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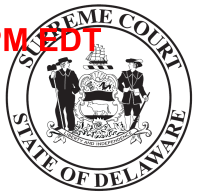

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD BLANCH, VIVIANNA BLANCH, RED BRIDGE & STONE, LLC and CLOVIS HOLDINGS LLC,	) No. 262, 2023
Defendants, Nominal Defendant, Counterclaim and Third-Party Plaintiffs-Below / Appellants,	) APPEAL FROM THE) COURT OF CHANCERY) FOR THE STATE OF) DELAWARE
v.	)
STONE & PAPER INVESTORS, LLC, CLOVIS HOLDINGS, LLC,	) C.A. No. 2018-0394-PAF
Plaintiffs and Counterclaim Defendants-Below / Appellees,	)
and	)
JAD TRADING LLC, DIAMOND CARTER TRADING, LLC, JOHN DIAMOND, KANOKPAN KHUMPOO, ALBERT CARTER, ELIZABETH CARTER, EISENBERG & BLAU CPAS, P.C., RICHARD EISENBERG, and DD & COMPANY, LLP,	)
Counterclaim and Third-Party Defendants-Below / Appellees.	)

APPELLEE STONE & PAPER INVESTORS, LLC'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is a case of blatant self-dealing by the managers of Clovis Holdings, LLC ("Clovis" or the "Company"). Clovis was created to acquire Tier1 International Inc. d/b/a ViaStone ("ViaStone"), the US distributor of stone-based paper products manufactured by Taiwan Lung Meng ("TLM").

Plaintiff/Appellee, Stone & Paper Investors, LLC ("Plaintiff" or "Stone & Paper"), Clovis's sole investor, contributed $3.5 million in reliance on representations from Clovis's managers, Defendants Richard Blanch ("Blanch") and Brian Skinner ("Skinner") (together, the "Managers"), that Plaintiff's investment would be used to acquire and operate ViaStone. Plaintiff received a 25% preferred membership interest in Clovis. The Managers contributed zero capital and received as "sweat equity" equal shares of the remaining 75% common membership units of Clovis, held by their affiliates, Defendant Red Bridge & Stone LLC ("Red Bridge"), and Defendant Skinner Capital LLC ("Skinner Capital"). Red Bridge is solely owned by Blanch's wife, Defendant Vivianna Blanch ("Vivianna" and, collectively with Blanch and Red Bridge, the "Blanch Defendants").[1]

The Court of Chancery found that shortly after Clovis was formed, Blanch instructed Vivianna to open a bank account for Red Bridge based on false pretenses

[1] Blanch, Red Bridge, Vivianna, Skinner, and Skinner Capital are collectively referred to herein as "Defendants."

to receive improper wires from Clovis. Vivianna agreed and misrepresented to the bank, *inter alia*, that she had a "client. . . ready to wire my monthly fee of $20k in" despite knowing that she would not be performing any services for Red Bridge or Clovis. That same day, the Managers wired $20,000 to Red Bridge, the first of numerous improper interested payments they caused Clovis to make.

The Chancery Court further found that by no later than November 29, 2015, unbeknownst to Stone & Paper, the Managers abandoned the ViaStone acquisition and "embarked on draining nearly all of [Clovis's] remaining funds and sought to conceal their activity by trying to recharacterize the payments to them as loans." (Op. at 2, 35.) Ultimately, the Managers wired approximately $2.5 million to their affiliates and personal creditors, leaving Clovis with just $6,500 remaining in its bank account. Meanwhile, Clovis never acquired ViaStone and the Managers began working for AaronStone, a competing brand having no connection to Clovis.

The court concluded that the Managers breached Clovis's operating agreement (the "Agreement") and their fiduciary duties, and fraudulently concealed their self-dealing. The court further concluded that Defendants engaged in a civil conspiracy and that Red Bridge, Vivianna, and Skinner Capital aided and abetted the Managers' fiduciary breaches.

Appellants[2] do not challenge most of the trial court's factual findings underpinning its conclusions. Rather, they principally contend that the court erred in finding that the Managers breached the Agreement, and therefore its "downstream" rulings must also be erroneous. However, as set forth below, the court's rulings as to the remaining claims are based on independent factual findings fully supported by the record evidence. Those factual findings are largely uncontested. The appeal is meritless, and the trial court's rulings should be affirmed.

[2] Appellants herein are Blanch, Red Bridge, Vivianna and Clovis.

SUMMARY OF ARGUMENT

1. Plaintiff denies Appellants' first argument. The Court of Chancery correctly concluded that the Managers breached Section 5.1 of the Agreement, which requires Plaintiff's written approval of any "Major Decisions," including "[e]ngaging in any business other than [the paper business currently conducted by [ViaStone] . . . ." The court did not conclude that "the compensation payments are . . . 'major decisions,'" as Appellants suggest. (Opening Br. 2.) Rather, the court found that the Managers breached Section 5.1 by "using the Company and its resources to '[e]ngag[e] in [a] business other than the Viastone Business' – namely, the AaronStone business," without obtaining Plaintiff's written approval. (Op. 52-53). Defendants fail to demonstrate such factual findings are clearly erroneous.

2. Plaintiff denies Appellants' second argument. By not raising the issue below, Defendants waived their right to argue that the payments were not "Interested Transactions" within the meaning of Section 5.2 of the Agreement. Further, the Chancery Court found that the Managers characterized the improper payments as "Management Fees" and then sought to recharacterize them as "loans" evidenced by promissory notes that the court found to be "sham documents." The court further found that, because Section 5.2 specifically provides that the Managers were entitled to management fees only if ViaStone was acquired, and Clovis never acquired ViaStone, there was no right to management fees and the payments were "Interested

Transactions" under Section 5.2. Moreover, Section 5.2 expressly provides that "loans" are "Interested Transactions." The trial court's unchallenged factual findings demonstrate that the salient exception to "Interested Transactions," namely for "the rendering of any service" "other than in the capacity of an employee or officer of the Company," is inapplicable. The payments also were not for "services rendered" by Clovis's "officers" or "employees." The Agreement makes clear that "officers" are separate and distinct from "Managers." There is no evidence that the Managers held any positions as "officers" of the Company, nor is there any evidence that the recipients of Clovis's funds were "employees" or "officers" of the Company, or had rendered any services to Clovis.

3. Plaintiff denies Appellants' third argument. The trial court, upon due consideration of voluminous exhibits, four days of trial testimony, and credibility determinations, properly found that the Blanch Defendants failed to carry their burden to prove acquiescence.

4. Plaintiff denies Appellants' fourth argument, which is based on their first and second arguments, for the reasons described above. Notably, Appellants do not challenge the trial court's factual findings that the Managers abandoned ViaStone, looted Clovis, fraudulently concealed their wrongdoing, and engaged in a civil conspiracy with Vivianna, Red Bridge, and Skinner Capital to misappropriate Clovis's funds.

5. Plaintiff denies Appellants' fifth argument. Appellants' contention that the trial court incorrectly determined that Plaintiffs' claims were direct mischaracterizes the court's rulings and ignores the court's conclusion that Plaintiff's claim for breach of Section 5.2 seeks to enforce a "personal right belonging to the members," rendering *Tooley* inapplicable. Appellants do not challenge – and have therefore waived – any argument that this conclusion was erroneous. Appellants also ignore (and waived any challenge to) the Chancery Court's discretionary decision to award damages directly to Plaintiff on the derivative claims based on its findings that Defendants, as wrongdoers in control of Clovis, should be prohibited from sharing in any derivative recovery.

