



IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEO INVESTMENTS HONG)	
KONG LIMITED,)	
)	
Plaintiff Below,)	CONSOLIDATED
Appellant/Cross-)	No. 415, 2025
Appellee,)	No. 428, 2025
)	
v.)	Court Below:
)	
TOMALES BAY CAPITAL)	Court of Chancery of the State of
ANDURIL III, L.P., TOMALES)	Delaware, C.A. No. 2022-0175-JTL
BAY CAPITAL ANDURIL III GP,)	
LLC, and IQBALJIT KAHLON,)	
)	
Defendants Below,)	
Appellees/Cross-)	
Appellants.)	

APPELLANT’S OPENING BRIEF

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NATURE OF PROCEEDINGS

The trial court found that the defendant fiduciaries in this case lied repeatedly, that those lies created a peril for a Delaware limited partnership (Tomales Bay Capital Anduril III, L.P (the “Fund”)), and that those lies were self-interested. But because of the way the trial court framed its analysis, it held that misconduct was insufficient to rebut the business judgment rule. This cannot be Delaware law.

The case turns on the relationship among Iqbaljit Kahlon, Plaintiff-Below Leo Investments Hong Kong Ltd. (“Leo Investments”¹), and the Fund. Kahlon is the managing member of the Fund’s general partner, Tomales Bay Capital Anduril III GP, LLC (“General Partner”). *See* Post-Trial Opinion (June 30, 2025), Ex.A_p.7. Kahlon and his surrogates recruited and ultimately admitted Leo as a Fund limited partner. Leo was drawn to the investment opportunity by the Fund’s exclusive investment target: Space Exploration Technologies Corp. (“SpaceX”). In negotiations, Leo explained that Leo Group, a public company in China, would need to make a public regulatory disclosure about the investment. Kahlon signed a contract agreeing to as much and admitted Leo to the Fund. Kahlon knew, in doing so, that SpaceX had always permitted investor disclosures but did not want to be

¹ Leo Investments and its indirect parent Leo Group Co. (“Leo Group”) are distinct entities, but they were one and the same for purposes of the investment at issue here. Like the trial court, this brief refers to them jointly (“Leo”) for simplicity where appropriate. *See* Ex.A_p.16 n.71.

surprised by them. He nevertheless failed to tell SpaceX about Leo's agreed disclosure. Even after Leo became a limited partner and made its disclosure, Kahlon simply hoped that SpaceX wouldn't find out about it.

But it did. SpaceX's CFO independently learned about the disclosure through the media and was surprised and angry. So he confronted Kahlon. In response, Kahlon lied about Leo rather than admit that he contractually authorized Leo's disclosure. Kahlon lied to protect himself and his personal future business opportunities with SpaceX. As the trial court summarized: "For Kahlon, setting up Leo Group to take the blame was part of the plan. He wanted to preserve his relationship with SpaceX." Ex.A_p.24.

But Kahlon's lies created a problem. Having been fed lies about Leo, SpaceX concluded that it did not want Leo as an indirect investor and would not let the Fund buy SpaceX common stock with Leo included. To address the problem that his lies created, Kahlon immediately decided to remove Leo from the Fund. *Post hoc*, he invoked forced removal terms in the Fund's Limited Partnership Agreement ("LPA") as an excuse. These terms underscore the gravity of the threat to the Fund that Kahlon's lies created. The LPA permitted removal only if Kahlon made a "reasonable judgment" that it was "reasonably likely" that a "material adverse effect" or "significant and adverse delay" on the Fund's business would otherwise result.

The trial court held that this passed fiduciary (and contractual) muster. In essence, it held that the fiduciary's lies did not rebut the business judgment rule because that fiduciary attempted to repair a self-inflicted wound. In doing so, the court's analysis effectively rendered it irrelevant that *Kahlon's deception caused the problem in the first place*. Put differently, had Kahlon not lied, there would have been nothing to fix. Had the court analyzed *all* of Kahlon's conduct, including the deception that caused the problem and not just his putatively contractual response to that problem, it should have held that Plaintiff rebutted the business judgment rule.

Once rebutted, Defendants could not have proven the entire fairness of the entirety of their uninformed, deceptive, and self-serving conduct. But again, by focusing on Kahlon's effort to mop up his own misdeeds, not the earlier misconduct, the trial court found Defendants' conduct entirely fair. The court's scathing fact findings underscore that, taking the earlier conduct into account, Defendants could not possibly have carried their entire fairness burden.

