely.

Section 5.17(b) states in pertinent part:

> None of (i) the Manager, (ii) any Member, . . . (each, an "Indemnified Party") will be liable to the Company, the Manager, any Member . . . for any act or omission, including any breach of this Agreement or any breach of a duty (fiduciary or otherwise) that such Indemnified Party may have with respect to the Company, such Member or such other Person, even if the act or omission furthers such Indemnified Party's own interest, unless such act or omission constitutes a bad faith violation of such Indemnified Party's implied contractual covenant of good faith and fair dealing, if any, created by this Agreement pursuant to Delaware law.

The Court of Chancery found that "Section 5.17(b), by its terms, is not implicated here;" it "cannot be read to bar a Section 18-110 claim seeking the court's determination regarding the validity of an action taken by the Manager, even if that determination requires the Court to interpret the LLC Agreement."[48]

C. TILTON'S INVALID 2017 TRANSACTION

In 2015, Tilton realized that she would lose control of Stila, and the other Portfolio Companies, if Zohar defaulted on the notes it owed to its own creditors and

[48] *Op.* at *10-11.

those creditors replaced her as Zohar's Collateral Manager.[49] So, Tilton caused Stila, and other Portfolio Companies, to execute consents, proxies, and amendments supposedly confirming her, or her personal entities', ownership and control of the Portfolio Companies.[50] The third amendment to Stila's LLC Agreement (the "2015 Amendment") was one such amendment. Tilton used her authority as Zohar's Collateral Manager to cause Zohar to approve these entrenchment devices.

When Tilton was replaced as Zohar's Collateral Manager, the new Collateral Manager brought a lawsuit in the Court of Chancery to confirm that Tilton's 2015 machinations were ineffective. The matter was tried in April 2017. On November 30, 2017, the court held that equity titled in Zohar's name belonged to Zohar, and Tilton's 2015 reallocation of governance rights at the Portfolio Companies that participated in that action (which did not include Stila) was ineffective.[51]

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[49] *See FSAR Holdings*, 2017 WL 5956877, at *2 ("[S]ensing that she might be replaced as collateral manager, and thereby lose control over the enterprise, in September 2015, Tilton caused [Zohar] to grant irrevocable proxies (without consideration) for shares of the Portfolio Companies' common stock (the 'Proxies') to entities under her control—Patriarch Partners XIV and Ark II. She admittedly granted the Proxies to 'make certain' that she would retain control of the Zohar Funds—and their Portfolio Companies—even if her managing entities, Patriarch Partners XIV and Patriarch Partners XV, no longer served as collateral manager."). *See also* B210-15.

[50] *FSAR Holdings*, 2017 WL 5956877, at *2.

[51] *Id.* at *3 ("[T]he Zohar Funds are the beneficial owners of the Portfolio Companies' equity.").

In the shadow of that dispute, without consulting Zohar, on November 13, 2017, Tilton executed the documents effecting the 2017 Transaction.[52] Among those documents, the 2017 Written Consent purported to amend Stila's LLC Agreement as follows:

> [N]otwithstanding anything to the contrary contained in the LLC Agreement, the Class A Interests shall have the sole right to:
>
> A. Remove or replace an existing Manager or appoint any additional manager . . .
>
> . . .
>
> C. Amend the LLC Agreement . . .[53]

These rights mirrored those that Tilton had purported to give herself through the 2015 Amendment.[54] Tilton abandoned her defense of Stila's 2015 Amendment by at least March 21, 2020.[55] Tilton did not fully disclose the terms of the 2017 Transaction to Zohar until April 9, 2019.[56]

Concurrently with executing the 2017 Transaction, Tilton also filed suit in California state court seeking a declaration that "the September 22, 2015

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[52] *Op.* at *5; A0165-70, A0171-72.

[53] A0161.

[54] *Compare* B001-4 (2015 Amendment); *see also* A0415 at 508:11-18 (Tilton).

[55] A0093 ¶56.

[56] *Op.* at *9.

Amendment to the Stila LLC Agreement is legal, valid, and has full force and effect."[57] Tilton's California complaint did not mention the 2017 Transaction.[58]

On November 14, 2017, unaware of the 2017 Transaction, Zohar's Collateral Manager sued in the Court of Chancery seeking a determination that it could (and later had) validly removed Tilton as Stila's Manager, notwithstanding the 2015 Amendment.[59]

D. ZOHAR'S BANKRUPTCY

The initial litigation over control of Stila halted when Tilton put Zohar into bankruptcy on March 11, 2018.[60] At that point, an agreement in place in Zohar's bankruptcy precluded Zohar from removing Tilton.[61] Tilton did not provide Zohar with a copy of the 2017 Written Consent until April 9, 2019.[62]

On March 9, 2020, Zohar filed an adversary proceeding in its bankruptcy, challenging numerous of Tilton's misdeeds, including the 2017 Transaction.[63] On March 21, 2020, Tilton suddenly resigned as Stila's Manager.[64] Before a

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[57] *See generally* B028.

[58] A0067 ¶34; A0415 at 509:16-20 (Tilton).

[59] A0092 ¶50; A0067 ¶¶35, 37.

[60] *Op.* at *3.

[61] *Id.*

[62] *Id.* at *9.

[63] *See* A0176-277.

[64] *Op.* at *6.

replacement could be put in place, Tilton purported to rescind her resignation on March 26, 2020;[65] she refused to yield practical control over Stila, despite Zohar's objections.

On April 21, 2020, Tilton executed a written consent on behalf of Stila's putative Class A Member (now Tilton's affiliate, Ark) that purported to reappoint her as Stila's Manager (the "2020 Written Consent"), pursuant to the authority seized in the 2017 Transaction.[66]

On April 30, 2021, Zohar executed a written consent appointing Kevin Carey as Manager (the "2021 Written Consent").[67] Tilton still refused to yield control of Stila. So, Zohar filed this action on May 1, 2021. As discussed in the Nature of Proceedings *supra*, the parties litigated this matter to a trial on the merits in December 2021.

E. THE OPINION AND JUDGMENT

In this action, Zohar raised three reasons why the 2017 Transaction was invalid.[68] The Court of Chancery held "that the outcome is dictated by the clear and unambiguous terms of Stila's LLC Agreement" and accordingly adopted Zohar's

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[65] *Id.*

[66] *Id.* at *2, *6.

[67] *Id.* at *6; *see also* A0284-85.

