EFiled: Sep 20 2022 09:12AM EDT
Filing ID 68126485
Case Number 242,2022

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 On appeal from the Court of Chancery, C.A. No. 2021-0384-KSJM

APPELLANT'S CORRECTED REPLY 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

September 16, 2022

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

TABLE OF CONTENTS*

* This Corrected Reply Brief corrects only the Table of Authorities, which was inadvertently incomplete in the Appellant's Reply Brief as originally filed. Except for the changes to the Table of Authorities, this corrected brief is identical in all respects to the originally filed brief.

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES

INTRODUCTION

By purporting to unilaterally unseat Stila's[1] Manager in contravention of the LLC Agreement's (the "Agreement") plain text, Zohar staged a corporate coup. The 2017 Transaction granted Manager-appointment authority not to Zohar but to a different entity. That transaction was binding and effective. Zohar had no business attempting to remove Stila's Manager and replace her with its own representative. The trial court should have rejected Zohar's hostile takeover.

Zohar's answering brief ("ZAB") fails to rehabilitate the trial court's flawed analysis. Zohar ignores Tilton's citations to this Court's precedent, makes legal arguments for which it identifies no support, and cites cases that undercut its positions. Worse still, Zohar conceals its faulty arguments and distorts the nature of this dispute through distracting and baseless attacks on Tilton's character and management of the portfolio companies. Indeed, Zohar opens with character assassination, renewing baseless claims of impropriety irrelevant to this appeal, allegations which were thoroughly rebutted at an earlier stage of litigation.[2] Then,

---

[1] Undefined capitalized terms have the meanings provided in the Opinion or Appellant's Opening Brief ("AOB").

[2] Zohar references unrelated cases, contending they represent a "constellation of efforts by Tilton" to misappropriate property or "engage[] in intentional misconduct." ZAB 3. Zohar advanced similar allegations in its post-judgment briefing below, App. to Appellant's Reply Br. ("AR") 6-8, and Tilton explained that in each case Zohar baselessly mischaracterized the court's holding to portray Tilton as self-interested and dishonest, AR20-21, AR25-26. Tellingly, the court below did

in a misleading portrayal, Zohar suggests Tilton somehow wrongfully "refused to cede" her position as Manager following the Opinion. But the Opinion deliberately and unambiguously refused to find Tilton was not Stila's Manager or to name Zohar's designated representative as Manager. Op. 41 & n.140. Tilton had a duty to continue ably managing Stila and ensuring its rehabilitation, as she had done since 2009.

None of Zohar's rehashed, misguided vitriol moves the needle in this appeal, which sets out multiple legal errors that infected the decisions below. *First*, Zohar never had any right to maintain this lawsuit under the terms of the Agreement's exculpation clause. *Second*, the decisions erred in finding that the portion of the 2017 Transaction that granted the Class A Member—a Tilton affiliate—the sole right to appoint Stila's Manager was unauthorized. *Third*, the court abused its discretion in granting Zohar's Rule 59(f) motion, providing relief the Opinion intentionally did not. This Court should reverse.

---

not credit such accusations; no court has ever found Tilton engaged in "misconduct" in managing Zohar, related funds, or any portfolio company.

ARGUMENT

I. Section 5.17(b) Bars Zohar's Action.

Zohar's Complaint sought a declaration that Tilton breached the Agreement—by conferring Manager-appointment powers on a new membership class—and the invalidation of Tilton's Manager-appointment. But Section 5.17(b) of the Agreement fully exculpates Tilton from all liabilities for any action taken as Manager—including any breach of the Agreement—with one exception not pleaded here. A140. That clause tracks 6 *Del. C.* § 18-1101(e), which permitted the parties to "eliminat[e] [] any and all liabilities," including equitable relief for a contractual-breach claim. Consequently, Zohar had no right to bring this lawsuit. Zohar's arguments cite inapposite cases construing irrelevant statutes, ignore the General Assembly's policy choices, and disregard the parties' contractual arrangement.

A. The LLC Act Authorizes the Broad Exculpatory Clause Here.

When the Legislature added Section 18-1101(e) to the LLC Act, it purposely authorized sweeping exculpatory provisions in LLC formation documents. Along with other amendments, Section 18-1101(e) provided for the possibility that alternative entities like LLCs could not only completely "eliminat[e]" fiduciary duties, but also fully "eliminat[e]" "any and all liabilities," for members and managers—contractual or otherwise—other than for a bad faith violation of the implied covenant. 6 *Del. C.* § 18-1101; AOB 26-27. This Court has not only implicitly recognized that these clauses can exculpate managers from equitable

remedies, but also that parties can contract out of the very type of action brought here. AOB 26-32.