The unduly narrow analysis also seemingly foisted a burden on Leo to prove causation: namely, that Leo's investment in the Fund, and the Fund's investment in SpaceX, would have gone as planned had Kahlon acted properly. But that causation or injury analysis has no place in determining whether a plaintiff has rebutted the business judgment rule. Regardless, the evidence reflects that SpaceX would have accepted the investment had Kahlon been honest at the outset; indeed, Defendants

conceded that the investment initially was “viable,” and Kahlon testified that he was “confident” that the investment would have proceeded if there weren’t a dispute about Leo’s disclosure.

Correcting these legal errors leads to the inescapable conclusion that Kahlon and the General Partner breached their fiduciary duties. A fiduciary cannot wound his beneficiaries and escape liability by attempting to staunch the bleeding. This Court should reverse, direct entry of judgment in favor of Leo on its fiduciary claims, and remand for the trial court to determine the appropriate remedy in equity.

SUMMARY OF ARGUMENT

1. Deceptive omissions and blatant lies rebut the business judgment rule. The Court of Chancery held otherwise by focusing only on the period *after* Kahlon had created a material risk to the Fund and then decided to eject Leo to save himself. Proper consideration of the prior period—when Kahlon’s deception inflicted the wound on the Fund that he scrambled to salve—compels a different outcome.

Kahlon’s lies and deception rebutted the business judgment rule. Thus, the court should have required Defendants to prove entire fairness. Even in addressing that doctrine in the alternative, the court erred by again focusing on the wrongly narrowed period to find that Kahlon’s actions were “entirely fair” when he “required [Leo] to withdraw.” Ex.A_p.65. Properly framed, the court’s factual findings about Kahlon’s actions *before* SpaceX refused Leo as an indirect investor require a holding that Kahlon and the General Partner’s actions were not entirely fair to the Fund and its limited partners, including Leo.

As the Court of Chancery found, Kahlon *created* the circumstances, for self-interested reasons, that led to the alleged need to forcibly withdraw Leo from the Fund. Ex.A_p.58-59 From November 15, 2021 (when Leo became a limited partner) to November 19 (when SpaceX’s CFO was surprised at Leo’s contractually-permitted disclosure), Kahlon repeatedly chose to keep SpaceX in the dark, directly contravening its known preferences. Once confronted, Kahlon lied about Leo’s

disclosure to protect himself and his lucrative relationship with SpaceX. He thereby breached his fiduciary duties.

In ruling for Defendants, the trial court also erred by essentially requiring Leo to prove the “but-for” world that would have existed absent Kahlon’s concealment and lies. That was improper and should not have been part of assessing whether Leo had rebutted the business judgment rule. Even so, the trial evidence overwhelmingly demonstrates that, but for Kahlon’s misconduct, Leo’s investment would have been successful. SpaceX had always permitted necessary disclosures about SpaceX investments, as long as SpaceX received advance notice, which Kahlon had experience providing and easily could have given here. Most tellingly, Kahlon testified that he was “confident” that the investment would have been successful but for the dispute about Leo’s disclosure.

2. Reversal is required on an independent issue because the court below also erred by failing to find that Defendants breached the forum selection clause of the Subscription Agreement by filing suit and demanding a jury trial in the Northern District of California on the same facts. That agreement required them to sue in Delaware for “any action or proceeding ... relating in any way to the Subscription Documents or any other Offering Materials” and waived the right to trial by jury. The court mistakenly read the clause as only applying to Leo because the provision separately funneled any actions by a subscriber against the General Partner to

Delaware, but the clause is written disjunctively. Either actions by the subscriber against the General Partner *or* any action “relating in any way to the Subscription Documents,” regardless of who brings it, must be in Delaware. Because the California suit “relate[s] ... to the Subscription Documents,” the court should have found a breach of the Subscription Agreement and awarded Leo its costs of defense.

STATEMENT OF FACTS

I. Factual Background

A. Kahlon forms Tomales Bay Capital, invests in SpaceX, and learns its preferences for investors.

In 2016, Kahlon formed Tomales Bay Capital, L.P. (“TBC”), a registered investment adviser. Ex.A_p.2. Kahlon is TBC’s managing partner, chief compliance officer, sole decisionmaker, and, along with his family trust, sole owners. Ex.A_pp.2-3.

Kahlon’s “bread and butter” is creating funds that invest in SpaceX, including the Fund here. Ex.A_p.3. Since Kahlon is the managing member of the Fund’s General Partner, “[f]or Fund decisions, all roads lead to Kahlon.” Ex.A_p.7.