6. Plaintiff denies Appellants' sixth argument. Appellants contend that joint and several liability is unavailable because the court purportedly did not award damages for breach of fiduciary duty. This argument was also not raised below and is therefore waived. Furthermore, the argument ignores the trial court's finding that "all of the Defendants formed part of the conspiracy to misappropriate Clovis's funds because Blanch, Vivianna Blanch, and Skinner acted in concert to misappropriate funds from Clovis." (Op. 88.) It is black-letter law that co-conspirators are jointly and severally liable.

7. Plaintiff denies Appellants' seventh argument. Appellants do not challenge the trial court's findings that they engaged in bad faith conduct,

obfuscation, and deceit, nor do they contend that the court abused its discretion in awarding fees to Plaintiff based on such conduct. Defendants merely challenge the trial court's fee award based on their first and second arguments, which are misplaced as explained above.

COUNTERSTATEMENT OF FACTS

A. The Parties' Relations Before Clovis

Plaintiff's principals, John Diamond ("Diamond") and Albert Carter, were business partners who founded Diamond Carter Trading, LLC ("DCT"). Skinner joined DCT in 2001. (Op. 6.) Diamond described Skinner as a "son" and harbored a great deal of trust in him. (Op. 6–7.)

Blanch and Skinner met in 2003. (Op. 7.) Blanch is a self-described "entrepreneur" who was the CEO of Metier Tribeca LLC ("Metier"), a retail beauty company. (*Id.*) Diamond and Carter met Blanch around 2007, and Skinner reintroduced them in or around 2011 or 2012. (*Id.*)

On July 3, 2013, Metier investors sued Blanch in federal court (the "Metier Action"), alleging that Blanch misappropriated Metier's assets and committed fraud. (Op. 8 (citing B000372).)

B. Blanch and Skinner Encourage Diamond and Carter to Invest in ViaStone

On May 16, 2013, Blanch sent an email to Skinner advising how to leverage his relationship with DCT: Skinner should "ask for $5MM of capital to be set aside in an account, that you can control. . . . If you execute this plan, you could…make yourself $330,000 annually and give yourself piece of mind for at least 3 years." (Op. 8-9 (citing B000370).)

Days later, Skinner approached Diamond about investing in ViaStone, advising that "ViaStone . . . is something we really need to look at." (Op. 9 (citing A000157; A000528–529 (222:19–223:14).) ViaStone is the U.S. distributor of stone paper products manufactured by TLM, a China-based manufacturer. (*Id.* (citing A000276 ¶ 8).) Skinner sought to encourage Carter and Diamond to invest in ViaStone's Series A financing round through Henry Kang, an investment banker at the Ajia Group ("Ajia"). (Op. 9-10.) On September 11, 2013, Carter requested that Ajia "work closely with [] Skinner so that we may become included in the Viastone venture." (Op. 10 (citing B000394).)

Later the same day, Skinner and Blanch changed course. Blanch emailed Skinner regarding "how to play this thing out" and schemed to cut Ajia out and purchase ViaStone through a new entity, using funding from Diamond, Carter and Drew Aaron, a friend of Blanch whose family owns a large paper broker. (Op. 11 (citing B000396).) Blanch and Skinner persuaded ViaStone's founder, Chow, to end his negotiations with Ajia, which had already made a deposit payment of $250,000 to acquire ViaStone. (Op 10, 11 & n.51.) "Shortly thereafter, Diamond committed to invest in acquiring ViaStone." (Op. 12.)

C. The Parties Form Clovis to Purchase ViaStone

In early 2014, Diamond, Carter, Skinner and Blanch began negotiating the terms of Clovis's operating agreement. Diamond sent Skinner an email requesting

"[c]lear language limiting the use of the capital provided by [Plaintiff] solely to investment in the 'Viastone Business' (the acquiring of the equity or assets of Tier1 International)." (Op. 15 (citing A000192).) Skinner and Blanch agreed. (B000401 at 402). Robert Okulski, Skinner and Blanch's lawyer, cautioned that Diamond's proposed language might be "too restrictive" because "a large portion of the capital is also going to be used to fund the operations of the Viastone business post-closing" and that "the funds are also to be used to cover the formation and ongoing operations of Clovis." (Op. 15 (citing B000401).) Blanch advised: "not sure their intent it [sic] to be limiting, however *they want to ensure the money is used for what we have stated – notably to purchase and run Tier1/ViaStone*," and proposed "a small carve out regarding Clovis expenses" and that the "money is for purchase and ongoing working capital for [ViaStone]." (Op. 15–16 (citing B000401; A000276–277 ¶ 10) (emphasis added).)

On April 4, 2014, the parties executed the Agreement. (Op. 16.) Consistent with Skinner and Blanch's representations that funds would be used "to purchase and run Tier1/ViaStone," Section 5.1 of the Agreement requires Plaintiff's written approval before "[e]ngaging in any business other than the Viastone Business, including, but not limited to, the funding and purchase and operations thereof through a subsidiary." (Op. 17; A000174 § 5.1(c).) "Viastone Business" is defined as "the paper business currently conducted by [Viastone], a California corporation

that the Company is seeking to acquire…." (A000168 § 1.1(kk).) Section 5.2 of the Agreement expressly addresses the Manager's compensation: "*in the event that the Company acquires the ViaStone business through a stock or asset purchase*, the current Managers … will be actively involved in the management thereof and will receive a fee or like compensation therefor." (A000174 § 5.2 (emphasis added).) The Agreement provides no right to compensation should Clovis not acquire ViaStone.

D. Defendants Conspire to Divert Assets from Clovis

Plaintiff capitalized Clovis with $3.5 million on April 8, 2014, in reliance on Skinner and Blanch's representations that the funds would be used to purchase and operate ViaStone. (Op. 15–16, 18; B000401.) Days later, by email dated April 16, 2014, Blanch instructed Vivianna to open a bank account for Red Bridge on false pretenses:

> Red Bridge & Stone LLC is a consulting business: Marketing Consulting. You have one client which will be Stone Paper Holdings LLC, a manufacturer of Paper in Asia and a DE based LLC. You will be assisting in the building of a new brand for the business. You will receive $20,000/month in consulting fees per a contract with Stone Paper Holdings LLC. You need a business bank account for Red Bridge & Stone that allows for bank wires.

(Op. at 20 (citing B000507).) "Blanch's instructions to his wife were founded on pure fabrication" because "[t]here was no contract between Red Bridge or Vivianna and 'Stone Paper Holdings LLC' pursuant to which Red Bridge would receive

$20,000 in consulting fees." (Op at 20–21 (citing A001102–1103 (796:21–797:1); A001201 (895:3–9).) Vivianna then falsely represented to the bank "that she had a 'client . . . ready to wire my monthly fee of $20k in" and that Red Bridge was "in the business of 'management consulting (including HR and Marketing)" when in fact, "Vivianna knew she would not be performing any services for Red Bridge." (Op. at 22 (citing B000521, B000509, A001201–1202 (895:22–896:17).)

Blanch continued making a false paper trail, writing to his accountant that "Viv has created a consulting company (Red Bridge & Stone, LLC) that will be working with an Asian paper manufacturer to market paper built from stone . . . in the US market place." (Op. 21 (citing B000508).) Blanch falsely wrote that Vivianna "will be receiving $20,000/month in payments per a contract to assist in marketing." (Op. 21–22 (citing B000508).)