Recognizing that the plain text and history of the LLC Act bars Zohar's relief, Zohar attempts to sidestep Tilton's arguments. Zohar first argues (without citation) that Agreement Section 5.17(b) does not embrace the full breadth of Section 18-1101(e) because it fails to use the exact phrase "any and all liabilities" or explicitly state that it "eliminates liability 'to the fullest extent permitted by law.'" ZAB 34. Zohar cites no authority requiring these "magic words." Nor does Zohar identify any material difference between the statute and the Agreement, which provides that the Manager will not be "liable…for any act or omission."[3] In any event, all this Court needs to decide is whether the Agreement's exculpatory language bars the breach of contract claim and relief Zohar sought below. It does.

Zohar next claims Section 18-1101(e) does not permit elimination of liability for a Section 18-110 action. ZAB 36; *but see* AOB 25-35. Zohar cites no authority for its position. For good reason: this Court has held the LLC Act permits elimination of liability for Section 110 actions. In *Elf Atochem N. Am., Inc. v.*

[3] Zohar points to *Bamford v. Penfold*, 2022 WL 2278867 (Del. Ch. June 24, 2022), to claim that the Agreement here was required to have said it provided exculpation to "the maximum extent permitted by applicable law." ZAB 36 n.116. But the fact that the agreement in *Bamford* happened to use that phrase in a different context, 2022 WL 2278867, *33-34, does not mean it is required—especially where the Agreement already materially tracks Section 18-1101(e).

Jaffari, 727 A.2d 286 (Del. 1999), this Court held that "the parties may contract to avoid the applicability of Sections 18-110(a) [and] 18-111." *Id.* at 295. And the Court adopted this holding in recognition of "the policy of the Act…to give the maximum effect to the principle of freedom of contract and to the enforceability of LLC agreements." *Id.*; *see also* AOB 31-32. Zohar offers no substantive response and barely mentions *Elf*. *See* ZAB 30 n.102.

Nor does Zohar defend the trial court's invocation of cases construing the Delaware General Corporation Law ("DGCL")—the predominant authority on which the trial court relied to support its conclusions. *See* AOB 26-33; ZAB 32, 35 n.114; Op. 26-28. Zohar has no response to the differences between the text of the LLC Act and the DGCL, nor to the fundamentally different policy choice the General Assembly made that allowed the parties to Stila's Agreement to broadly contract out of any ability to bring this action. *See* AOB 26-34.

Zohar also manufactures a false (and immaterial) distinction between Section 18-1101(c)—which permits the elimination of an LLC member or manager's "***duties***"—and 18-1101(e), which permits the elimination of "***liabilities***." The distinction is obvious: an LLC agreement can eliminate the duty itself under (c), or it can choose to maintain the duty but eliminate any liabilities for breach under (e). Zohar fails to grapple with this distinction, instead arguing that the difference between (c) and (e) is that the former permits elimination of fiduciary duties, "but

not the duties owed pursuant to a contract," while the latter "allows for the exculpation of liability for both breaches of fiduciary duty and breaches of contract." ZAB 35. It then argues that "this distinction…only makes sense if the 'liability' in subsection [e][4] refers only to monetary liability." *Id*.

Zohar is doubly wrong. *First*, Subsection (c) in fact permits the "eliminat[ion]" of ***all*** "duties" "at law or in equity," "***including*** fiduciary duties" (emphasis added). "Including," of course, indicates that there are additional "duties" that can also be eliminated beyond fiduciary duties—namely, contractual duties, a paradigmatic "legal" duty. *Second*, the distinction between (c) and (e) makes perfect sense under the natural reading of "any and all liabilities" as including both legal and equitable liabilities: subsection (c) permits the elimination of the underlying contractual or fiduciary duty itself, while (e) permits the LLC and its members and manager to choose instead to maintain the underlying duty but eliminate liabilities for its breach—in the face of which a manager acting in good faith would fulfill the duty even without the threat of liability hanging over her.[5] Moreover, Tilton does

[4] Zohar references "subsection (c)" here, but only subsection (e) discusses the elimination of "liability," and the thrust of Zohar's sentence is clearly directed at (e).

[5] Zohar's cases, *see* ZAB 35 n.114, involve erroneous dicta or are inapposite. Tilton addressed *Feeley* and *DG BF* in her opening brief. AOB 27 n.5. Zohar has no response to rehabilitate those cases. And *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2021 WL 5267734 (Del. Ch. Nov. 12, 2021) involved an exculpation clause that expressly provided only for the elimination of liability "for monetary damages." In ***that*** circumstance, only monetary liability is eliminated.

not argue that the LLC Act permits "drafters to render an LLC Agreement unenforceable," ZAB 35-36—the LLC Act and the Agreement preserve a party's ability to bring a claim for "bad faith violations of…[the] implied contractual covenant of good faith and fair dealing." *See* AOB 34. That protection is meaningful. *See id.* And regardless, it is the contractual arrangement to which the parties agreed.

