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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUNAR REPRESENTATIVE, LLC, Plaintiff-Below/Appellant, v. AMAG PHARMACEUTICALS, INC. Defendant-Below/Appellee.	)	No. 227, 2023 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2019-0688-JTL

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

This appeal presents the significant issue of whether the trial court abused its discretion in entering a terminating sanction against Lunar.[1] A default judgment is arguably the most severe remedy that can be leveled by a trial court because it precludes a claim from being decided on the merits. It also exacts significant consequences on a party and its counsel. As such, this Court has established guardrails to ensure that terminating sanctions are entered sparingly and only under the most egregious circumstances where no other sanction is available to remedy litigation misconduct. The court below veered outside these guardrails and abused its discretion in entering a default judgment.

Lunar concedes that it missed the deadline for substantial completion of document production and that its former lead counsel erred in failing to sufficiently engage with counsel for AMAG regarding discovery and scheduling in late 2022 and early 2023. Admittedly, this conduct was "willful" under the precedent of this Court. However, willful misconduct by counsel does not automatically justify entry of a terminating sanction. When the entirety of the trial record is objectively evaluated and considered in context under the *Minna* factors, it does not show the

[1] Unless otherwise indicated, capitalized terms used herein shall have the same meaning as set forth in Appellant's Corrected Opening Brief ("COB" or "Opening Brief") and Appellee's Answering Brief ("AB" or "Answering Brief").

type of prolonged and egregious misconduct exhibited in the few other cases that Delaware courts have found to warrant the ultimate sanction of a default judgment.

AMAG largely ignores the numerous decisions cited by Lunar demonstrating that the *Minna* factors dictate reversal here, instead primarily relying on parroting the reasoning of the trial court. The rebuttal arguments AMAG does advance overstate Lunar's conduct, rely on speculation to suggest that Lunar was complicit in the errors of its counsel, ignore or pass blame regarding its own delay in serving affirmative discovery and producing documents which contributed to the overall pace of the litigation, and fail to persuasively distinguish the few cases it actually addressed that were cited by Lunar in its Opening Brief. For the reasons set forth in Lunar's Opening Brief and herein, the trial record, when objectively examined against the backdrop of this Court's precedents, overwhelmingly supports reversal of the trial court's ruling and order.

ARGUMENT

I. A BALANCING OF THE *MINNA* FACTORS SUPPORTS REVERSAL OF THE COURT OF CHANCERY'S RULING AND ORDER.

Entry of a default judgment is a disfavored "extreme remedy." *Greystone Digit. Tech., Inc. v. Alvarez*, 2007 WL 2088859, at *2 (Del. Ch. July 20, 2007) (citation omitted). A default judgment should be granted only in compelling circumstances and if no other sanction would be appropriate under the circumstances. *See Hoag v. Amex Assurance Co.*, 953 A.2d 713, 716-17 (Del. 2008).

As set forth in Lunar's Opening Brief, an examination of the *Minna* factors leads to the conclusion that the trial court's ruling and order should be reversed. Lunar addresses below the primary rebuttal arguments advanced by AMAG in its Answering Brief related to each *Minna* factor.

A. Factor 1: The Record Does Not Support AMAG's Contention That Lunar Bears Responsibility For The Sanctionable Conduct.

This Court has held that a trial court should refrain from entering a default judgment where the party litigant was not responsible for the conduct warranting imposition of sanctions:

> Furthermore, although as a general rule a party is burdened with its attorney's errors, this rule is 'inappropriate in th[e] instance where there is nothing to show willfulness or conscious disregard of the [orders] by plaintiff … except the conduct of the lawyers.' Accordingly, 'the extreme remedy of dismissal with prejudice is too punitive … [when] counsel, not plaintiff, bears much if not all responsibility for failure to comply with the Superior Court orders.'