[68] *Op.* at *7.

first contractual argument, finding that "there is no need to address or decide the allegations of bad faith and breach of fiduciary duty."[69]

After dispensing with a laches and acquiescence argument that Tilton does not resurrect on appeal and has therefore waived,[70] the Opinion held that Stila's exculpatory provision, Section 5.17(b), does not bar this action: Section 5.17(b)'s restriction on liability "is not implicated" in this *in rem* Section 18-110 proceeding that does not impose liability.[71]

Turning to the substance of the 2017 Transaction, the Opinion held the 2017 Transaction "purport[ed] to amend Section 5.8 by stripping the Common Member's contractual right to remove and replace the Manager . . . ."[72] Per Section 11.3, such unilateral amendment could not be effected absent express authority in the Agreement.[73] "Nothing in Section 5.8 can be construed as expressly authorizing the Manager to amend it unilaterally . . . ."[74] Thus, the Opinion reasoned that Section 5.8 could not be unilaterally amended through an issuance of equity via Sections 3.4

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[69] *Id.*

[70] *Id.* at *8-10. *See In re Nat'l S'holder Litig.*, 2010 WL 2585282, at *2 (Del. June 29, 2010) ("Arguments that are not presented in an appellant's opening brief are waived on appeal.").

[71] *Op.* at *10-11.

[72] *Id.* at *13.

[73] *Id.* at *11.

[74] *Id.* at *13.

and 5.4.[75] In support of this conclusion, the Opinion noted that reading the Agreement to permit unilateral amendment when creating new classes of membership interests would render other provisions that explicitly permitted unilateral amendment superfluous.[76] The court thus declared the governance aspects of the 2017 Transaction void and the 2020 Written Consent, purportedly executed on authority of the 2017 Transaction, entirely void.[77] The Opinion left Zohar's challenges to the validity of the economic aspects of the 2017 Transaction to be resolved in other proceedings.[78]

F. THE MOTION FOR CLARIFICATION

Despite the Opinion and Judgment, Tilton refused to concede that she was no longer Stila's Manager.[79] As a result, Zohar filed its Motion for Clarification on June 6, 2022, requesting that the Court of Chancery clarify the Opinion and Judgment and end the dispute between the parties.[80]

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[75] *Id.*

[76] *Id.*

[77] *Id.* at *15.

[78] *Id.*

[79] *See generally* AOB.

[80] A0426-40.

On June 7, 2022, Chancellor McCormick reassigned this action to herself, due to Vice Chancellor Slights' retirement.[81] Following motion practice and oral argument,[82] the Court of Chancery clarified the Opinion and Judgment through a July 11, 2022 Letter Decision, expressly starting that "[b]y failing to brief the effect of Section 5.18 on her putative right to remove and replace Managers, Tilton waived the argument" and, therefore "Zohar retains the ability to remove and replace the Manager as a Common Member. Zohar exercised that right in the 2021 Written Consent. The 2021 Written Consent is valid. Carey is Stila's Manager."[83]

Tilton filed her notice of appeal in this Court on July 12, 2022 contesting the Opinion, Judgment, and Letter Decision.

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[81] Chancery D.I. 180.

[82] *See* B760 at 75:5.

[83] Letter Decision at 8.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DETERMINED THE LIMITATION ON LIABILITY IN SECTION 5.17(B) OF THE LLC AGREEMENT IS INAPPLICABLE TO THIS SECTION 18-110, *IN REM* ACTION.

A. Question Presented

Did the Court of Chancery correctly hold that Stila's unexceptional exculpation clause did not preclude either this action or Zohar's challenges to Tilton's purported amendment to Stila's LLC Agreement?[84]

B. Scope of Review

De novo review applies to "questions of law and contract interpretation, including the interpretation of LLC agreements." *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56 (Del. 2019). The trial court's factual findings are upheld unless clearly erroneous. *Id*.

C. Merits of Argument

Tilton claims that Section 5.17(b) of Stila's LLC Agreement, which states that Stila's Manager and others shall not be "liable to" Stila or other named parties "for any act or omission, including any breach of this Agreement or any breach of duty," bars this action.[85]

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[84] *Op.* at *10-11.

[85] *See* AOB at 22-35.

The Opinion found Section 5.17(b) inapplicable to this Section 18-110 action seeking a declaration as to the *res* of Stila's manager position.[86] Tilton fails to meaningfully address this reasoning.

On appeal, Tilton instead relies on dictionary definitions and a flawed statutory analysis of Section 18-1101(e) of the Delaware Limited Liability Company Act ("LLC Act") to argue that the word "liable" in Section 5.17(b) must be read so broadly as to nullify all express terms of Stila's LLC Agreement.[87] The language of Section 5.17(b), however, is far too mild to reach such a dramatic result. Prior cases discussing such provisions have interpreted them to preclude monetary damages, while permitting equitable remedies.

1. Section 5.17(b) Does Not Preclude *In Rem* Proceedings or Relief.

A waiver of rights must be unambiguous and unequivocal to be effective.[88] Tilton's Opening Brief does not dispute this standard. She has thus waived any

[86] *Op.* at *10-11.

[87] AOB at 23.

[88] *Op.* at *14 n.130 (citing *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1210-11 (Del. 2021) ("A waiver may be either express or implied, but either way, it must be unequivocal.") and other collected cases)).

argument to the contrary.[89] Moreover, because Tilton unilaterally drafted the LLC Agreement, any ambiguity must be interpreted against her.[90]

Section 5.17(b) of Stila's LLC Agreement does not clearly and unequivocally waive the right to seek the *in rem* relief provided through this Section 18-110 action. Section 5.17(b), states, in relevant part, that:

> None of the Manager, (ii) any Member, (iii) any director, officer, partner, equity holder, controlling Person or employee of the Manager or any Member . . . (each an "Indemnified Party") will be liable to the company, the Manager, any Member . . . for any act or omission, including any breach of this Agreement or any breach of duty (fiduciary or otherwise) . . . unless such act or omission constitutes a bad faith violation of such Indemnified Party's implied contractual covenant of good faith and fair dealing . . . .

The Court of Chancery held that "Section 5.17(b), by its terms, is not implicated here."[91] "Section 18-110 actions are *in rem*, not *in personam*, proceedings . . . the dispute is over the *res*, i.e., the corporate office, not the personal liability of the LLC's constituents." Therefore, because this is an action to define the status of property rather than to "hold Tilton personally liable for damages or

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[89] *In re Nat'l*, 2010 WL 2585282, at *2.

[90] *See In re Nantucket Island Assocs. Ltd. P'ship Unitholders Litig.*, 810 A.2d 351, 361 (Del. Ch. 2002) ("[M]ost limited partnership agreements are drafted almost exclusively by . . . the lawyers for their founding general partners. . . . As a result, the court is required to resolve ambiguities against the drafting general partner[.]").