E. Clovis Never Acquires ViaStone, and Skinner and Blanch Drain Clovis's Funds

Clovis never acquired ViaStone. (Op. 35; A000276 ¶ 9.) Meanwhile, "Blanch repeatedly lied about who he was, who he represented, and his ability to distribute stone paper." (Op. 26–29.)[3]

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[3] For instance, Blanch represented to a friend that he started "a private equity fund" and "bought a[n] environmentally friendly paper company" and that "the Chinese government just built us a $250MM plant in China that produces 360MM tons annually." (Op. 13–14 (quoting B000399).) The Court of Chancery described Blanch's representations as "pure fiction." (*Id.*)

Instead of using the funds invested by Plaintiff to acquire and operate ViaStone, between April 18, 2014, through October 5, 2016, the Managers wired $797,000 to Red Bridge and $1,482,500 to Skinner Capital, despite neither entity ever providing any services to Clovis. (Op. 23; A000278 ¶ 12.) The Managers also had Clovis wire $75,000 to Spangler Scientific, LLC ("Spangler"), a medical device company, for a personal investment by the Blanches, and $115,000 to the Roth Law Firm to pay Blanch's personal legal bills. (Op. 35 (citing A000952–954 (646:21–648:15).) Another $11,510 was paid to Blanch's personal credit card.[4] Blanch and Vivianna used Red Bridge's ill-gotten gains to pay their American Express credit card balance, day care, babysitters and private school. (Op. 23 (citing A001238–1242 (932:17–936:3); B000525; B000524).)

The Court of Chancery found that by November 29, 2015, at the latest, the Managers had determined that the ViaStone acquisition was no longer possible. (Op. 32 (citing A001122 (816:4–8).) "At that point, Skinner and Blanch turned their attention to draining Clovis's bank account." (Op. 35.) On December 1, 2015, Skinner wired Red Bridge and Skinner Capital $240,000 each. (Op. 35–36 (citing A000278 ¶ 12).) Initially booked as "loans," the Managers testified that Richard

[4] Additionally, the Managers improperly caused Clovis to pay $510,124.35 towards DCT's American Express card, which was largely used for Skinner's personal expenses. (Op. 76-77; A000281 ¶ 16.)

Eisenberg, Clovis's accountant, instructed Skinner to treat these payments as a lump sum loan. (Op. 36 (citing A000724 (418:3–13); A000941–943 (635:21–637:15).) The court found more credible Eisenberg's testimony that he "received specific instructions" from the Managers "to treat those disbursements of $240,000 as loans." (Op. 36 (citing A001371 (1065:14–21).)

Despite contending that the $480,000 was an "advance" on their 2016 management fees, the Managers continued to wire large sums to their affiliates throughout 2016. (Op. at 37–38.) In a span of less than three months, between July 13 and October 5, 2016, they caused Clovis to wire $780,000 to Skinner Capital and $170,000 to Red Bridge, sums they characterized as loans. (Op. 38 (citing A000278 ¶ 12).)

During this time, the Managers began holding themselves out as officers of "AaronStone," a brand owned by Aaron Paper with no privity to Clovis, and sought to market TLM's product as "AaronStone Paper" in Turkey. (Op. 32; B000798; A001033–1034 (727:1–728:3); A001024–1025 (718:12–719:7); A000702–703 (396:23–397:4); A001058 (752:13-19).)

F. The Managers Alternatively Treat Funds Misappropriated from Clovis as Loans Or "Guaranteed Payments"

In October 2016, after they had wired at least $2,481,000 from Clovis to their affiliates and personal creditors, Skinner and Blanch instructed Clovis's accountant to treat "[a]ll cash to Red Bridge . . . in 2015 and 2016 . . . [as] a loan." (Op. at 36

(citing B000667).) The accountant, having previously been instructed to categorize the payments as "guaranteed payments" on Red Bridge's Schedule K-1, questioned this instruction: "Are you sure about this? There were payments during the year that were called guaranteed payments, and then a payment in December of $240K apiece that was called a loan. Were all payments made during the year meant to be loans?" (Op. at 36–37 (citing B000667).) Skinner responded: "Red Bridge should all be loans[,] for Skinner Capital you can leave as is. Unless you think they need to be the same." (*Id.* at 37 (citing B000667).)

Months later, Skinner again directed Eisenberg to treat the $1,020,000 disbursed in 2016 to Red Bridge and Skinner Capital as loans. (Op. at 38 (citing B000784).) In response, Eisenberg requested "loan documents evidencing the loans and the repayment terms," and documentation of the "pre-2016 loans." (Op. at 38 (citing B000784).). Skinner then provided Eisenberg with unsigned, unsecured promissory notes payable to "Clovis LLC [*sic*]" with no payments due until 2030 (the "Promissory Notes"). (Op. 38–39 (citing B000670, B000554, B000675).) The Court of Chancery found the Promissory Notes to be "sham documents" (Op. 64), a factual finding not contested by Appellants.

After Blanch and Skinner failed to provide proper loan documentation, Eisenberg terminated Clovis as a client. (Op. 39 (citing B000785).) In January 2018, Skinner instructed Clovis' new accountants, Citrin Cooperman, to forgive

$310,000 in "loans" to Skinner Capital by reclassifying same as "guaranteed payments" and to "[d]isregard the note for Skinner Capital...the note is wrong as some of it is income not a note." (Op. 39 (citing B000787.) Weeks later, Skinner attempted to forgive an additional $295,000 in purported loans made to Skinner Capital, at which point the accountants alerted Diamond, who objected. (Op. 40 (citing B000795).) Blanch was displeased with the accountant for having included Diamond on the exchange. (Op. 40 n.196 (citing B000793).)

On May 31, 2018, Plaintiff commenced this action.

G. The Trial Court Concludes that the Managers Fraudulently Concealed their Self-Dealing, Breached the LLC Agreement and their Fiduciary Duties, and that Vivianna, Skinner Capital and Red Bridge are Liable for Aiding and Abetting and Conspiracy

Following a four-day trial involving 689 trial exhibits and testimony from six live witnesses, the Court of Chancery issued its Opinion. The court found that Blanch and Skinner breached the Agreement and their fiduciary duties, and engaged in fraudulent concealment. (Op. 3.) The court further found Vivianna, Skinner Capital and Red Bridge jointly and severally liable with the Managers for aiding and abetting their fraudulent activities and fiduciary breaches, and that the Defendants engaged in a civil conspiracy to misappropriate Clovis's assets. (*Id.* 88.) The court calculated damages based on the amount of the improper payments to Defendants. (*Id.* 86-87, 103-105.)

Following supplemental briefing, on December 27, 2021, the court ruled that damages on Plaintiff's successful derivative claims should be payable directly to Plaintiff:

> The Court already found that "[a]fter definitively deciding not to acquire ViaStone, Blanch and Skinner turned to looting Clovis," and in turn, breached their fiduciary duties to the company while perpetuating a fraud on the plaintiff. …. Skinner and Blanch misappropriated Clovis's assets. And any award damages [*sic*] to Clovis would immediately revert to Blanch and Skinner's control as they are the company's sole managers. Furthermore, because plaintiff is Clovis's only other member, the Court can narrowly tailor a remedy that would only benefit that member -- *i.e.*, a direct payment to the plaintiff.

