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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GGH-RE INVESTMENT PARTNERS LIMITED and CEZARY JARZABEK, Defendants-Below/ Appellants/Cross-Appellees,	:	
v.	:	C.A. No. 36, 2023
GOLUB CEE INVESTORS LLC, Plaintiff-Below/ Appellee/Cross-Appellant.	:	APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 2021-0810-KSJM

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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DATED: May 2, 2023

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NATURE OF PROCEEDINGS

The Court of Chancery correctly found that Defendants GGH-RE Investment Partners Limited ("GGH-RE") and Cezary Jarząbek (together with GGH-RE, "Defendants") had breached the operating agreement of Golub Gethouse Realty Company LLC (the "Company") at least twenty times, even though a single breach would have been sufficient for the relief sought. On this record, the trial court appropriately declared that GGH-RE was removed as the Operating Managing Member ("OMM") of the Company and that GGH-RE and Jarząbek were not managers or legal representatives of the Company. Respectfully, this Court should affirm.

The trial court properly imposed discovery sanctions on Defendants in the form of adverse inferences based on Defendants' failure to respond to any discovery or sit for a deposition prior to the first trial date in this expedited action. Although Defendants did then produce some documents and sit for a deposition, they did not cure the deficiencies identified by Plaintiff before the second trial date and never produced documents responsive to many requests.

These sanctions were especially appropriate in this expedited action pursuant to 6 *Del. C.* § 18-110 and were supported by the record that existed at the time, including Jarząbek's own testimony and Polish and Cypriot government records (or the absence thereof).

Defendants' refusal to engage in discovery was coupled with Defendants' continued breaches of the Company's operating agreement by selling its assets without the consent of Plaintiff Golub CEE investors LLC ("Golub" or "Plaintiff").

Indeed, trial was rescheduled three times due to Defendants' actions while they continued to breach the operating agreement by attempting to sell the indirect assets of the Company. Trial was finally held on June 30 and July 1, 2022, more than 9 months after this action was initiated and included live fact witnesses as well as expert witnesses.

As the Court of Chancery's September 14, 2022 bench ruling (the "Bench Ruling") properly recognized, the record supported the finding that Defendants had breached the operating agreement multiple times.

Defendants' arguments on appeal are factually and legally flawed. Defendants have not explained why partial compliance, but not full compliance, with the requirements of the Second Amendment was possible, and Defendants' foreign law defense also fail on the merits.

The record supports each of the breaches found by the trial court.

The trial court declined to award Plaintiff attorneys' fees, and Plaintiff moved for reargument, asking the trial court to address its argument that it was entitled to fees under equitable principles. The trial court denied the motion for reargument regarding fees on January 3, 2023.

The Court should reverse the trial court's decision with respect to fee shifting as the indemnification provision contained in the LLC Agreement requires fee-shifting in an instance such as this. The trial court also abused its discretion when it declined to award fees to Plaintiff on equitable grounds.

On February 1, 2023, Defendants filed a notice of appeal. On February 15, 2023, Plaintiff filed a notice of cross-appeal.

SUMMARY OF ARGUMENTS

Answer To Defendants' Summary Of Arguments

(1) **Foreign Law.** Denied. The Court of Chancery correctly concluded as a matter of fact that full performance of Defendants' obligations under the operating agreement was possible on the basis of Defendants' partial compliance. In the alternative, Defendants' foreign law defense fails as impossibility due to foreign law is not a recognized defense and Defendants' assumed the risk of impossibility. In the alternative, Polish and Cypriot law permit the performance of Defendants' obligations.

(2) **Evidentiary Burden.** Denied. The Court of Chancery correctly found that Plaintiff had met its burden to establish at least 20 breaches of the LLC Agreement and Second Amendment. Defendants' argument that Mr. Glazier (not "Glazer") was not credible fails, as Mr. Glazier did testify consistently. In the alternative, to the extent Mr. Glazier's testimony was inconsistent, the doctrine *of falsus in uno, falsus in omnibus* should not be applied as the inconsistencies were minor and his testimony was corroborated by government records. In the alternative, Mr. Glazier's testimony was not essential for many of the breaches found by the Court of Chancery. Defendants' argument that Defendants could not appoint a Cypriot company director because Golub never nominated one fails because it was not preserved below. Defendant's argument that the "Major Decision" provision

only applies "if the Company provides services" also fails. The Court of Chancery correctly interpreted the relevant provisions of the LLC Agreement. This issue is also not included in the argument section of Appellants Opening Brief.

(3) **Discovery Sanctions.** Denied. The Court of Chancery did not abuse its discretion in making adverse inferences that were tailored to rectify Defendants' refusal to produce directly relevant documents.

Plaintiff's Summary Of Arguments On Cross-Appeal

I. The Court of Chancery erred in finding that the indemnification provision in the LLC Agreement did not apply to first party claims.

First, under *International Rail Partners LLC v. American Rail Partners*, LLC, 2020 WL 6882105 (Del. Ch. Nov. 24, 2020), indemnification provisions in LLC are to be interpreted broadly, and it is not necessary for the provision to expressly include first-party claims.

Second, the indemnification in the LLC Agreement is substantively different from the one at issue in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I*, 2020 WL 7861336 (Del. Ch. Dec. 31, 2020).

II. The Court of Chancery erred in finding that Plaintiff was not entitled to fee-shifting on equitable principles.

STATEMENT OF FACTS

A. Background

Plaintiff Golub is a Delaware limited liability company. (B1962; B0463 ¶10.) Defendant GGH-RE was substituted for Salimondi Holdings Limited as a Member of the Company. (B1962; B0463 ¶11.) Defendant Cezary Jarząbek is Polish citizen (B1962) and has served as a manager of the Company under 6 *Del. C.* § 18-110(c). (B0463 (¶12).)

The Company is a Delaware limited liability company created to develop Golub's real estate investments in Poland with Jarząbek. (B1963; AO-0409-0410.) The Company does not own real estate directly, but rather invests through a series of affiliates and subsidiaries, common in the real estate industry. (AO-0410; B0357; B2009 (11:12-19); B2005-2021.)

When the Company was formed in 2009, Jarząbek did not have experience in real estate, and so Golub and its affiliates provided expertise, financing, and lent their reputation to projects. (B0465 (¶19); B0722 (27:15-28:3, 28:23-25); B1963.) Jarząbek conducted the Company's day-to-day business and was responsible for setting up the structure of the enterprise. (B0465 (¶19); B2059 (61:1-16); B2307 (309:5-8).)

The Company owns 100% of non-party Golub Gethouse Holdings Limited ("GGH"). (B1963; B0463 (¶14); B0742 (121:5-7).) GGH is the 67% owner of another Cypriot company, Golub Gethouse Realty Company Ltd. ("GGRC"). (B1963; B0463 (¶14); B0745 (121:7-9).) GGRC owns direct and indirect interests in several Polish and Cypriot special purpose property owning companies that exercise management control over Polish and Cypriot operating companies. (B0463 (¶14); B0357; B0745 (121:9-11).) Jarząbek served on the management boards of GGH, and GGRC because GGH is the sole director of GGRC, and all of the underlying entities that own and control the Company's assets. (B0463 (¶14).)

B. <u>The LLC Agreement</u>

The LLC Agreement contains a Delaware choice of law provision and does not modify the OMM's fiduciary duties. (AO-0090 (§17.3).)

When the First Action was filed (B0197), the LLC Agreement required Golub's consent for "Major Decisions" which includes the "direct or indirect sale ... of a Project ... not in accordance with an Approved Project Budget" and refinancings. (AO-0080-82 §10.3 (vii, xi, xii).)

At that time, the LLC Agreement defined "Project" as "[a]ny residential, office, retail, or commercial or project or land held for the development thereof located in the Territory [including Poland] which is *<u>directly or indirectly</u>* acquired,

developed or redeveloped by the Company or for which the Company provides any services." (AO-0070 (§1.1) (emphasis added).)

Also at that time, GGH-RE was the OMM, a role described in Section 10.2. (B0460 (¶4); B0724 (34:14-16).) Section 10.2 provides, in part: "[GGH-RE] or the Key Personnel of [GGH-RE] is in breach of its obligations hereunder, then [GGH-RE] shall immediately thereupon cease to be a Operating Managing Member of the Company." (AO-0080 (§10.2).) When the First Action was filed, Section 10.2 also stated: "If at any time [GGH-RE] ceases to be a Operating Managing Member of the Company for any reason, then Golub shall have the right to appoint itself or its Affiliate as a replacement Operating Managing Member for such retiring Operating Managing Member." (AO-0080 (§10.2).)

Under Section 11.5 of the LLC Agreement, "Indemnification by the Members," of the LLC Agreement, Golub is entitled to indemnification, including its attorneys' fees, for GGH-RE's wrongful acts and breaches of the LLC Agreement. (AO-0084 (§11.5).)

C. Defendants' Initial Breaches Of The LLC Agreement And The First Action

Defendants admit they did not obtain Golub's consent to obtain short term bond financing by issuing retail bonds through an entity Golub Gethouse MLT, secured by an interest in Project Mennica (the "Retail Bonds"). (B2015 (17:12-20); B0814 (294:22-295:15); B2294 (296:15-18); *see also* B2015-B2016.)

As the deadline to make payments on the retail bonds approached, Golub Gethouse MLT could not make those payments and Jarząbek faced potential personal liability (B0814 (295:19-23, 296:1-19); B2015-2018 (17:12-19:10, 20:2-18); B2295 (297:7-9), B2297 (299:22-24).) And so, Defendants attempted to sell the Company's interest in Project Mennica, without Golub's Consent, a violation of the LLC Agreement. Project Mennica was to be sold, but Jarząbek was attempting to sell it to a different bidder for a lower price. (B1964; B0193; B0069; B0728-31 (50:15-51:3, 53:21-54:12, 55:20-56:2, 56:8-12, 57:16-22, 59:24-60:5, 62:5-9, 63:2-9, 64:1-9, 65:7-9), B0206-208 (¶¶32, 39-40).) Jarząbek admitted that Golub had an indirect interest in Project Mennica, that he did not seek Golub's consent to attempt to sell Project Mennica. (B0461 (¶6); B0730-0731 (58:17-59:1; 64:17-65:1, 65:22-25); B1324 (¶2(b)), B2081 (151:13-21).) Jarząbek asserted that the sale of an asset held indirectly by the Company did not require the consent of Golub (B0734 (75:4-10, 75:21-76:3)) despite the LLC Agreement's clear language.