In sum, Zohar cannot avoid the text, history, and purpose of the LLC Act. This Court should reverse.

B. Enforcing the Agreement's Broad Exculpation Clause Is Consistent with the Legislature's Policy Determination for LLCs.

Zohar claims Tilton's reading of Section 5.17(b) is "absurd." ZAB 37. Not so. That section adopts the General Assembly's own policy preferences. The General Assembly recognized LLCs are "creatures of contract," and so gave "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). Indeed, this Court has held that 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*, 727 A.2d at 291.

Furthermore, the LLC Act "reflect[s] 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 v. Blum*, 2010 WL 629850, *10 n.67 (Del. Ch. Feb. 24, 2010) (discussing LP Act) (citation omitted).[6] Though parties are free to adopt liability-elimination clauses narrower than permitted by the LLC Act, Zohar—a sophisticated party—did not, no matter how it attempts to twist Section 5.17. Exculpatory clauses meaningfully decrease transaction costs and, as they did here, provide managers critical discretion to take actions for a company's benefit. Zohar may not like the Legislature's policy to treat LLCs differently from corporations, the latter of which may exculpate for "monetary damages" only, 8 *Del. C.* § 102(b)(7), but it cannot ask this Court to deem the Legislature's choices (as adopted in Section 5.17(b)) absurd.

Contrary to Zohar's contentions, LLC members are not left unprotected when they agree to exculpatory clauses as broad as those permitted under the LLC Act. As the General Assembly recognized, a manager may still be liable for bad faith violations of the implied covenant of good faith and fair dealing. AOB 34. That is an important and meaningful backstop. Zohar has no response to Tilton's cases on this point. *Id.* And Zohar's own cited case—*Bamford*—confirms Tilton's point. As

[6] Zohar's only response to *Kelly* is to admit that clear provisions may eliminate duties and obligations. ZAB 37 n.119. It is hard to imagine a more clear exculpatory clause than that in Section 5.17(b).

Bamford recognized, though the exculpation Section 18-1101(e) permits seems "extreme," this is the "statutory floor that the…LLC Act…imposes." 2022 WL 2278867, *33 n.18. The Legislature chose to "preserve accountability for intentional misconduct that ran contrary to the best interests of the entity" by precluding exculpation for this subset of claims, *id.*, and thereby encouraged the parties to take advantage of the "freedom of contract" granted to LLCs by putting in the express terms it deems appropriate. 6 *Del. C.* § 18-1101(b). The parties did that here, and this Court should not and cannot override the Legislature's policy determination.[7]

C. Exculpating a Manager From *All* "Liability" Includes Exculpation for Equitable Liability.

Zohar takes issue with Tilton's construction of "liability" as found in the LLC Act and Section 5.17(b). Zohar claims that "liable," as used in Section 5.17(b), cannot include equitable relief. But rather than respond substantively to the numerous cases Tilton cites that construe "liable" or "liability" to encompass equitable relief, AOB 25-26, the best Zohar musters is that these courts "simply used the term in passing, in different contexts, in a manner that encompassed equitable relief," ZAB 30-31 & n.105. That was precisely Tilton's point: the plain, common

[7] Zohar hyperbolically avers that the General Assembly's choices, if adopted as written, would render any "written obligation" unenforceable. ZAB 38. Not so. All Tilton asks is that the Court determine that Zohar contractually waived its ability to bring a control dispute under 6 *Del. C.* § 18-110, as *Elf* already held was enforceable. *See* 727 A.2d at 295. The Agreement's terms remain in full force and effect, even if the remedies available to enforce them are constrained.

usage of words matter, and that courts regularly consider "liability" to encompass equitable relief confirms how Section 5.17(b) should be construed. AOB 25-26. Zohar even concedes, as it must, that Tilton's dictionary definitions confirm "the word liable has been used to include certain equitable remedies." ZAB 31.