Lehman Cap. v. Lofland ex rel. Estate of Monroe, 906 A.2d 122, 131 (Del. 2006) (quoting *Rittenhouse Assocs. Inc. v. Frederic A. Potts & Co., Inc.*, 382 A.2d 235, 236 (Del. 1977)). AMAG does not dispute this settled principle of Delaware law. Instead, it argues that this factor should not be considered on appeal and that in any event the Court should infer Lunar's complicity in the sanctionable conduct. These attempts to discount the first *Minna* factor are unavailing.[2]

As an initial matter, this factor was fairly presented below and should be considered by the Court on appeal. The court below expressly considered the effect of a default judgment on Lunar and concluded that Lunar has "a remedy against their lawyer." (Ex. A at 66-67). The trial court having raised and considered Lunar's position vis-à-vis its counsel in weighing whether to enter a default judgment, such argument is properly before this Court on appeal. *See, e.g., Watkins v. Beatrice Cos., Inc.*, 560 A.2d 1016, 1020 (Del. 1989) (in determining whether an issue has been fairly presented to the trial court, this Court has held that the mere raising and consideration of an issue at the trial court level is sufficient to preserve it for appeal) (citing *Sergeson v. Del. Tr. Co.*, 413 A.2d 880, 881–82 (Del. 1980)). Moreover, the

[2] AMAG characterizes Lunar's argument under the first *Minna* factor as its "lead" argument. (AB at 33). The fact that Lunar's Opening Brief sequentially addressed the *Minna* factors as they were set forth by this Court in *Minna* does not brand it as Lunar's lead argument. Lunar's lack of involvement in the sanctionable conduct is just one of several persuasive arguments in favor of reversal.

argument concerning Lunar's involvement in the sanctionable conduct is directly responsive to a factor this Court has articulated should be considered in determining whether the trial court abused its discretion in entering a default judgment. *See Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215 (Del. 2009); *Hoag*, 953 A.2d at 718. Thus, even if the Court were to determine the argument was not fairly presented below, this *Minna* factor should be considered in the interests of justice. Supr. Ct. R. 8. The interests of justice exception is particularly applicable here where the issue on appeal is whether to affirm or reverse the trial court's entry of a terminating sanction.

It bears noting that the trial court's reasoning, if accepted, threatens to swallow the principle set forth in *Lehman* and elsewhere; clients *always* have a remedy against lawyers who engage in willful misconduct. More importantly, the "facts" referred to by AMAG do not support a finding that Lunar was complicit in the errors in judgment of its counsel. First, AMAG makes the unsupported and uncited statements in its Answering Brief that Lunar "was in active communication with its attorneys about discovery," "knew full well that its attorneys had a history of dilatory conduct," and "knew that it had not produced a single document." (AB at 37). There are no such facts in the record. Second, counsel's reference during oral argument to Lunar as "an expert in the litigation process" does not prove that Lunar was complicit in the sanctionable conduct. (AB at 34). Counsel's reference related generally to

the discovery process and did not speak to whether Lunar's former lead counsel was regularly communicating with representatives of the funds comprising Lunar or keeping such client representatives updated with respect to the litigation. Indeed, to the extent counsel is not regularly updating its client, a party can at the same time be both an expert in the litigation discovery process and without knowledge of the day-to-day conduct of its counsel and the status of the litigation. That is what happened here—Lunar was unaware of the conduct by its former lead counsel that led to the trial court's entry of a default judgment—and there is no record evidence to the contrary. Third, the fact that Lunar may have been a "repeat-player" who "know[s] all about litigation" says nothing about Lunar's culpability regarding the sanctionable conduct. (Ex. A at 65). The inference AMAG attempts to draw regarding Lunar's culpability does not logically flow from these statements.

Moreover, AMAG's suggestion that the timing of Lunar's replacement of lead counsel demonstrates culpability on the part of Lunar is misplaced. As an initial matter, Lunar strongly disputes the trial court's finding of a failure to prosecute and dilatory conduct justifying entry of a default judgment. However, following the trial court's ruling bringing to light certain errors in judgment by its former lead counsel, Lunar made the decision to replace its lead counsel. This timing in no way supports the inference that Lunar was complicit in the sanctionable conduct. To the contrary, the timing leads to the reasonable inference that Lunar was not being properly kept

apprised of the litigation, and that it was only after the trial court's ruling and order that Lunar became aware of the errors in judgment which caused it to replace lead counsel.

Consistent with this Court's prior precedent, Lunar's lack of complicity supports reversal of the trial court's ruling and order. *See Lehman*, 906 A.2d at 131 (holding that "'the extreme remedy of dismissal with prejudice is too punitive … [when] counsel, not plaintiff, bears much if not all responsibility for failure to comply with the Superior Court orders'") (citation omitted); *Rittenhouse*, 382 A.2d at 236-37 (finding Superior Court abused its discretion in ordering a dismissal for failure to comply with discovery orders where the record showed that counsel, not the plaintiff, bore much if not all responsibility for failure to comply with court orders); *Sundor Elec., Inc. v. E.J.T. Constr. Co., Inc.*, 337 A.2d 651, 652-53 (Del. 1975) (reversing Superior Court's entry of default judgment as too severe a sanction where counsel, and not the party, was responsible for the discovery misconduct); *Drejka v. Hitchens Tire Serv. Inc.*, 15 A.3d 1221, 1224 (Del. 2010) (reversing trial court's entry of default judgment as abuse of discretion where plaintiff did not appear to have any responsibility for her attorney's conduct).

