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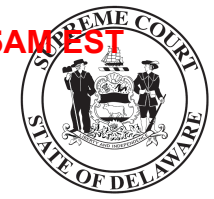

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DG BF, LLC, a Delaware limited liability company, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company; and JEFF A. MENASHE, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company, Plaintiffs below, Appellants, v. MICHAEL RAY, an individual, and VLADIMIR EFROS, an individual, and AMERICAN GENERAL RESOURCES, LLC, a Delaware limited liability company, Defendants below, Appellees and AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company, Nominal Defendant below, Appellee.	No. 272,2022 Court Below: Court of Chancery of the State of Delaware C.A. No. 2020-0459-MTZ **PUBLIC VERSION –** **FILED NOVEMBER 18, 2022**

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NATURE OF PROCEEDINGS

This appeal challenges a judgment and award of fees in favor of defendants below, American General Resources, LLC ("AGR") and two of its board members, Michael Ray and Vladimir Efros.[1] The Court of Chancery dismissed Appellants' case as a sanction for their serial misconduct, which continued notwithstanding many warnings and the imposition of lesser sanctions. The court then shifted fees based on its findings that Appellants "litigated in bad faith," made "false statements on the record," and "knowingly asserted frivolous claims."

The trial court's rulings are based on a mountain of contemporaneous evidence. Having experienced Appellants' refusal to correct their course in defiance of multiple orders, Appellants' misdirected energy towards motion-practice side-shows, and their prioritizing of "bluster over substance"—and having ultimately found that Appellants concealed evidence that they knew their claims were frivolous—the trial court appropriately exercised its discretion to dismiss Appellants' case and shift fees as a culminating sanction.

On appeal, Appellants make three arguments: (1) their misconduct substantially complied with the trial court's orders; (2) the trial court jumped too

[1] Appellants are AGR, Mr. Ray, and Mr. Efros. The Appellees are Jeff A. Menashe and DG BF, LLC ("DG BF").

quickly to dismissal; and (3) Appellants were represented by a "small firm" that was overwhelmed. This sanitized story does not withstand scrutiny.

First, there is no published opinion in Delaware that parallels the persistent intentional misconduct that the Vice Chancellor encountered. Appellants' misconduct accumulated over approximately a year and collectively deprived Appellees of a fair opportunity to defend themselves:

- Appellants allowed Menashe to self-collect documents. (A-007619.)
- Menashe took no steps to collect information from employees of DG BF. (A-007616.)
- Appellants refused to collect or image key repositories "without offering any substantive grounds for opposition." (A-007616-7618.)
- Appellants sought and obtained an expedited schedule only to miss every substantive deadline. (A-007778.)
- Appellants then disobeyed a court order to "set a deadline" by which they would collect key repositories of information. (A-007626.)
- Appellants then disobeyed a court order to "file a stipulation by the end of the day with concrete deadlines for getting the Key Repositories to [Appellees'] vendor." (A-007620.)
- Appellants made inaccurate statements to the court about their discovery efforts. (A-007616.)
- Appellants failed to provide compliant "hit reports to aid in finalizing search terms." (A-007619.)
- Appellants provided a "wholly deficient" privilege log that was never updated despite orders to do so. (A-007618.)

- Menashe lied under oath. (A-007771.)

- Menashe intentionally destroyed evidence, including by actively deleting text messages and wiping an entire laptop during this case. (A-007627; A-006255 at 42:3-14.)

- Appellants' counsel "was extremely obstructive" at a deposition, in a manner comparable to Joe Jamail. (A-007622; A-005531.)

- As a final act of defiance, only days after being held in contempt, Menashe covertly instructed an e-discovery vendor to withhold vast amounts of his cellphone data from Appellees in direct contradiction of the court's ruling. (A-007623.)

Second, the trial court provided several accommodations and issued incremental sanctions before ordering dismissal. The court:

- provided achievable deadlines for Appellants to bring their document production and privilege log into compliance, notwithstanding missed deadlines and the rapidly approaching trial date. (A-005516-5517.)

- twice revised those deadlines to help Appellants, even allowing them to offer their own deadlines (which Appellants failed to do). (A-006999; A-007229-7230.)

- directed Appellants to produce documents after only a "quick peek" review for privilege (effectively shifting the cost of identifying Appellants' relevant documents to Appellees). (A-006990.)

- deemed a request for admission admitted. (A-007621.)

- precluded Appellants from offering evidence to support their core claim. (A-007621.)

- ruled that "an adverse inference was warranted." (A-007622.)

- shifted fees three times. (A-005517; A-005531; and A-007242.)

- held Appellants in contempt. (A-007238.) Then, in its Order of Dismissal, the court ultimately held that Appellants were in contempt of three discovery orders. (A-007626.)

- ultimately eliminated Appellants' ability to even conduct a "quick peek" review before production. (A-007241.) Instead, the court ordered that Menashe's cellphone and images of his server and laptop must be given to Appellees' e-discovery vendor for an "attorneys-eyes-only review," subject to Appellants' clawing back privileged documents. (*Id*.) Menashe's attempt to thwart this order with his covert instructions to the vendor triggered the court's dismissal ruling.

Third, the trial court properly rejected the notion that Appellants were merely represented by a "small firm outnumbered by Appellees' multiple counsel." Appellants' Opening Brief ("AOB") at p. 14. Appellees had the resources to file frivolous motions, make discovery demands upon Appellees, attempt to re-litigate nearly every decision by the trial court, and commence and amend a parallel action pending in New York asserting nearly identical claims. (A-007618.) Appellants' litigation strategy, not disparate resources, led them down this path.

The misconduct described above justifies the trial court's exercise of discretion in this case. But there is more to show why dismissal and fee shifting is appropriate. The "crux" of Appellants' claims below was that Appellees allegedly misrepresented AGR's historical financials and projections. (A-007771 n.16.) But after the trial court ordered Appellants' repositories to be turned over directly to Appellees without prior review, Appellees discovered an email authored contemporaneously with the filing of this action that revealed that Menashe was

never concerned about the financials that induced his investment. (A-007772.) In other words, Menashe's primary fraud claim was frivolous, he knew it, and he moved forward with belligerence and contempt anyway. If any case deserves to be dismissed with fees shifted, it is this one.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly exercised its broad discretion to dismiss Appellants' case after Appellants ignored a series of lesser sanctions and it became clear that Menashe had actively withheld and destroyed evidence undermining claims he knew were frivolous.

2. Denied. The Court of Chancery properly exercised its discretion to shift attorneys' fees because Appellants acted in bad faith, made false statements on the record, and knowingly asserted frivolous claims.

STATEMENT OF FACTS

I. DG BF's Investment In AGR.

Starting in March 2019, Menashe and his two then-employees, Kevin Raesly and Marc Levit, engaged in significant due diligence in anticipation of making a potential $10 million investment in AGR, a cannabis company. (A-007614; A-002468.) In due diligence, AGR provided Menashe—an experienced investment banker—with financial information and projections. (A-000790-791 ¶¶ 3-4.)

Following due diligence, DG BF agreed to invest $5 million in AGR's Series D round of financing. (A-000192-198.) DG BF's investment closed on or around June 25, 2019. (A000076.)