Zohar also claims the Court of Chancery has interpreted the word "liable" in exculpation provisions to be limited only to liability for monetary damages. However, as Tilton explained in her opening brief, the cases Zohar relies on are inapposite—either incorrectly decided on the basis of erroneous analogy to the separate corporation context, or involving materially different LLC agreement clauses than those here. *See, e.g.*, AOB 27 n.5 (discussing *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 663-64 (Del. Ch. 2012); *DG BF, LLC v. Ray*, 2021 WL 776742, *9 (Del. Ch. Mar. 1, 2021)). Nor, of course, are any of the cases Zohar relies on for its interpretation of the exculpation provision binding on this Court—in contrast to the decisions of this Court cited by Tilton. Zohar offers no response.[8]

[8] Zohar also cites *Metro Storage International LLC v. Harron*, 275 A.3d 810, 847 (Del. Ch. 2022), which cited in dictum the same erroneous language from *Feeley* Tilton addressed in her opening brief. AOB 27 n.5. Aside from that dictum, *Metro Storage* is irrelevant. It involved a claim against an LLC under a fiduciary duty theory for "loss, liability or damage suffered or incurred by the company" based on a member's misconduct. 275 A.3d at 847. The agreement in *Metro* did not even eliminate fiduciary duties (unlike here, *see* Section 5.17(a)), and was by its own terms limited to categories of damages. *Id*.

Zohar also fails to address the textual differences between the DGCL's and the LLC Act's treatment of exculpation for equitable remedies. The DGCL expressly limits exculpation only to "personal liability" for "monetary damages." AOB 28. The LLC Act has no such "monetary damages" limitation, instead permitting the exculpation of "any and all liabilities." These differences reflect the Legislature's clear policy decision that parties to LLC agreements may exculpate managers from claims for equitable relief—and that policy choice makes sense given that LLC investors are often more sophisticated. *See* AOB 28-32. Reading these two provisions to provide the same limitations—*i.e.*, to exculpation of monetary damages, while refusing to provide for exculpation of equitable relief—would render the disparate language in those provisions meaningless, contrary to well-established canons of statutory interpretation and to the General Assembly's clear, express intent. *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"). Zohar does not respond.

Zohar's remaining cases are inapposite or incorrectly presented. Zohar cites *Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC*, 2014 WL 4374261, *35 n.275 (Del. Ch. Sept. 4, 2014), to claim that an exculpatory provision does not affect the court's equitable powers. But that case is wildly different from this one. Most importantly, the exculpatory provision in *Ross* only insulated members and

managers from liability for "mistakes of judgment or for any action or inaction, unless such mistakes, action or inaction arise out of, or are attributable to, willful misconduct or bad faith." *Id.* That language is, on its face, far narrower than Section 5.17(b). In any event, the portion of the court's opinion on which Zohar relies—in a case considering the entirely unrelated question of whether monetary damages were appropriate for a breach of fiduciary duty claim under the entire-fairness doctrine—is dictum. The court expressly noted that "consider[ing] [the exculpation provision] is unnecessary at this juncture." *Id.*

Zohar also improperly relies on *Marubeni Spar One, LLC v. Williams Field Services*, 2020 WL 64761, *10 (Del. Ch. Jan. 7, 2020) and *Solar Cells, Inc. v. True North Partners*, 2002 WL 749163 (Del. Ch. Apr. 25, 2002). *Marubeni* does not support Zohar's absolutist proposition that ***all*** contractual breaches are entitled to a remedy. *See* ZAB 32 n.107. Instead, the court was construing a provision that exculpated liability "unless [the member] breaches its obligations under this Agreement as a result of gross negligence, fraud or willful misconduct," 2020 WL 64761, *3—a far cry from Section 5.17(b)'s exculpation for all liabilities for breach. *Marubeni*, moreover, demonstrates parties are capable of retaining forms of relief they deem important. Similarly, *Solar Cells* was decided before the Legislature adopted Section 18-1101(e), so it bears on neither the interpretation of that statute

nor of Section 5.17(b). Additionally, there was no dispute in *Solar Cells* over whether "liability" included equitable relief.

Zohar's final arguments are equally meritless. Contrary to Zohar's contentions, Tilton ***did*** cite a case from this Court confirming exculpation of liability may include equitable remedies like Section 18-110 claims. *See Elf*, 727 A.2d at 295; AOB 31-32. Zohar is right that "sophisticated parties are assumed to be aware of common provisions for the purpose of interpretation." ZAB 33 n.108. Therefore, Zohar should have been aware of *Elf* when it agreed to limit its remedy for breach to bad faith breaches of the implied covenant.[9]

D. The Agreement Bars the Relief Sought Here.

Zohar argues that the Agreement does not clearly waive the right to seek Section 18-110 *in rem* relief. Largely relying on the same inapposite cases as the court below, Zohar claims this proceeding does not seek to impose equitable liability on Tilton. But Zohar again ignores *Elf* and the fact that Delaware courts have repeatedly enforced provisions of LLC agreements that waive rights to bring *in rem*

[9] Zohar complains that Tilton's separate California action would have been barred by Tilton's reading of Section 5.17(b). ZAB 33. But Zohar was free to raise Section 5.17(b) as a defense there (one of a series of cases involving Stila that have not resulted in substantive rulings). Regardless, extrinsic evidence of conduct long post-dating the Agreement's execution is irrelevant to its construction. *See* ZAB 44.