On September 9, 2020, Golub sent a removal notice (the "First Removal Notice") "immediately" removing GGH-RE as OMM and appointing Golub as OMM. (AO-0080 §10.2; B0065; B0467 (¶23).)

The First Removal Notice detailed how GGH-RE and Jarząbek breached their respective obligations under the LLC Agreement, including failing to seek Golub's consent to the acquisition of the Atlas/Skyreach project, which he admitted to.

(B0066; B0810 (278:7-8 ("I was negotiating on behalf of a company called GGH Atlas which refers to Atlas/Skyreach Project")); B2014-2015 (16:14-17:10).)

The First Removal Notice also detailed how Defendants failed to seek Golub's consent to issue the Retail Bonds.

On September 15, 2020, counsel for Golub cautioned Jarząbek that he should not act on behalf of any of the Company's subsidiaries without Golub's consent. (B0067.)

On September 24, 2020, through counsel, GGH-RE responded by claiming that the First Removal Notice was invalid and ineffective. (B0468 (¶26).) Jarząbek continued to act as the OMM after receiving the First Removal Notice. (B0735 (79:3-13).)

Sometime around the fall of 2020, Plaintiff, Defendants, and the Radziwills[1] attempted to reach a settlement of the disputes between those parties, including the sale of Project Mennica. (B2026-2027 at 28:19-29:13.) During those negotiations, the document that would become Exhibit A of the Second Amendment was first drafted. (B2027, 2121, 2124-2125 (29:14-18, 123:3-7, 126:23-127:5).)[2] Jarząbek

[1] The Radziwills have an interest in the Company's subsidiaries through their company, Loxeco, which has an interest in GGH Realty Company Limited Cyprus, and a direct interest in Project Mennica. (B2030 (32:7-19); B0357.)

[2] Jarząbek's testimony regarding when Exhibit A was drafted was not credible. (B2235 (305:12-15 (testifying it was drafted in January 2021)), B2304 (306:1-10 (cannot recall what was drafted in connection with September/October meetings)),

was represented by Daniel Kopania, a Polish lawyer at Clifford Chance. (AO-0481-482 (179:3-180:9); B2028-2029 (30:3-7, 30:23-31:4); B2303 (305:3-7).)

On November 12, 2020, Plaintiff filed the First Action, seeking, among other things, declaratory and injunctive relief pursuant to 6 *Del. C.* § 18-110 that GGH-RE was removed as OMM of the Company pursuant to the LLC Agreement and the First Removal Notice and alleging that the Proposed Project Mennica Transaction was a violation of Golub's rights under the LLC Agreement and GGH-RE had breached its fiduciary duties. (B0212-219 (¶¶61-85, 86-100 & at 22).)

On February 10, 2021, the First Action was dismissed. (AO-0104-105.)

Defendants were represented by Delaware counsel when the parties executed the Second Amendment. (AO-0105; B0741 (102:22-23, 103:7-20).) Before the parties agreed to the final version of the Second Amendment, Jarząbek also instructed counsel for a related entity, Golub Gethouse Sp. z o.o. to confirm whether the proposed changes in Exhibit A were possible, specifically whether the terms of certain bonds would restrict changes to the management board of certain entities. (B0311-314; B0739-740 (95:15-97:19, 98:14-99:25); B2057 (59:15-18).) Jarząbek also had that same Polish attorney review the proposed changes to the entities. (B0741 (102:5-14).) Jarząbek did not raise any concerns at that time regarding the legality of the proposed changes

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B2306 (308:14-22 (stating that he began the process of implementing Exhibit A in December)).)

under Polish or Cypriot law. (B0738 (91:6-92:24); AO-0447-448, 478-479 (145:15-146:7, 176:21-177:11); B2057-2058 (59:2-60:24).)

D. <u>The Second Amendment</u>

Under the Second Amendment, dated January 29, 2021, both Golub and GGH-RE were to be joint OMMs of the Company and "[a]ll powers of management … shall be vested in them jointly and all decisions to be made by or on behalf of the Company and each entity in which the Company has a direct or indirect interest shall require their joint consent." (B0317-18 (§4); B0735 (79:23-80:3).) This was to give Golub joint control over "day-to-day" activities of the subsidiaries. (AO-0388 (86:3-13); B2034-2035 (36:18-37:4).)

The Second Amendment also required that GGH-RE "shall execute and deliver to Golub all documents identified on Exhibit A hereto as 'Required Documents'" and "cause Cezary Jarząbek to fully and promptly cooperate with Golub and its attorneys and representatives in accomplishing the objectives set forth on Exhibit A hereto with respect to certain Projects of the Company and certain entities in which the Company has an interest." (B0318 (§7).) The actions required by Exhibit A involved entities in Cyprus and Poland in order to establish joint control by Golub and Jarząbek. (B0735-0736 (80:11-14, 83: 17-20).)

The Second Amendment specified that "[a]ny failure by GGH[-RE] to timely and fully so act and perform shall be deemed to be a material breach by GGH[-RE] under this Agreement." (B0318 (¶7).) Section 10.2 of the LLC Agreement, as amended by the Second Amendment, provides, in part: "if [GGH-RE] or either or both of the Key Personnel of [GGH-RE] is in breach of its obligations hereunder, then [GGH-RE] shall immediately thereupon cease to be a [sic] Operating Managing Member of the Company. If at any time [GGH-RE] ceases to be an Operating Managing Member for any reason, then Golub shall be the sole Operating Managing Member." (AO-0080 (§10.2); B0318 (¶6).) This trigger provision was included due to Defendants' past conduct. (B2034 (36:2-6).)

The Second Amendment also modified the definition of "Project" to mean "Any residential, office, retail, or commercial or project or land held for the development thereof located in the territory which is directly or indirectly acquired, developed or developed by the Company or for which the Company provides any services, including any direct or indirect interest therein" by adding the underlined language. (B0317 (¶1); AO-0070.)

E. Defendants Breach The Second Amendment And GGH-RE Is Removed

After the execution of the Second Amendment, GGH-RE and Jarząbek breached their obligations under the LLC Agreement and the Second Amendment many times.

On August 10, 2021, counsel for Golub sent a Second Notice of Removal to GGH-RE (the "Second Removal Notice"), listing various breaches by GGH-RE and Jarząbek, including failing to comply with obligations under Exhibit A to the Second Amendment, holding himself out as authorized to act on behalf of the Company and its subsidiaries without Golub's consent, and removing Golub's representative from the bank authorization list for the Company, and refusing to provide Golub with corporate documents of the Company and its subsidiaries. (B0362.)

On the basis of those breaches, as well as the breaches listed in the First Removal Notice, the Second Removal Notice "immediately" caused GGH-RE to be OMM and Golub became the sole OMM of the Company. (B0317 (§10.2); B0362-365; B2041-2042 (43:21-44:3).)

F. Defendants Continue To Breach The Second Amendment

After receiving the Second Removal Notice, Jarząbek stated that the removal was "groundless" and continued to act unilaterally on behalf of the Company and its subsidiaries, even though (1) he had been removed and (2) even before his removal, the Second Amendment required joint control of the Company and its subsidiaries, which Jarząbek admitted. (B0366; B0804 (256:19-22).) This was in spite of Golub's multiple warnings to Jarząbek that the sale of the Company's indirect assets constituted a breach of the LLC Agreement and Second Amendment and that he had been removed as OMM. (B0574; B0808 (272:8-25).) A list of the breaches

occurring after the Second Removal Notice are contained in pages 33-35 below, summarizing the Bench Ruling.

Critically, Jarząbek still did not act to fulfill his duties with respect to GGH. The Second Amendment required that (1) Golub have its own appointed board member and (2) actions of the board of directors be approved by the Golub Designee and Jarząbek designee. (B0327.) Jarząbek admitted that a Golub appointee has not been added to the board of GGH, which is consistent with the records of the Cypriot Register of Companies. (B0789 (196:11-13); B0577.) The current board of management of GGH included three members, Jarząbek, and two Cypriot residents affiliated with C. Savva & Associates Ltd. ("Savva"). (B0795 (219:12-220:19).)

Savva is the administrator of the Cyprus entities and is responsible for keeping their records. (B0742 (107:4-6, 107:12-23, 108:9-23); AO-0438 (136:15-24); B2043 (45:23-13).) Savva is also bound to follow the instructions of an engagement letter with respect to the appointment or removal of a director. (B0794-795 (215:6-11, 220:22-221:5).) For tax reasons, the board of management of Cypriot entities in an enterprise such as this is made up of a majority of Cypriot nationals, who are suggested by the corporate administrator. (B2044 (46:7-11), B2090-2091 (92:2-14, 93:1-10); B2260-2262 (262:10-263:1, 264:5-11).)

Savva's engagement letter states that "[Savva is] permitted to correspond and to take instructions from the Beneficial Owner(s), and from the Authorized Person(s) of the Company separately[.]" (B0059.) Jarząbek was listed as the Authorized Person with full authority to act on behalf of Eugene Golub and Savva. (*Id*.) Jarząbek, Eugene Golub, and Michael Newman signed as beneficial owners. (B0063-64; B0345.)

Jarząbek never instructed Savva to appoint a Golub representative, which he admitted, although he had the power to do so under the existing engagement letter, at the very least with Golub jointly. (AO-04391(37:9-22); B2049 (51:17-19); B0754 (155:2-7); B2301 (303:3-4).) When Golub tried to appoint a representative to the board of GGH, he withheld his consent. (AO-0443-444 (141:17-142:18); B2056-2057 (58:8-59:1).) The Court made the adverse inference that on or around August 25, 2021, Charles Savva emailed Jarząbek and asked him for his position regarding adding a Golub representative to the board of GGH, and Jarząbek either did not give an affirmative answer or gave a negative answer. (B1326 (¶2 (q)-(r)).) Savva represented that it would email Jarząbek regarding his position on the Golub representation on the GGH board and reported that Jarząbek opposed it. (B0367; B0381.)

After the signing of the Second Amendment, at Jarząbek's insistence, the parties attempted to enter into a new engagement letter with Savva that would require joint assent by Golub's representative and Jarząbek, but the parties had not agreed to the specific terms. (AO-0441-444 (139:19-142:18); B0359; B2048-2049 (50:8-51:16); B0751 (143:17-144:1).)