About one month later, changing conditions in the rapidly evolving legal cannabis industry compelled AGR to revise its financial projections downward. (A-004945-4947.) AGR provided its revised financial projections to Raesly, who had served as Menashe's primary point person for AGR diligence. (A-007298.) The next day, AGR also provided its reasoning underlying the revised projections, which Appellants understood and incorporated into a PowerPoint presentation of their own for soliciting prospective investors. (A-004712-4714; A-006358-6371.)

Months later, in early 2020, Menashe sought to double down on his AGR investment by becoming the lead investor on AGR's next financing round, its Series E round. (*See*, *e.g.*, A-006381-6385). But the terms on which Menashe wanted to

invest in the Series E round were self-serving and onerous. He insisted on receiving a large stake in AGR for a meager $250,000 further investment. (A-006384.)

When AGR proved unenthusiastic about Menashe's lowball offer, Menashe took steps to gain leverage. Appellants alleged that at a February 11, 2020 dinner, Menashe told AGR's directors and its second largest shareholder that, "Efros had grossly misrepresented the Company's financial condition to Series D holders." (A-000844 ¶ 125.) Menashe would later contend in this litigation that upon receiving AGR's revised projections in July 2019 he believed that Appellees had defrauded him. (A-006309 at 164:22–165:6.) Still, Menashe continued to insist on becoming the Series E lead investor. (A-006384.) He was also actively reaching out to third parties about investing in the Series E round. (A-006394.)

Another credible Series E lead investor emerged. Menashe hired counsel to fire a "shot over the bow" in the form of this litigation. (A-005431.)

II. Menashe Fires a "Shot Over the Bow."

Appellants filed their initial complaint on June 11, 2020, followed by an amended complaint on August 11, 2020. (A-000062; A-000054.)

The amended complaint spanned 143 pages. With 24 counts, the trial court noted that it took "readers on a comprehensive tour of the realms of fiduciary duty, contract, and tort." (A-002364; A-000787-928.) Later, after the court saw emails showing that Menashe knew his core claim lacked merit (A-007771-7774), the court

observed that his "shot across the bow resembled buckshot: the work to clean the wounds was onerous, by design." (A-007778.) (internal quotations omitted).

Because many of their allegations were fictional (A-007771-7774),[2] Appellants had some initial success. The trial court granted Appellants' motion for a temporary restraining order regarding AGR's proposed Series E financing round on July 6, 2020. (A-000595-597.) But three days later, after full briefing on the Series E issues, the court terminated the temporary restraining order and entered declaratory judgment in Appellees' favor on that claim. (A-000598-612.)

After the court terminated the TRO, Appellants filed their "buckshot" amended complaint and served far-reaching discovery. (A-007778.) Appellees moved to dismiss the amended complaint, and the court stayed discovery pending that motion over Appellants' objection. (A-001783-1848, A-001921-1924.) Appellants withdrew some claims (A-002014-2016), and then, on March 1, 2021, the court dismissed eighteen of Appellants' twenty-four causes of action, labeling thirteen of them "detritus." (A-002361-A-2431; A-002417.)

During this time, Appellants also filed a complaint in New York asserting fraud claims arising out of Appellants' $5 million investment in AGR, telling the New York court that it had "exclusive jurisdiction" over those claims. (A-005796-5819; A-006095-6122; A007629.) Appellants also began a practice that would be a

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2 *See* Section VIII *infra*.

hallmark of this case—requiring the parties to re-litigate (and the trial court to reconsider)—nearly every issue on which Appellants lost. This started with an application for certification of an interlocutory appeal after the trial court granted declaratory judgment against Appellants on their claim seeking to block the Series E financing. (A-000669-727.) Soon after, Appellants refused to stay discovery during pendency of Appellees' motion to dismiss, forcing Appellees to file a motion to stay. (A-001346-1484.) Appellants' opposition to the stay motion had no merit, and, making matters worse, Appellants unnecessarily moved to compel discovery, although the Court of Chancery guidelines specifically say that is improper. The trial court granted the stay (A-001921-1924) and Appellants immediately filed a motion for reconsideration, which was denied. (A-002011-2013.)

With their amended complaint trimmed, Appellants insisted on an expedited schedule, with trial in less than six months. (A-007778.) The court entered a stipulated scheduling order on March 30, 2021, ordering that (1) Appellants' document production would begin within 30 days of receipt of discovery requests; (2) the parties would substantially complete document production by June 11, 2021; (3) the parties would identify experts by June 18, 2022; and (4) all discovery would close by August 25, 2022. (A-002876-2882.) Trial was set for September 15-17, 2021. (*Id*.)

III. Appellants Miss the Substantial Production Deadline.

Appellees served discovery requests shortly after the trial court approved the stipulated expedited schedule. (A-002883-2994.) Appellants produced documents on May 7, 2021, but Menashe supervised and self-collected those documents. (*See* A-007616 at n.13; A005203-5213; A-005225-5241 at 40:18-23, 82:18-20, 103:7-13; A-003900-4475; and A-005044-5057.) Appellants made no other productions before the June 11, 2021 substantial production deadline. (A-007616.)

Appellants collection of electronically stored information ("ESI") was also flawed. (A-007616-7624.) Appellants did not collect or image Menashe's cellphone or laptop; they did not collect or image laptops or email accounts used by Raesly and Levit, who were heavily involved in DG BF's investment in AGR; and they did not collect or image the server on which DG BF stored documents. (A-007616; A-003900-3915; A-004329-4331.) Appellants were also unwilling or unable to provide a comprehensible hit report for documents that they had collected (likely due, in part, to Menashe's self-collection). (A-007616; A-003904-3907.) Appellees began to ask about these issues in May 2021. (A-007711-7713.)

The trial court observed that identifying the information within Appellants' control "proved elusive." (A-007616.) Appellants' counsel repeatedly represented to Appellees that the laptops that Raesly and Levit had used when negotiating DG BF's investment in AGR had been donated. (A-004334; A-005006.) But on the eve

of trial, Appellees learned that the laptops had actually been in Appellants' counsel's possession for weeks. (A-007616; A-005052 n.5; A-5570 at 43:15-20). Additionally, although Appellees had issued a detailed litigation hold (A-007616 n.14; A-006470-6476), Menashe testified he did not know what a litigation hold was, and he did not advise his colleagues to preserve documents or collect their data. (A-007616; A-006488-6489 at 32:23-25.) All the while, Menashe was destroying key evidence from his cellphone and laptop.

IV. Menashe Was Actively Destroying Evidence.

Appellees learned during meet-and-confer efforts that Menashe had been destroying evidence, leading to a Rule 30(b)(6) deposition on Appellants' document collection and preservation efforts. (A-005113-5115; A-004330.) The deposition confirmed that Appellants had destroyed and were continuing to destroy relevant evidence.

Six months *after* filing this lawsuit, Menashe wiped and donated the laptop he had used for AGR due diligence. (A-006255 at 42:3-14.)