AMAG does not address *Rittenhouse* or *Sundor* in its Answering Brief, which were cited by Lunar in its Opening Brief, and only attempts to distinguish *Lehman* in passing. (AB at 36-37). AMAG appears to argue that *Lehman* is different because

the misconduct was attributable to "inept intraoffice communications." (AB at 36). Although inept intraoffice communications were partly responsible for the noncompliance, the record also demonstrated multiple failures over the course of the litigation to respond to discovery and a finding by the trial court that the plaintiff's counsel had "willingly and consciously disregarded the Court's very clear order to produce what was a critical piece of information in this case." *Lehman*, 906 A.2d at 130; *see also id.* at 125-30. Despite the *Lehman* trial court's finding of willful and conscious disregard of the discovery rules and court orders, this Court reversed the entry of a default judgment as an abuse of discretion because there was nothing in the record to suggest that Lehman, the party plaintiff, was responsible for the misconduct. *Id.* at 131-32.

Here, the trial court similarly abused its discretion in granting a default judgment based on the reasoning that Lunar was not prejudiced because it could simply bring a malpractice claim against its lawyer. (Ex. A at 66-67). As the party plaintiff who was not responsible for the sanctionable conduct, Lunar should be afforded its day in court to have its claims adjudicated on the merits.

B. Factor 2: The Sanctionable Conduct Did Not Cause Prejudice To AMAG And The Delaware Judicial System Supporting The Entry Of A Default Judgment.

In arguing the prejudice caused to AMAG by Lunar's conduct justified entry of a default judgment, AMAG attempts to reposition this case as being about the

evidence in Lunar's possession and the purported prejudice caused to AMAG by Lunar's delay in producing documents. (AB at 37-40). That is simply not correct. This case is about AMAG's failure to pay the second Milestone Payment in breach of the Merger Agreement, which Lunar alleges occurred in two ways. First, AMAG failed to exercise commercially reasonable efforts to develop and market Makena. (A734). The evidence on that issue is undisputedly within the sole possession of AMAG. Second, Lunar's Amended Complaint alleges that AMAG actually achieved the Net Sales figure required to trigger the second Milestone payment, but changed AMAG's financial accounting in an effort to avoid making payment to Lunar. (A734). Again, the relevant evidence is exclusively within the possession of AMAG.

AMAG's arguments regarding prejudice are also belied by its own litigation conduct. It had not served any affirmative discovery requests on Lunar at the time of the trial court's request for a status report in July 2022. It was not until August 2022, nearly three years into the litigation and just months before the substantial completion deadline, that AMAG served discovery. (A908). AMAG's litigation conduct directly contradicts the trial court's finding of prejudice on the grounds that AMAG "didn't get to pursue the types of discovery that they should have been able to pursue" and "didn't get to make the types of decisions that they should have been able to make in real-time." (Ex. A at 58). To the contrary, AMAG had several years

to serve discovery but chose not to, instead waiting until the eleventh hour and only after the trial court requested a status report. If the evidence in Lunar's possession was relevant at all, let alone critical, AMAG would have promptly sought discovery from Lunar.

Similarly, prejudice to the judicial system as a whole did not warrant entry of a default judgment. As an initial matter, contrary to AMAG's allegation, Lunar did not ignore prejudice to the judicial system in its Opening Brief. (AB at 40). Lunar acknowledged that it failed to comply with the Scheduling Order and that its former lead counsel's failure to proactively engage with counsel for AMAG about discovery and other case deadlines was an error in judgment. (COB at 1-2, 5, 18, 28, 34-35). Lunar does not suggest that the trial court should have turned a "blind eye" to this conduct. Rather, Lunar argued that this case does not present egregious facts similar to those that have been found by Delaware courts to justify entry of a default judgment. *See DG BF, LLC v. Ray*, 2021 WL 5436868, at *6-7 (Del. Ch. Nov. 19, 2021) (ORDER) (entering default judgment where plaintiffs (i) were in contempt of three discovery orders, (ii) spoliated evidence, (iii) refused to answer several core questions and struggled to produce a complete and adequate privilege log, (iv) engaged in excessive motion practice to the exclusion of their own discovery obligations, (v) focused on amending their identical complaint in a parallel action pending before another court, (vi) opposed the defendant's motion to compel without