GGH is at the "top" of the European structure (B0357) and Jarząbek's refusal to appoint a Golub board member prevented Golub from accessing critical information and is what "legally" allowed Jarząbek to run the European companies as if Golub had no rights at all. (B2037 (39:13-23).)

G. The Second Action

On September 20, 2021, Plaintiff commenced this action (the "Second Action") under 6 *Del. C.* § 18-110 and moved to expedite. (B0401.) Throughout the Second Action, Defendants consistently delayed and obstructed the Delaware litigation while continuing to act unilaterally and breach the LLC Agreement and Second Amendment.

On October 5, 2021, the Court granted expedited treatment, noting that a trial within "45 to 60 days" was "how we would normally approach these sorts of cases." (B0429.) The Court instructed Jarząbek, who did not have counsel that day, to find counsel for GGH-RE and update the Court by October 12, 2021. (B0436, B0439.)

On October 13, 2021, Plaintiff filed a Motion for Default Judgment on the basis that Defendants had not filed an answer by the deadline. (B0444.) On October 19, 2021, the Court filed a letter, warning that GGH-RE risked default judgment without counsel and gave Defendants until October 25, 2021 to respond to the Complaint. (B0452.)

Defendants' counsel entered an appearance on October 26, 2021 and stated that the firm had "been retained today" and requested an extension until October 29, 2021, which was granted. (B0453.) Defendants filed their Answer to the Verified Complaint (the "Answer") on Friday, October 29, 2021. (B0458.) The Answer did not raise foreign law or any affirmative defense other than failure to state a claim.

Trial was set for January 7, 2022. (B0494.) Throughout November, Plaintiff's counsel tried, in vain, to move the case forward through a schedule, depositions, and a status quo order. (B0522.)

On December 1, 2021, counsel for Defendants moved to withdraw, stating that "[c]ounsel has repeatedly contacted Defendants to obtain necessary information and direction on certain matters and has received no response" and "Defendants' failure to cooperate with counsel … prevents counsel from meeting anticipated deadlines leading to a trial", which was granted. (B0529-0530 (¶¶4-5); B0572.) On December 2, 2021, Plaintiff served requests for production and noticed depositions of Jarząbek and GGH-RE. (B0533; B0536; B0543.)

Plaintiff did not hear from Defendants regarding the discovery, and so, on December 22, 2021, Plaintiff's counsel emailed Defendants' withdrawing counsel stating that Plaintiff would seek a default judgment if Defendants did not comply. (B0576.)

On January 6, 2022, Plaintiff filed a Motion For Default Judgement Pursuant To Rule 37 (the "Rule 37 Motion") seeking default judgment, or in the alternative, an order designating the factual allegations in the Complaint as true and precluding Defendants from introducing evidence at trial responsive to the discovery requests or raising defenses relating to the requested discovery. (B0580.) In the Rule 37 Motion, Plaintiff outlined how Defendants had been uncooperative and dilatory in response to Plaintiff's efforts to move the expedited case forward. (B0581-0583.) Plaintiff also explained that it was the literal eve of trial, but Plaintiff had not received any discovery from Defendants, Defendants had not served any responses and objections to Plaintiff's discovery, and Defendants had not sat for their noticed depositions. (B0582-0585.) Plaintiff explained that if the trial court declined to enter default judgment, Plaintiff would be severely prejudiced if Defendants were permitted to conduct "trial by surprise" the next day. (B0585.)

On January 7, 2022, the first trial date, Plaintiff was nevertheless prepared to proceed, but the trial court instead held a hearing on the pending motions for default and motions for a status quo order. (B0633.) Plaintiff's counsel observed "[a]t no

point in time has either defendant offered any reason to suggest that the LLC agreement was not breached, that the second removal notice was not proper, or that the relief demanded should not be granted." (B0644.)

The trial court initially stated it was "likely to enter a default judgment against [Jarząbek] and GGH-RE Investment Partners Limited," but ultimately declined to enter a default judgment. (B0646, B0659-0660.) The trial court instructed the parties to schedule a new trial within a month. (B0695.) The trial court gave GGH-RE until a week before trial at the latest or face default judgment to retain new counsel. (B0704-707 (75:7-13; 76:10-22; 78:1-4).) The trial court also instructed Jarząbek to produce documents responsive to Plaintiff's requests by January 14, 2022 and entered a status quo order (the "Status Quo Order"). (B0623.)

Defendants did not comply with their discovery obligations. (B1369-1372; B0848.) The day after the January 7, 2022 hearing, a Saturday, counsel for Plaintiff met and conferred with Jarząbek regarding document production. Jarząbek did produce some documents by the deadline. (B0849.) However, Plaintiff identified deficiencies in the production and sent a letter to Jarząbek regarding those deficiencies on January 19, 2022, offering to postpone the deposition noticed for Friday, January 21, 2022 until the next week on the condition that Jarząbek produce the requested documents by January 21, 2022. (B0855.) Jarząbek did not respond to the letter until the morning of January 21, 2022, less than two hours before the

noticed depositions of Jarząbek and GGH-RE were scheduled to begin. (B0858.) Jarząbek asked for the deposition to be postponed until Monday, January 24, 2022. (B0858.) Plaintiff agreed on the condition that Jarząbek produce the requested documents by 5 P.M. ET on Saturday, and Jarząbek agreed. (B0857-0858; B0719-0720 (17:2-18:19).)

However, Jarząbek produced no documents that weekend. (B0850.) When asked why, Jarząbek brazenly stated: "I just have to spend time with my sons. I wasn't able to work during the weekend [] on these matters." (B0720 (19:3-12).) Jarząbek stated that he would produce the documents before the deposition resumed the next day at 11 A.M. ET, but did not do so. (B0788 (192:11-193:2).) The following day, Jarząbek stated that he would produce the documents by 6 P.M. ET on January 26, 2022. (B0788 (193:7-13).) He never produced the documents.

Furthermore, during the deposition, Plaintiff requested that Jarząbek produce responsive documents referenced in his testimony (including at least one document that Jarząbek consulted during the deposition) but Jarząbek did not. (*See, e.g.,* B0747 (126:25-127:16), B0749-0750 (136:9-11, 137:9-139:1, 140:11-13); B0790 (199:2-13), B0797 (226:13-228:23), B0806-0808 (262:22-263:17, 269:11- 270:4), B0816-0817 (305:22-306:25, 308:12-20), B0823 (330:14-20); B0862.)

Additionally, Jarząbek stated in his deposition that he could not confirm certain facts and could not produce certain documents because he no longer had access to the Company's database because he had not paid the vendor that maintained the database. (B0721 (25:1-24, 26:2-7), B0795 (221:16-19), B0795 (, B0797 (227:22-228:4, 228:20-23), B0817 (306:22-25), B0822 (328:18-23); B2240 (310:8-16).)

Plaintiff filed a letter to the Court dated January 28, 2022 outlining Defendant's discovery deficiencies. (B0848.)

At 8:09 p.m. on February 3, 2022—the literal eve of (the rescheduled) trial—Defendants' current counsel entered an appearance. (B0867.) The Court postponed trial again. (AO-0553.)

On February 4, 2022, the trial court again heard argument on the motions for default. (A0-510.) Counsel for Plaintiff explained that Defendant's continued delay was prejudicial as Defendants' delay allowed Defendants to continue to exercise control over the Company and its subsidiaries. (AO-0531-0532.) Concerningly, Jarząbek was using his continued de facto control over the subsidiaries to carry out transactions without Golub's consent (as required by both the Second Amendment and the LLC Agreement prior to the Second Amendment). (AO-0532-0537.) The trial court noted that "[t]he most draconian remedy available would have been to grant the most for default the first time it was brought because there were good

grounds then" and that if trial had been held on that date, it would have indeed been a "mess" and "prejudiced the plaintiff" because Defendants "failed to adhere to any obligations in this case and seemed to sift through counsel uncontrollably." (AO-0540.) The trial court noted that "Mr. Jarząbek forwarded a bunch of communications to my office about his efforts to retain counsel" and "they reflect that he didn't even try to really get an attorney until after the deadline I set."

The trial court again declined to grant Plaintiff's Rule 37 motion for default judgment but invited Plaintiff to submit proposed adverse inferences and limited Defendants to the current discovery based on Defendant's discovery failures. (AO-0553 (44:6-13).) The trial court reasoned that "having failed to adhere to his discovery obligations to date, would no longer be able to benefit from them and that your side would be able to permit or draft adverse inferences that arise from whatever documents could or should have been produced and that we go forward effectively on the record that exists plus the adverse inferences you draft towards a hearing on the merits." (AO-0548-0549.) The trial court also instructed Plaintiff that the adverse inferences are like stipulated facts, but unilateral, and that they should not be conclusory or legal conclusions. (AO-0555.) The trial court also instructed that the adverse inferences "can't be directly contradictory to documents that have actually been produced or testimony that's been given" but "to the extent

you think the discovery that has not been produced would be supportive of those factual inferences, I'm open to entertaining them." (AO-0555.)

Eight days before the February 14, 2022 trial date, Defendants belatedly[3] submitted notice of intent to raise foreign law issues, and days before the third trial date, Defendants submitted a continuance motion and a letter from a Cypriot lawyer (B0869, B1313, B1350; B1322). The continuance motion raised for the first time the argument that foreign law prevented Defendants from performing their obligations under Exhibit A of the Second Amendment. (B1313.)

The trial court instructed the parties to reschedule trial in approximately four weeks to "present[] the issues of Polish and Cypriote law" or explain "why those issues do not or should not bear on the outcome of this case." (B1323.)

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[3] "A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice." Ct. Ch. R. 44.1. Defendants did not raise illegality or impermissibility as an affirmative defense in any prior submission. (B0480.) Defendants' Notice of Intent to Raise Foreign Law Issues (B0869), was not "reasonable written notice" because it was served late in the evening of February 6, 2022 and was also not sufficiently specific to determine the substance of the foreign law issues. The notice provided that "[D]efendants GGH-RE Investment Partners Limited and Czarek Jarząbek intend to raise legal issues arising under the laws of The Commonwealth of Poland and the Republic of Cyprus generally bearing upon the corporate governance and corporate law of each country[.]" (B0869.) Defendants did not raise issue of Cyprus law in their continuance motion. It was only the morning of February 11, 2022, at 9:29 a.m., that counsel for Defendants sent a "Letter Opinion of Andreas Haviaras" purporting to opine on Cypriot law (B1345.)