proceedings. *See* AOB 33 & n.7.[10] The best Zohar argues is that the language doing so must be express. ZAB 30 & n.102. But Section 5.17(b) is express: no member shall be liable "for ***any*** act or omission, including ***any*** breach of this Agreement or any breach of a duty" unless it constitutes a bad faith violation of the implied covenant. (emphases added.) This exculpatory provision is not limited to actions in law, to "personal liability," nor to "monetary damages." *Contra* 8 *Del. C.* § 102(b)(7). The sole claim here was for breach of contract, not for breach of the implied covenant. That is an exculpated claim expressly included in Section 5.17(b).

By voiding a portion of the 2017 Transaction based on a purported breach of contract, the trial court altered Tilton's rights and imposed equitable liability on her not permitted under the Agreement.[11] Zohar should never have been permitted to bring or maintain this action. This Court should reverse.

---

[10] In contrast, Zohar relies on cherry-picked language in inapposite cases. For example, Zohar cites to *MPT of Hoboken TRS, LLC v. HUMC Holdco, LLC*, 2014 WL 3611674, *8 n.54 (Del. Ch. July 22, 2014) and *Feeley* to assert that a Section 18-110 proceeding is *in rem*. True, but irrelevant. *MPT* does not provide any guidance on whether an *in rem* claim can be exculpated. Similarly, *Lynch v. Gonzalez Gonzalez*, 2020 WL 3422399, *4-7 (Del. Ch. June 22, 2020), involved jurisdictional questions relating to *in rem* actions, not exculpatory provisions. Regardless, *Lynch* recognized that Section 18-110 proceedings can involve "equitable controversies," *id.* at *7 n.62, precisely the type of controversy Zohar brought here but waived under Section 5.17(b). And *Branson v. Branson*, 2019 WL 193991, *4 (Del. Jan. 14, 2019), was a quiet title action, and its consideration of personal jurisdiction has no bearing here whatsoever.

[11] Zohar's response comparing "void" with "voidable" is inscrutable. ZAB 28-29. There is no dispute the lower court rendered "void" the relevant portion of the 2017 Transaction, thus invalidating it. Judgment 2; Op. 41.

II. The 2017 Transaction Was Fully Valid.

The 2017 Transaction created the Class A Membership Interests and, *inter alia*, amended the Agreement to grant that class the sole authority to appoint Stila's Manager. Contrary to the conclusion below, that portion of the 2017 Transaction—like the rest of the transaction—is consistent with the Agreement. Multiple provisions of the Agreement authorized Tilton, in her "sole discretion," to execute the 2017 Transaction and amend the Agreement. AOB 37-42. This Court should validate the 2017 Transaction in full and reverse the judgment below.

Zohar argues the Agreement prohibits almost any amendment without Zohar's approval. *See* ZAB 39. But four separate (yet interrelated) provisions granted Tilton the authority to execute the 2017 Transaction, AOB 37-42, and plainly authorized her to amend the Manager-appointment process through the issuance of a new class of interests. That is precisely what Tilton did.

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). Accordingly, Section 11.3 permits the Manager to amend so long as such amendment was "expressly contemplated" elsewhere. As Tilton has explained, AOB 39, the amendment providing appointment rights to Octaluna was "expressly contemplated" because she was expressly authorized to create new Membership

Interests on terms she deemed appropriate, with such terms "***deemed to be contained in this Agreement for all purposes hereof***," A131 § 3.4 (emphasis added).

Zohar incorrectly contends Tilton ignores the term "expressly" in Section 11.3. ZAB 42. But it is Zohar that ignores the key verb "contemplated"—which, by its plain, undisputed meaning, includes any amendment that the Agreement considered or acknowledged as a possibility. AOB 38. Zohar's construction converts Section 11.3's "expressly contemplated herein" language into a clear-statement test. The parties could have agreed to that, but the language would have looked very different (*i.e.*, if Section 11.3 had only permitted the Manager to amend "if the Manager is expressly authorized to amend in the text of the amended provision itself"). When read appropriately—and in recognition of the Agreement's purpose to give Tilton the ability to revitalize the distressed Stila and to secure needed capital by issuing Membership Interests as appropriate—Section 11.3 is far broader.

Second, Section 3.4 "expressly contemplate[s]" that the Manager might issue new classes of Membership Interests with terms that amend other sections of the 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). In executing the 2017 Transaction, Tilton, in her "sole discretion," issued new classes of Membership Interests, conferred those interests on Octaluna, and granted it Manager-appointment rights, all as permitted by Section 3.4's grant of authority to issue these interests having "such terms as she determines to be appropriate." A160-164.[12] The parties could have drafted Section 3.4 to limit those terms, but they did not. Instead, the terms of the Class A Membership Interests "will be deemed to be contained in this Agreement for all purposes hereof." A131.