offering any substantive grounds for their opposition, (vii) engaged in extremely obstructive conduct at a Rule 30(b)(6) deposition, causing the court to order a second Rule 30(b)(6) deposition on the same topics, and (viii) actively attempted to thwart the trial court's discovery order by directing their discovery vendor to restrict the material given to the defendant's discovery vendor), *aff'd*, 294 A.3d 63 (Del. 2023); *Hoag*, 953 A.2d at 718-19 (entering default judgment only after party violated four orders of the Superior Court); *Jacobson v. Ronsdorf*, 2005 WL 2149748, at *1-3 (Del. Ch. Aug. 23, 2005) (granting default judgment where party, among other things, (i) provided discovery responses that were "'woefully inadequate, to the point of being made in bad faith,'" (ii) generally refused to engage in discovery, (iii) made repeated insulting and disrespectful comments about the parties and the court in public filings, and (iv) filed frivolous motions with the court), *aff'd*, 906 A.2d 807 (Del. 2006); *Zhu v. Kane*, 2023 WL 373283 (Del. Ch. Jan. 23, 2023) (ORDER) (plaintiff violated at least nine court orders, six of which were under threat of default, before Court of Chancery granted default judgment).[3]

Less punitive sanctions were available to deter similar conduct and to quell any concern that the trial court was condoning the actions of Lunar's lead counsel or letting Lunar off easy. Indeed, monetary and evidentiary sanctions impose

[3] AMAG did not even attempt to address *DG BF*, *Jacobson*, or *Zhu* in its Answering Brief.

significant reputational and other harm to parties and their counsel such that they deter similar conduct in the future. At the same time these lesser available sanctions have a punitive and deterrent effect, they also permit an adjudication of claims on their merits. On balance, Lunar's conduct was not sufficiently egregious, prolonged, or clouded in bad faith to require the imposition of a terminating sanction to avoid a breakdown of the judicial system. *See Drejka*, 15 A.3d at 1224 (reversing entry of default judgment where there was no evidence that counsel who was responsible for the dilatory conduct acted in bad faith).

C. Factor 3: AMAG's Recitation Of The Procedural History Of This Case Omits And Misconstrues Significant Facts That Refute The Trial Court's Finding Of A History Of Dilatory Conduct On The Part Of Lunar.

Lunar set forth the procedural history of this case in its Opening Brief. (COB at 10-19). While that history shows that neither party moved with alacrity in connection with the litigation of this case, it does not support the trial court's finding that Lunar engaged in a "prolonged and persistent failure to litigate the case and failure to comply with deadlines" warranting imposition of a terminating sanction. (Ex. A at 64). The arguments advanced by AMAG in its Answering Brief similarly fall short of showing a history of dilatoriness by Lunar.

First, neither party did anything to meaningfully advance the case during the period between entry of the stipulated confidentiality order in July 2021 and the trial court's request for a joint status report in July 2022. While Lunar had served party

and non-party discovery (A697, A712, A747, A782), AMAG had not produced a single document or served any affirmative discovery. AMAG attempts to excuse its failure to produce any documents in response to Lunar's discovery on the basis that it had lodged objections and the "ball was in Lunar's court." (AB at 9). However, a party cannot simply serve objections to discovery and avoid producing documents. *See, e.g.*, *In re Oxbow Carbon LLC Unitholder Litig.*, 2017 WL 959396, at *2 (Del. Ch. Mar. 13, 2017) ("numerous federal decisions made clear that 'boilerplate, generalized objections are inadequate and tantamount to not making any objection at all'").

Second, in response to the trial court's request for a status report, AMAG represented to the trial court that the parties remained engaged in fact discovery and "have worked cooperatively on the discovery that remains, including recently served additional document requests." (A886). If Lunar's conduct was dilatory as of the filing of the status letter in July 2022, as AMAG now contends on appeal, AMAG presumably would not have made this representation to the trial court.