The trial court also granted Motion For Adverse Inferences (the "AI Motion") stating that "I find the motion to be reasonable and well-supported…." (B1322; B1324.) The AI Motion outlined the evidentiary basis supporting each adverse inference and the connection between the missing discovery and the adverse inference. (B0871.)

The adverse inferences included the following findings:

(1) certain entities were indirect assets of the Company and Jarząbek had attempted to sell those assets without Golub's consent;

(2) an action required by the Second Amendment had not occurred when (a) that action is not reflected on the Polish National Court Register and (b) Defendants had not produced any documents showing that that that action has taken place and was submitted to the Polish National Court Register;

(3) actions required by the Second Amendment had not been carried out with respect to certain of the Polish Entities; and

(4) findings relating to Jarząbek's failure to approve the appointment of a Golub representative to the board of GGH and the use of funds that had been earmarked to pay the Savva debt.

(B0871; B1324.)

Plaintiff moved to enforce the Status Quo Order and on April 13, 2022, the trial court enjoined Defendants from selling two of the Company's Projects, negotiating a loan for another Project, or initiating legal proceedings on behalf of a subsidiary. (B1448; B1556.)

Trial was scheduled for a fourth time on April 8, 2022, but on March 31, 2022 it was continued at Defendants' Counsel's request. (B1532.)

Trial was finally held on June 30 and July 1, 2022. Jarząbek and Mr. Glazier testified as fact witnesses. Expert witnesses on Polish and Cypriot law also testified.

H. The Bench Ruling And Motion For Reargument

On September 14, 2022, the trial court issued the Bench Ruling, finding that "[t]he contract interpretation in this case is unusually simple." (DT-020.) In total, the trial court found at least 20[4] distinct breaches of the LLC Agreement by the Defendants, any one of which would be sufficient to find that GGH-RE had been removed. (DT-060.) The trial court noted that "[t]he record in this case is unusually truncated, due in large part to defendants' failure to adhere to their discovery obligations. In addition, because Golub has alleged many breaches of the LLC agreement, each allegation relies on a somewhat thin record, often consisting only of the limited trial and deposition testimony and Golub's adverse inferences and Polish public records." (DT-024.)

[4] In its Bench Ruling, the Court stated that it had found "20 clear breaches of the LLC agreement by GGH-RE and Jarzabek," however Plaintiff counts 22 breaches.

a. Breaches In the First Removal Notice

The trial court found that Defendants had committed two of the alleged breaches contained in the First Removal Notice. These findings were based on the testimony of witnesses, including admissions by Jarząbek, not adverse inferences.

The Sale of Atlas/Skyreach. The trial court found that Jarząbek had arranged the sale of Atlas/Skyreach without obtaining Golub's consent, citing the testimony of Jarząbek and Mr. Glazier, including Jarząbek's admission from his deposition that he had done so. (DT-025; B0809-810 (277:13-278:10); AO-0415-0416 (113:7-114:2); B2014-2015 (16:13-17:10).)

The Retail Bonds. The trial court found that Jarząbek had issued the Retail Bonds without the consent of Golub citing the testimony of Jarząbek and Mr. Glazier (DT-025-DT-027; AO-0416-0418 (114:14-116:4); AO-0630 (176:2-11); B2015-2021 (17:17-23:17)), including Jarząbek's admission that he did not consider Golub's consent to be necessary and that he was potentially criminally liable (DT-027; AO-0630 (176:4-6); B2276-2279 (278:13-81:06).)

Attempted Sale of Project Mennica to Mennica Polska. The trial court found that Jarząbek attempted to sell the Company's interest in Project Mennica to Mennica Polska without Golub's consent, breaching Section 10.3, citing the adverse inferences. The AI Motion cited, among other things, Jarząbek's admissions that the Company has an indirect interest in Project Mennica and that he negotiated a

potential transaction with Mennica Polska S.A. without seeking Golub's consent. (B0874; B0731 (62:3-63:9, 64:21-65:1, 65:22-25).)

b. Exhibit A Breaches

GGH Management 7 sp. z o.o. The trial court found that Defendants had breached their obligations under the Second Amendment to amend the articles of association of GGH Management 7 sp. z o.o. to require a minimum and maximum of two members of the board of directors, citing the adverse inference, the fact that "Defendants have offered no evidence to the contrary" and the Polish national records. (DT-036-DT-037; B0497, B0418, B0342, B1302.) The AI Motion also cited Jarząbek's deposition testimony that he did not know if the articles of association of GGH Management 7 Sp. z o.o. had been changed. (B0880; B0802 (249:1-10).)

Golub Gethouse Property Fund II S.A. The trial court found that GGH-RE had failed to appoint a Golub nominee to the management board and failed to appoint a new supervisory board, constituting a breach of the Second Amendment, citing the adverse inference and the Polish national records. (DT-038; AO-0160.) The AI Motion also cited Jarząbek's testimony that he could not remember who was on the current board of Golub Gethouse Property Fund II S.A. (B0878-0879; B0816-0817 (302:18-23, 305:18-306:25).)

Golub Gethouse Real Estate Investment Management Sp. z o.o. The trial court found that GGH-RE had breached the Second Amendment because it had not appointed a Golub nominee to the management board, citing the adverse inference, and the Polish national records. (DT-038; AO-0198.) The AI Motion also cited Jarząbek's testimony that he would "have to check" but he believed that Piotr Polakowski had been removed from the board of Golub Gethouse Real Estate Investment Management Sp. z o.o. and that there had been an attempt to appoint Hanna Podwysocka to the board, but she did not qualify. (B0879; B0817 (308:10-20), B0818 (311:14-24).)

GGH Management 8 sp. z o.o. The trial court found two breaches with respect to GGH Management 8 sp. z o.o. First, GGH-RE had not caused a Golub nominee to the management board. (DT-040; AO-0210.) Second, GGH-RE had not amended the articles of association to require a minimum and maximum of two members. (DT-040; AO-0210.) In addition to the adverse inference, the trial court relied on the Polish national records. (DT-040; AO-0210.) The AI Motion also cited to Jarząbek's testimony that he could not remember if the articles of association had been changed or if Golub's representative had been appointed. (B0879-880; B0822-0823 (327:4-16, 328:6-23, 329:8-330:6, 330:14-20).)

GGH Management 10 sp. z o.o. The trial court found two breaches with respect to GGH Management 10 sp. z o.o. First, GGH-RE had not caused a Golub nominee to the management board. (DT-040-DT-041; AO-0224.) Second, GGH-RE had not amended the articles of association to require a minimum and maximum of two members. (DT-041; AO-224.) In addition to the adverse inference, the trial court relied on the Polish national records.

Postepu 3 sp. z o.o. The trial court found two breaches with respect to Postepu 3 sp. z o.o. First, GGH-RE had not caused a Golub nominee to the management board. (DT-041-DT-042; AO-0236.) Second, GGH-RE had not amended the articles of association to require a minimum and maximum of two members. (DT-041-DT-042; AO-0236.) In addition to the adverse inference, the trial court relied on the Polish national records.

Bakharval Investment Ltd. The trial court found that GGH-RE had breached the Second Amendment by failing to appoint a Golub representative to the board of Bakharval Ltd. and failing to implement a policy under which board action required joint instructions from representatives of Golub and Jarząbek, citing the testimony of Mr. Glazier. (AO-0434 (132); DT-042-DT-043.)[5]

[5] The trial court was unable to locate a copy of JX55, which was the copy of the Cypriot register of companies' entry for that entity. (DT-042-DT-043; AO-0247.)

Golub Gethouse Holdings Limited. The trial court found that GGH-RE and Jarząbek had breached the Second Amendment by failing to appoint a Golub representative to the board of GGH and failing to implement a policy under which board action required joint instructions from representatives of Golub and Jarząbek, citing the adverse inference, the testimony of Jarząbek, who admitted he had not appointed a Golub representative to the board, the testimony of Mr. Glazier, the testimony of George Pamboridis, a copy of the Cypriot Register of Companies entry for GGH, the engagement letter between Savva, the Cypriot administrator of GGH, and the beneficial owners of GGH, and emails between Savva and the parties. (DT-043-DT-046; B0754 (155:2-7), B0795 (220:20-221:25); B02044, B2056-2057, B2090-91 (46:4-47:14), B2056-57 (58:8-59:1), B2090-91 (92:2-93:10); B2260-61 (262:10-9), B2262-63 (264:2-18), B2301 (303:1-4); B0367, B0059, B0381; AO-0441-0445 (139:10-143:10).) The Chancellor noted that Mr. Glazier had testified that Jarząbek had "insisted on negotiating a new engagement letter with Savva, then stalled the negotiations for months by missing numerous calls with Savva and refusing to clearly state this acquiescence to the terms of the second amendment and Exhibit A." (DT-045; AO-0441-0445 (139:10-143:10).) Stating, "[c]onsidering Jarzabek's attendance report throughout this litigation, I found that to be credible, to be honest." (DT-045.)

The trial court noted that the twelve violations due to failure to implement the requirements of the Second Amendment were "simply the most obvious and enduring" and "any one of those 12 are sufficient to remove GGH-RE as operating managing member of the company." (DT-047—DT-048.)

Defendant's exhibit, AO-0297 is a chart purporting to show compliance with the Exhibit A requirements, *does not contradict any of these findings*. (AO-0300.)

c. Other Breaches Included In The Second Removal Notice Or The Complaint

The Company Database. The trial court found that Jarząbek had breached Section 9.2 of the LLC Agreement, which required GGH-RE and Jarząbek to provide Golub with information regarding the Company and its subsidiaries because he had caused the Company to lose access to its database when he moved the database to the control of a different vendor and did not pay that vendor's bill, citing the trial testimony of Mr. Glazier. (DT-049-DT-50, DT-052; B2076 (78:2-16).) Jarząbek also testified that he no longer had access to the Company's server. (B0816 (305:1-25).)

The Removal of Golub's Representative from the Bank Authorization List. The trial court found that Jarząbek had removed Golub's representative from the bank authorization list and refused to reinstate him, or any other, violating 10.2 of the LLC Agreement, citing Mr. Glazier's testimony and noting that Defendants had

not addressed this allegation. (AO-0454-0457 (152:24-55:4); B2039-2040 (41:7-42:7); DT-53-DT-54.)

d. Breaches of Section 10.3 After The Second Action Was Initiated

The trial court found six breaches of Section 10.3 of the LLC Agreement, as amended by the Second Amendment, which occurred after the Second Action was initiated. (DT-57-DT-060.) The trial court noted that "[t]he facts of the allegations themselves are not really in dispute; most of them are stipulated to the pretrial order or have been reached by an adverse inference." (DT-057.)