As with its cramped interpretation of Section 11.3, Zohar ignores important language from Section 3.4. That section makes clear that new Membership Interests may have "terms" that affect and amend other portions of the Agreement because they "will be deemed to be contained in this Agreement." Zohar provides no response. Indeed, Zohar appears to agree that Section 3.4 allows the Manager to amend when issuing new Membership Interests without Zohar's consent. *See* ZAB 42-43. But the Agreement does not cabin the impact such amendments might have on existing provisions. Instead, the "deemed to be contained" clause emphasizes that terms adopted pursuant to Section 3.4 have the same effect as any other amendment.

[12] Contrary to Zohar's contention, nothing in Tilton's interpretation suggests Section 3.4 gives the Manager "a blanket conferral of discretion" in all of her actions. ZAB 45 n.146. Instead, Tilton correctly emphasizes that the Manager's wide discretion to issue new classes of interests might affect other Agreement provisions.

Third, Section 5.4 grants the Manager broad powers, including "creating and issuing…classes of Membership Interests." A136. Zohar contends Section 5.4 undermines Tilton's position because it prohibits the Manager from acting where the Agreement calls for the approval of the members. ZAB 43. But this limitation only applies to "actions…not otherwise provided for in this Agreement." A316. And the authority to grant new Membership Interests, with "terms as she determines to be appropriate," is expressly conferred by Section 3.4. Accordingly, Section 5.4 is an expansion of the Manager's authority beyond those powers expressly described in the Agreement. It does not limit the powers the Manager has under Section 3.4 or other Agreement provisions.

Fourth, 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. The 2017 Transaction furthered several of Tilton's responsibilities as Manager. AOB 41-42. By issuing new Membership Interests to procure necessary capital, the 2017 Transaction fell within the broad delegation of authority conferred on Tilton. *See Zimmerman v. Crothall*, 62 A.3d 676, 715-16 (Del. Ch. 2013) (provision in operating agreement identical to Section 5.4 allowed board to take actions "not explicitly address[ed]" in operating agreement).

Zohar's remaining arguments against these clear provisions miss the mark. Zohar's contention that Tilton's reading renders language in Section 4.8 surplusage is wrong. As Tilton has explained, unlike Section 3.4, Section 4.8 does not grant nor limit any substantive authority to amend. AOB 44; A133-134. Rather, it merely describes what happens to distributions after the Manager takes certain actions, including that such distributions are "[s]ubject to…the terms of any class of Membership Interests" created pursuant to Section 3.4. Indeed, Section 4.8 does not mention amendment at all and certainly does not demonstrate that "only Section 4.8 included an express permission for the Manager to amend." ZAB 6. Tilton's construction reads Section 4.8 *with* Section 3.4; it is Zohar that tries to excise contractual language from 3.4 to which the parties duly agreed. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (Delaware courts "read a contract as a whole and…give each provision and term effect," so no "part of the contract" is "mere surplusage" and no term is "meaningless or illusory").

Likewise, Zohar falsely contends that Tilton improperly urges the Court to consider extrinsic evidence instead of the contractual text. *See* ZAB 44. Instead, Tilton asks the Court to construe the agreement in a way even Zohar agrees is appropriate—"determin[ing] the parties' intent objectively, by references to the language of the agreement[.]" ZAB 45 n.146. Zohar's cited cases each explain that the parties' intent, not expressed in an agreement itself, cannot override a contract's

plain text. *See* ZAB 44-45. But Tilton does not seek to override text. Instead, she contends that the Agreement's purpose, ***as expressed in the contract's terms***, confirms Tilton was authorized to amend to create new classes of Membership Interests and to grant them Manager-appointment rights. *See, e.g.*, A135 § 5.1, A136-137 § 5.4 (provisions conferring broad authority on the Manager). The 2017 Transaction's amendment of the Manager-appointment powers was valid and properly conferred appointment rights on Octaluna, and Tilton remains Stila's rightful Manager. This Court should reverse.