(B000322 at 337 (16:6–21).) Appellants do not challenge this ruling.

H. The Court of Chancery Awards Plaintiff Reimbursement of its Fees and Expenses Based on the Blanch Defendants' Egregious Litigation Misconduct

On April 6, 2023, the Court of Chancery issued a Letter Opinion awarding Plaintiff all its fees and expenses to be paid by the Blanch Defendants under the "bad faith" exception to the American Rule. The Court of Chancery found, *inter alia*, that the Blanch Defendants "repeatedly flouted the court's deadlines without explanation or requests for extensions and improperly withheld documents." (B000347 at 361.) The Chancery Court further found that the Blanch Defendants filed third-party claims falsely alleging that Plaintiffs' principals and their spouses misappropriated $2 million from Clovis, despite later admitting that Defendants received over $2.4 million of Clovis's $3.5 million in capital. (B000347 at 361.)

The Chancery Court further found that the Blanch Defendants changed positions regarding treatment of the interested payments at issue. For instance, "before trial, the Blanch Defendants asserted that Clovis made payments in the form of a salary or management fees to Red Bridge, while arguing in their post-trial briefing that those payments were actually loans." (B000347 at 362 (citing B000818 at 831; B000038 at 52–53, 69).) The court found that "the Blanch Defendants also reversed their positions on whether loans made by the Company to Red Bridge had been repaid, as well as who managed and owned Red Bridge." (B000038 at 57–58 (citing B000800 at 805; A001074 (768:3–6); B000808 at 811; A001091–1092 (785:8–786:1); B000001 at 11; A001221 (915:8–11); A001088 (782:16–21); B000818 at 835).)

Appellants do not dispute the trial court's factual findings concerning their "bad-faith conduct in this case," or the Court of Chancery's conclusion that such conduct "exemplifies an egregious pattern of obfuscation, deceit, and misconduct that requires judicial action." (B000347 at 365–366.)

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE MANAGERS BREACHED SECTION 5.1 OF THE OPERATING AGREEMENT

A. Question Presented

Whether the court correctly concluded that the Managers violated Section 5.1 of the Agreement, which requires Plaintiff's written approval before Clovis could engage in any business other than the "the paper business currently conducted by [ViaStone]," when Defendants do not dispute that "[a]fter definitively deciding not to acquire ViaStone, Blanch and Skinner turned to looting Clovis" (Op. 88) and worked for "AaronStone," a stone paper brand owned exclusively by Aaron Paper, without Plaintiff's written approval.[5]

B. Scope of Review

This Court reviews issues of contract interpretation *de novo*. *Exelon Generation Acquisitions, LLC v. Deere & Co*., 176 A.3d 1262, 1266–67 (Del. 2017). The Court of Chancery's factual findings "will not be set aside by a reviewing court unless those factual determinations are clearly erroneous." *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000). Moreover, "[w]hen factual findings are based on determinations regarding the credibility of witnesses…, the deference already required by the clearly erroneous standard of appellate review is

[5] Preserved, *inter alia*, at B000839 at 879-880; B000090 at 121-122.

enhanced." *Id.* (citation omitted). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *The Bank of New York Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

C. Merits of Argument

The trial court correctly concluded that the Managers breached Section 5.1 of the Agreement, which provides that "no action shall be taken with respect to ['Major Decisions'], unless such Major Decision has been approved in writing by the Board and the Preferred Members." (Op. at 50 (citing A000173, § 5.1.) One of the "Major Decisions" is defined to be "[e]ngaging in any business other than the Viastone Business, including, but not limited to, the funding of the purchase and operations thereof through a subsidiary." (Op. at 50; A000174, § 5.1(c).) "Viastone Business" is defined as "the paper business currently conducted by Tier1 International, Inc., a California corporation that the Company is seeking to acquire through a subsidiary either pursuant to a stock or asset purchase." (Op. at 52 (citing A000168, § 1.1(kk)).) ViaStone distributes TLM's stone paper products in the United States. (Op. 2, 9 (citing A000276 ¶ 8).)

By November 2015, at the latest, Blanch had concluded that the ViaStone acquisition "wasn't going to happen."[6] (Op. at 32 (citing A001122 (816:4-8).) "Rather than pursue selling stone paper by acquiring and operating ViaStone, which was to be the focus of Clovis, Blanch attempted to cut out Chow and ViaStone and establish a direct relationship with TLM." (Op. at 32 (citing B000548); *see also* B000549.) TLM rejected Blanch's overtures, citing its "strong relationship" with ViaStone. (Op. at 32 (citing B000550 at 552).) The court found that the Managers were seeking to market TLM's product as "AaronStone Paper," noting that Clovis and ViaStone had "agreed not to work together at this time." (Op. at 53 (citing B000549).) The court correctly conclude that this email "constituted a breach of Section 5.1" because "[a]t that point, Blanch and Skinner were using the Company and its resources to '[e]ngag[e] in [a] business other than the ViaStone Business'– namely, the AaronStone business," a finding wholly consistent with the aforesaid emails where the parties agreed that Clovis's resources would be used toward the purchase and operation of Viastone. (Op. at 52-53.) The court found that "[t]he AaronStone business was not the "ViaStone Business" and that the Managers

[6] By November 2015, Clovis still had over $2,000,000 in its checking account. (B000404 at 442.)

breached Section 5.1 by not obtaining Plaintiff's written preapproval to engage in business other than the ViaStone Business.[7] (Op. at 53.)

Defendants' assertion that the court improperly "tied Blanch and Skinner's right to compensation to purchasing ViaStone" (Opening Br. 28) mischaracterizes Plaintiff's position and the court's rulings under Section 5.1. Section 5.1 does not address the Managers' compensation, and the trial court did not make any rulings regarding any "right to compensation" under Section 5.1. Rather, the court held that after the Managers abandoned ViaStone, their *activities* in furtherance of the *AaronStone business*, absent approval, violated Section 5.1. (Op. 53.)

Defendants reference Section 4.1(c), which merely vests the Managers with authority to manage Clovis's "day to day operations," and erroneously contend that "[t]here is no dispute this authority included paying officers and employees, and for Blanch and Skinner to receive compensation for their services." (Opening Br. at 25.) Plaintiff disputes that the Managers had any right to compensation under the Agreement without acquiring ViaStone. Moreover, Defendants never argued previously that they were entitled to compensation under Section 4.1(c), and have therefore waived such argument.

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[7] As noted above, Blanch and Skinner held themselves out as officers of AaronStone, a brand owned exclusively by the Aaron Group.

Appellants fail to demonstrate that the trial court clearly erred in concluding that the Managers breached Section 5.1.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE MANAGERS BREACHED SECTION 5.2 OF THE OPERATING AGREEMENT

A. Questions Presented

1. Did Appellants waive their argument that the self-interested payments at issue were not covered under the definition of "Interested Transaction" under the Agreement?[8]

2. Did the trial court correctly conclude that the Managers breached section 5.2 of the Agreement by causing Clovis to wire "management fees" and/or "loans" to Red Bridge without first fully disclosing same to Plaintiff or determining that such transactions were fair and reasonable to Clovis?[9]

B. Scope of Review

This Court reviews issues of contract interpretation *de novo*. *Exelon*, 176 A.3d at 1266–67. Factual findings will be upheld unless they are "clearly erroneous." *Cede*, 758 A.2d at 491. "When factual findings are based on determinations regarding the credibility of witnesses, however, the deference already required by the clearly erroneous standard of appellate review is enhanced." *Id.* (citation omitted). "Where there are two permissible views of the evidence, the factfinder's

[8] By the nature of this issue, it could not have been raised below.