Attempted Sale of Project Mennica to AT Capital. The trial court found that Jarząbek attempted to sell Project Mennica to AT Capital without Golub's consent, citing the adverse inferences and the stipulated pretrial order. (DT-057-DT-058; B1974-1976 (¶¶ 15-17), B1325 (2(b)).) The AI Motion also cited Jarząbek's admission that he had negotiated a potential transaction with AT Capital despite receiving a letter from Golub stating that he did not have the authority to agree to such a transaction without Golub's consent. (B0874-0875, B0975-76; B0809 (274:13-275:2).)

Sale of Project Liberty. The trial court found that Jarząbek sold Project Liberty without Golub's consent, citing the adverse inferences and the stipulated pretrial order. (DT-058; B1987-1988 (¶35).) The AI Motion cited to Jarząbek's testimony that he had entered into a preliminary agreement to sell Project Liberty,

and the transaction had closed. (B0875, B0978-980; B0806-0808 (265:22-266:24, 268:4-269:10, 269:17-270:8).)

Attempted Sale of Project LivInn Krakow. The trial court found that Jarząbek attempted to sell Project LivInn Krakow without Golub's consent, citing the adverse inferences and the stipulated pretrial order, which specified that Jarząbek had not sought Golub's consent. (DT-058-DT-59; B1987 ¶32.) The AI Motion cited to Jarząbek's testimony that he had signed a letter of intent for the sale of LivInn Krakow and that he had not sought the consent of Golub. (B0875-0876; B0805-0806 (258:16-25, 259:1-14, 260:23-262:2, 261:3-4, 264:25-265:2).)

Attempted Sale of Project Lublin. The trial court found that Jarząbek sold Project LivInn Krakow without Golub's consent, citing the adverse inferences and the stipulated pretrial order, which specified that Jarząbek had not sought Golub's consent. (DT-059; B1971.) The AI Motion cited to Jarząbek's testimony that he had negotiated for the sale of Project Lublin and that he had not sought Golub's consent. (B0876-0877; B0810 (278:11, 280:2-16).)

Attempted Sale of Project Postepu. The trial court found that Jarząbek attempted to sell Project Postepu without Golub's consent, citing the adverse inferences and the stipulated pretrial order, which specified that Jarząbek had not sought Golub's consent. (DT-059; B1971.) The AI Motion cited Jarząbek's testimony that he had negotiated for the sale of Project Postepu and that he did not

believe he needed to seek the consent of Golub to sell the indirect assets of the Company. (B0877; B0810 (277:13-278:2, 279:3-280:3).)

Attempted Sale of Project Jagiellonska. The trial court found that Jarząbek attempted to sell Project Jagiellonska without Golub's consent, citing the adverse inferences and the stipulated pretrial order, which specified that Jarząbek had not sought Golub's consent. (DT-059-DT-060; B1971.) The AI Motion cited Jarząbek's testimony that he had negotiated for the sale of Project Jagiellonska and that he did not believe he needed to seek the consent of Golub to sell the indirect assets of the Company. (B0877; B0810 (278:2-6, 279:3-280:3).)

e. The Court of Chancery Rejects Defendants' Defenses

The trial court rejected each of Defendants defenses. (DT-061-DT-068.) The trial court noted that Defendants failed to raise any defense in its answer except failure to state a claim and that Defendants had not established that Delaware law even recognizes impossibility under foreign law as a defense, but still addressed the merits of each defense. (DT-060; DT-065.)

The trial court held that Defendants' Cypriot and Polish law defenses failed because "defendants' own partial compliance with the terms of the second amendment and Exhibit A belies the defense." (DT-065.) As the trial court explained, "*Defendants do not explain how some of the requirements in Exhibit A were impossible* due to Polish and Cypriot law *but others were possible*; they merely

claim broad impossibility." (DT-065 (emphasis added).) And so the trial court concluded that the foreign law defenses "just fail[] *as a matter of fact*." (DT-065 (emphasis added).)

The trial court found Jarząbek's testimony (AO-0604, AO-0631) that he had forwarded all of the documents on JX203 (AO-0297) to Golub to be "difficult to credit." It also found that Jarząbek had testified inconsistently as to whether Golub's representatives had consented to the issuance of the Retail Bonds, concluding that it was more likely than not that he did not seek Golub's consent. (DT-026-27.)

The trial court noted that "Defendants … argue that Golub failed to meet its evidentiary burden, primarily attacking the sufficiency and consistency of Glazier's testimony" by stating "that the documentary evidence regarding some of Exhibit A's requirements, including records of the Polish National Court Register, reveal that some of Exhibit A's requirements were met, despite Glazier's testimony that he verified the allegations in the complaint before it was filed…." (DT-061.) The trial court rejected this argument, noting that although Defendants had met some of the requirements of Exhibit A, "[m]any of those requirements … were not met until after the second removal notice was sent and the complaint was filed" and "[r]egardless, the breaches I found today still not have been met, or are still effective to reach the outcome I reached." (DT-061.)

f. The Court of Chancery Denies Plaintiff's Request For Fees

The trial court denied "Golub's request for fee shifting under Section 11.5 of the LLC agreement[.]" (*Id*. at 69.) The Court, *sua sponte*, raised *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I*, 2020 WL 7861336 (Del. Ch. Dec. 31, 2020), and relied on that opinion to find that the LLC Agreement did not provide for fee-shifting in this instance, stating "indemnification provisions such as these apply only to claims asserted by third parties to the contract, rather than to first-party, or inter se, litigation between the parties, unless the contract explicitly provides to the contrary." (DT-069.)

On January 3, 2023, the trial court denied Plaintiff's Motion For Reargument Of The Court's September 14, 2022 Bench Ruling Regarding Attorneys' Fees And Expenses (the "Motion For Reargument"). (B2386-393; AB Ex. 1.) Plaintiff, in the Motion For Reargument, had argued that the trial court had overlooked its equitable arguments for fee-shifting, but the trial court ruled that the adverse inferences were "sufficient redress for most of the litigation behavior about which Plaintiff complains" and that Golub has shown no evidence that Defendants' foreign law or Loxeco-related arguments are anything other than zealous advocacy." (AB Ex. 1 at 3-5.)

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY IMPOSED THE ADVERSE INFERENCES AS AN EXERCISE OF ITS DISCRETION

A. Question Presented

Whether the trial court correctly imposed adverse inferences to cure the prejudice to Plaintiff caused by Defendants' discovery failures, including failing to respond to any discovery or sit for a noticed deposition before the first trial date, and refusing to cure other deficiencies identified by opposing counsel before the second trial date. Preserved at B0580-0622; B0848-864; and B0871-B1213.

B. Standard of Review

"This Court will not disturb a trial court's decision regarding sanctions imposed for discovery violations absent an abuse of that discretion." *In re Rinehart*, 575 A.2d 1079, 1082 (Del. 1990). "[A] trial court's decision to impose sanctions must be just and reasonable." *Id*.

C. Merits of Argument

This Court has found that an adverse inference is appropriate in the context of a jury instruction when "a litigant intentionally suppresses or destroys pertinent evidence…." *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 548 (Del. 2006); *see also Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1178 (Del. Ch. 2009) (drawing adverse inference when defendant recklessly caused the destruction of a hard drive).

The trial court has found that adverse inferences are an appropriate sanction when a party has failed to produce required information. *See James v. Nat'l Fin. LLC*, 2014 WL 6845560, *13 (Del. Ch. Dec. 5, 2014). This Court has upheld the implementation of a more severe discovery sanction, default judgment, for failure to comply with discovery obligations. *Minna v. Energy Coal, S.p.A*., 984 A.2d 1210 (Del. 2009) (upholding default judgment despite the fact that the sanctioned party had produced thousands of pages of documents and had not falsified or destroyed documents when the sanctioned party had, among other things, had refused court ordered discovery); *DG BF, LLC v. Ray*, 2021 WL 5436868 (Del. Ch. Nov. 19, 2021) (dismissing action due to Plaintiff's willful failure to comply with discovery obligations and dilatory conduct), *aff'd* 2023 WL 2482650, --- A.3d ---- (Del. Mar. 13, 2023).

Defendants argue that they should not face sanctions for failing to adhere to their discovery obligations because (1) the trial court did not find that Jarząbek acted "maliciously, or with intent to delay, to obstruct, or otherwise with a culpable metal [sic] state" and (2) Jarząbek was unfamiliar with Delaware law. (OB at 6.)

a. Defendants Intentionally Refused To Comply With Their Discovery Obligations

Defendant's first argument, that the trial court did not find that Jarząbek had the requisite mental state required to impose adverse inferences fails. Plaintiff explained in its submissions and during hearings below that Jarząbek was flouting

his discovery obligations as part of a larger strategy of delay. The delays caused by Jarząbek worked in his favor as he was able to continue to breach the LLC Agreement and Second Amendment. (Pages 33-35, supra.) This is sufficient to show that Jarząbek's intent was "to delay," "to obstruct" or otherwise "culpable," and equally so under the correct "intentional" or "reckless" standard.

Jarząbek was on notice that discovery requests were due and a deposition had been scheduled, yet completely ignored those obligations until after the first trial date. And even when he did produce some documents and sit for deposition, he did not attempt to cure any of the deficiencies identified in Plaintiff's letter to him on January 19, 2022. (B0854-55; B0857-860.) Finally, failing to pay the vendor (B0721-22 (25:2-24, 26:2-7), B0795-97 (221:16-19, 227:22-228:4, 228:20-23); B0817 (306:22-25), B0822 (328:18-23); B2308 (310:8-16)) was at best, reckless, and very likely also done with the intent of covering his tracks and obstructing Golub's ability to exercise its rights in this action and beyond. The obligations of the LLC Agreement included providing Golub with Company documents. (AO-0078-79, AO-0093.) Accordingly, Jarząbek was on notice before this action that he was responsible for maintaining those documents. Jarząbek never recovered those documents during the litigation despite paying for attorneys in this action and other actions.

b. Defendants Cannot Claim Ignorance Of Delaware Law As An Excuse When Defendant GGH-RE Was The Operating Managing Member of A Delaware LLC And Defendants' Own Actions Caused Defendants To Not Have Delaware Counsel

Defendants' second argument ignores the history and context of this matter. Jarząbek and GGH-RE had Delaware counsel during the First Action. Jarząbek had the resources to retain Polish counsel during the pendency of this action in order to pursue legal actions in those jurisdictions. (B1681.) Jarząbek was instructed multiple times by the trial court that he needed to retain Delaware counsel for GGH-RE. (B0438; B0452; B0705 (76:20-22).) Jarząbek did briefly retain counsel in this action to file an answer, but that counsel found it necessary to withdraw because Jarząbek would not communicate with his Delaware attorney. (B0453; B0455; B0458; B0528.) It was Jarząbek's own choices and actions that caused him to not have Delaware counsel until the day before the second trial date.