III. The Lower Court Abused Its Discretion by Granting Relief Unavailable and Unwarranted Under Rule 59(f).

The Letter Decision reflects an abuse of discretion because it granted Zohar's post-trial motion and declared Kevin Carey to be Stila's Manager, the exact relief that the Opinion found unwarranted on the trial record. Zohar's arguments supporting that decision miss the mark for three reasons. *First*, Zohar attempts to avoid the stringent standard for Rule 59(f) motions by arguing that its motion was for clarification or further relief, not reargument. But the case law is clear that the same standard applies in either situation. *See Naughty Monkey LLC v. MarineMax Ne. LLC*, 2011 WL 684626, *1 (Del. Ch. Feb. 17, 2011) (not addressed by Zohar). Regardless, Zohar's motion did not meet even the standard it offers. *Second*, the Opinion did not overlook the issue or err in refusing to declare a Manager or who can remove one. Rather, the Opinion expressly considered and unambiguously declined to decide that issue. Op. 41 & n.140. For good reason: that issue is being actively litigated elsewhere, and its resolution may be impacted by issues that the parties jointly chose not to put before the trial court. *Third*, Zohar erroneously claims Tilton waived any reliance on Amendment 1 when the parties stipulated that it was not at issue here. To the contrary, that stipulation preserved the issue.

1. Zohar was not entitled to post-judgment relief under any of the standards it suggests. Zohar asserts a clarification motion carries a "separate and distinct standard from that of a motion for reargument." ZAB 50. But Zohar did not

identify below, let alone address, what that standard might be. A426-440. And its own cited cases, ZAB 49, acknowledge "a motion for clarification is treated as a motion for reargument," *New Castle Cty. v. Pike Creek Recreational Servs., LLC*, 2013 WL 6904387, *2 (Del. Ch. Dec. 30, 2013); *accord Gore v. Al Jazeera Am. Holdings I, Inc.*, 2015 WL 721068, *1 (Del. Ch. Feb. 19, 2015). As Tilton explained, a movant seeking relief under Rule 59(f) bears a "heavy burden" to establish that the court overlooked controlling law or misapprehended the facts or law in a dispositive way. AOB 48-49 (quoting *In re TransPerfect Global, Inc.*, 2021 WL 2030094, *1 (Del. Ch. May 21, 2021)). Zohar made no such showing in its motion, nor did the Letter Decision make any such finding.

To the extent a motion for clarification is assessed any differently than a motion for reargument, clarification does not impose a ***lower*** standard, but at most a slightly different (but equally rigorous) one—which Zohar also failed. Clarification is appropriate only "where the meaning of what the Court has written is unclear." *New Castle Cty.*, 2013 WL 6904387, *2 (quoting *Naughty Monkey*, 2011 WL 684626, *1). Even where appropriate, clarification is a narrow remedy. *See Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2017 WL 3863893, *1-2 (Del. Ch. July 27, 2017). Zohar incorrectly claims the Opinion's holding was unclear. But the Opinion expressly and purposefully declined to determine *who* Stila's Manager was or even who presently had the right to appoint or remove him or her—*i.e.*, the

Opinion declined to grant Zohar the relief it had sought. Op. 41 & n.140.[13] The Opinion is neither ambiguous nor confusing. It just reached a result Zohar does not like.

Zohar next attempts to rehabilitate the Letter Decision by cherry-picking aspects it frames as "clarif[ying] points already made in the Opinion." ZAB 52-53. For instance, Zohar claims the Letter Decision's determination that "the conduct that the Vice Chancellor found 'could be deemed' a waiver…was in fact a waiver," merely clarified the Opinion rather than changed it. ZAB 53; Letter Decision 8 (quoting Op. 33 n.124). And even though the Opinion expressly refused to decide the proper Manager or who can appoint her, Zohar claims the Letter Decision's affirmative resolution of these questions was a mere clarification. These are not clarifications of ambiguous prior rulings. They are new holdings—reversals, in fact—and reflect an abuse of discretion. *See* AOB 51-52.

The lower court likewise abused its discretion to the extent it provided "further relief" under Rule 59(f). Each of Zohar's cases on whether a party may seek "further

[13] Zohar suggests that by not deciding which "person or entity" held the Manager-appointment right before 2017, the Opinion made the equivalent of "an explicit statement that 'Zohar's 2021 Written Consent is valid' or 'Carey is Stila's Manager.'" ZAB 48. In support, Zohar claims its status as "Stila's sole Member prior to the 2017 Transaction" gave it the right to appoint Stila's Manager." *Id.* That is incorrect. Under Section 5.18, added by Amendment 1 in 2011, appointing a Manager required unanimous consent from all Members. AOB 14. The Opinion never held Zohar could unilaterally appoint Stila's Manager.