[9] Preserved, *inter alia*, at B000090 at 114; B000839 at 878.

choice between them cannot be clearly erroneous." *The Bank of New York Mellon Trust*, 29 A.3d at 236.

C. Merits of Argument

1. The Blanch Defendants Failed to Raise at Trial and Thus Waived Any Argument That the Payments to Red Bridge Were Not "Interested Transactions"

For the first time on appeal, the Blanch Defendants contend that the wires that the Managers caused Clovis to send to Red Bridge were not "Interested Transactions" within the meaning of Section 5.2 of the Operating Agreement but rather "officer" compensation.

The trial court correctly concluded that the subject "guaranteed payments" or "loans" between Clovis, on the one hand, and Clovis's Managers and/or controlling Members, on the other, were "Interested Transactions" under Section 5.2:

> An "***Interested Transaction***" means any transaction between a Member, a Manager or a member of the Board, or any Affiliate thereof, on the one hand, and the Company, on the other hand, including, without limitation, (a) any transaction evidencing a loan to (or the forgiveness of a loan to) any such Person, or (b) the purchase, sale, lease or exchange of any property or the rendering of any service (other than in the capacity of an employee or officer of the Company or any Affiliate of the Company) by any such Person to the Company or an Affiliate of the Company.

(A000174.)

Relying on the carveout under subsection (b), Appellants contend that "paying an officer for rendering services to the Company is not an interested transaction." (Appellants' Opening Br. 5.) This argument was never raised below and is waived.

"Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Sup. Ct. R. 8. Thus, an "argument . . . not fairly presented to the Court of Chancery . . . will not be considered for the first time on appeal." *Shawe v. Elting*, 157 A.3d 152, 162 n.30 (Del. 2017) (citation omitted). The "interests of justice" exception under Rule 8, which Appellants fail to invoke, "is extremely limited and invokes the plain error standard of review." *Russell v. State*, 5 A.3d 622 (Del. 2010).

Defendants never previously disputed that the subject payments are within Section 5.2's definition of "Interested Transaction". To the contrary, they expressly argued in post-trial briefing that the payments were governed by Section 5.2:

> Pursuant to Section 5.2 of the Operating Agreement, "any transaction evidencing a loan to (or forgiveness of a loan to) any such Person" had to be first fully disclosed to the Board and the Members. JX036, page 12. John Diamond consented to the loan arrangement, which is memorialized by his November 20, 2016 written response. JX317.

(B000038 at 68 (citing A000158; A000266); *see also* B000038 at 42 (citing A000266).).

Similarly, during Post-Trial Oral Argument, the Blanch Defendants contended that the payments were "loans," but not that they fell outside Section 5.2. (*See* B000157 at 266 (110:21–24) ("the company is making loan payments to the managers so that the money -- the loan that was transmitted to the managers represents $20,000 per month for work in Clovis Holdings.").) Simply put, the Blanch Defendants consistently acknowledged below that the subject payments were "Interested Transactions" within the meaning of Section 5.2.

Appellants contend that this issue was preserved "at A000272-273, 290 & Defendants' Pre-Trial Brief at 21 (Nov. 30, 2020)." (Opening Br. at 31 n.6.) The only reference to Section 5.2 in any of those documents concerns "Whether *Plaintiff* violated Section 5.2 of the Operating Agreement . . . by entering into Interested Transactions," relating to Clovis's counterclaims against Plaintiff, which are not the subject of this appeal. (A000290.)

Having misrepresented that this argument was preserved below, Appellants do not argue that the interests of justice exception to Rule 8 may be applicable. *See* Sup. Ct. R. 14(b)(vi)(A)(1) ("Where a party did not preserve the question in the trial court, counsel shall state why the interests of justice exception to Rule 8 may be applicable."). Appellants had a full and fair opportunity to argue that the payments were not "Interested Transactions," yet chose not to do so. For instance, Plaintiff argued in post-trial briefing that the subject payments were "Interested Transactions"

under Section 5.2. (B000090 at 115.) As noted above, in their Post-Trial Answering Brief, the Blanch Defendants acknowledged that the payments constituted "Interested Transactions." (*See* B000038.)

Appellants waived their right to now argue that these previously acknowledged "Interested Transactions" are not governed by Section 5.2. *See Chester Cnty. Employees' Ret. Fund v. New Residential Inv. Corp.*, 186 A.3d 798 (Del. 2018) (declining to "indulge … arguments for the first time on appeal"); *Shawe*, 157 A.3d at 162 (holding that "argument was not fairly presented to the Court of Chancery, and will not be considered for the first time on appeal."); *see also Leighton v. Beatrice Companies, Inc.*, 533 A.2d 1254 (Del. 1987) ("The fact that these issues were not properly presented to the trial court is, alone, sufficient reason to dismiss Leighton's appeal.").

2. The Trial Court Correctly Concluded that the Payments Were Improper "Interested Transactions" Within the Meaning of Section 5.2

Even had Appellants not waived this argument, it still fails because the trial court's finding that the payments were Interested Transactions is thoroughly supported by the record. The carveout relied upon by Appellants, which by its terms applies to "the rendering of any service (other than in the capacity of an employee or officer of the Company or any Affiliate of the Company)" is inapplicable.

a. The Court of Chancery Correctly Found That the Purported “Management Fees” and “Loans” Are “Interested Transactions” Under Section 5.2

As discussed in Point II.C.1, *supra*, there was never any dispute below that the “management fees” or “loans” paid to Red Bridge were “Interested Transactions” within the meaning of Section 5.2. In any event, that conclusion is fully supported by the court’s factual findings that the Managers initially characterized payments to their affiliates as “management fees” and then sought to recharacterize such payments as “loans.” (Op. 58-59.)

As to “management fees,” the Chancery Court found that that Section 5.2 specifically addresses compensation to the Managers, providing that “in the event that the Company acquires the Viastone business . . . , the current managers, directly or through their respective Member entities, will be actively involved in the management thereof and will receive a fee or like compensation therefor.” (Op. at 56.) The trial court found that “[b]ecause Clovis did not acquire ViaStone, Blanch and Skinner would have been entitled to the Management Fees only if they had satisfied the approval requirements of Section 5.2.” (*Id.*)

The Court of Chancery further found that to the extent that Defendants characterized payments as “salary,” such characterization “is not justified by reference to any contract between Clovis and Skinner Capital or Red Bridge” (Op. at 55), a factual finding that Defendants do not refute. The fact that the Managers,

through Red Bridge and Skinner Capital, received a 75% ownership stake in Clovis without contributing their own capital, reflects the parties' intention to give the Managers "sweat equity" as part of the deal. (A000348 (42:5–21); A000674–675 (368:19–369:19).)

The trial court also found that the Managers sought to treat the bulk of the payments as "loans," another factual finding that Appellants do not contest. "Interested Transaction" expressly includes any "loan to (or the forgiveness of a loan to)" Clovis's Managers or Members. (A000174; Op. at 63-64.)[10]

Defendants further argue, without any supporting authority, that "[w]hat the trial court should have done is to treat those payments as additional management fees for the upcoming year. . . ." (Opening Br. 33.) However, salary advancements are essentially loans, which again are clearly "Interested Transactions" under Section 5.2.