Furthermore, on January 7, 2022, the trial court told Jarząbek that "if there are documents in your possession that you say would support the case that you've put forward today, then they should have been produced earlier," that he was to begin producing documents that day, and "[t]hat means everything that you intend to rely on and everything they've asked for, not just the documents you like." (B0655 (26:18-21), B0659 (30:7-10).) The trial court further explained:

> [Y]ou have to look at what they've asked for and really think and dig deep, where are those documents and what might they want and be overinclusive. And they're going to push you to be overinclusive. And it's going to feel intrusive, but that's part of your obligation here is to produce to them the information they're asking for.

(B0659 (30:13-19).) In short, Jarząbek was on notice well before the February 4 hearing that he was responsible for complying with discovery obligations. Jarząbek was also on notice as early as the first hearing on the motion to expedite that he would need to retain Delaware counsel for GGH-RE. If Defendants were unfamiliar with how to comply with Delaware discovery law, it was only because Defendants only retained counsel at the last minute to avoid default judgment.

What's more, this is an action under 6 *Del. C.* § 18-110 to remove GGH-RE as a manager of a Delaware LLC. Jarząbek through GGH-RE accepted the responsibilities and duties of being the Company's OMM and he agreed to the terms of the Second Amendment. Having accepted the responsibility of managing a Delaware LLC, Jarząbek cannot use his ignorance of Delaware law to excuse his conduct over the course of *several months* of litigation leading up to the entry of the adverse interferences.

c. The Adverse Inferences Were Well-Crafted To Rectify Defendant's Discovery Deficiencies

The AI Motion sought adverse inferences based on the categories of documents and specific documents that Plaintiff had sought, but Defendants had not produced. (B0871.) For example, Plaintiff sought, and Defendants agreed to produce,

documents regarding potential transactions with third parties to sell assets indirectly held by third parties, but Defendants did not do so. (B0873.) The adverse inferences appropriately addressed specific potential and completed transactions which were supported by the evidence in the record. (B0872-0877; B1324-1325.)

In another example, when Jarząbek was asked about whether he had produced any documents showing that the required changes to the Polish entities had been submitted to the Polish National Court Register, he stated that he might not have access to the documents. (B0878.) An adverse inference appropriately stated that an action required by the Second Amendment has not occurred when (1) that action is not reflected on the Polish National Court Register and (2) Defendants have not produced any document showing that that action has taken place and was submitted to the Polish National Court register. (B0878; B1325-1326; AO-0297.)

Other adverse inferences were based on email exchanges between Golub and Savva in which Savva referenced communications with Jarząbek that had not been produced. (B0881-0882; B1326-1327.)

Finally, some adverse inferences were based on documents regarding a loan agreement and the planned use of the funds, which contradicted Jarząbek's testimony. Jarząbek had not produced any documents on this topic. (B0883-0884; B1327.)

II. THE RECORD BELOW SUPPORTED THE FINDING THAT DEFENDANTS HAD BREACHED THE LLC AGREEMENT

A. Question Presented

Did the trial court err in finding that Defendants had breached the LLC Agreement and Second Amendment at least 20 times? No. Preserved at B1381-82, B1388-B1391, B1342-B1395, B1400-408, B1410-14, B2336-340, B2344-368.

B. Standard of Review

"When the determination of facts turns on a question of credibility and the acceptance or rejection of 'live' testimony by the trial judge, those factual findings must be given great deference by an appellate court. This Court must accept the factual findings made by the trial judge if those findings are supported by the record and are the product of an orderly and logical deductive process." *New Castle Cnty. v. Disabatino*, 781 A.2d 687, 690 (Del. Ch. 2001).

This Court reviews questions of law *de novo*. *Bradfield v. Unemployment Ins. Appeal Bd.*, 53 A.3d 301, *1 (Del. 2012); *see W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC*, 12 A.3d 1128, 1131 (Del. 2010) ("[T]he grant of a motion for judgment on the pleadings presents a question of law, which we review *de novo,* to determine whether the court committed legal error in formulating or applying legal precepts.") (internal quotations omitted).

Issues related to contract interpretation are reviewed *de novo*. *See Exelon Generation Acqs., LLC v. Deere & Co*., 176 A.3d 1262, 1266-67 (Del. 2017) ("'The proper construction of any contract … is purely a question of law,' so we review questions of contract interpretation *de novo*.") (footnote omitted).

C. Merits of Argument

Defendants make three arguments for why Defendants did not meet their evidentiary burden. First, Defendants allege that "Mr. Glazer's [sic] own testimony was both inconsistent with other Golub evidence and he contradicted himself" and the Court relied on his testimony. (OB at 38.) Second, Defendants argue that because there is no evidence that the Cypriot entities had pre-existing supervisory boards, GGH-RE cannot have breached its obligation to appoint a new supervisory board. (OB at 38-39.) Defendants' third argument is that GGH-RE was not required to appoint a Golub nominee because Golub had not specifically nominated an individual. (OB at 39.) All three arguments fail.

a. Mr. Glazier's Testimony Was Consistent

As a threshold issue, assuming arguendo, that the trial court were to disregard all of Mr. Glazier's testimony, Jarząbek's own admissions and government records support most of the breaches and is sufficient to establish that it is more likely than not that Defendants breached the LLC Agreement and Second Amendment.

Furthermore, Defendants have identified no actual inconsistencies in Mr. Glazier's testimony. The first purported inconsistency is that Mr. Glazier testified that he had reviewed and verified the Complaint before it was filed, and that the allegations were true to the best of his knowledge. (OB at 34-35.) Defendants claim that the Polish National Records contradict the claims in the Complaint, but the record in this case, and Defendants' own exhibit, JX203, show that many of the changes with respect to the Polish entities required by Exhibit A to the Second Amendment were not carried out. (OB at 35; AO-297-303.) The Chancellor, who observed Mr. Glazier's trial testimony, addressed and dismissed this argument in the Bench Ruling. (DT-061 at 61 ("As I found earlier, defendants met some of Exhibit A's obligations. Many of those requirements, however, were not met until after the second removal notice was sent and the complaint was filed. Regardless, the breaches I found today still have not been met, or are still effective to reach the outcome I reached".)").)

The only other purported inconsistency deals with how Defendants did or did not send the documents required by Exhibit A to the Second Amendment. (OB at 35-38.) Yet Mr. Glazier consistently testified in his deposition and at trial that Golub has not received all of the required documents, either via the formal process described in the Second Amendment, or any other informal means, such as email. (OB at 35-38; AO-0474-476; B2058-2063.)

Finally, to the extent that the testimony cited by Defendants in their opening brief constitutes an inconsistency, it is not a material inconsistency and Mr. Glazier's testimony cited by the trial court is corroborated by other evidence. Consequently, Mr. Glazier's testimony should not be disregarded. *Mermelstein v. Lewes Citizens Senior Center, Inc*., 2002 WL 31667520, *4 (Del. Super. Ct. Oct. 29, 2002) ("In litigation, where a witness testifies falsely, the law permits an instruction: false in one thing false in everything. The deceptions, however, must be *material* and the *other evidence may be accepted with corroboration*.") (emphasis added).

b. Whether The Cypriot Entities Had Preexisting Supervisory Boards Is Irrelevant To Whether GGH-RE Breached Its Obligation To Appoint A New Supervisory Board

Defendants argue that they did not breach the Second Amendment by failing to appoint a supervisory board to certain Polish entities because those entities did not already have a supervisory board fails for several reasons.

First, Defendants did not preserve this argument below. The pages cited in Defendants' opening appeal brief (AO-712-718) only discuss the issue of Mr. Glazier's credibility not supervisory boards.

Second, the argument is nonsensical. Defendants' Polish Expert did not explain in his report or testimony any reason why Defendants would not be able to amend the articles of association of the Polish entities to allow for a supervisory

board and then appoint individuals to that supervisory board. Indeed, Defendants did amend the articles of association of some of the Polish entities. (AO-0297.)

c. Golub Did Not Fail To Nominate Golub Designees

Defendants' argument that they did not breach the Second Amendment because Golub did not nominate specific individuals to serve as its designee on the boards of the various subsidiaries also fails.

First, Defendants did not preserve this argument below. The pages cited in the opening brief (AO-712-718) do not discuss the nomination of individual Golub nominees.

Second, this argument is also nonsensical. Defendants had an affirmative duty to carry out the tasks listed in Exhibit A to the Second Amendment. If Defendants were unable to carry out the appointment of a Golub nominee because they did not know who they were supposed to appoint, Defendants could have inquired with Golub, or raised this defense at any point after receiving the Second Removal Notice or the filing of the Complaint. Mr. Glazier testified that a person suggested by Savva would likely have been the nominee. (AO-0442-0443 (140:22-141:3).) In any event, Defendants' conduct shows that Defendants were not interested in the joint control that the Second Amendment was meant to achieve.

III. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT NEITHER POLISH NOR CYPRIOT LAW WAS AN OBSTACLE TO COMPLYING WITH THE SECOND AMENDMENT

A. Questions Presented

Did the trial court err in finding that performance of Defendants' obligations under Exhibit A to the Second Amendment was possible under Polish and Cypriot law as a matter of fact? No. Preserved at B1417; B2372, B2374.

In the alternative, did Defendants meet their burden of establishing that Defendants were excused from performing their obligations under Exhibit A to the Second Amendment under Polish and Cypriot law? No. Preserved at B2370-75.