[91] *Op.* at *11.

other remedies[,]" Section 5.17 is inapplicable regardless of how broadly the word "liable" is defined.[92]

Tilton admits that this proceeding is *in rem*, in accord with well-established authority.[93] Nonetheless, she summarily posits that the Court of Chancery "imposed a form of equitable liability on her" in this action.[94] Tilton does not and cannot offer any authority to support the notion that the resolution of an *in rem* proceeding constitutes an imposition of any form of liability on her.[95]

Tilton attempts to sidestep the *in rem* issue by arguing that this action imposed equitable liability on her by "invalidating" the governance aspects of her 2017 Transaction.[96] Tilton distorts the Opinion. The Court of Chancery held that "the 2017 Transaction, to the extent it purported to grant Octaluna the sole right to remove

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[92] *Id.*; *see Lynch v. Gonzalez Gonzalez*, 2020 WL 3422399, at *7 (Del. Ch. June 22, 2020 (limiting remedy based on Section 18-110's *in rem* nature); *see also Branson v. Branson*, 2019 WL 193991, at *4 (Del. Jan. 14, 2019) ("The Court of Chancery's order quieting title in the *in rem* action exercised jurisdiction over the property; it did not impose . . . any personal liability or obligation.").

[93] *See* AOB at 33 ("Nor is it of any moment that a Section 18-110 proceeding is *in rem* . . . ."); *Feeley v. NHAOCG, LLC*, 2012 WL 966944, at *5 (Del. Ch. Mar. 20, 2012) ("Section 18–110 of the LLC Act grants this Court *in rem* jurisdiction to determine who validly holds office as a manager of a Delaware limited liability company."); *MPT of Hoboken TRS, LLC v. HUMC Holdco, LLC*, 2014 WL 3611674, at *8 n.54 (Del. Ch. July 22, 2014) (quoting *Feeley*, 2012 WL 966944, at *5) (same).

[94] AOB at 33.

[95] *See id.*

[96] *See, e.g.*, *id.* at 2 ("[T]he court invalidated that portion of the 2017 transaction.").

and replace the Manager, *is void*."[97] The Court of Chancery expressly rejected Tilton's argument that the 2017 Transaction was voidable, but not void.[98] Tilton has not appealed that ruling; she has waived any disagreement with it on appeal.[99] A void act is void *ab initio*.[100] Thus, the court did not *invalidate* anything, the court held that that portion of the 2017 Transaction had never been of any force or effect.

Rather than grapple with Section 5.17(b) itself, Tilton observes that Delaware courts have enforced other LLC agreement provisions waiving members' rights "to bring other *in rem* proceedings, like those for judicial dissolution[.]"[101] The cases that Tilton cites that found such waiver, however, included clear, express, and

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[97] *Op.* at *15 (emphasis added).

[98] *Id.*

[99] *See In re Nat'l*, 2010 WL 2585282, at *2.

[100] *See In re Coinmint, LLC*, 261 A.3d 867, 902 (Del. Ch. Aug. 12, 2021).

[101] *See* AOB at 33 n.7.

unambiguous language doing so.[102] There was no such express waiver here. Thus, Tilton's authority undermines her position.

2. Tilton's Attempts to Redefine "Liability" Offer No Grounds for Reversal.

Rather than address the inapplicability of Section 5.17(b)'s plain language to any *in rem* proceedings,[103] Tilton argues at length that the word "liable" within Section 5.17(b) can be interpreted to include equitable relief. To support this claim, Tilton asserts that courts "have long recognized the term 'liable' includes equitable relief."[104] The cases that Tilton cites for this proposition, however, did not interpret the meaning of the word "liable;" they simply used the term in passing, in different

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[102] *See id.* (citing *Huatuco v. Satellite Healthcare*, 2013 WL 6460898, *5 (Del. Ch. Dec. 9, 2013) ("The parties specifically considered, and addressed, dissolution and dissolution rights . . . The parties . . . rejected all default rights under the Act unless explicitly provided for in the LLC Agreement or 'otherwise required' by law."), *aff'd*, 2014 WL 2566155 (Del. June 5, 2014); *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318 (Del. Ch. Aug. 19, 2008) (parties expressly waived dissolution and receiver rights in section titled "Waiver of Dissolution Rights" wherein each member "waives and renounces such Member's right to seek a court decree of dissolution or to seek the appointment by a court of a liquidator for the Company")); *id.* at 30-32 (discussing *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 295 (Del. Apr. 6, 1999) (finding a waiver of jurisdiction where "we do not believe there is any doubt of the parties' intention to agree to arbitrate *all* disputed matters in California." (emphasis in original)).

[103] *Op.* at *11.

[104] AOB at 25-26.

contexts, in a manner that encompassed equitable relief.[105] Tilton also cites a number of dictionaries that define "liability" broadly.[106] Tilton's definitional argument demonstrates, at best, that the word liable has been used to include certain equitable remedies in certain contexts.

In this specific context, however, the authority is directly contrary to Tilton's position. The Court of Chancery has interpreted the word liable, absent any modifier, in the context of exculpation provisions in alternative entity agreements on multiple prior occasions. Those cases found the provisions to bar liability for monetary damages, but to not preclude equitable relief, let alone *in rem* rulings. *Ross Holding and Mgmt. Co. v. Advance Realty Grp., LLC*, 2014 WL 4374261, at *35 n.275 (Del. Ch. Sept. 14, 2014) (finding an "exculpation provision" stating "'No

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[105] *See id.* (citing *Arnold v. Society for Savings Bancorp, Inc.*, 678 A.2d 533, 535 n.2 (Del. 1996) (mentioning an "injunction proceeding in which the director defendants were potentially liable for equitable relief"); *U.S. v. Late Corp. of the Church of Jesus Christ of Latter-Day Saints*, 150 U.S. 145, 149 (1893) (quoting an 1893 joint resolution of Congress that referenced debts for which the Mormon church was "legally or equitable [sic] liable"); *Bodley v. Taylor*, 9 U.S. 191, 222-23 (1809) (a purchaser of land "is liable, in equity, to the rules which apply to a subsequent purchaser with notice of a prior equitable right"); *Yucis v. Sears Outlet Stores, LLC*, 813 F. App'x 780, 786-87 (3rd Cir. 2020) ("an employer is strictly liable for equitable relief—such as back pay and reinstatement"); *In re RegO Co.*, 623 A.2d 92, 96 (Del. Ch. 1992) ("courts rejected the contention that stockholders who received corporate distributions on dissolution were liable in equity for a claim that arose after the winding-up period had expired"); *Hunt v. DelCollo*, 317 A.2d 545, 550 (Del. Ch. 1974) (quoting a 1941 treatise that referred to an affirmative land covenant as an "equitable liability")).

[106] AOB at 24-25.