SpaceX is privately held and has a right of first refusal (“ROFR”) on its shares, enabling it to control who acquires them. Ex.A_p.3. SpaceX has unwritten preferences regarding who directly or indirectly owns its shares. Ex.A_p.3-5. It prefers to not have investors based in China, which Kahlon knew before he solicited Leo. Ex.A_pp.4-5. But Kahlon also knew “it is acceptable [to SpaceX] to have [Chinese] investors if the investments are structured properly.” Ex.A_pp.4-5. Indeed, TBC had other “investors in its funds acquiring SpaceX shares that originated from China.” Ex.A_p.5.

Kahlon also knew that SpaceX expects that any investor’s need to make public disclosure about a SpaceX investment will be discussed with SpaceX in advance.

Id. For investment vehicles like the Fund, SpaceX expects that the fund’s managers (here, Kahlon) identify for SpaceX any disclosure requirements that their investors have. *Id.* “Although SpaceX does not want to be surprised, the company has always permitted legally required disclosures.” *Id.*

Consistent with this broad permission for regulatory disclosures, “many investors have disclosed their investments in SpaceX.” *Id.* & n.18 (citing examples). Kahlon had experience in this regard, both for his investors and for himself.

For example, Kahlon facilitated disclosures for Betsy DeVos, a TBC investor, when President Trump nominated her to the cabinet in 2016. A.377_p.213:20-24. Because of nomination-triggered disclosure obligations, DeVos requested to disclose her indirect investment in SpaceX. A.377_p.214:9-13. Kahlon “relayed that to [SpaceX’s CFO] Bret Johnsen, got his consent, and then the disclosure was eventually made.” A.377_p.214:11-13. Kahlon has done likewise, Ex.A_p.5, repeatedly disclosing in SEC filings that, “[a]t [TBC], Mr. Kahlon invested in innovative and technology-based companies including SpaceX,” A.1130²; *see also* A.403-04_pp.318:14-322:7.

SpaceX seeks “to work with a small group of intermediaries that it trusts.” Ex.A_p.3. Kahlon was one of them. Ex.A_p.4. This “close relationship [with

² *Accord* A.1299, A.1471, A.1643, A.1815, A.1986, A.2158, A.2260, A.2361, A.2561, A.2763, A.2962, A.3155, A.3255.

SpaceX] has made Kahlon a rich man. Due to the relative scarcity of SpaceX shares, Kahlon has been able to charge high fees for access.” Ex.A_p.4. He “also hope[d] to leverage the SpaceX relationship to facilitate investments in other [Elon] Musk-affiliated companies.” *Id.*

B. October 2021: Kahlon solicits an investment from Leo.

Kahlon sought investors for his funds through Farhan Hussain and George Yang of Gulf Asia Venture Group (“Gulf Asia”), who connected Kahlon with potential investors for a fee. Ex.A_p.6.

In October 2021, Yang presented Steven Zhang, a Leo Group director and its head of external investments, with the opportunity to invest in the Fund, which aimed to purchase SpaceX common stock at \$56/share.³ Ex.A_p.7-8. Although (as customary) Leo agreed to pay Gulf Asia a fee if it invested, Gulf Asia’s loyalties were “aligned with” Kahlon. Ex.A_p.6 & n.19; *see* A.855.

C. November 2–15: Kahlon and Leo negotiate and agree to Leo’s regulatory disclosure, Leo becomes a limited partner, and Kahlon conceals this from SpaceX.

On November 2, Kahlon, Gulf Asia, and Zhang met to discuss Leo’s potential investment in the Fund. Ex.A_p.8. Because Leo Group is a Chinese public company, Zhang explained that if Leo invested, the Shenzhen Stock Exchange’s

³ A 10-to-1 stock split occurred during the period relevant here, so Leo has normalized the pricing by using the post-split figures throughout.

rules would require Leo to “issue a public announcement” that “would set out the terms of the contract and also give information on the GP and the LPs.” *Id.*; see A.715. Although “Kahlon initially observed that ‘it would be best not to disclose the name of SpaceX or information concerning the other LPs ...’ because ‘[t]hey deemed that information to be quite sensitive,’” he “never hinted that either the Fund or SpaceX would object to a regulatory disclosure.” Ex.A_p.8 (citations omitted). “He did not suggest that SpaceX had any reluctance about Chinese investors” or “say that he needed to check with SpaceX before letting Leo Group invest.” *Id.*

Leo wanted to invest, and Defendants wanted Leo’s capital, so the parties negotiated terms. Ex.A_p.9. On November 11, Leo’s counsel (“MagStone”) asked Kahlon to address various matters, including Leo’s required disclosure of information about the investment (*e.g.*, the name of the Fund and its plan to invest in SpaceX). *Id.*

The next day, MagStone reiterated these disclosure obligations and stressed that the parties needed to agree on permissible disclosures:

[I]f the fund cannot agree to the disclosure scope as I mentioned (*i.e.*, the specific items), please let me know as soon as possible. Due to regulatory concerns, we may not have sufficient wiggle room to compromise on those specific items.