The Blanch Defendants' elaborate scheme to create a false paper trail surrounding the payments to Red Bridge makes clear that the payments at issue were not legitimate salary to "officers" of the Company, as Appellants argue, but rather improper payments in violation of Section 5.2. For instance, the court found that

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[10] Appellants' contention that the Court of Chancery should have determined that the improper loans were salary advancements is internally inconsistent, as salary advancements are also loans and would require loan documentation.

before Clovis began wiring funds to Red Bridge, "Blanch, with Vivianna's assistance, attempted to create a misleading paper trail regarding Red Bridge and the source of its funds, and attempted to shelter payments from Clovis to Red Bridge through Vivianna Blanch." (Op. at 75 (citing B000504; B000508; B000521; A001187 (881:5–18)).) The Court of Chancery found that "Blanch's actions are consistent with a motive to shelter unauthorized payments from Clovis from any scrutiny . . . ." (Op. 75–76 n.314.)

Having correctly found that the payments were "Interested Transactions" under Section 5.2, the trial court next correctly found that, other than $400,000 in payments to Skinner Capital which had been disclosed to the Plaintiff, the interested transactions violated Section 5.2 because they were neither "first fully disclosed" to Plaintiff, nor "at least as favorable to the Company as . . . similar transactions between parties operating at arm's length." (Op. at 57–58, 62 n. 281.)

b. The Carve-Out in Section 5.2(b) Is Inapplicable as Plaintiff Does Not Complain About "Rendering of Services" and the Payments were Not Made to "Officers" or "Employees" of the Company

The exception to Interested Transactions relied on by Defendants is inapplicable. It expressly concerns "the rendering of any service" "in the capacity of an employee or officer of the Company." (A000174, § 5.2(b).) Plaintiff did not claim that the Managers improperly "render[ed] services" to the Company. Rather,

Plaintiff claimed that the Managers improperly caused Clovis to wire funds (or make loans) to their affiliates.

Further, none of the payments were sent to "officers" or "employees" of the Company; the payments were sent to the Managers' affiliates and creditors, none of which served as Clovis officers or employees. Prior to this appeal, Defendants never contended that the payments were made to Blanch in his capacity as an "officer" or "employee." Rather, "Defendants generally characterize these payments as either management fees or loans." (Op. 55.) There is no evidence that Blanch was an "officer" of Clovis and notably, he fails to inform this Court of his officer title. The Agreement does not identify Blanch as an officer of Clovis. Rather, it expressly distinguishes between "Managers" and "officers." It identifies "Richard Blanch and Brian Skinner" as Clovis's "Managers" and provides that Clovis "shall have a board of Managers (the "***Board***"), which shall initially consist of [Richard Blanch and Brian Skinner]." (A000166, § 1.1(v); A000171, § 4.1(a).) The Agreement differentiates between the "Board" and "Managers" on the one hand, and "officers" on the other. (*See* A000176, § 7.1(a) ("The Managers *and Officers* shall not have personal liability . . . , provided that nothing in this Section . . . shall eliminate or limit the liability of any such Manager *or Officer*. . . .") (emphasis added); *id.*, § 7.1(b) ("the Company shall indemnify . . . each Member, Manager . . . *and each officer of the Company*"; A000177, § 7.2(a) ("[e]ach Member, Manager *and officer*

of the Company may rely on . . . any resolution. . . .") (emphasis added); *id.*, § 7.2(b) ("each Member, Manager *and officer* of the Company may consult with legal counsel . . . .") (emphasis added). (*See* A000177, § 7.2(b).)

The omission of "Managers" from the exception under Section 5.2(b) demonstrates that "management fees" are not covered under the exception for "rendering of . . . services" by an "officer" or "employee" of the Company. *See Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at *11 (Del. Ch. Sept. 10, 1999) (explaining that omission of a term in a contract "speaks volumes" when compared to included terms (citing Arthur L. Corbin, 3 *Corbin on Contracts* § 552 at 206 (1960))). Thus, the exception is inapplicable.

III. THE TRIAL COURT CORRECTLY FOUND THAT PLAINTIFF DID NOT ACQUIESCE TO PAYMENTS TO BLANCH

A. Questions Presented

Was it clear error for the Court of Chancery to find that Defendants failed to carry their burden to prove that Diamond acquiesced to management fees to Blanch?[11]

B. Scope of Review

"[F]actual findings of a trial judge will not be set aside by a reviewing court unless those factual determinations are clearly erroneous." *Cede*, 758 A.2d at 491. "When factual findings are based on determinations regarding the credibility of witnesses, however, the deference already required by the clearly erroneous standard of appellate review is enhanced." *Id.* (citation omitted).

C. Merits of Argument

Defendants contend that because the Chancery Court concluded that Diamond acquiesced to Skinner receiving monthly sums, then Diamond must have agreed to the same for Blanch. (Opening Br. at 35–36.) This argument fails, as the court's credibility-based finding that Plaintiff did not acquiesce to payments to Blanch is fully supported by the record evidence. (Op. 56–61.) The trial court relied on the testimony of Mr. Diamond, "a generally reliable witness" (Op. 4), finding that

[11] Preserved, *inter alia*, at B000923 at 945-950; B000839 at 897-898.

"Diamond credibly testified that he would not have approved a salary to Blanch in the amount of $20,000 per month because Diamond did not have any relationship with Blanch, and Blanch was already drawing a full-time salary as CEO of Metier…." (Op. 57 (citing A000352–353, 46:15–47:11).) The court's finding is entitled to "enhanced" deference, *Cede*, 758 A.2d at 491, and must be affirmed.[12]

Further, the "Blanch Defendants failed to cite any documentary evidence indicating that Plaintiff approved the Management Fees to Red Bridge before the Management Fees were paid." (Op. 55.) The court further found that, to the extent the Managers sought to characterize the unauthorized payments as "loans," they relied on "sham documents" and therefore "Diamond could not have acquiesced to loans that were not, in fact, loans." (Op. 64–65; B000670; B000554; B000675.)

Appellants contend that "Diamond . . . received a copy of Clovis's 2014 tax returns" via email, purportedly showing that Blanch was paid $20,000 per month from April through December 2014. (Opening Br. at 35–36 (citing A000264).) However, the referenced email merely contained a link to the tax return. Diamond's uncontroverted testimony established that after receiving this email, he advised the sender that he was not Clovis's manager and that the tax return should instead be sent to Skinner,. (A000391–392, 85:13–86:9.) Diamond did not attempt to view the

[12] Of the key players who testified at trial, the Court of Chancery found that "Blanch was the least credible witness." (Op. 4.)

return until after the link expired. (A000390–391, 84:18–85:3.) The first time Diamond saw the return was after this action was filed. (*Id.*).

Appellants also rely on a September 2015 email from the accountant to Diamond stating, "Clovis paid a management fee to Red Bridge and Stone LLC" and asking, "[a]re we going to issue a Schedule K-1 to Richard Blanch?" (Opening Br. at 36 (citing A000196).) However, when Diamond immediately forwarded this email to Skinner to "go over" the accountant's questions, Skinner wrote that "*Everything below is wrong*." (Op. 67 (citing A000196) (emphasis added).)

Appellants next argue that Diamond acquiesced because he "received Clovis's K-1s…" (Opening Br. 36.) However, they do not challenge the court's findings that "Skinner provided Schedule K-1s to Plaintiff that did not accurately reflect the Company's actual assets and cash." (Op. 67-68 (citing B000559 at 579); B000680 at 701; B000404 at 468, 472).)