Additionally, Menashe routinely deleted relevant text messages and lied about it under oath. (A-007771.) Menashe initially testified that he did not text about business matters. (A-005845 at 75:24–76:1.) When confronted with his own business texts, Menashe admitted he deleted them. (A-007043-7044; A-007616; A-

006323-6324 at pp. 222-23) Menashe continued his practice of actively deleting his text messages through this litigation. (*Id.*)[3]

V. Appellants Continue Their Misconduct.

Appellants fought hard to avoid a review of their laptops and Menashe's cellphone. After simply declining to collect them, Appellants attempted to deflect by insisting that "relevant data is primarily stored" on a server controlled by Menashe.[4] (A-007617; A-004329-4335.) But Appellants initially refused to search that server and, specifically, a folder on that server named after AGR's operating entity, Bloom Farms. (A-007617; A-005717-5721; A-005515-5524.)

Appellants' counsel was then extremely obstructive at the Rule 30(b)(6) deposition on Appellants' document retention issues. (A-007622.) Mr. Fox was found to have "improperly directed the witness not to answer certain questions"; he was "extraordinarily rude (and) uncivil"; and he "obstructed the ability of the

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[3] Appellants assert that such messages were not "favorable" to Appellees. AOB at p. 39. In reality, the messages that Menashe deleted directly undercut his claims. (A-007043-7044) (describing text messages that Menashe—without dispute—destroyed)).

[4] As discussed below, the record shows that the "Demeter server"—as Appellants call it—was a server maintained by Menashe for his various companies, including Demeter and DG BF. In Appellants' "Third Party Motion to Quash," they readily admitted that Menashe "exerts control over all entities" that used the server. (A-006801.)

questioner to elicit testimony to assist the Court in this matter." (A-005531.)[5] After motion practice, Appellees were awarded a second deposition. (A-007622 n.38; A-005111-5289; A-005447-5467; A-005528-5531.) The trial court ordered Mr. Fox to submit a certification that he reviewed the Statement of Principles of Lawyer Conduct, and the 2021 Guidelines to Help Lawyers Practice in the Court of Chancery. (A-007622 n.38.) Mr. Fox failed to submit a certification. (*Id.*)

Appellants also refused to answer core questions in written discovery. Critically, they would not identify (1) the alleged material omissions underlying their fraud claim; or (2) the financial statements or projections that formed the basis for their belief that misrepresentations had been made. (A-007617-7618; A-003900-3915; A-004218-4219.)

Appellants also failed to produce a complete and adequate privilege log despite a court order to do so. (A-007618; A-003907-3908; A-004392-4395.)

Appellants argue that much of the misconduct amounts to "a small firm outnumbered by Appellees." *See* AOB p. 14. But the reality is Appellants chose to dedicate their resources to maneuvers they perceived would gain a strategic advantage, rather than ensuring compliance with the court's rules and orders. They filed a motion to appoint a receiver over AGR, which they ultimately withdrew. (A-

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[5] Appellants try to shift blame for Mr. Fox's conduct. The transcript of the deposition speaks for itself. (A-005126-5179.) Over 600 lines in the transcript (roughly 20%) are Mr. Fox's objections.

007618; A-004476-4478; A-004722-4739; A-005323-5325.) They filed two motions to extend the expedited scheduling order that they had insisted on, which the court denied for failing to meet the applicable standard. (A-007618; A-007030-7033.) They filed a nearly identical complaint in a parallel action in New York, and amended those claims. (A-007618; A006063-6096.) They demanded that Appellees image and collect about 28 repositories, including cellphones, laptops, and servers. (A-003904; A-007711-7713.) And as discussed, Appellants resisted nearly every ruling by the trial court by seeking re-argument or interlocutory appeal, forcing the parties to re-litigate numerous decisions. (A-002011-2013; A-000778-786; A-007658-7660.)

VI. Appellants Are Found in Contempt of Three Court Orders.

On August 3, 2021, the trial court held the first hearing in a series of hearings on Appellants' failings. (A-005480-5524.) Prompted by Appellees' motion to compel discovery, the court accommodated Appellants by allowing them to set their own deadlines by which to collect and image Menashe's cellphone and laptop, the electronic repositories for his colleagues, and any server on which DG BF stored files (the "Key Repositories"). (A-005515-5521.) The court ordered Appellants to provide hit reports to aid in finalizing search terms, and to produce all hit documents to Appellees to review at Appellants' cost. (*Id.*) The court also ordered Appellants to respond to specific written discovery requests and provide a compliant privilege

log. (*Id.*). The court encouraged greater participation by Appellants' Delaware counsel and shifted fees against Appellants. (*Id.*)

Appellants did not comply. (A-007619.) Appellees summarized Appellants' contempt of the August 3rd ruling in a letter to the trial court, and the court scheduled a hearing for August 12th. (A-005326-5328.) At that hearing, Appellants' counsel represented that Menashe's cellphone was being imaged "right now." (A-006996 at 15:8-13.) With Delaware counsel promising improvements, the trial court ordered Appellants to file a stipulation by the end of the day setting concrete deadlines for providing the Key Repositories to Appellees' vendor so that discovery could be completed before the looming depositions and trial. (A-007620; A-006999-7002.)

Appellants again ignored the court's orders. They did not file a stipulation as ordered. (A-007620.) Rather, on August 16th, Appellants' counsel stated that "[t]here is no DG BF server," a stunning comment given the ongoing discovery motion practice. (A-005985.) When Appellees provided proof that this was false, Appellants agreed that hits in the "Bloom Farms" folder on the server—a folder containing documents handpicked by Menashe—would be produced, declining to image and search the entire server as ordered. (A-005984-6002; A-007620.)[6]

[6] Appellants' refusal to collect the entire server was problematic for many reasons, including that Menashe allegedly had documents relating to other cannabis investments that he was considering contemporaneously with AGR, which would have been highly relevant to his fraud claims. (A-005720.)

Then, on August 17, 2021, Appellees stated that "the vendor was unable to successfully image Mr. Menashe's cell phone and laptop"—*i.e.*, the cellphone that was purportedly being imaged "right now" on August 12—and that new equipment was on its way to the vendor. (A-007620; A-006002)

Appellees filed a third motion on August 18th. (A-005541-6091; A-006156-6219.) The trial court heard that motion on August 23, 2021, and held Appellants in contempt. (A-007238-7243; A-007621.) The depositions of Menashe, his colleagues, and key players at AGR were scheduled for the coming days, and trial was three weeks away. (A-007621-7622.) Appellants had still not imaged the server or Menashe's laptop, and—"remarkably," according to the court—had not yet even begun imaging Menashe cellphone—*i.e.*, the phone that was purportedly being imaged "right now" on August 12. (A-007621; A-007225-7226.) Menashe had not imaged his phone because he did not want to be inconvenienced. (A-006765-6766.)

The trial court ordered the images of the server, Menashe's laptop, and Menashe's cellphone to be produced for Appellees' review on an attorneys-eye-only basis until a deadline passed for Appellants to claw back privileged documents by properly logging them. (A-007621; A-007241-7242.) The court also ordered that all documents that were being withheld on privilege grounds, but not yet logged, must be produced to Appellees on an attorneys-eyes-only basis until that same clawback-by-log period passed. (*Id.*) Finally, as to written discovery, the court

deemed a request for admission admitted, and ordered that Appellants were precluded from offering at trial any financial statement or projection that was not explicitly identified in their discovery responses. (A-007621; A-007240-7241.) The court stated an adverse inference was warranted, and took the scope of that inference, and the potential for dismissal, under advisement. (A-007622; A-007241.)