Member . . . shall be liable to any other Member . . .' does not place [defendant] outside the reach of the Court's equitable powers"); *see also Solar Cells, Inc. v. True North Prs., LLC*, 2002 WL 749163, at *4 (Del. Ch. Apr. 25, 2002) (interpreting provision that neither party "shall have any liability . . . with respect to any such conflict of interest" to have "no bearing on the likelihood that Solar Cells would be successful on the merits of its contention that the proposed merger . . . should be enjoined."); *Feeley*, 62 A.3d at 664-65 (stating that provision reading "'no Member shall be . . . liable, responsible, accountable in damages or otherwise' . . . limits only the potential availability of a monetary remedy, not the potential for injunctive or other equitable relief" (citations omitted)).[107] Tilton does not cite any case finding that an exculpation provision addressing *liability* extended to equitable remedies, let alone *in rem* relief imposed on the entity itself.

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[107] *See also Metro Storage Int'l LLC v. Harron*, 275 A.3d 810, 847 (Del. Ch. 2022) (interpreting provision that stated "[e]ach Member, Manager and Officer . . . shall not be liable to the Company for any loss, liability or damage suffered or incurred by the Company . . ." as one that "does not eliminate or modify any fiduciary duties. The Exculpatory Provision is just that—an exculpatory provision that generally eliminates the availability of money damages as a remedy for breaches of duty, subject to enumerated exceptions. The fiduciary obligations remain, as does the availability of remedies other than money damages."); *Marubeni Spar One, LLC v. Williams Fields Servs.*, 2020 WL 64761, at *3, *10 (Del. Ch. Jan. 7, 2020) (finding that if a defendant "has breached the contract, [plaintiff] is entitled to a remedy" despite LLC agreement with clause stating defendant "shall have no liability under this Agreement").

Section 5.17(b) must be interpreted with the Court of Chancery's body of case law in mind.[108] Against that backdrop, Section 5.17(b) cannot be read to clearly and unequivocally waive any right to enforce Stila's LLC Agreement. Any reasonable investor would assume the numerous prior opinions to be correct as to the implications of Section 5.17(b). Had Tilton, as the drafter of Stila's LLC Agreement, intended to preclude enforcement of the agreement, she needed to use more explicit language to do so.[109]

Instead, Tilton herself previously interpreted Section 5.17(b) to permit equitable remedies and *in rem* relief. In 2017, Tilton herself sought a declaration as to her authority as Manager and the validity of her 2015 Amendment in California state court.[110] Tilton's California litigation would have been barred by her current reading of Section 5.17(b). Because Section 5.17(b) cannot be read to clearly and

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[108] The Court of Chancery has previously observed that sophisticated parties are assumed to be aware of common provisions for the purpose of interpretation. *See, e.g.*, *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *4 (Del. Ch. Apr. 27, 2004) ("Because the Agreement is a heavily negotiated contract between sophisticated persons who were represented by counsel, it is reasonable to assume that the parties and/or their attorneys were aware of the detailed and long-established usage of the word 'costs.'"). Thus, even non-binding precedent is relevant to the question of whether Section 5.17 clearly and unambiguously waived all rights to enforce Stila's LLC Agreement.

[109] *See, e.g.*, *Kelly v. Blum*, 2010 WL 629850, at *10 n.70 (Del. Ch. Feb. 24, 2010).

[110] A0091 ¶49; B028.

unambiguously waive the right to seek equitable remedies, let alone *in rem* relief, Section 5.17(b) did not effect a waiver of those rights.[111]

3. Tilton's Statutory Analysis Offers No Grounds for Reversal.

In addition to her definitional argument, Tilton discusses the hypothetical scope of exculpation permissible under the LLC Act. Tilton contends that the LLC Act must permit parties to contract to waive any enforcement of an LLC Agreement other than a breach of the implied covenant because the wording of the LLC Act is broader than the comparable provision in the corporate code; specifically Tilton notes that the LLC Act permits a waiver of "any and all liability."[112]

The theoretical scope of the phrase "any and all liability" in the LLC Act is not relevant to this action. The words "any and all" do not appear in Section 5.17(b) of Stila's LLC Agreement. Nor does Section 5.17(b) state that it eliminates liability "to the fullest extent permitted by law." Thus, Section 5.17(b) is narrower than the LLC Act; the hypothetical scope of what the LLC Act may permit is not at issue in this case.

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[111] *E.g.*, *Gotham Partners v. Hallwood Realty Partners*, 817 A.2d 160, 175 (Del. 2002) ("[C]ourts will not construe a contract as taking away other forms of appropriate relief, including equitable relief, unless the contract explicitly provides for an exclusive remedy.").

[112] AOB at 28.

In the event the Court elects to take up this issue, Tilton's statutory analysis is flawed.

First, Tilton's reading of Section 18-1101(e) of the LLC Act as permitting parties to preclude any enforcement of an LLC agreement conflicts with Section 18-1101(c) of the Act. Section 18-1101(c) permits the wholesale removal of the duties of a fiduciary, but not the duties owed pursuant to a contract.[113] In contrast, Section 18-1101(e) allows for the exculpation of liability for both breaches of fiduciary duty and breaches of contract. Such a distinction between the two provisions only makes sense if the "liability" in subsection (c) refers only to monetary liability, because a waiver would then allow the contract to remain enforceable in equity even if contractual liabilities are eliminated.[114] If Section 18-1101(e) permitted drafters to

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[113] "To the extent that, *at law or in equity*, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing." 6 *Del. C.* § 18-1101(c) (emphasis added).

[114] *See Feeley*, 62 A.3d at 664-65 ("By limiting or eliminating the prospect of liability but leaving in place the duty itself, a provision adopted pursuant to Section 1101(e) restricts the remedies that a party to the LLC agreement can seek. Monetary liability may be out, but injunctive relief, a decree of specific performance, rescission, the imposition of a constructive trust, and a myriad of other non-liability-based remedies remain in play."); *see also DG BF, LLC v. Ray*, 2021 WL 776742, at *9 (Del. Ch. Mar. 1, 2021) (explaining that a provision under Section 1101(e) can restrict monetary relief but not equitable relief); *Bandera Master Fund LP v.*

render an LLC Agreement unenforceable, one would expect Section 18-1101(c) to permit the removal of contractual duties—which Section 18-1101(c) does not.[115]

Second, although subsection 18-1101(e) permits elimination of liability for the causes of action of "breach of contract and breach of duties (including fiduciary duties) of a member," it does not do so for a Section 18-110 action. Thus, even if subsection 18-1101(e) permitted exculpation from equitable remedies, it would not extend to a cause of action under Section 18-110 of the LLC Act.

Just as in her analysis of Section 5.17(b), Tilton criticizes the existing case law, but cannot cite a single case that adopts her preferred interpretation of the statute.[116]

Boardwalk Pipeline P'rs., LP, 2021 WL 5267734, at *78 (Del. Ch. Nov. 12, 2021) (stating that a partnership agreement took "***full advantage*** of th[e] statutory authority" in the LP Act equivalent of 18-1101(e) when the agreement provided that "no Indemnitee shall be liable for ***monetary damages*** . . . ." (emphases added)).