Third, AMAG omits from its Answering Brief the context in which the parties were operating following the trial court's request for a status report in July 2022. In August 2022, AMAG approached Lunar about entering into settlement discussions. (A1062-A1063). Lunar declined because AMAG had not yet produced any discovery, and therefore could not reasonably evaluate the value of its case for

purposes of discussing settlement. (*Id.*). Thereafter, on February 2, 2023, counsel for the parties discussed the case status and AMAG again broached the possibility of settlement discussions. (A1063). This time, however, AMAG coupled its settlement approach with news that AMAG's financial outlook was dire and that it would be wasteful for the parties to expend resources on the case when a potential bankruptcy filing by AMAG's parent corporation could make collection of any judgment difficult, if not impossible. (A1064). Lunar's counsel again expressed the need to review AMAG's documents, which had only recently been produced (on December 23, 2022, January 20, 2023, and January 31, 2023), to evaluate the value of Lunar's case. (A1064-A1065). AMAG encouraged Lunar to undertake this review promptly because of the potential imminent bankruptcy filing by Covis Pharmaceuticals. (A1064). Lunar's lead counsel believed based on these interactions that the priority was for it to review AMAG's recently produced documents and determine whether settlement discussions would be fruitful. (A1064-A1065). While Lunar's lead counsel should have been proactive in documenting these understandings and been more responsive to AMAG's counsel, these facts and circumstances do not exemplify the dilatory conduct warranting a terminating sanction.

Fourth, AMAG's continued questioning of the veracity of Lunar's former lead counsel's representation that it was evaluating the strength of Lunar's claims in

February and March 2023, is unsupported. (AB at 32-33). As explained in the Opening Brief (at 34 n.12), one-third of AMAG's documents had only recently been produced on December 23, 2022. (A1063). The balance of AMAG's documents were not produced until January 20 and 31, 2023. (*Id.*). In the period following the February 2, 2023 telephone call, Lunar was determining how to efficiently evaluate the value of its case and the viability of settlement discussions. (Ex. A at 32-33). Consistent therewith, on February 14, 2023, counsel for Lunar inquired about the existence of an escrow created for the litigation in connection with Covis's acquisition of AMAG. (A1065). Against this backdrop, the fact that Lunar had not yet downloaded AMAG's second and third productions is not surprising—those productions had just been made and Lunar had a large number of documents to review from the December 23, 2022 production. Moreover, after the filing of the Motion, the parties discussed a resolution providing for a stay of the case to facilitate possible settlement discussions and an amended scheduling order. (A1066-A1067). Following the breakdown of these discussions, counsel for Lunar requested a new link to download the second and third productions. (Ex. A at 32-33). AMAG's continued attempt to impugn the representations of Lunar's prior lead counsel that it was focused on AMAG's discovery in February and March 2023 is thus without basis.

Fifth, the filing of a single motion to compel by AMAG does not support the finding of a prolonged history of dilatoriness. As the correspondence demonstrates, the parties resolved the motion without court involvement. (A982-983; B44-48). The fact that Lunar required additional time, partly due to the holidays, to provide substantive responses to the interrogatories on January 4, 2023, does not exhibit dilatory conduct. Nor does the fact that counsel for Lunar agreed to reimburse AMAG for the attorneys' fees related to the filing of the motion to compel. Parties negotiate resolutions to discovery and merits issues all the time for business, strategic and practical reasons without admitting culpability, and that should be encouraged by courts. It was an abuse of discretion for the trial court to assign dilatory conduct to Lunar's former lead counsel based on AMAG's motion to compel.

Lunar concedes that it missed the substantial completion deadline and that its former lead counsel should have been more responsive in communicating with AMAG's counsel regarding discovery and scheduling. These missteps, however, when considered in context and based on the overall facts and circumstances, do not demonstrate an extreme history of dilatoriness and bad faith conduct warranting a terminating sanction.

D. Factor 4: AMAG's Argument That Lunar's Willful Misconduct Was Sufficiently Egregious And Pervasive To Warrant Entry Of A Default Judgment Is Unpersuasive.

Lunar has never disputed that its failure to meet the substantial completion deadline involved an element of willfulness, as that term has been interpreted by Delaware courts. However, an act of willfulness does not automatically trigger entry of a default judgment. Indeed, Lunar does not seek to "move the goal posts" as argued by AMAG (AB at 32)—rather, as evident from the *Minna* factors, Lunar seeks to underscore that there is a balancing required to determine the appropriate sanction to remedy willful conduct.