Rather than attending to their own obligations under the trial court's orders, Appellants took countermeasures, demanding on August 24, 2021 that Appellees image AGR's server "for all financial records going back to when [Menashe] invested in the company." (A-007622-7623; A-006810) ("Our IP company wants to image your client's server for all financial records going back to when Jeff invested in the company. Let us know before close of business tomorrow when our IP company can come in and image that server. Thank you.").

On August 25, 2021, Appellees informed the trial court that their vendor had not yet received the server image, Menashe's laptop image, or Menashe's cellphone, and they had not been shipped within the court-ordered timeframe. (A-007622; A-006735-6814.) That same day, "Third Parties" moved to quash production of the server image. (A-007622; A-006818-6829.) The motion to quash stated that imaging was in process and would take another "day or two" (A-007622 n.40, A-006827 n.2), even though Appellants' counsel had told the trial court on August 23 that the imaging was being done that day and would be complete "before the close

of business today or certainly by tomorrow." (A-007622-7623, n.40; A-006913 at 16:3-6.) The motion to quash—which the trial court correctly noted was an attempted "partial vacatur" of its August 23rd ruling—was frivolous, ignoring that Menashe (a party to this litigation) "exerts control over all entities" that used the server. (A-006801 n.1.) The motion to quash also directly contradicted Appellants' statements to the trial court from days earlier.

VII. Menashe Tries to Undermine a Court Order.

Having been held in contempt, and with dismissal on the line, Appellants' intentional misconduct intensified to outright defiance. When Menashe eventually sent his cellphone to be imaged, he included a letter ("Cellphone Letter") instructing Appellees' vendor to withhold certain information from Appellees in direct violation of the court's ruling on August 23, 2021. (A-007202-7206.) Menashe sent the letter to "make clear" that Appellees' vendor was "not to provide opposing counsel with any correspondence between me" and any of the thirty-four listed individuals on purported privilege grounds, and was not to provide Appellees' counsel with "any content from my photos and videos as they are personal." (*Id*.) Appellees would never have discovered Menashe's Cellphone Letter if they had not asked the vendor if Menashe had included his cellphone PIN in the package with the cellphone as requested (he had not). (*See* A-007041.) Appellees included Menashe's Cellphone

Letter in its reply brief in support of their spoliation motion, which was filed on August 27, 2021. (A-007037-7198.)

On August 27, 2021, the trial court informed the parties that the matter would be dismissed, and that judgment would be entered for Appellees. (A-007199-7201.) Trial was cancelled. The trial court then detailed the rationale for its ruling in its November 19, 2021 Order of Dismissal. (A-007613-7630.)

VIII. Menashe Withheld Evidence Showing His Claims Were Frivolous.

After the trial court ruled that Appellants must turn over documents without prior review by Appellees, it quickly became apparent why Appellants had resisted complying with their discovery obligations. The documents in the production—which were responsive to Appellees' initial discovery requests, but which Appellants had failed to turnover—eviscerated Appellants' claims. (A-007772.)

The core of Appellants' claims were that Appellees misrepresented financial information and projections (A-000793 ¶ 5), "refuse[d]" to provide AGR's "financial model" before Menashe invested (A-000797 ¶ 8), and then failed to timely update Menashe when the company made changes to its projections.[7] (A-000830-

[7] Appellants also alleged in their amended complaint that Appellants knew that AGR's then-CFO was under investigation for conduct relating to work with an unrelated company. (A-000793-794 ¶ 6.) There is no record evidence to support that allegation.

831 ¶ 93.) The trial court found that Appellants showed that each allegation was false, and Menashe knew it. (A-007772-7774.)

In one previously withheld email, Menashe told his counsel that "the issue is NOT that financials were revised downward—so avoid mentioning $s and %s." (A-007268.) In another email, one of Menashe's advisors acknowledged that the purpose of the lawsuit was to send a "shot over the bow"—omitting any mention of fraud. (A-007265.) Appellees also uncovered documents showing not only that Appellants were given access to AGR's "financial model," contrary to Appellants' express allegations, but that Raesly spent "2.5 hours with AGR" and "[i]n terms of the model, we walked through step by-step / tab-by-tab, their thinking into the assumptions." (A-007272.) Further still, Appellees uncovered communications showing that Appellees immediately notified Appellants about the revised projections the same day they were uploaded to the data room. (A-007298.)

The concealed documents also show that Appellants analyzed AGR's revised financials and concluded that the decreases in revenue—the lynchpin of their fraud claims—were "to be expected with a young industry as it works out the kinks." (A-007294.) Appellants even created a presentation that relied on the revised financial projections, which they provided to investors. (A007278-7291.)[8]

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[8] Appellees submitted additional evidence of the frivolity of Appellants' claim at the February 15, 2022 hearing on their fee application. (A-007738.)

All those documents were responsive to Appellees' discovery requests but originally withheld, and came to light only after the trial court's discovery orders requiring Appellants' further production of documents.

Appellees' fee application followed after dismissal. (A-007767.) Of the total $2,253,262.56 fee award requested, $404,728.78 related to previous fee awards and fees on fees for the fee application. (A-007774; A-006943-6981; A-007245-7612). The difference was requested as a bad faith award. (A-007774.) In a detailed May 23, 2022 letter ruling, the trial court determined that Appellees' fee request was warranted by law and that the amount was reasonable. (A-007767-7781.)

ARGUMENT

I. The Trial Court Appropriately Exercised its Broad Discretion to Dismiss the Action.

A. Questions Presented.

Whether the trial court properly exercised its broad discretion to dismiss this frivolous action following Appellants' repeated and persistent misconduct and failure to respond to multiple lesser sanctions.

B. Standard of Review.

This Court reviews discovery rulings for abuse of discretion. *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006).

"Judicial discretion is the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice as to produce injustice, its legal discretion has not been abused." *Id.*

A trial court has broad discretion to impose sanctions for contempt, so long as they are "just and reasonable" and coercive or remedial, rather than punitive. *Gallagher v. Long*, 940 A.2d 945 (Del. 2007) (TABLE). It is well established that "[o]ne possible sanction is the entry of a default judgment against the contumacious party," if there is "an element of willfulness or conscious disregard of a court order." *Connection, Inc. v. Synygy Ltd.*, 2021 WL 1943350, at *2 (Del. Ch. May 11, 2021).

The trial court's factual findings are entitled to deference. "So long as the Court of Chancery has committed no legal error, its factual findings will not be set aside on appeal unless they are clearly wrong and the doing of justice requires their overturn." *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 418-19 (Del. 2010).

C. Merits of the Argument.

1. The Trial Court Properly Exercised its Judgment in Dismissing the Claims.

This Court has directed trial courts to "be diligent in the imposition of sanctions upon a party who refuses to comply with discovery orders, not just to penalize those whose conduct warrants such sanctions, but to deter those who may be tempted to abuse the legal system by their irresponsible conduct." *Hoag v. Amex Assurance Co*., 953 A.2d 713, 717 (Del. 2008).

Court of Chancery Rule 37(b)(2) identifies sanctions that a trial court can impose for violation of a discovery order, including: (i) awarding an adverse inference; (ii) striking claims or prohibiting the party from introducing evidence; and (iii) dismissing the action or rendering a judgment by default against the disobedient party. *James v. Nat'l Fin. LLC*, 2014 WL 6845560, at *8 (Del. Ch. Dec. 5, 2014).