[115] It would be both unnecessary and nonsensical for the LLC Act to provide that a contract can remove contractual duties. Parties may always omit a contractual duty that they do not want anyone to have the ability to enforce from a contract.

[116] The closest a court has appeared to come to supporting Tilton's analysis of Section 18-110 was in *Bamford v. Penfold*, which Tilton does not cite. 2022 WL 2278867 (Del. Ch. June 24, 2022). There, the relevant exculpation provision explicitly reached "the maximum extent permitted by applicable law." *Id.* at *33. In interpreting the scope of Section 18-110, the court reasoned that "[i]t seems possible that by preventing exculpation for bad faith violations of the implied covenant, the drafters of the LLC Act were seeking [to] preserve accountability for intentional misconduct that ran contrary to the best interests of the entity." *Id.* at *33 n.18.

Ultimately, however, because Section 5.17(b) does not reach the fullest extent permitted by law, Tilton's statutory analysis cannot expand Section 5.17(b).

4. Tilton's Proposed Interpretation of Section 5.17(b) Is Absurd.

Finally, Delaware courts will not interpret a provision in a manner that creates an absurd result,[117] and will avoid interpreting one provision in a manner that makes another illusory.[118] Tilton's interpretation of Section 5.17(b) does both.[119]

Tilton claims that Section 5.17(b) prevents any cause of action to enforce any express provision of the LLC Agreement.[120] If the only possible cause of action related to Stila is for "bad faith" breaches of the implied covenant of good faith and fair dealing, then rights expressly written down are unenforceable while those left

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[117] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract.").

[118] *Manti*, 261 A.3d at 1208 ("Contracts will be interpreted to 'give each provision and term effect' and not render any terms 'meaningless or illusory.'" (citations omitted)).

[119] Tilton claims the doctrine of *caveat emptor* empowers the Court to ignore the absurdity of her argument. AOB at 34. Not so. The case Tilton cites warned only that buyers need beware that LLC agreements *may* eliminate fiduciary duties through clear and unambiguous provisions. *See Kelly*, 2010 WL 629850, at *10. It did not conclude that investors need be alert for surreptitious provisions rendering the agreement unenforceable.

[120] AOB at 23-27.

unsaid might be vindicated in court.[121] Under Tilton's version of Section 5.17(b), Zohar may have a cause of action to prevent Tilton from looting Stila's treasury only if the LLC Agreement were silent on the topic; adding a provision barring misappropriation would eliminate any claim for theft. Tilton's reading of Section 5.17(b) would render every other clause in the LLC Agreement illusory and unenforceable.[122]

This way lies chaos. Section 5.17(b) applies in equal measure to Zohar, Tilton, Stila's officers, and many others. Under Tilton's interpretation, Tilton would have no recourse had Carey begun acting as Manager in 2021 when appointed. In fact, had any *officer* of Stila begun acting as Manager, none of Tilton, Zohar, or even Stila would have any cause of action.

It seems unlikely that any parties, anywhere, would ever include a "Written Obligations Unenforceable" clause in their contract. But adopting Tilton's preferred reading means that every LLC agreement that contains a provision that exculpates "liability" for a breach of contract actually contains such a self-destruct provision.

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[121] *See Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. Nov. 23, 2009) ("The implied covenant does not apply when the subject at issue is expressly covered by the contract." (internal citations and quotations omitted)).

[122] *See supra* Statement of Facts B.6.

II. THE COURT OF CHANCERY CORRECTLY FOUND THE 2017 AND 2020 WRITTEN CONSENTS VOID.

A. Question Presented

Did the trial court correctly hold that Tilton's unilateral amendment of the provision governing the right to remove the Manager was void under the terms of the LLC Agreement?[123]

B. Scope of Review

De novo review applies to "questions of law and contract interpretation, including the interpretation of LLC agreements." *In re Shorenstein*, 213 A.3d at 56. Findings of fact are reviewed and upheld unless clearly erroneous. *Id*.

C. Merits of Argument

The parties agree that Tilton purported to amend Section 5.8 of Stila's LLC Agreement through the 2017 Written Consent executed as part of the 2017 Transaction.[124]

1. The Court of Chancery Correctly Held that Stila's LLC Agreement Does Not Permit the Manager to Unilaterally Eliminate Members' Governance Rights.

Stila's LLC Agreement requires the Member's (Zohar's) approval for amendment, subject to express exceptions. Section 11.3 states, "[e]xcept for any

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[123] *Op.* at *11-16.

[124] *See* AOB at 37 ("[T]he 2017 Transaction . . . amended Stila's Manager-appointment process through the issuance of a new class of membership interests.").

amendments otherwise expressly contemplated herein . . . this Agreement and the Certificate may be amended or modified from time to time only by the Members." The Court of Chancery held that "[b]y granting the new Class A Members the *sole* right to appoint the Manager, the 2017 Transaction . . . amend[ed] Section 5.8 without the requisite consent—Zohar's consent."[125]

Tilton argued to the Court of Chancery that Sections 3.4 and 5.4 of the LLC Agreement "authorized her to grant Octaluna the Class A Interests on terms that she deemed appropriate, including the sole right to remove, replace, and appoint Stila's Manager, as well as the sole right to amend the LLC Agreement as needed to effectuate the transaction."[126] She repeats this argument on appeal.[127]

The Court of Chancery rejected Tilton's argument:

> Nothing in Section 5.8 can be construed as expressly authorizing the Manager to amend it unilaterally, even if the amendment was implicitly effected through the creation and issuance of a new class of Membership Interests in reliance on Sections 3.4 and 5.4 of the LLC Agreement.[128]

The Court of Chancery noted in contrast that, "with regard to the distribution of the Company's proceeds, the Manager could have unilaterally created and issued new classes of Membership Interests with claims superior to those of the existing

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[125] *Op.* at *13 (emphasis in original).

[126] *Id.* at *11.

[127] AOB at 39-41.

[128] *Op.* at *13.