Ex.A_p.12. Defendants understood this, too, as Kahlon testified. A.409_p.344:8-23.

To bridge the disclosure issue and avoid a future dispute, Yang suggested that Zhang prepare and share with Kahlon a document specifying what Leo needed to disclose. Ex.A_p.13; *see* A.312_p.25:3-11.

On November 13, Leo, through Zhang, sent the proposed disclosure to Yang. Ex.A_p.13. Yang forwarded it to Kahlon, describing it as the announcement Leo “will send to China Securities Regulatory Commission.” *Id.* The draft explained that “Leo Investments will invest US\$50 million” in the Fund and that the Fund “will invest exclusively in the SPACE X project.” Ex.A_pp.13-14. Although it was primarily in Mandarin, “SPACE X” appeared in English, making it clear that the announcement would specifically mention SpaceX. Ex.A_p.14.

About two hours later, MagStone sent Defendants an English version of the “draft of intended disclosures to be made by Leo for its regulatory compliance purposes.” Ex.A_p.14. The draft said that the Fund’s “[o]bjective” was to invest into SpaceX. Ex.A_pp.14-15.

Later that day, Kirkland, copying Kahlon, responded with a revised draft side letter regarding disclosure. Ex.A_p.15; A.716 (“Side Letter”). The Mandarin document from Zhang, unedited, was “Exhibit A.” Ex.A_p.15. Kirkland had revised the Side Letter to include:

Notwithstanding anything to the contrary in Section 7.12(a) of the Partnership Agreement [the “Confidentiality Provision”], to the extent that the Investor is required by law to do so, *the Investor may disclose the information*

described in Exhibit A without the consent of the General Partner and without delivering an Opinion of Limited Partner's Counsel to the General Partner pursuant to Section 7.12(a) of the Partnership Agreement.

Ex.A_p.15 (emphasis added) (quoting A.723). In sharing this updated draft, Kirkland explained:

We also have provided that the requirement for a legal opinion will be waived in connection with the disclosure contemplated by new *Exhibit A (which we understand summarizes the legally required disclosure)*.

Id. (emphasis added). Leo accepted these edits. *Id.*

On November 15, the parties executed the investment agreements, including the Side Letter. Ex.A_p.16. Leo became a Fund limited partner and party to its LPA. *Id.* Kahlon admitted Leo to the Fund because he “did not anticipate any problem with [Leo’s] investment” and believed this was “acceptable.” *Id.* But he concealed from SpaceX his agreement and Leo’s forthcoming disclosure. Ex.A_p.17.

D. November 16: Leo makes the agreed disclosure, the media picks it up, and Kahlon continues to conceal the matter from SpaceX.

Leo promptly provided its \$50 million capital contribution. Ex.A_p.16. Meanwhile, Kahlon used Leo’s investment to solicit more investors in China, asking a friend there if he had “any folks interested in spcex [sic] still?” Ex.A_p.17, adding:

If it helps we just got a 50m check from LEO.cn between us. So might help with folks in terms of speed. I don’t

know if [L]eo is well known in China but it's a 18b business.

Ex.A_pp.17-18.

On November 16, Leo “filed the agreed-upon disclosure as an announcement with the Shenzhen Stock Exchange.” Ex.A_p.18; *see* A.838-46. Media reports “included information from the announcement, added the reporter’s own spin, and occasionally included a comment from Leo Group.” *Id.* While Leo placed an article in certain media via a public relations firm, the article’s contents did not go beyond the parties’ agreed disclosure. Ex.A_p.19. Indeed, Leo placed the article “primarily to circulate factual information about the announcement and limit market speculation.” Ex.A_pp.19-20. Moreover, Zhang ordered Leo employees to not “disclose anything beyond the scope of the announcement.” Ex.A_p.20.

Kahlon saw one of the articles and, despite having signed the Side Letter, including approving the proposed public announcement just the day before, he flew off the handle: “Fuck[,] Leo announced it[,] Motherfuckers[.]” *Id.*; A.847-48. Kahlon was concerned with “his own relationship with SpaceX and whether he would ‘survive this.’” Ex.A_p.22 (citation omitted).