When evaluating whether to enter a default judgment as a sanction, the Court of Chancery generally considers six factors:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure [to comply]; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was

> willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Connection, 2021 WL 1943350, at *3 (citing *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215 (Del. 2009)).

Spoliation may also warrant dispositive sanctions. A dispositive sanction is warranted "where a party acts to intentionally or recklessly destroy evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item." *TR Invs., LLC v. Genger*, 2009 WL 4696062, at *17-18 (Del. Ch. Dec. 9, 2009) (internal citations and quotation marks omitted), *aff'd*, 26 A.3d 180 (Del. 2011). In determining what remedy to award for spoliation, the trial court should consider: (i) "the culpability of the spoliating party"; (ii) "the degree of prejudice suffered by the aggrieved party"; and (iii) "the availability of lesser sanctions that could avoid unfairness to the aggrieved party and serve as an adequate penalty to deter such future conduct." *Id.*

Here, the trial court had the foregoing tests in mind when it found Appellants in contempt of its August 3, August 12, and August 23 discovery orders. (A-007626.) Notably, Appellants do not appeal the trial court's rulings that Appellants were in contempt of the court's orders. Appellants' Opening Brief argues that their discovery efforts were made in good faith, but the trial court found *as a factual matter* otherwise and carefully explained the basis for its findings. After dealing

with Appellants' misconduct in almost real-time fashion, sometimes addressing issues as they arose within days or mere hours, the trial court expressly found that

> [Appellants] undisputedly were bound by the orders, had notice of them, and nevertheless violated them. They did not set a deadline to collect and image the Key Repositories or respond to written discovery as ordered on August 3. They did not stipulate to a deadline for submitting the Key Repositories to a vendor as ordered on August 12. They did not provide the image of the Demeter server to Appellees. And they were prejudicially late in providing the image of Menashe's laptop and Menashe's cellphone, in violation of the August 23 order. After this pattern of contumacious behavior, Menashe then attempted to thwart the Court's order to turn his cellphone over to Appellees' vendor, directing the vendor to restrict the material given to Appellants' counsel.

(A-007626.)

The court continued its specific factual findings on the issue of spoliation:

> [Appellants], specifically Menashe, spoliated evidence in Menashe's text messages and on the laptop he used during due diligence. [Appellants] were under a legal duty to preserve relevant evidence from at least the date they filed this suit, and received a litigation hold notice from [Appellees]. Their spoliation was not negligent; Menashe's destruction of his text messages, which persisted through two depositions about DG BF's recordkeeping, was intentional.

(A-007626-7627.)

The court found further that

> [Appellants'] contempt and spoliation caused [Appellees] incredible prejudice. The only way [Appellees] would obtain [Appellants'] discovery material in advance of trial was to review it themselves in the final days before trial, while preparing for depositions without the benefit of that discovery material.

(A-007627.)

After determining these key facts, the trial court applied this Court's six-factor test for assessing whether dismissal was appropriate. (*Id*.) It reasoned as follows:

> Each *Minna* factor supports entering a default judgment as a sanction.
>
> a. Party Responsible for Failure to Comply. [Appellants] have nobody to blame but themselves. [Appellants'] failure to meet their discovery obligations began with their early partial collection and failure to preserve Demeter repositories, and ended with Menashe's spoliation of his text messages and attempt to thwart this Court's orders regarding his cellphone.
>
> b. Prejudice to Defendants. As mentioned, [Appellees] have suffered significant prejudice as a result of [Appellees'] contempt and spoliation, and would have suffered incredible prejudice had the matter not been halted days before trial.
>
> c. History of Dilatoriness. While [Appellants] bombarded [Appellees] with discovery requests and motion practice, they completely ignored their obligations to even image the Key Repositories until after the substantial completion deadline passed, and provided some of those images only after the Court thrice ordered them to do so. Even the simple order to overnight Menashe's cellphone to [Appellees'] vendor was not timely followed. [Appellants] did nothing to tend to their affirmative obligations in this matter until after the deadlines passed, and could not demonstrate any excusable neglect; their delays were of their own making. After the Court got involved, [Appellants] refused to comply with this Court's orders to set their *own* deadlines for their overdue discovery. [Appellants'] dilatoriness has plagued this case.
>
> d. Willfulness and Bad Faith. [Appellants] have knowingly ignored the Court's clear and accommodating orders. [Appellants] ignored their discovery obligations in bad

faith, while heaping trouble and expense upon [Appellees].

e. Effectiveness of Sanctions Short of Dismissal. The Court has been patient with [Appellants] to a fault. The Court accommodated [Appellants] when [Appellees] sought hard deadlines and [Appellants] asked for flexibility. The Court gave [Appellants] some grace and gave Delaware counsel the opportunity to lead [Appellants] out of their morass of noncompliance. The Court entered nearly dispositive discovery sanctions, and noted it was considering an adverse inference and dismissal, but [Appellants] continued to ignore their obligations and this Court's orders. Repeated fee-shifting for motion practice and DG BF's second 30(b)(6) deposition, and allowing [Appellees'] counsel to review [Appellants'] repositories at [Appellants'] expense, had no effect. While [Appellees] have generously characterized this state of affairs as a "Menashe problem" (D.I. 247 at 25), I believe his counsel's approach of prioritizing bluster over substance has compounded the problem. It is clear that no sanction short of dismissal has been or would be meaningful.

f. Meritoriousness of [Appellants'] Claims. [Appellants'] primary claim is for fraud. [Appellants'] failure to answer written discovery substantially weakened that claim, as they declined to identify any omissions or misrepresentations in written discovery and so were precluded from offering any at trial. And even if [Appellants] could still prevail on that claim here, [Appellants] have filed a claim for fraudulent inducement in New York State based on these same facts, telling that court that New York state and federal courts 'ha(ve) exclusive jurisdiction over any disputes 'arising out of, or relating to' the Purchase Agreement, ***including, without limitation, [Appellants'] claims that [Appellees] fraudulently induced it to enter into the Purchase Agreement"*** by which it invested in AGR. [Appellants] withdrew all claims relating to that Purchase Agreement from this case. [Appellants'] remaining claims for breach

> of AGR's operating agreement due to AGR's corporate governance practices offer only nominal damages, and do not support or seek any injunctive relief.

(A-007627-7630.) (emphasis in original; citations omitted).

The trial court's Order of Dismissal is well reasoned and supported by the record. Appellants' "continued contumacious conduct" warranted dismissal. (A-007200.) This Court should not disturb the trial court's reasoned exercise of judgment and discretion in dealing with the conduct of litigation before it.

In response to the robust record of misconduct below, Appellants argue that their misconduct was "excusable shortcomings" and amounted to "substantial compliance." AOB at p. 22. They also reject the notion that they should have been required to provide Appellees with an image of their server. And they state that there is "no precedent supporting default judgment in this case." *Id.* at p. 23. Each argument fails.