Members."[129] Section 4.8 states that it is "'[s]ubject to . . . the terms of any class of Membership Interest created pursuant to the last sentence of Section 3.4 . . . .'"[130] The court observed that "[t]here is no such language in Section 5.8, however, thus illustrating the parties' intent that Section 5.8 cannot be amended by virtue of the creation and issuance of new classes of Membership Interests under Section 3.4."[131]

Finally, the court reasoned that "[i]f Tilton were authorized to amend any and all sections of the LLC Agreement without Zohar's consent, as she claims, Section 4.8's 'subject to the terms of any class of Membership Interest created pursuant to the last sentence of Section 3.4' language would be mere surplusage."[132]

None of Tilton's arguments on appeal undermine the Court of Chancery's straightforward analysis:

First, turning again to dictionaries, Tilton argues that the Court of Chancery's interpretation of Section 11.3, as requiring express language in the section to be amended without Member approval, was "cramped."[133] Tilton urges this Court to replace Section 11.3's exception for amendments "expressly contemplated herein"

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[129] *Id.*

[130] *Op.* at *13 (quoting Section 4.8). Section 7.2(e) similarly expressly permits amendment by the Manager. A0143 ("[T]he Manager will reflect each Transfer and admission . . . by preparing an amendment to this Agreement . . .").

[131] *Id.*

[132] *Id.*

[133] AOB at 42.

with an exception for "such amendments [as] are noted in the LLC Agreement as a 'possibility.'"[134] Tilton's definitional exercise conspicuously ignores the adjective "expressly" appearing before "contemplated." A term that is express is: "[c]lear; definite; explicit; plain; direct; unmistakeable . . . ."[135] The Court of Chancery correctly took the word "expressly" into account when interpreting Section 11.3.

Second, Tilton argues that Section 3.4 granted her wholesale authority to amend almost any provision in the LLC Agreement by providing that the terms of new issuances would be "deemed to be contained" in the LLC Agreement.[136] The deemed contained clause does not provide wholesale authority to amend.

Instead, the deemed contained clause specifies a means and a level of formality required of the Manager when issuing new Membership Interests: the Manager may issue new interests through a written consent, which "will be deemed to be contained in this Agreement" without the need to prepare a restated LLC Agreement or other document. The deemed contained clause also works with

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[134] *Id.* at 38.

[135] *Empire of Carolina, Inc. v. Deltona Corp.*, 501 A.2d 1252, 1255 (Del. Ch. 1985) (further defining "express" as "not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct." (quoting Black's Law Dictionary)).

[136] AOB at 39, 43.

Section 4.8 (discussed above) to permit the Manager to unilaterally set the economic terms of a new class—not to wantonly amend any provision of the Agreement.

Third, Tilton argues that the 2017 Transaction was valid because it was supposedly consistent with the managerial authority set forth in Section 5.4 of the LLC Agreement. Section 5.4, however, undermines Tilton's position. The preamble to Section 5.4 excepts from the Manager's authority to act, "situations in which the approval of the Members is required by . . . this Agreement . . . ." Thus, Section 5.4(a)'s authorization for the Manager to "issu[e] additional Common Interests or additional Series A Preferred Interests and creat[e] and issu[e] other classes of Membership Interests[,]" is specifically subject to Sections 5.8 and 11.3. Tilton's Opening Brief simply omits this language.

Fourth, Tilton attempts to argue that her construction does not render the clauses in Section 4.8 (and Section 7.2, which similarly expressly permits amendment by the Manager) mere surplusage. At bottom, this argument amounts to the assertion that "Section 4.8 merely confirms that if the manager creates a new class of interest and the terms of those interest affect distributions, then those new membership terms override the distribution formula in Section 4.8."[137] In as much as Tilton interprets Section 3.4 to already provide that the Manager's new

[137] *Id.* at 44 (emphasis omitted).

membership terms would override Section 4.8, this "mere[] confirm[ation]"[138] is by definition, surplusage.

2. Tilton's Various Arguments Around Intent Provide No Basis For Reversal.

Although the Court of Chancery had a full post-trial record before it, it did not consider extrinsic evidence in construing the LLC Agreement.[139] It found the LLC Agreement unambiguous.[140] Woven throughout Tilton's arguments, however, are suggestions that this Court should interpret the LLC Agreement to grant Tilton authority beyond the Agreement's plain language, based upon her assertions as to the "distinct purpose" of the LLC Agreement and her supposed concerns with "constituency conflict."[141]

As a legal matter, Tilton's claims with respect to the purpose of the LLC Agreement are irrelevant in the face of its plain language.[142] If the Agreement were ambiguous, it would be interpreted against its drafter. Tilton drafted the LLC Agreement herself,[143] meaning that "[w]hen the [LLC] was created, [she] had the

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[138] *Id.*

[139] *See generally Op.* at *11-14.

[140] *Id.* at *7.

[141] AOB at 9-10, 12, 44.

[142] *Absalom Absalom Trust v. Saint Gervais LLC*, 2019 WL 2655787, at *5 (Del. Ch. June 27, 2019) ("The evident purpose of a provision can influence its interpretation, but it cannot override the plain language of the provision.").

[143] A0088 ¶32.

freedom to draft a clear and explicit grant of authority to [her]self to amend the partnership agreement in these circumstances. But [she] did not do so." *In re Nantucket*, 810 A.2d at 354-55 (rejecting argument that general partner had "implicit authority to amend the agreement when necessary to afford rights to new unitholders"). Instead, the LLC Agreement permits the Common Member to remove and replace the Manager at will (Section 5.8) and includes other express checks on the Manager's authority.[144] The case law that Tilton cites is actually consistent with this outcome.[145] Section 3.4's "sole discretion" language did not permit Tilton to rewrite other provisions in the LLC Agreement.[146]

Finally, as with her interpretation of Section 5.17(b), discussed in Argument I, *supra*, Tilton's proposed interpretation of Section 3.4 would render all other

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[144] *See supra* Statement of Facts B.6.

[145] AOB at 40 (citing *Myers v. Myers*, 408 A.2d 279, 281 (Del. 1979) (holding that the trial court erred in looking to the parties' intent); *Bank of New York Mellon v. Commerzbank Cap. Funding Tr. II*, 2011 WL 3360024, at *7 (Del. Ch. Aug. 4, 2011) ("The Court determines the parties' intent objectively, by reference to the language of the agreement[.]")).

[146] *See Stockman v. Heartland Indus. P'rs, L.P.*, 2009 WL 2096213, at *7 n.31 (Del. Ch. July 14, 2009) ("Heartland argues that this provision grants the General Partner discretion in *all* of its actions! But, if § 4.2(a) is a blanket conferral of discretion, then the numerous uses of 'sole discretion' or its variants throughout the Partnership Agreement are superfluous. As a result, this interpretation is at odds with the requirement that this court attempt to give meaning to every term in an agreement." (emphasis in original)).

provisions in the LLC Agreement illusory, including a plethora restricting the Manager's authority[147]—an absurd outcome.

[147] *See e.g.*, *supra* Statement of Facts B.6.

III. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION BY ISSUING THE LETTER DECISION TO CLARIFY THE OPINION.