Thus, the Court of Chancery's conclusion that Defendants did not prove acquiescence is not clearly erroneous and should be affirmed.

IV. THE TRIAL COURT'S FINDINGS OF FRAUD, BREACH OF FIDUCIARY DUTY, CONSPIRACY AND AIDING AND ABETTING ARE UNCHALLENGED AND SHOULD BE AFFIRMED

A. Questions Presented

Whether the Court of Chancery correctly concluded that the Blanch and Skinner fraudulently concealed their self-dealing and breached their duty of loyalty, and that Vivianna Blanch, Red Bridge, and Skinner Capital aided and abetted those fiduciary breaches and engaged in a civil conspiracy to misappropriate Clovis's assets.[13]

B. Scope of Review

The trial court's factual findings will not be set aside absent clear error. *Cede*, 758 A.2d at 491. In reviewing factual findings based on credibility determinations, "the deference already required by the clearly erroneous standard of appellate review is enhanced." *Id.* (citation omitted).

C. Merits of Argument

Appellants contend that that the trial court erred in finding breach of fiduciary duty, fraudulent concealment, civil conspiracy and aiding and abetting because the payments were not "Interested Transactions" under Section 5.2. (Opening Br. 37–38.) Appellants reiterate their Section 5.2 arguments, asserting that "it was not misappropriation for the managers to pay themselves a salary for the day-to-day

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[13] Preserved, *inter alia*, at B000090 at 124-143; B000839 at 881-894.

work rendered in their capacity as officers of Clovis." (Opening Br. 39.) However, as discussed in Point II.C.2, *supra*, the trial court correctly applied the plain terms of Section 5.2 to conclude that the interested payments were unauthorized.

Moreover, the Court of Chancery's conclusions as to the fraud and breach of fiduciary duty claims were based on independent findings of fact, none of which are challenged on appeal. In concluding that the Managers breached their fiduciary duties, the Court of Chancery found that the Managers "acted in bad faith" by approving "transactions . . . designed to enrich Blanch and Skinner at Clovis's expense. . . ." (Op. 75.) The court further found that "Blanch and Skinner were conscious of their wrongdoing because each engaged in acts of subterfuge designed to conceal their conduct." (Op. 75–76 (citing B000504; B000508; B000521; A001187 (881:5–18).) As to the fraudulent concealment claim, the court found that "Skinner and Blanch purposefully aimed to conceal their self-dealing from Plaintiff" by "characterizing payments from Clovis to Skinner Capital and Red Bridge as loans" and seeking "to keep Diamond uninformed about Clovis's financial status." (Op. 85–86 (citing A001371, 1065:14–21; A000196; B000790; B000559 at 579; B000680 at 701; B000404 at 468); *id.* 86 n.342 (citing B000791).) Defendants do not challenge any of these factual findings or the Chancery Court's conclusion that the Managers' actions "constituted 'overt misrepresentation[s]' and 'active

concealment of material facts,' and . . . that they were knowingly false." (Op. 86 (citation omitted).)

Nor do Defendants challenge the Court of Chancery's finding that "all of the Defendants formed part of the conspiracy to misappropriate Clovis's funds because Blanch, Vivianna Blanch, and Skinner acted in concert to misappropriate funds from Clovis." (Op. 88-89 (citing A001371 (1065:14–24); A000430 (124:9–125:25); B000793.) Vivianna participated in the conspiracy by serving as the sole owner of the vessel for misappropriated funds:

> [Vivianna] is Red Bridge's sole member. She established a bank account for the purpose of receiving Blanch's Management Fees, under false pretenses. She then used the money flowing into Red Bridge to pay for personal expenses. Vivianna Blanch testified that she knew that Red Bridge was being formed to shield payments from recovery.

(Op. 88–89 (citing A001236 (930:7–9)).) Moreover, Defendants' statement that it was "no secret Vivianna owned Red Bridge" (Opening Br. 38) is an admission that Vivianna continued to further the conspiracy by helping fabricate evidence in defending against Plaintiff's claims.[14]

Defendants also do not challenge the Chancery Court's finding that Vivianna, Red Bridge and Skinner Capital "knowingly participated" in the Managers' fiduciary

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[14] At trial, Plaintiff argued that the purported Red Bridge operating agreement was a sham document, and the Court of Chancery noted that the Blanch Defendants did not oppose this argument, thereby waiving the issue. (Op. 89 n.347.)

breaches because, *inter alia*, "[t]hey were mechanisms through which Blanch and Skinner obtained and funneled the misappropriated assets." (Op. 90–91.)

Thus, the court's rulings on the breaches of loyalty, fraudulent concealment, conspiracy and aiding and abetting claims should be affirmed.

V. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN AWARDING DAMAGES DIRECTLY TO PLAINTIFF

A. Questions Presented

1. Did the trial court correctly conclude that Plaintiff's claim for breach of Section 5.2 of the Agreement may be brought as a direct claim because it seeks to enforce a "personal right belonging to" Plaintiff?[15]

2. Did the Court of Chancery properly exercise its discretion in awarding damages directly to Plaintiff on the derivative claims?[16]

3. Did Appellants waive any challenge to the trial court's conclusion that Plaintiff's claim for breach of Section 5.2 may be brought as a direct claim because such claim seeks to enforce a "personal right belonging to the members" by failing to raise the issue in their Opening Brief?[17]

B. Scope of Review

"This Court will uphold the trial court's factual findings unless they are clearly erroneous, and will review damage awards . . . for abuse of discretion." *Gatz Properties, LLC v. Auriga Cap. Corp.*, 59 A.3d 1206, 1212 (Del. 2012) (citation omitted). "We do not substitute our own notions of what is right for those of the

[15] Preserved, *inter alia*, at Memorandum Opinion dated May 31, 2019 (Opening Br., Ex. B).

[16] Preserved, *inter alia*, at B000090 at 126.

[17] By the nature of this issue, it could not have been raised below.

trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Id.* (citations and internal quotations omitted).

C. Merits of Argument

The Court of Chancery properly exercised its discretion to calculate damages based on the total sum of payments found to be improper under Section 5.2 and directed that such damages be paid directly to Plaintiff because the claim under Section 5.2 is direct. (Op. 103-104; *see also* Op. 86 (the Manager's "fraudulent concealment . . . does not support a damages award beyond the damages awardable from Skinner's and Blanch's breaches of contract and fiduciary duty.").[18]

Appellants contend that "[t]he trial court's holding that the claims were direct rest[s] on legal error." (Opening Br. 41.) However, the Chancery Court did not rule that all of Plaintiff's claims were direct. They also contend that "awarding damages from Red Bridge and Vivianna Blanch directly to Plaintiff constituted further legal error, as the court's damages award was based entirely on a breach of Section 5.2" and "Plaintiff had no claims against Red Bridge and Vivianna Blanch for breach of the Operating Agreement." (Opening Br. 41, 44–45 (citing Op. 104–105).) This

[18] The court may estimate the *amount* of damages "so long as the court has a basis to make a responsible estimate of damages." (Op. 104 (quoting *Delaware Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243, at *15 (Del. Ch. Oct. 23, 2002)). The trial court's responsible estimate of damages was based on the total sum of the improper payments under Section 5.2.

argument also misconstrues the Court of Chancery's ruling, as the court did not hold that Red Bridge and Vivianna breached the Agreement.