To be clear, Appellants do not even try to contest any of the facts set forth above. They argue that they achieved "substantial compliance" with the court's orders because Appellees eventually possessed Menashe's cellphone and "laptop images." AOB ¶ 28. This argument does not withstand scrutiny. To begin with, the scheduling order set the substantial production deadline on June 11, 2022, but Appellants did not even collect the Key Repositories by then. (A-006770.) The trial court subsequently ordered three times that Appellants produce documents from

their server. (A-005517; A-006999; A-007241.) On August 23, as a "final endeavor to coerce compliance with this Court's orders," the trial court instructed Appellants to deliver images of Menashe's server and laptop and ship Menashe's phone "*today*." (A-007241-7242.) Appellants represented that the server issue would be "moot before close of business today or certainly by tomorrow." (A-007225.) But Appellants *never* collected and produced documents from the server.

Two days later, Appellants had still not delivered the laptop. (A-006736.)

Menashe also did not ship his cellphone until the afternoon of August 24th. (A-006737.) When Appellees' vendor finally received the cellphone, it could not transfer data to Appellees because of Menashe's instruction in his Cellphone Letter. (*See* A-007202-7206.) All of this occurred on the eve of trial, with key depositions looming as well. Appellants' conduct to intentionally thwart the litigation process was not "excusable shortcomings" or "substantial compliance." It was misconduct in direct defiance of court orders. (A-007626.)

Appellants' argument that the trial court should not have compelled them to provide a "forensic imaging" of their server fails too. For one, Appellants' demanded the same of Appellees, and more. They demanded that Appellees image or give live access to 28 different repositories. (A-005065-5067.)[9] Moreover, this

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[9] The Court of Chancery's guidelines expressly reference the "goose and gander rule" for e-discovery. *See also TravelCenters of Am., LLC v. Brog*, 2008 WL 762485, at *1 (Del. Ch. Mar. 18, 2008).

argument again ignores the history of the case. The trial court did not originally require Appellants to produce an image of Menashe's server. It was not until Appellants were in contempt of the court's August 3rd discovery order—and had failed to provide deadlines by which they would provide the Key Repositories to their own vendor (*see* August 12th ruling, A-006998-7002)—that the trial court finally ordered Appellants to produce an image of the server. (A-007229-7242.)

And, *finally*, there is ample precedential support for the trial court's decision to dismiss the case.

In *Gallagher v. Long*, this Court affirmed the trial court's dismissal of an action based on appellants' failure to attend two hearings and a deposition, as well as their failure to comply with an order compelling them to turn over possession of certain personal property. 940 A.2d at *1 (TABLE).

In *Minna v. Energy Coal S.pA.*, this Court affirmed entry of default judgment because defendants-below disregarded a discovery order, breached a settlement agreement, failed to produce "important categories of documents," ignored the trial court's order to reveal the identity of a newly formed company, and did not pay a discovery fee award. 984 A.2d at 1213.[10] In doing so, this Court affirmed the trial court's determination that default judgment was warranted because of the "history

[10] Based on this misconduct, the trial court entered judgment for the plaintiff for almost $11 million. *Id.*

of dilatoriness," the repeated "motions to compel," and the "real financial consequences" befallen the plaintiff in having to expend legal fees to because of the appellants' "bad faith, willful disregard" of applicable standards. *Id.* at 1215-16.

And *Hoag v. Amex Assurance Co.* dealt specifically with a plaintiff's failure to provide information about a cellphone and cellphone number in response to four trial court orders. 953 A.2d at 714-16. Despite the relatively narrow misconduct, which the defendant admitted was about a "small detail" of the case, the trial court entered default judgment. *Id.* at 715. This Court affirmed because of "repeated failures to comply with four court orders over the span of three years." *Id.* at 718.

The bad faith exhibited in *Gallagher*, *Minna*, and *Hoag* pales in comparison to Appellants' behavior. Appellants' "knowing and brash" discovery misconduct "contributed substantially to the well-over thirty motions or letter applications." (A-007770.) On August 23rd, Appellants were held "in contempt of this court's explicit August 3rd order to image certain identified repositories." (A-007238.) The trial court then found that Appellants were in contempt of its August 3 discovery (for a second time), as well as its August 12 and August 23 discovery orders. (A-007626.) And unlike *Gallagher*, *Minna*, and *Hoag*, Appellants' misconduct was not only defying court orders. Menashe also actively (and admittedly) destroyed relevant evidence, lied under oath and in pleadings to the trial court, and knowingly pursued frivolous claims. (A-007627; A007768-7774.) Even worse, Menashe tried to stop

the implementation of the August 23 discovery order when he sent the Cellphone Letter.[11] Appellants' misconduct is an order of magnitude worse than the cases in which this Court has affirmed entry of a default judgment.

2. The Spoliation Findings are Supported by Substantial Evidence.

Appellants' appeal of the trial court's spoliation findings hinges on their erroneous view that "the record reflects no other 'purpose' in Menashe's conduct than his usual mechanical practice of disposing of text chatter." AOB at p. 37. This ignores the court's factual findings on this precise point. Based on voluminous evidence, the trial court held that Menashe's "spoliation was not negligent" because it "persisted through two depositions about DG BF's recordkeeping." (A-007627.)

Appellants' argument on appeal, therefore, are about the factual determination of spoliation reached by the trial court. Again, Appellants do not point to any "clearly erroneous" fact relied upon by the trial court. Nonetheless, a review of the evidentiary basis for the court's factual determination of spoliation is warranted.

Appellants never took even the most basic steps to preserve evidence from the due diligence period (or any period, for that matter). (A-007616; A-006488-6489 at

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[11] Appellants argue that the "record contains no evidence showing how that letter came about." (AOB at p. 29) That is irrelevant. The Cellphone Letter speaks for itself. Appellants had every opportunity to explain it, including in their opposition to the fee applications and in their motion for reargument. (*See* A-007202-7206.) The reality is, the Cellphone Letter was a defiant act of bad faith for which Appellants can provide no explanation.

32:23-25.) They did not image Key Repositories to preserve them, and they never issued an internal hold notice, despite sending one to Appellees and receiving one from Appellees. (A-007626-7627.) Incredulously, Menashe said that he did not know what a litigation hold was. (A-006488-6489 at 32:23-25.)[12] Nor did he advise Levit or Raesly to preserve documents. (*Id.*; A-006491-6493 at 44:16–50:4.) In fact, it would later emerge that Appellants only had Raesly's and Levit's computers because Raesly and Levit failed to adhere to Menashe's orders to wipe their computers and have them donated. (A-006255 at 43:15–44:14.)

Moreover, Menashe was *intentionally* destroying evidence on a routine basis. (A-006324 at 223:11–224:2.) During DG BF's deposition on document preservation, Menashe repeatedly testified that he never texted about "business-related matters." (*See* A-006263 at 75:10–76:1) ("I'm not a texter"; "Q. Do you ever text about business-related matters on your cellphone? A. No.")). Three days after Menashe testified that he was "not a texter," Appellees cited a text message in which Menashe proposed to lead a "$5 million to $6 million" round of investment in AGR at a time when he was allegedly flabbergasted by AGR's revised projections. (A-006639.) Menashe eventually testified that he had deleted that text message, and

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[12] Menashe would later try to justify his destruction of evidence by claiming that he did not know any better because he had never been involved in litigation before. (A-006934) (Menashe "has never been involved in litigation before.")) That, too, proved to be untrue. (A-007044-7045.)

did so "quickly." (A-006323 at 222:12-14.) Given the nearly immediate way in which Menashe deleted text messages, they were gone before they could be backed up to the iCloud. (A-006303 at 141:3–143:21.) Menashe's immediate purge of relevant messages was an intentional practice that inexplicably continued right up to the dismissal of this case. (A-006263 at 76:7-24; A-006323-6324 at 222:6–223:2.)