A. Question Presented

Whether the Court of Chancery abused its discretion in (a) granting Zohar's Motion for Clarification, (b) clarifying that the Opinion determined that (i) Zohar retains the ability to remove and replace the Manager as the Common Member, (ii) that Zohar's 2021 Written Consent is valid, and (iii) that Carey is Stila's Manager, and (c) further clarifying that Tilton waived any argument with respect to Amendment No. 1 or Section 5.18 of Stila's LLC Agreement.[148]

B. Scope of Review

This Court reviews a trial court's order on a motion for clarification or reargument for abuse of discretion. *See Monnat v. Sparks*, 2007 WL 914200, at *2 (Del. Mar. 28, 2007). Tilton concedes that this deferential standard applies.[149]

C. Merits of Argument

Tilton's third appellate argument asks this Court to reverse the Court of Chancery's issuance of the Letter Decision. Tilton claims that "[t]he Chancellor's Letter Decision . . . effectively reviewed the Opinion *de novo* and overruled it by deciding the 'ultimate issue' the Vice Chancellor had refused to reach: that Zohar's

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[148] Letter Decision at 3-8.

[149] AOB at 46.

appointee was Stila's Manager."[150] Tilton's argument on this point distorts the relevant law, the procedural record, and the Opinion.

1. Zohar's Motion for Clarification Met the Governing Standard.

Through this action, Zohar asked that "the Court declare that the November 2017 Written Consent was invalid and that Carey is the proper Manager of Stila."[151] The Opinion and Judgment both held in Zohar's favor.[152] Rather than include an explicit statement that "Zohar's 2021 Written Consent is valid" or "Carey is Stila's Manager," however, the Opinion specified 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."[153] Zohar was Stila's sole Member prior to the 2017 Transaction. Zohar thus interpreted the Opinion and Judgment to mean that Zohar had the right to appoint Stila's Manager and had validly done so.[154]

Tilton instead interpreted the Opinion and Judgment to mean that the Court of Chancery had declined to rule on who was entitled to appoint Stila's Manager and who was Stila's Manager. Despite the Opinion's statements that "Tilton did not

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[150] *Id.* at 49.

[151] A0080 ¶92.

[152] *Op.* at *16; Judgment.

[153] *Op.* at *16.

[154] *See* A0427-28 ¶¶1-3.

have the authority to amend the LLC Agreement to strip Zohar of its right to remove and replace the Manager and give that right to herself[,]"[155] and "the 2020 Written Consent's appointment of Lynn Tilton as Manager of Stila Styles, LLC is void[,]"[156] Tilton took the position that she should retain control of Stila until a different lawsuit removed her.

Court of Chancery Rule 59(f) provided an avenue for Zohar to ask the court either to clarify that the Opinion and Judgment had fully adjudicated control of Stila in Zohar's favor or to provide that additional determination. *See, e.g.*, *New Castle Cnty. v. Pike Creek Recreational Servs., LLC*, 2013 WL 6904387, at *2 (Del. Ch. Dec. 30, 2013) ("Procedurally, a motion for clarification is treated as a motion for reargument."), *aff'd*, 105 A.3d 990 (Del. 2014).[157] Zohar did both through its Motion for Clarification. Tilton's appellate argument that the Court of Chancery could only provide relief pursuant to Rule 59(f) to address a clear error[158] is wrong.

"The appropriate forum for relief from an allegedly ambiguous term [in a ruling] is in the Court of Chancery by filing a motion for clarification." *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1275

[155] *Op.* at *16.

[156] Judgment ¶3.

[157] *See also Gore v. Al Jazeera America Holdings I, Inc.*, 2015 WL 721068, at *1 (Del. Ch. Feb. 19, 2015) (granting motion for clarification pursuant to Rule 59(f)).

[158] AOB at 48-52.

(Del. 2014). "A motion for clarification may be granted where the meaning of what the Court has written is unclear." *New Castle Cty.*, 2013 WL 6904387, at *2. This is a separate and distinct standard from that of a motion for reargument. *See Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2017 WL 3863893, at *2 (Del. Ch. July 27, 2017) (providing a clarification but denying motion to the extent it sought reargument).

Rule 59(f) also permits motions for further relief. *See, e.g.*, *Stone v. Stant*, 2008 WL 2938543, at *1 (Del. Ch. July 18, 2008) (providing further relief upon Rule 59(f) motion); *Hamm v. Dvorak*, 2002 WL 1466595, at *1 (Del. Ch. June 20, 2002) (same). Further relief may be granted where an issue or argument was properly presented previously, but was not resolved through the opinion. *See id.*; *see also Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 2019 WL 3814453, at *1 (Del. Ch. Aug. 14, 2019) (addressing a "predicate issue" missing from its opinion on a motion for reargument).

Thus, Zohar's Motion for Clarification met the standards necessary for the clarification or further relief that it sought.

2. The Letter Decision Properly Clarified the Opinion.

On appeal, Tilton mischaracterizes the Letter Decision to argue that "[t]he Chancellor's Letter Decision . . . effectively reviewed the Opinion *de novo* and

overruled it by deciding the 'ultimate issue' the Vice Chancellor had refused to reach[.]"[159]

The Opinion did not refuse to reach any material issue. The Opinion held that Tilton's 2017 Written Consent was void.[160] The Opinion held that Tilton was not Stila's Manager.[161] Although the Opinion dilated on the effects of Amendment No. 1 to Stila's LLC Agreement, the Opinion ultimately held that the outcome of its analysis did not depend upon that issue.[162] The Opinion was decided on the basis of Section 5.8 because the parties tried the case based on Section 5.8.[163] The "ultimate issue" that the Court of Chancery left for resolution in other proceedings was the economic effect of its ruling:

> I see no reason to surmise whether the other features of the 2017 Transaction, beyond the designation of the Class A Member's sole right to remove and appoint Stila's Manager, are or are not valid, especially since those questions are pending before the Bankruptcy Court.[164]

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[159] AOB at 49.

[160] *Op.* at *15 ("[T]he 2017 Transaction, to the extent it purported to grant Octaluna the sole right to remove and replace the Manager, is void.").

[161] *Id.* at *16 ("Tilton did not have the authority to amend the LLC Agreement to strip Zohar of its right to remove and replace the Manager and give that right to herself.").

[162] *Id.* at *12 ("[W]hether the 2017 Transaction is analyzed through the lens of the original iteration of Section 5.8 or the amended Section 5.18 makes no difference.").

[163] *Id.*

[164] *Id.* at *15.