B. Standard Of Review

Court of Chancery Rule 44.1 treats the determination of foreign law as a question of law. When a party contends that the lower court made incorrect determinations of foreign law, and the lower court's determination of foreign law did not rest of the credibility of foreign law experts, such determinations are treated as rulings on a question of law and are subject to de novo review. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochmical Co., Inc.*, 866 A.2d 1, 30 (Del. 2005). However, where "the trial court's determination of foreign law rests on the credibility of foreign law experts, the trial court's predicate credibility findings will be accorded appropriate deference." *Id.*

C. Merits Of Argument

Defendants have the burden to establish the substance of foreign law. *Germaninvestments AG v. Allomet Corp.*, 225 A.3d 316, 319 (Del. 2020). Defendants claim that because the Company does not have a direct interest in the Polish and Cypriot entities, Polish and Cypriot law "denies [Golub or the Company] any right to impose binding instructions upon a management board member." (OB at 10.) This argument fails.

a. Defendants Fail To Address The Court of Chancery's Reasons For Finding The Foreign Law Defense Inapplicable

The trial court rejected Defendants' foreign law defenses on the basis that "defendants' own partial compliance with the terms of the Second Amendment and Exhibit A belies the defense." (DT-065.) Indeed, Defendants have not offered an explanation for "how some of the requirements in Exhibit A were impossible due to Polish or Cypriot law but others were possible" but instead "they merely claim broad impossibility." (DT-065.) The Court of Chancery found that the foreign law defense failed "as a matter of *fact*." (DT-065 (emphasis added).) Plaintiff's Polish law expert made a similar point in his report. (B1467 (¶ 23).)

Jarząbek has appointed and removed members of the board of managers and amended the articles of association of some of the Polish entities. (B2306-2307 (308:5-309:3).) This includes: GGH Management 3 (B0275, B0285, B0328, B1214), GGH Management 2 (B0300, B0303, B0221, B0231, B1226, B1237), GGH

Investments sp z o.o. (B0242, B0252, B1250, B1259), Golub Gethouse sp. z o.o. (B0265, B1296, B1278), and GGH Management 7 (B0339, B0342, B1291, B1302). This demonstrates that compliance is possible, and further, that Jarząbek's noncompliance when it suits him is a dereliction of his duties towards the Company as well as the Polish entities.

Defendants do not address the issue of why they were able to amend the governing documents and change the makeup of the governing board. Defendants also do not explain why the issue of impossibility under Polish and Cypriot law was only raised in February 2022, more than a year after the Second Amendment was executed and five months after this action was initiated.

Instead, Defendants claim that in other instances where they breached the Second Amendment and LLC Agreement by attempting to sell assets, borrow money, or purchasing property, they were following their legal obligations under Polish and Cypriot law to act in the best interest of those entities. (OB at 31.) This is a new argument not preserved on appeal. And as stated, it does not explain the partial compliance with the Exhibit A obligations.

b. Foreign Law As A Defense

(i) Impossibility Due To Foreign Law Is Not A Defense

At common law, impossibility due to foreign law does not excuse performance. *David v. Veitscher Magnesitwerke Actien Gesellschaft*, 35 A.2d 346, 347 (Pa. 1944); 30 WILLISTON ON CONTRACTS § 77:59 (4th ed. 2022); *but see* 14 CORBIN ON CONTRACTS § 76.10.

Delaware courts have not recognized impossibility under *foreign* law as a defense. In *Martin v. Star Publishing Co*., this Court outlined the five circumstances in which the doctrine of impossibility may apply. 126 A.2d 238, 242 (Del. 1956). Tellingly, this Court in *Martin* specified that *domestic* law was a valid defense but did not include foreign law in the list.

The other four categories listed in *Martin* all involve a supervening event. *Id*.; *see also Mueller v. Marvel*, 2004 WL 7325622, at *3 (Del. Com. Pl. Dec. 8, 2004). Other Delaware cases discussing the doctrine of impracticability/impossibility also require a supervening event. *See, e.g., Bobcat N. Am., LLC v. Inland Waste Holdings, LLC*, 2019 WL 1877400, at *9 (Del. Super. Ct. Apr. 26, 2019); *Mountaire Farms, Inc. v. Williams*, 2005 WL 1177569, at *5 (Del. Super. Ct. Apr. 25, 2005).

(ii) Defendants' Breaches Are Not Excused Because Defendants Assumed The Risk Of Impossibility

Some jurisdictions treat impossibility of performance due to foreign law as impossibility of fact or existing impracticability. *Northrop Corp. v. Triad Intern. Mktg. S.A.*, 811 F.2d 1265, 1270 n.7 (9th Cir. 1987), order amended on other grounds, 842 F.2d 1154 (9th Cir. 1988); RESTATEMENT (SECOND) OF CONTRACTS § 264 (May 2022) ("If the prohibition or prevention already exists at the time of the making of the contract, the rule stated in § 266(1) [Existing Impracticability Or Frustration] rather than that stated in § 261 [Discharged By Supervening Impracticability] controls, and this Section applies for the purpose of that rule as well.").

If the supervening event was foreseeable and defendant assumed the risk of impossibility, then the defense of impracticability does not apply. *Bobcat*, 2019 WL 1877400, at *9-10.

The relevance of Polish and Cypriot law was foreseeable on the face of Exhibit A and Defendants had access to Polish counsel. (AO-0481-0482 (179:3-180:9); B0311-0316.)

Defendants assumed the risk of non-performance. The Second Amendment states that "*[a]ny failure* by GGH[-RE] to timely and fully so act and perform shall be deemed to be a *material breach* by GGH under this Agreement." No language limits GGH-RE's obligation to perform. In the absence of any such language, the

contract unambiguously assigns the risk of non-performance to Defendants. *Bobcat*, 2019 WL 1877400, at 9-10.

Furthermore, to successfully assert a defense of impossibility, the impossibility must be the result of "fortuitous" circumstances. *Martin,* 126 A.2d 238, at 242; *Muller*, 2004 WL 7325622, at *4 (noting that "no action or inaction of Defendant" led to the changed circumstances) which is not the case here.

Accordingly, the foreign law defenses also fail for the reasons above.

c. The Court of Chancery correctly concluded that compliance was permissible under Polish law

Defendants claim that it is illegal for members of the management board of a Polish entity to seek informal directions from stockholders or indirect beneficial owners of the company and that the Exhibit A requirements cannot be implemented since certain intermediate steps were not carried out. (OB at 30.) But as Profs. Siemiątkowski and Wiórek's report explains (B1461, cited as "Siemiątkowski") and Prof. Wiórek's testimony at trial (B2232-2254), Polish law does not prevent the performance of the Exhibit A obligations.

First, Polish law permits the objectives of Exhibit A through certain steps. The LLC Agreement and Second Amendment do not require that instructions be carried out in a particular way. (B2234 (236:22-24).) The Exhibit A obligations or a "corporate strategy" could be carried out with corporate mechanisms such as a shareholders' meeting to amend the articles of association or appoint or remove a

member of the management board. (B1464 ¶¶6-7; B2234 (236:6-12).) A Spółka z ograniczoną odpowiedzialnością (abbreviated "sp. z o.o.") is the equivalent of a limited liability company. Under Polish law, the beneficial owners can manage its affairs by issuing binding instructions to its management board by passing shareholders resolutions and by exercising other powers conferred on them in the company's articles of association. (B1467-1468 (¶26).) The shareholders of an sp. z o.o. could amend the articles of association to require consent from certain parties for certain actions or to create a supervisory board whose consent was required for certain decisions, which Defendants' experts and brief acknowledge. (B2204 (206:12-15); B2241 (243:8-16); OB at 4 n.4.)

Second, Polish law does not prohibit issuing or listening to informal instructions. (B2203 (205:9-13), B2210-2211 (212:19-213:12), B2214-2215 (216:22-217:03), B2246 (248:7-9).) Informal instructions are often used in Poland. (B1465 (¶12).)

The only entity that could seek damages against a member of the board of managers in such a situation would be the company itself, which is rare when a member followed formal instructions from the parent company. (B1465, B1468 (¶12, ¶27).) And, as Profs. Siemiątkowski and Wiórek also note, had Defendants carried out their Second Amendment obligations, any decisions regarding the board of management or sale or encumbrance of the Polish entities, which require a

shareholders' resolution, would have required the joint agreement at the Cypriot entity level of the Golub appointed director. (B1468-1469 (¶30).) And as Defendants' expert admitted, nothing prevents the 100% shareholder of a Polish entity from removing a member of the management board because he did not follow their instructions. (B2203 (205:18-8).)

Defendants imply that carrying out the Exhibit A obligations would be contrary to the best interests of the Polish entities (OB at 30-31), a purely hypothetical concern. The LLC Agreement and Second Amendment do not obligate anyone to carry out harmful instructions. (B2239 (241:3-9); B2241 (243:4-7).) In the event that a contract obligated a member of the board of managers to follow the instructions of third-party beneficial owner, and those instructions were contrary to his duties towards the entity, he could resign. (B2210 (212:5-11); B2250 (252:4-11).)

d. The Court of Chancery correctly concluded that compliance was permissible under Cypriot law

Defendants also argue that under Cypriot law, a management board member of a Cypriot entity owes his fiduciary duties to the entity alone. (OB at 30.) But Defendants fail to explain why compliance with Exhibit A would violate those fiduciary duties or any aspect of Cypriot law.

The Second Amendment does not specify exactly how to implement the changes, allowing steps compatible with Cypriot law to be used. (B2271 (273:5-14).) A Golub representative could be appointed to the board of GGH through a directors' resolution or a shareholders' resolution, although this is not strictly necessary in the context of a closely held special purpose entity. (B1470, B1481; B2261 (263:10-18), B2267-2269 (269:8-10; 270:9-271:8).) Prof. Haviaras admitted that the articles of association can be amended to allow directors to seek consent from beneficial owners before taking certain actions. (B2222-2223 (224:13-225:9).) In the event that a director does not follow the instructions of a beneficial owner, he can have the director removed—which is a power given to Jarząbek under the current engagement letter. (B2267-2268 (269:8-270:4).) Under the current engagement letter, which Defendants' expert never reviewed, Jarząbek has the authority to instruct the Savva representatives to appoint a Golub representative. (B2222 (224:3), B2264 (266:1-5); B148.)

As Prof. Pamboridis explained, the concept of a nominee director, a Cypriot national who follows the instructions of non-Cypriot beneficial owners, is employed in Cyprus. (B2262 (264:2-11).) It is true that such a nominee director cannot use the fact that he acted at the instruction of a beneficial owner as a "get-out-of-jail-free card" if he violates the law. (B2262-2263 (264:12-265:23).) However, a corporate

structure such as the one at issue here often includes Cypriot entities in order to achieve a "greater entrepreneurial scheme." (B2269 (271:4-12).)