As the trial court would later observe, Menashe's deletion of text messages was substantially prejudicial because he "used his text messages to communicate about this matter." (A-005652 at 38:5-11.) Indeed, Menashe ultimately admitted that he deleted text messages between himself and Sally Nichols (President of Bloom Farms, AGR's operating entity) and Richard Archer (AGR's CEO/CFO) during the pendency of this case. (A-006323-6324 at 223:14–224:2.)

Menashe also admitted that he wiped and donated his computer in December 2020, six months after he started the current litigation. (A-006255 at 42:3-14.) That was the computer that he used during diligence on the AGR investment, and likely would have contained evidence of the financial statements, revisions thereto, and Menashe's reaction that were central to his claims.

Accordingly, abundant evidence supports the court's conclusions as to spoliation and prejudice. The trial court's factual findings are entitled to deference. *Alaska Elec. Pension Fund*, 988 A.2d at 419. To attempt to overcome this standard, Appellants offer three arguments, none of which are availing.

First, Appellants argue that there can be no finding of spoliation because they deleted evidence as part of a "preexisting established policy." AOB at p. 36. But record does not contain evidence of any "preexisting established policy" regarding document retention or destruction. Instead, Menashe explained that he destroyed relevant text messages because he was too "busy" and decided that he "did not need to retain this information" (A-005751) or because he believed the "contents were false" and he did "not care to talk to" representatives of AGR. (A-006323-6324 at 223:14–224:2.)

Moreover, the record shows that Appellants' self-proclaimed course of conduct was not followed. Neither of Menashe's associates (Raesly and Levit) donated their computers. (A-007616; A-005052 n.5; A-5570 at 43:15-20.)

Furthermore, even if there were some "preexisting established policy," Appellants fail to recognize that they were under an obligation to suspend any document destruction policies to ensure that they preserved all potentially relevant evidence. *See Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *29 (Del. Ch. July 22, 2015) ("A party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit"). Appellees informed Appellants of that duty at the outset of the litigation. (A-007626-7627.)

None of the cases cited by Appellants support their position. For example, in *Lesh v. ev3, Inc.*, Appellees deleted certain documents under a clear, written document destruction policy. 2013 WL 3155761 (Del. Super. Apr. 16, 2013). Once the defendant anticipated litigation, it tried to preserve relevant evidence, including by directing "its IT department to preserve any existing [ESI] created or formerly maintained by certain former ev3 employees." *Id*. at *2. Likewise, in *Sears, Roebuck & Co. v. Midcap*, the court declined to find that Sears "willfully or recklessly" destroyed evidence where it had destroyed records under a document retention policy and was "under no legal obligation to preserve" the documents. 893 A.2d 542, 548 (Del. 2006). Here, according to his deposition testimony, Menashe anticipated litigation in July 2019. (A-006309 at 164:24–165:6.) But there can be no serious debate that upon filing this litigation (actually earlier, when litigation was first anticipated) Appellants had to preserve all relevant evidence.

Second, Appellants' argument that they were unfairly made to shoulder the sole burden of preserving text messages also misses the mark. Nothing about the court's orders suggests that the parties' preservation obligations were one-sided. Appellees engaged in a sprawling ESI protocol that included imaging or collecting 28 repositories (including cellphones and personal email accounts), native QuickBooks files, and providing live access to their "Sage Intacct" accounting system. (A-005065-5067.)

Third, Appellants speciously argue that their spoliation could not have been intentional because they had no way to know that they needed to preserve Menashe's text messages and computer. They even represented to the trial court that Menashe had "never been involved in litigation before." (A-006935.) That was false. Menashe is a seasoned litigant, who was well-aware of the necessity of preserving ESI (like text messages). (A-007044-7045.) In fact, in one prior case, Menashe filed a motion to compel arguing that it was "imperative" that he inspect the other side's "existing or deleted text messages" to give him "a fair opportunity to defend" against certain claims. (A-007045; A-007174-7191.) Even further, Appellees informed Menashe of that obligation early in this case. (A-006473-6476.)

For these reasons, this Court should defer to the trial court's findings regarding spoliation.

3. The Trial Court Properly Exercised its Discretion in Denying Appellants' Unrelated Trial Continuance Motion.

On appeal, Appellants argue for the first time that dismissal "could have been avoided by a simple trial continuance." AOB at p. 40. This argument, though clever, fails. Appellants never argued to the trial court that moving trial was an appropriate lesser sanction; their motion to continue trial was unrelated to the discovery orders.

A more detailed examination of the timeline is revealing. On March 30, 2021, the trial court entered an expedited schedule per the parties' stipulation. (A-002876-

2882.) Fact and expert discovery closed on August 25, 2021 and trial was set for September 15, 2021. (*Id.* ¶ 3(e), (o).)

Despite the expedited schedule, Appellants were inactive for the first several months. They waited until mid-July to begin taking depositions. They also failed to timely disclose experts or serve expert reports.

Consequently, Appellants began asking the court for more time. On July 19, 2021, after the expert deadlines had passed, Appellants filed a Motion to Extend Deadlines for Expert Witness Discovery. (A-004765-4814.) On August 2, 2022, Appellants separately moved to continue the September 15 trial date and amend the scheduling order. (A-005290-5317.) Appellants told the court that they needed more time to amend their complaint (again) to allege facts and take discovery related to a proposed transaction between AGR and third-party Flow-Kana. (A-005297-5300.) Appellees opposed both motions. (A-004926-4991; A-005342-5433.)

The court heard and denied both motions at the August 13th hearing. (A-007030-7033.) In reliance on Rule 6(b), the court determined that Appellants failed to show excusable neglect to extend the lapsed expert deadlines. (A007030.) The trial court noted that Appellants missed "two compromise expert disclosure dates they offered after blowing the one on the scheduling order." (*See* A-007031.)

The trial court also determined that Appellants had not met the standard for a trial continuance. In particular, the court held that the "Flow-Kana transaction"—

which was Appellants' primary basis for asking to continue trial—did not "offer a basis to continue the trial" because Appellants had known about the transaction for over two months and done nothing. (A-007031.) In fact, the proposed Flow-Kana transaction actually favored expediting trial. (*Id*.)

The trial court did not error in denying Appellants' attempt to amend the complaint and restart discovery on the eve of trial. Appellants disregarded numerous deadlines in a court-ordered schedule that they insisted upon and agreed to. In cases like this, when the reason for seeking to continue the trial date appears to be "mostly of Plaintiff's counsel's own making," trial courts have denied a motion for continuance. *See, e.g.*, *Meck v. Christiana Care Health Servs., Inc*., 2011 WL 1226456, at *1 (Del. Super. Mar. 29, 2011).[13]

That is especially true because Appellants had sought and obtained expedited treatment. Appellants subsequently failed to prioritize this case as required. But Appellees put tremendous resources and efforts into maintaining the schedule and trial date. Appellees were eager to prove that Appellants' claims are meritless and end Appellants' attempt to try to leverage this lawsuit. Having one of AGR's larger unitholders claim he was defrauded continued to put a cloud over the company, and Appellants had repeatedly used this lawsuit to disrupt AGR's business operations,

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[13] Additionally, given the fluid situation related to COVID-19, the trial court properly held that the "effects of the COVID pandemic on how trial is conducted will be assessed as trial gets closer." (A-007032 at 51:8-12.)

including by trying to enjoin AGR's Series E round of financing, seeking a receiver over AGR, and threatening to add Flow-Kana as a defendant. It would have been unfair to now give Appellants, after they ignored nearly every court-ordered deadline, a "do-over" and require Appellees to go through the entire discovery process again while Appellants continued to use the lawsuit as improper leverage.