Here, where the conduct of Lunar's lead counsel was not tainted by bad faith and there had been no prior warnings of default, it was an abuse of discretion for the trial court to enter a terminating sanction. *See Drejka*, 15 A.3d at 1224 (reversing entry of default judgment where counsel responsible for the dilatory conduct was not acting in bad faith). AMAG relies on *Wahle v. Medical Center Of Delaware, Inc.*, 559 A.2d 1228 (Del. 1989), to argue that it should have come as no surprise to Lunar that the trial court entered a default judgment for willful misconduct. However, this case is unlike *Wahle* in several material respects. There, the plaintiff engaged in ongoing dilatory conduct which started at arbitration and was followed and compounded in the Superior Court. *Id.* at 1233. Among other things, the plaintiff repeatedly failed to disclose her medical expert, which was required by

statute and a prerequisite to litigating the plaintiff's claim, violated several court orders, and failed to submit a pretrial stipulation. *Id.* at 1231-32. Ultimately, the plaintiff's repeated failure to identify an expert witness and take any other action to litigate her claims compelled the trial court to enter a default judgment, which was affirmed by this Court. *Id.* at 1234. By contrast, here, the record does not show complete inaction for the duration of the entire litigation or obstructionist conduct. As conceded, Lunar failed to meet the substantial completion deadline and its lead counsel should have been more proactive in formally setting forth its understandings regarding scheduling and discovery, but these errors in judgment are not the type of willful misconduct that justifies imposition of a terminating sanction. *Compare Keith v. Lamontagne*, 2021 WL 4344158, at *1-2 (Del. Super. Ct. Sept. 20, 2021) (ORDER) (finding that although the defendant was dilatory in timely responding to discovery and communicating with the plaintiff, such conduct was not egregious enough to warrant entry of a default judgment), *with DG BF*, 2021 WL 5436868 (defaulting party, among other things, violated multiple court orders, spoliated evidence, and engaged in obstructive conduct at deposition); *Jacobson*, 2005 WL 2149748 (defaulting party, among other things, served bad faith discovery responses, refused to engage in discovery, and filed frivolous motions); *Zhu*, 2023

WL 373283 (defaulting party violated at least nine court orders, six of which were under threat of default).

E. Factor 5: Lesser Sanctions Were Available To The Trial Court And Were More Appropriate To Remedy Lunar's Conduct.

AMAG incorrectly argues that lesser sanctions would have been unworkable or would not have adequately punished Lunar.

First, it is settled Delaware law that an adjudication on the merits is preferable to judgment by default. *TR Investors, LLC v. Genger*, 2009 WL 4696062, at *19 n.76 (Del. Ch. Dec. 9, 2009) (citing *Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009) and *Beckett v. Beebe Med. Ctr., Inc.*, 897 A.2d 753, 757-58 (Del. 2006)), *aff'd*, 26 A.3d 180 (Del. 2011)). Here, a panoply of monetary and evidentiary sanctions were available to the trial court and such sanctions have been employed successfully by Delaware trial courts to remedy discovery abuse and dilatory conduct. Such sanctions include various degrees of fee-shifting, burden shifting and allocation, and adverse inferences. *See, e.g., Drejka*, 15 A.3d at 1224 (Del. 2010) (reversing trial court's entry of default judgment as an abuse of discretion and reasoning that monetary sanctions imposed against counsel responsible for the dilatory conduct was more appropriate); *TR Investors*, 2009 WL 4696062, at *18-19 (declining to enter default judgment as sanction for willful spoliation, instead elevating burden of persuasion one level, among other sanctions); *In re ExamWorks Gp., Inc. S'holder Appraisal Litig.*, 2018 WL 1008439, at *10-11

(Del. Ch. Feb. 21, 2018) (imposing monetary and evidentiary sanctions tailored to the specific misconduct); *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002*, 2018 WL 6331622, at *12-15 (Del. Ch. Dec. 4, 2018) (imposing "sanctions tailored to the specific violation" and precluding party from entering into evidence belatedly produced documents). It was an abuse of discretion for the trial court to conclude these lesser available sanctions were unworkable, particularly when such sanctions have been utilized by trial courts to advance the policy favoring adjudications on the merits.

Second, whether monetary-based or evidentiary-based, or both, lesser sanctions would still serve to punish Lunar and deter similar future conduct. (*See supra*, pp. 11-12). Moreover, as demonstrated by the imposition of lesser sanctions in other cases, such sanctions can be crafted to practically work and not cause prejudice to AMAG or excessively punish Lunar.