relief" for an issue otherwise "not resolved," ZAB 50, involves a court's inadvertent failure to address a properly raised issue. *See Manti Holdings, LLC v. Authentix Acquisition Co.*, 2019 WL 3814453, *1 (Del. Ch. Aug. 14, 2019) (hearing reargument on an issue raised in briefing that the court "should have addressed…initially"); *Stone v. Stant*, 2008 WL 2938543, *1 (Del. Ch. July 18, 2008) (reargument granted where earlier decision "did not deal squarely" with a presented issue); *Hamm v. Dvorak*, 2002 WL 1466595, *1 (Del. Ch. June 20, 2002) (reargument granted where "initial decision overlooked" a portion of claim).[14] There was nothing inadvertent about the Opinion's decision not to grant relief that was dependent on issues the parties jointly chose not to "join[] issue on" here and that "are pending before the Bankruptcy Court." Op. 40-41 & 41 n.140; *see also* Op. 13. n.53 (noting "Zohar's sole request…for relief" was a judgment "declaring…Kevin Carey is the Manager of Stila"). Indeed, the Opinion expressly decided "not [to]

[14] None of the cases Zohar cites to argue that "Rule 59(f)…permits motions for further relief" deals with a motion characterized by that title—nor do any of those cases even use the phrase "further relief." Instead, each addresses a motion "for reargument" and, accordingly, assesses whether "reargument is appropriate" under the circumstances. *See* ZAB 50. But even assuming that "further relief" of the type Zohar sought is available under Rule 59(f), Zohar was not entitled to it, and the lower court abused its discretion in granting it.

venture down that road without a map." *Id*. at 41 n.140. There was therefore no basis to seek "further relief."[15]

2. This Court does not need to reach the merits of the Letter Decision in order to reverse and vacate it. But if this Court does reach the merits, it should find that the Letter Decision improperly determined that Tilton waived any argument based on Amendment 1 and the Section 5.18 it added to the Agreement.

As an initial matter, there was no basis for the Letter Decision to overrule the Opinion's express decision to not hold that Tilton waived any reliance on Section 5.18. Op. 33-34 n.124. That decision did not require clarification, nor did it justify any "further relief" to resolve an issue inadvertently overlooked. *Cf. Mrs. Fields Brand*, 2017 WL 3863893, *1-2; *Manti Holdings, LLC*, 2019 WL 3814453, *1. Nor was the Letter Decision's new holding correct: Tilton did not waive reliance on Section 5.18. In the Pre-Trial Stipulation below, the parties agreed that "[n]either Amendment No. 1 nor Amendment No. 2 are at issue in this Action." A89. Accordingly, as the Opinion below recognized, "***both parties***…proceeded" without

[15] Zohar argues that accepting Tilton's interpretation of the Opinion would ***create*** a "clear error meriting reargument." ZAB 53. This assertion misconstrues the Opinion, which determined that the 2017 Transaction was partially invalid based on one of three alternative grounds Zohar offered, and so did not reach Zohar's second or third grounds. Op. 17, 39 n.137. Tilton's challenge to the Letter Decision would have no effect on the Opinion's partial invalidation of the 2017 Transaction. Thus, adopting Tilton's argument would not reopen this question or require the court to reach Zohar's alternative grounds.

briefing the effect of Amendment 1 on the questions at issue here. Op. 33 (emphasis added).

As a result, the parties did not "join[] issue" on the full set of factual or legal arguments that might conclusively resolve the question of who is the authorized Manager and who now holds the authority to appoint her, and the Opinion declined to decide those questions. Judgment 2; Op. 41 & n.140. The fact that ***both*** parties put aside the meaning of Section 5.18 for the limited trial before the court below confirms the Opinion correctly left the "ultimate issue" of who has control to be decided for another day. In light of the parties' stipulation, the fact that Zohar's pre-trial brief "argue[d] only Section 5.8 applied," ZAB 55, did not abandon Tilton's arguments as to Amendment 1, as the Opinion implicitly recognized. Yet that is the basis on which the Letter Decision found waiver. It provided no authority for finding waiver of a binding term in a contract that, by the party's agreement, was not "at issue" in that particular action. Consequently, the Letter Decision reflects an abuse of discretion.[16] This Court should reverse.

[16] Zohar incorrectly claims that the decisions below held Tilton "conceded" that Section 5.8 (and not Section 5.18) controlled the pre-2017 appointment procedure, and that she has not disputed that concession here. But the parties stipulated to the validity of Amendment 1 and thus to Section 5.18. A89. Similarly, the Opinion found that "both parties proceeded as if" Amendment 1 were not at issue, not that Tilton had unilaterally conceded any argument. Op. 33. And the Letter Decision addressed Tilton's purported concession in connection with its waiver finding—a finding Tilton has challenged on this appeal. Letter Decision 8; AOB 51-52.

CONCLUSION

This Court should reverse the Opinion and Judgment and remand for judgment for Tilton or, alternatively, vacate the Letter Decision and remand with instructions to enter the original judgment.

September 16, 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

6,469 words

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