The Letter Decision clarified points already made in the Opinion:

The Opinion	The Letter Decision
Quoting Section 5.18: "'no Member may take any of the following actions without the consent of each Series A Preferred Member: (a) remove or replace an existing Manager or appoint any additional manager . . . .'" Noting elsewhere that "Zohar . . . held all of Stila's Series A Preferred Interests from the creation of those interests until they were redeemed in February 2016."[165]	"[U]nder Section 5.18, no Member could remove or replace an existing Manager or appoint any additional manager without Zohar's consent."[166]
"[N]either Zohar nor Tilton have argued that Section 5.18 should inform the Court's analysis."[167]	"Before their current dispute concerning the effect of the Opinion, the parties ignored the curious effect of Section 5.18, including romanette (iii), on the members' rights to remove or replace managers."[168]
"Given the fact that both parties have proceeded as if the removal and appointment authority remains in Section 5.8, I will do the same."[169]	"By arguing that Section 5.8 governs, Tilton effectively conceded this point. Section 5.8 thus governs . . . ."[170]

[165] *Id.* at *12, *3 (quoting Section 5.18).

[166] Letter Decision at 6.

[167] *Op.* at *12.

[168] Letter Decision at 7.

[169] *Op.* at *12.

[170] Letter Decision at 8.

The Opinion	The Letter Decision
"[T]he failure to rely upon Section 5.18 throughout these proceedings could be deemed a waiver of any argument that the section governs or is even relevant to the outcome here."[171]	"This decision finds the conduct that the Vice Chancellor found 'could be deemed' a waiver of Tilton's argument was in fact a waiver. By failing to brief the effect of Section 5.18 on her putative right to remove and replace Managers, Tilton waived the argument."[172]

By clarifying the meaning of the Opinion and Judgment, the Letter Decision granted relief squarely within the scope of a motion for clarification.[173]

To the extent that the Letter Decision granted additional relief pursuant to Rule 59(f), by addressing a matter previously unaddressed within the Opinion and Judgment, that was within the Court of Chancery's discretion to do. *See Stone*, 2008 WL 2938543, at *1 (holding that reargument was "appropriate" where "the Court failed to address an issue fairly presented to it").

In any event, Tilton's interpretation of the Opinion includes a clear error meriting reargument. The Opinion expressly declined to reach Zohar's second and third arguments because the court found the first argument fully dispositive.[174] If

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[171] *Op*. at *12 n.124.

[172] Letter Decision at 8.

[173] *Id.* at 3 ("Pointing to judgment in its favor, Zohar contends that Carey is the rightful Manager of Stila. Through Plaintiff's Motion, Zohar seeks clarification that this is the effect of the Opinion.").

[174] *Op.* at *7 n.137 ("[T]he parties have engaged extensively regarding the extent to which Tilton breached her duty of good faith and fair dealing in effectuating the 2017 Transaction . . . Having found that Tilton did not have this authority, I need

Tilton were correct that the Opinion did not identify Stila's Manager, the Court's basis for not reaching Zohar's second and third arguments would be a clear error, meriting correction.[175]

3. Tilton Waived Any Section 5.18 Argument By Failing to Raise It At All in the Court Below, and by Only Arguing Section 5.8 Applies.

Turning from procedure to substance, Tilton claims the Court of Chancery abused its discretion in finding that she had waived any argument regarding the effects of Amendment No. 1. This finding was not an abuse of discretion.

Tilton did not rely upon rely upon Section 5.18 anywhere in her pre- or post-trial briefing; she affirmatively briefed the effect of Section 5.8 on the right to appoint and remove the Manager.[176]

In the PTO, Tilton stipulated that "[n]either Amendment No. 1 nor Amendment No. 2 are at issue in this Action."[177] On appeal, Tilton claims "the parties stipulated that Amendment No. 1 was valid and would not be litigated in this action."[178] The PTO, however, provided that Amendment No. 1 was irrelevant. To

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not and will not decide whether she did or did not breach the duty of good faith and fair dealing.").

[175] *See* AOB at 46-48.

[176] B145-46; B330, B366-67; *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001) (party waived arguments not raised in post-trial brief).

[177] A0089 ¶38.

[178] AOB at 51.

the extent Tilton misunderstood what the PTO meant, she was further put on notice that Zohar would argue only Section 5.8 applied by Zohar's pre-trial brief.[179]

Tilton cannot dredge up a new argument based on Amendment No. 1 after trial. "The stipulations in a pretrial order are binding generally . . . ." *ABC Woodlands, L.L.C. v. Schreppler*, 2012 WL 3711085, at *3 (Del. Ch. Aug. 15, 2012). Tilton's status as a defendant, rather than plaintiff, does not preclude waiver. *See, e.g.*, *Zaman v. Amedeo Holdings Inc.*, 2008 WL 2168397, at *14-15 (Del. Ch. May 23, 2008) (finding defendants waived arguments by failing to raise them in answer, pre-trial brief, or pre-trial order).

Moreover, in addition to finding a waiver, the Opinion and Letter Decision each found that Tilton "conceded" that Section 5.8 in Stila's initial LLC Agreement controlled absent the 2017 Transaction.[180] On appeal, Tilton does not dispute these findings of concession. Tilton's concession that Section 5.8 applies moots any question as to whether she waived arguments with respect to Amendment No. 1 or Section 5.18.

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[179] B086.

[180] *Id.* at *12 ("both parties have proceeded as if the removal and appointment authority remains in Section 5.8"); Letter Decision at 8 ("By failing to brief the effect of Section 5.18 on her putative right to remove and replace Managers, Tilton waived the argument. By arguing that Section 5.8 governs, Tilton effectively conceded this point.").

CONCLUSION

For the foregoing reasons, the Court of Chancery's Post-Trial Memorandum Opinion, the Final Order & Judgment, and the Letter Decision should be affirmed.

Tilton posits that, in the event of reversal, judgment should enter in her favor. That is not the case. In the event of reversal, this action must be remanded to the Court of Chancery to address Zohar's arguments concerning the implied covenant and substantive unfairness.

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ Emily V. Burton
C. Barr Flinn (#4092)
Emily V. Burton (#5142)
Alberto E. Chávez (#6395)
Kevin P. Rickert (#6513)
Nehama L. Hanoch (#6817)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Attorneys for Zohar Litigation Trust-B

Dated: September 9, 2022

CERTIFICATE OF SERVICE

I, Alberto E. Chávez, Esquire, hereby certify that on September 9, 2022, a copy of the foregoing document was served on the following counsel in the manner indicated below:

FILE&SERVE XPRESS

Kathleen M. Miller, Esq.
Robert K. Beste, III, Esq.
SMITH, KATZENSTEIN
& JENKINS LLP
1000 West Street, Suite 1501
Wilmington, DE 19801

Daniel B. Rath, Esq.
Rebecca L. Butcher, Esq.
Jennifer L. Cree, Esq.
LANDIS RATH & COBB LLP
919 Market Street, Suite 1800
Wilmington, DE 19801

/s/ Alberto E. Chávez
Alberto E. Chávez (No. 6395)