IV. THE COURT OF CHANCERY ERRED IN DECLINING TO AWARD ATTORNEYS' FEES

A. Questions Presented

Did the trial court err in declining to award attorneys' fees to Plaintiff pursuant to the indemnification provision in the LLC Agreement or equitable principles? Yes. Preserved at B1420-1421; B1956-1957; B2383.

Did the trial court err in finding that Defendants had not breached their fiduciary duties when Mr. Jarząbek admitted to selling the Company's assets without the consent of Golub, as required under the LLC Agreement and Second Amendment, when he was motivated by a personal need for liquidity. Preserved at- B1421, B1956-57, B2383, B2391-93.

B. Standard Of Review

Issues related to contract interpretation are reviewed *de novo*. *See Exelon Generation*, 176 A.3d at 1266-67. "[T]his Court 'will not disturb a trial judge's decisions regarding sanctions imposed for discovery violations absent an abuse of discretion.'" *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011), *quoting Lehman Capital v. Lofland*, 906 A.2d 122, 131 (Del.2006). "To the extent a decision to impose sanctions is factually based" this Court will "accept the trial court's factual findings so long as they are sufficiently supported by the record, are the product of an orderly and logical reasoning process, and are not clearly erroneous." *Id.*

Questions of policy are reviewed *de novo*. *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 908 (Del. 2021).

C. Merits Of Argument

a. The LLC Agreement Awards Fees In Instances Of First-Party Breaches

The trial court erred in finding (*sua sponte*) that because Section 11.5 of the LLC Agreement did not "explicitly provide" for fee shifting in first-party litigation, Plaintiff was not entitled to fees and costs here. (DT-069.)

As a threshold issue, Defendants waived any arguments on this question. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del.1999). Plaintiff cited to the indemnification provision to support fee shifting in its pretrial briefs (B1420) and in its post-trial brief (B2383), but Defendants never argued that the indemnification did not include first-party claims.

First, International Rail Partners LLC v. American Rail Partners, LLC, 2020 WL 6882105 (Del. Ch. Nov. 24, 2020), *cert. denied*, (Del. Ch. 2020), *and appeal refused,* 245 A.3d 517 (Del. 2021) controls, not *Great Hill*. As explained in *International Rail*, the "line of decisions which established a presumption that a standard indemnification provision in a bilateral commercial contract would not be presumed to provide for fee-shifting." 2020 WL 6882105, at *4 (Del. Ch. Nov. 24, 2020). However, "[u]nlike typical commercial contracts, indemnification and advancement provisions in LLC agreements are derived from clear statutory

authority and apply much more broadly." *Id*. at *7; *see also Great Hill*, 2020 WL 7861336, at *5 (distinguishing *International Rail* and noting that that case involved a "corporate instrument"); *GMF ELCM Fund L.P. v. ELCM HCRE GP LLC*, 2021 WL 4313430, at *6 (Del. Ch. Sept. 22, 2021) ("This Court typically construes contractual indemnification provisions in partnership and LLC agreements broadly in favor of indemnification.") The Court of Chancery in *International Rail* determined the LLC Agreement's indemnification provision included first party claims, even though the provision did not specifically say so. *Int'l Rail*, 2020 WL 6882105, at *7-8.

Second, the language of Section 11.5 does explicitly contemplate fee-shifting in an instance, as here, where a Member breaches a representation or warranty made in the LLC Agreement. In *Great Hill*, two provisions in a merger agreement were at issue. 2020 WL 7861336, at *2-3. Section 10.02(a) of the merger agreement stated that the "each Effective Time Holder" would indemnify the "*Parent and the Surviving Corporation*" for its "*pro rata*" share of loss suffered by a "Parent Indemnified Person" relating to "any breach *by the Company*" of representations and warranties in the merger agreement, or breaches by "such Effective Time Holder of any of the covenants or agreements of such Effective Time Holder" and "any fines, penalties or similar assessments *imposed against the Company* … for violating applicable credit card association policies …." *Id*. at *2 (emphasis added). In other

words, Section 10.02(a) was meant to address how to indemnify the parent against losses it incurred in indemnifying Parent Indemnified Persons and paying fines that the parent incurred (by each Effective Time Holder paying its pro-rata share). The Court of Chancery in *Great Hill* found that that provision did not apply to disputes between parties to the contract, because a different provision controlled fee-shifting between parties. *Id*. at *6.

Unlike the indemnification provision in *Great Hill*, Section 11.5 of the LLC Agreement can only make sense if read to include first-party disputes. Section 11.5 states that "each Member" shall indemnify "the Company *and each of its other Members* … which the Company *or any of such other Members* shall sustain … which relate or arise out of or in connection with a *breach by an indemnifying Member* of any representation, warranty *or covenant made by an indemnifying Member in this Agreement* or in any agreement or instrument delivered pursuant hereto." (AO-0084.) Based on the language of Section 11.5, it addresses who should pay when a Member of the Company harms the Company *or another Member*, when it breaches a covenant in the LLC Agreement or amendments thereto.

Furthermore, this interpretation makes sense given that the contract at issue is an LLC operating agreement. The covenants in the LLC Agreement and Second Amendment, such as the restrictions on the sale of Projects or the requirements of Exhibit A, are for the benefit of the other Members. An interpretation that only

indemnifies third parties would render the provision practically useless. Accordingly, the "clear and unequivocal articulation of [the parties'] intent" is that it applies to third-party claims. *Schneider Nat'l Carriers, Inc. v. Kuntz*, 2022 WL 1222738, at *31 (Del. Super. Ct. Apr. 25, 2022) (finding that an indemnification provision covered first party claims even though it did not "expressly state" that it did) (internal quotation omitted). In *Schneider*, the Superior Court found that an indemnity provision did include first party claims on the basis that there was no separate fee-shifting provision in a share purchase agreement and the indemnity provision covered breaches of covenants that could only be breached by the buyer against the seller. *Id.* at *30-31.

b. Plaintiff Is Entitled To Attorneys' Fees Under The Principles Of Equity

Although Delaware courts ordinarily do not award attorneys' fees to prevailing parties, the courts make an exception "if it is shown that the defendant's conduct forced the plaintiff to file suit to 'secure a clearly defined and established right.'" *McGowan v. Empress Ent.,* 791 A.2d 1, 4 (Del. Ch. 2000). Furthermore, where parties have unnecessarily prolonged or delayed litigation, courts have found bad faith sufficient to justify a fee-shifting award. *Johnston v. Arbitrium (Cayman Islands) Handels AG,* 720 A.2d 542, 546 (Del. 1998); *see also Jernigan Capital Operating Co., v. Storage Partners of Kop, LLC, et al*., 2020 WL 7861334, *3-4 (Del. Ch. Dec. 31, 2020).

The Court of Chancery denied Plaintiff's equitable arguments in favor of fees by stating that the adverse inferences were "sufficient redress for most of the litigation behavior about which Plaintiff complains" and "the question … is whether, after teasing out already-sanctioned behavior, Golub is entitled to fee-shifting based on the nature of Defendants' legal arguments." (AB Ex. 1 at 1.) The Court of Chancery concluded that "Golub has shown no evidence that Defendants' foreign law or Loxeco-related arguments are anything other than zealous advocacy" and so fee-shifting on equitable grounds was not appropriate. (*Id*. at 3-5.)

First, the trial court erred because the adverse inferences were imposed to rectify the prejudice to Plaintiff with respect to its ability to establish its entitlement to relief on the merits. The adverse inferences did not rectify the economic harm to Plaintiff imposed by Defendants' dilatory conduct. In addition to the cost incurred by Plaintiff in making discovery-related submissions, Defendants' evasive, dilatory, and absent style of litigation also caused Plaintiff to incur additional costs to get Defendants to follow their obligations and get this action to trial.

Defendants missed the first two deadlines to respond to the Complaint. (B0444, B0451; B0453; D.I. 21 (Trans. ID 67044187).) Plaintiffs could not finalize a case schedule or trial date because Defendants would not communicate with their first counsel in this action. (B0528; B0563-0565; B0483; B0486; B0525.) Trial was delayed twice so Defendants could retain counsel. (B0659; B0865; B0867; B1313;

AO-0510-0514,-0553.) And trial was delayed a third time because Defendants belatedly raised foreign law defenses seven days and three days before trial. (B0869, B1313, B1350; B1322). Each delay created additional expense in trial preparation.

Over the course of this action, Plaintiff has been forced to bring motions to cause Defendants to comply with their responsibilities as litigants, including the entry of a case schedule (B1424, B1722, B1960) and participating in discovery (B0580). Plaintiff had to file a motion for the Court of Chancery to enter the Status Quo Order. (B0553.) Plaintiff also had to prepare multiple submissions to ensure that Defendants would comply with the Status Quo Order. (B1448, B1486, B1540, B1773.) Defendants belatedly raised new defenses after Plaintiffs had already submitted its pretrial brief, requiring Plaintiff to file a revised pretrial brief (B1356) and a reply pretrial brief (B1891) to address those defenses. These submissions all incurred additional expenses for Golub.

Second, Golub is entitled to attorneys' fees because it was forced to bring this action to enforce a clearly defined right. Golub executed the Second Amendment on January 29, 2021 for the purpose of settling the First Action. (B1379-1386.) But instead of following the Second Amendment, Defendants consistently avoided the joint control scheme through delay and obstruction. After the Complaint was filed, Defendants continued to act unilaterally in violation of the LLC Agreement, Second Amendment, and Status Quo Order by attempting to sell

the Company's Projects—the exact type of behavior that the Second Amendment was meant to unambiguously prevent.

These actions were also a violation of Defendants fiduciary duties. Plaintiffs alleged and demonstrated that Defendants had continued the pattern of selling off assets without Golub's permission due to a personal need for liquidity arising from the Retail Bonds (AO-0627 (162:6-9); B2015, B2020-2021), and Defendants did not refute this evidence. Consequently, the actions of Defendants were also a breach of their fiduciary duties. *See Largo Legacy Group v. Charles*, 2021 WL 2692426, at *13 (Del. Ch. June 30, 2021).

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Chancery's final judgment in all respects except that this Court should remand to the court below for an award of fees and expenses that Plaintiff incurred in this action.

DATED: May 2, 2023

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