Finally, Lunar does not argue for a categorical rule that lesser sanctions must always be entered prior to a default judgment. (AB at 41). However, as the case law makes clear, entry of a default judgment "must be reserved for the most serious and disruptive examples of noncompliance." *Jacobson*, 2005 WL 2149748, at *3; *see also James v. Nat'l Fin. LLC*, 2014 WL 6845560, *11-13 (Del. Ch. Dec. 5, 2014) (despite finding that violations "appear to have been willful," ruling that "[a]lthough I believe that entry of a default judgment would be warranted on these

facts, I will not grant that remedy in light of the Delaware Supreme Court's guidance about invoking the ultimate sanction and the availability of less punitive consequences"). Because of the consequences of entry of a default judgment, this extreme remedy is typically granted only after prior warning or threat of default by the trial court. *Jacobson*, 2005 WL 2149748, at *3 (granting default judgment only after party was given numerous warnings about the consequences of failing to comply with discovery obligations); *see also Lehman*, 906 A.2d at 133 ("The trial judge had an entire spectrum of lesser sanctions available that he could and should have considered before entering, ***without any warning***, the ultimate sanction of dismissal with prejudice.") (emphasis in original); *Minna*, 984 A.2d at 1213-14 (Court of Chancery entered default for violations of discovery orders only after prior warning that further violations could result in a default judgment); *Zhu v. Kane*, C.A. No. 2021-0664-KSJM (Del. Ch. Jan. 23, 2023) (Letter Op.) (A1162) (Court of Chancery entered default judgment only after warning that continued failures to comply with court orders and discovery obligations would result in a default judgment); *Midland Interiors, Inc. v. Burleigh*, 2006 WL 279137, at *2-3 (Del. Ch. Jan. 27, 2006) (declining to enter default judgment where party had inexcusably failed to attend nine depositions and altered a doctor's note because the trial court had not issued any prior warnings and the strong preference for resolving cases on the merits).

Here, there was no prior warning. The trial court's suggestion that "if we had had an argument and a ruling on [AMAG's] motion to compel, you would have seen the first steps in that escalation" does not constitute the iterative approach to terminating sanctions endorsed by the Delaware courts. (Ex. A at 64). The fact is the parties resolved the motion to compel without court involvement and, as a result, there was no argument and ruling. That should not be used against Lunar. Indeed, the trial court recognized that it was making "the jump" straight to default judgment. (Ex. A at 64-65). Taking all of the facts and circumstances into consideration, this was an abuse of discretion.

F. Factor 6: AMAG's Arguments Do Not Refute The Merits Of Lunar's Claims.

The final *Minna* factor addressing the merits of Lunar's claims is admittedly difficult to ascertain at this stage of the case. That likely explains why AMAG's contention that Lunar's case is "exceptionally weak" relies on two examples that in no way discount the merits of Lunar's claims. First, the fact that Grant Thornton purportedly found that the numbers presented by AMAG did not trigger the second milestone payment is of little consequence. (AB at 38). Lunar alleges that AMAG took active steps, including *changing* its accounting methodologies, to slow down Makena sales in order to miss the $400 million second Milestone Payment threshold. (A330-A331). The relevant evidence therefore relates to AMAG's internal treatment of sales numbers and its accounting policies underlying the production of

the numbers ultimately presented to, and reviewed by, Grant Thornton. Second, it says nothing about the strength of Lunar's claims that Lunar could not identify the name of the specific Cantor Fitzgerald analyst to whom AMAG's former CEO allegedly admitted a plan to suppress sales to avoid the milestone payment. (AB at 42-43; A330 ¶ 24; A67; B55-56). This allegation is among many to be weighed by the trial court based on the evidence presented at trial in determining whether AMAG used commercially reasonable efforts. And Lunar has not retracted its allegation—rather, it has only averred that it is not aware of the name of the specific Cantor Fitzgerald analyst. (B55-56).

Lunar has viable claims that withstood AMAG's motion to dismiss. To the extent the Court finds this *Minna* factor relevant to its determination of whether the trial court abused its discretion, it weighs in favor of reversal.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Appellant's Corrected Opening Brief, Lunar respectfully requests that this Court reverse the trial court's ruling and order granting a default judgment and remand this case to the Court of Chancery for further proceedings.

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2023, a copy of APPELLANT'S REPLY BRIEF was served via File & Serve*Xpress* upon the following attorneys of record:

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