Moreover, at no point did Appellants request to continue the trial to allow them to remedy their multiplying discovery deficiencies and, therefore, the argument was waived. *See Minna*, 984 A.2d at 1214-15 (citing *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005)). To the contrary, at the August 13th hearing, the trial court allowed the Appellants to offer deadlines by which they would finish collecting the Key Repositories. (A-006999.) Appellants never expressed that they could not meet the new schedule. (A-006999-7000.) Instead, they confirmed that the revised deadlines were "workable." (*Id*.)

It was in this context that the trial court maintained the September 15, 2021 trial date. (A-007030.) Appellants never renewed their request for a trial continuance after the August 12, 2021 hearing. Any claim on appeal that the trial court should have continued the trial rather than issue terminating sanctions is baseless and has been waived.

II. The Trial Court Properly Exercised its Discretion to Shift Attorneys' Fees.

A. Questions Presented.

1. Whether the trial court abused its broad discretion in determining that Appellants' misconduct satisfied the bad faith fee shifting standard.

2. Whether the trial court abused its broad discretion in fixing the amount of attorneys' fees to be awarded.

B. Standard of Review.

Delaware courts award attorneys' fees when opposing parties unnecessarily prolong or delay litigation, fail to abide by court orders, give false testimony, or knowingly assert frivolous claims. *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 506 (Del. 2005); *see Isr. Disc. Bank of N.Y. v. First State Depository Co*, 2013 WL 2326875, at *31 (Del. Ch. May 29, 2013) (awarding fees under the bad faith exception for misleading the court, failing to abide by orders, delaying the litigation, and advancing "multiple theories that had 'minimal grounding in fact and law'"); *ATR-Kim ENG Fin. Corp. v. Araneta*, 2006 WL 4782272, at *22-23 (Del. Ch. Dec. 21, 2006) (shifting fees for obstruction of discovery requests, "presentation of baseless and shifting defenses, and ... outright lies under oath"). Here, the trial court determined as a factual matter that Appellants managed to check all of the above with their misconduct, and on that basis awarded Appellees their reasonable fees. (A-007768-7774.)

This Court reviews such awards for "a clear abuse of discretion." *Kaung*, 884 A.2d at 506. To the extent that the fee award is premised upon factual findings, the question on appeal "is whether there is adequate evidence to support the [court's] ruling." *Williams v. Brookside Community, Inc.*, 306 A.2d 711, 712 (Del. 1973) (citing *Colt Lanes of Dover, Inc. v. Brunswick Corp.*, 281 A.2d 596 (Del. 1971)).

C. Merits of the Argument.

Appellants' misconduct was far ranging. They disregarded discovery rules, defied orders, made misrepresentations to the court, gave false statements under oath, and knowingly pressed frivolous claims. And they refused to change course after the court imposed a series of lesser sanctions. There is no precedent in published Delaware decisions for such egregious misconduct.

In awarding Appellees all their fees incurred in this action, the trial court began with a key factual finding: Appellants "litigated in bad faith." (A-007768.)[14] The court noted that "the bad faith exception to the American Rule applies in cases where the court finds litigation to have been brought in bad faith, thereby unjustifiably increasing the cost of litigation" and that "[t]here is no single standard of bad faith the warrants an award of attorneys' fees in such situations." (A-007769) (numerous citations omitted).

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[14] Notably, the trial court had shifted certain fees for discovery violations under Rule 37 as part of its August discovery orders. Appellants have not challenged those rulings.

Against that background, the trial court determined that Appellees had produced evidence sufficient to satisfy the burden of producing "clear evidence" of bad faith conduct. (A-007769.) To that end, the trial court cited five specific examples of ways in which Appellants unnecessarily prolonged and delayed litigation. (A-007770.) Next, the trial court specifically determined that Menashe made false statements on the record, including that (1) he did not text about business matters; and (2) he had never been involved in litigation before, which was "demonstrably false." (A-007771) (*see* A007037-7198; A-006226-6715.) Finally, the court held that Appellants "knowingly asserted frivolous claims." (A-007771.) To reach that factual conclusion, the court weighed heavily that Appellants' "litigation conduct regarding their anchoring fraud claim betrays that they knew that claim was frivolous all along." (*Id*.) Appellants did not "answer several core questions" relating to their fraud claim; Appellants filed an identical claim in New York; and emails showed that "Menashe was never concerned that the financials he saw fraudulently induced his investment." (A-007772.)

On appeal, Appellants have overlooked these crucial factual findings, focusing instead on their self-proclaimed success at the pleading stage. Appellants' success at that stage, before Appellants were able to test the veracity of their allegations, is irrelevant. Appellants do not address the trial court's finding that they pursued this litigation for an improper purpose—to gain leverage over AGR (*i.e.* "a

shot over the bow")—and then prosecuted it in a manner calculated to inflict maximum harm. (A-007778.)

Further, the record supports the conclusion that Appellants never prepared for trial because they never intended to go to trial. After all, they knew all along that their claims were frivolous. Appellants filed and maintained this case in an improper, misguided attempt to gain negotiating leverage. This explains Appellants' strategy and tactics: it answers why they sought an expedited trial, did nothing, and then belatedly asked for a continuance of trial. Appellants' "utter failure to properly collect, produce, and log discovery, in knowing and brash contempt of orders," also shows Appellants' lack of desire to actually try this case. (A-007770.) Indeed, Appellants' leverage would evaporate if they had to go to trial. Their misconduct drove up the cost of litigation significantly. So, when Appellants argue that "the entire fee shift appears to be based on two prelitigation emails altogether" (AOB at p. 45), they have entirely missed the point. The record is not "sparse" as Appellants argue. AOB at p. 48. It is packed with evidence of bad faith conduct, as the trial court painstakingly documented. (A-007768-A7774.)

Appellants' claim that the fee award "is simply excessive" (AOB at p. 50), ignores the trial court's detailed analysis of the factors set forth in Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct. (A-007774-7780.) Again, the court shows that it was mindful of Appellants' strategy of driving up attorneys' fees

dealing with frivolous claims, writing that "Appellants' 'shot across the bow' resembled buckshot: the work to clean the wounds was onerous, *by design*." (A-007778) (emphasis added). It takes substantial resources to recover from such a wound, and even more to press forward through the thickets to be prepared to obtain vindication at an expedited trial. Appellants cannot now complain that they made the path difficult for Appellees. Appellees' fee request is reasonable.

CONCLUSION

The trial court's rulings are supported by the evidence and are the product of an orderly and deductive process. Its application of the law is free from error. The court's decision should be affirmed.

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