Appellants further challenge the May 2019 Opinion on the grounds that it does "not fully address both *Tooley* factors." (Opening Br. 42.) However, Defendants ignore (and have therefore waived any challenge to) the court's determination that Plaintiff's claim for breach of Section 5.2 seeks to enforce a "personal right" belonging to Plaintiff under the Operating Agreement, and therefore *Tooley* does not apply.

> Before evaluating a claim under *Tooley*, "a more important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?" Because the . . . claims at issue here belong to the holding stockholders under the state laws that govern the claims, . . . *Tooley* does not affect our [decision].

(Opening Br., Ex. B, at 10-11 (quoting *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1127 (Del. 2016) (quotation marks omitted)).) Because the claim seeks to enforce "a personal right belonging to the members," the court properly determined that *Tooley* does not apply and Plaintiff "may bring its claim directly." (Opening Br., Ex. B, at 11.)

Defendants also contend that the court's May 31, 2019, Memorandum Opinion "analyzed a pre-amended complaint." (Opening Br. 42.) This is irrelevant, as Count I of the First Amended Verified Complaint is substantively identical to Count I of the original Complaint. To the extent the amended pleading seeks

additional relief of "disgorgement," it does not alter the nature of the claim as one to enforce Plaintiff's personal rights under Section 5.2. (*See* Opening Br., Ex. C.)

Moreover, the court's decision to award damages directly to Plaintiff was supported by ample record evidence. Following further briefing on this very issue, the trial court concluded that derivative damages should be paid directly to Plaintiff:

> Skinner and Blanch misappropriated Clovis's assets. And any award of damages to Clovis would immediately revert to Blanch and Skinner's control as they are the company's sole managers. Furthermore, because plaintiff is Clovis's only other member, the Court can narrowly tailor a remedy that would only benefit that member -- *i.e.*, a direct payment to the plaintiff.

(B000322 at 337 (16:14–21).) Appellants make no mention of this analysis in their Opening Brief and therefore have waived any challenge to it. *See In re Peierls Charitable Lead Unitrust*, 77 A.3d 232, 238 (Del. 2013). Regardless, as the court correctly determined, because of Skinner's (through Skinner Capital) and Blanch's (through Red Bridge) significant ownership in Clovis, and because they might otherwise benefit from a recovery for their own wrongdoing, Count One was properly deemed direct. *See, e.g., Allen v. El Paso Pipeline GP Co.*, 90 A.3d 1097, 1107 (Del. Ch. 2014) ("If [the defendants] are proven to be wrongdoers, this factor would support awarding relief to the class of innocent unitholders, not to [the company]."). Accordingly, the court properly exercised its discretion in awarding damages directly to Plaintiff.

VI. THE TRIAL COURT CORRECTLY CONCLUDED THAT DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE

A. Questions Presented

1. Did Appellants, by failing to raise the issue below, waive their argument that joint and several liability is unavailable on the grounds that the Court of Chancery purportedly did not award damages for breach of fiduciary duty?[19]

2. Whether the Court of Chancery erred in holding Defendants jointly and severally liable where the court found that they engaged in a civil conspiracy to misappropriate Clovis's funds and that Vivianna, Red Bridge and Skinner Capital aided and abetted the Managers' self-dealing.[20]

B. Scope of Review

"This Court will uphold the trial court's factual findings unless they are clearly erroneous, and will review damage awards and attorneys' fee awards for abuse of discretion." *Gatz*, 59 A.3d at 1212 (citation omitted). "We do not substitute our own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Id.* (citations and internal quotations omitted).

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[19] By the nature of this argument, it could not have been raised below.

[20] Preserved, *inter alia*, at B000090 at 141-142.

C. Merits of Argument

Appellants contend that the trial court's finding of joint and several liability "must be reversed" because the court "did not award damages for breach of fiduciary duty." (Opening Br. 46.)

Appellants waived this argument. Although they contend it was preserved in their Motion for Reargument, Supplemental Post-Trial Answering Brief, and Pre-Trial Brief, there is no mention of joint and several liability in their Pre-Trial or their Supplemental Post-Trial Answering Briefs. In their Motion for Reargument, Defendants argued that joint and several liability was unwarranted because they "did not engage in an [*sic*] underlying unlawful activity." (B000907 at 917–918.) Because Defendants did not previously argue that joint and several liability was unavailable on the grounds that the trial court "did not award damages for breach of fiduciary duty," the argument is waived. *See Shawe*, 157 A.3d at 162 n.30 (an "argument . . . not fairly presented to the Court of Chancery . . . will not be considered for the first time on appeal.") (citation omitted)).

Moreover, Appellant's argument ignores the court's holdings that Blanch and Skinner breached their fiduciary duties, committed fraudulent concealment, and that Skinner Capital, Red Bridge, and Vivianna aided and abetted the fiduciary breaches. "A defendant who aids and abets a breach of fiduciary duty is jointly and severally liable for the damages resulting from the breach." *In re Rural/Metro Corp. S'holders*

Litig., 102 A.3d 205, 220 (Del. Ch. 2014). As mentioned in Point V.C., *supra*, after finding liability, the Court of Chancery reasonably calculated damages based on the sum of improper payments under Section 5.2. (*See* Op. 86-87 ("Plaintiff's damages resulting from Blanch's and Skinner's fraudulent concealment are already subject to recovery by Plaintiff through its breach of contract and breach of fiduciary duty claims.").) Thus, Appellants' contention that the court did not award damages for breach of fiduciary duty is misplaced.

Appellants next assert that "there were no facts presented that the Blanch Defendants personally benefited in any way from the management fees paid to Skinner or that the Blanch Defendants were the mechanism through which they were obtained." (Opening Br. 47.) This argument ignores the finding that "all of the Defendants formed part of the conspiracy to misappropriate Clovis's funds because Blanch, Vivianna Blanch, and Skinner acted in concert to misappropriate funds from Clovis" (Op. 88). It is well-settled that "co-conspirators are jointly and severally liable for the acts of their confederates committed in furtherance of the conspiracy." *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 170 (Del. 1976).

Thus, the Court of Chancery properly held the Defendants jointly and severally liable.

VII. THE CHANCERY COURT PROPERLY EXERCISED ITS DISCRETION TO AWARD PLAINTIFF ITS FEES

A. Questions Presented

Whether the Court of Chancery properly exercised its discretion to award Plaintiff its fees and expenses based on the Blanch Defendants' bad faith conduct, where the court's factual findings of bad faith litigation conduct are uncontested.[21]

B. Scope of Review

This court reviews the trial court's factual findings for clear error and attorneys' fee awards for abuse of discretion. *Gatz*, 59 A.3d at 1212 (citation omitted).

C. Merits of Argument

Appellants' final argument is based on a hypothetical: if the Court had found for the Blanch Defendants, then fee shifting under the "bad faith" exception to the American Rule would have been unwarranted. For the reasons discussed above, the Court of Chancery's rulings should be affirmed. Notably, Appellants do not address – let alone dispute – any of the Court of Chancery's factual findings establishing the Blanch Defendants' bad faith litigation conduct, nor do they contend that the Court

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[21] Preserved, *inter alia*, at B000090 at 149-154; B000839 at 899-902.

of Chancery abused its discretion in awarding fees to Plaintiff based on such conduct. Accordingly, the fee shifting award should be affirmed.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order affirming the Court of Chancery's rulings and orders appealed from in all respects.

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