Kahlon initially decided to try to push the deal through and conceal from SpaceX the disclosure and Leo’s investment. Ex.A_p.20. He did not seek to remove Leo. Ex.A_p.22. Rather, Kahlon asked Leo to get the articles removed so that “SpaceX would perhaps not find out about it.” Ex.A_p.21; A.387_p.255:13-22,

A.423-24_pp.400:23-402:4. “Even though Leo Group had bargained for the right to make the agreed-upon disclosure and then did what it bargained for the right to do, Leo Group accommodated Kahlon’s request.” Ex.A_p.21.

As for SpaceX, Kahlon stayed silent. Notwithstanding SpaceX’s preferences to avoid surprises, Kahlon did not tell SpaceX about Leo, the Side Letter, the disclosure, or the media reports.

E. November 17: Kahlon submits stock purchase agreements to SpaceX and continues to conceal Leo’s disclosure from SpaceX.

The next day, Kahlon sent Johnsen, SpaceX’s CFO, two proposed stock purchase agreements by which a TBC-affiliated fund would purchase hundreds of millions of dollars worth of SpaceX common stock at \$56/share. Ex.A_pp.8, 20. The proposed purchase was for the benefit of the Fund and another TBC entity, and Kahlon remained silent about Leo. Ex.A_p.22. Thereafter, Kahlon messaged his attorney at Kirkland:

Sent spa to company for signing[.] Hope this doesn’t
below up[.] Blow up in my face lol[.]

Kirkland responded:



A.854.

- F. November 19: SpaceX’s CFO sees an article about the disclosure and is surprised and upset, but Kahlon blames Leo rather than explain that he had specifically agreed to it.

On November 19, Johnsen sent an email to Kahlon, with the subject line “Leo Investments?” Ex.A_p.23; A.3353. It linked a media article about Leo’s disclosure, asking “What is this?” Ex.A_p.23; A.3353-57. Other than commentary commending Leo for investing in a visionary company, “Kahlon had approved each detail” in the article by executing the Side Letter. Ex.A_p.22.

Kahlon immediately called Johnsen, but didn’t tell him any of that. Johnsen “expressed his surprise and displeasure” that Leo’s investment was public. Ex.A_p.23. “Johnsen also alluded to concern that the investment could trigger review by the Committee on Foreign Investment in the United States” (“CFIUS”). *Id.*

In response, Kahlon lied. He “blamed the media attention on Leo Group,” Ex.A_p.23, and “hid his own responsibility,” Ex.A_p.57. Kahlon “did not”:

- “recount the four days spent on hammering out disclosure terms, the Side Letter, or the agreed-upon disclosure documented in Exhibit A,” Ex.A_pp.23-24;
- “mention that he [therefore] knew about the disclosure and authorized it in advance,” Ex.A_p.23;
- “tell Johnsen that [Leo Group’s] disclosure was legally required,” *id.*;
- “explain that Leo Group’s announcement faithfully tracked the agreed-upon disclosure,” Ex.A_p.24; or

- “reveal[] that [he] had been part of the problem,” Ex.A_p.57.

Instead, Kahlon “let Leo Group take the fall when they were blameless, and he did not reveal his own involvement or take responsibility for the problem he created.” Ex.A_pp.58-59. Johnsen did not learn any of these facts (or that the Side Letter even existed) until his deposition. Ex.A_p.24.⁴ Kahlon’s decision to leave SpaceX in the dark wrongly left the impression that Leo had unilaterally made an unauthorized disclosure that flouted SpaceX’s preferences, when the opposite was true.

Particularly given Kahlon knew SpaceX’s preferences (including a desire to not “be surprised,” Ex.A_p.5), he “was to blame for not going to Johnsen earlier.” Ex.A_p.57. But once confronted with SpaceX’s surprise and anger, “[f]or Kahlon, setting up Leo Group to take the blame was part of the plan. He wanted to preserve his relationship with SpaceX.” Ex.A_p.24. Kahlon later explained in a text message to Gulf Asia: “sx is gonna blame leo on all this[.] ... i should be fine.” Ex.A_p.24.

Unsurprisingly given Kahlon’s deception, at the end of the call, Johnsen made clear that he would not permit the Fund’s SpaceX investment if Leo were a limited partner. *Id.*⁵

⁴ Kahlon also did not correct Johnsen’s misperception regarding CFIUS. Ex.A_p.24. Kahlon had obtained CFIUS legal advice years earlier and knew that this indirect investment raised no CFIUS implications. *Id.*

⁵ Underscoring how much Kahlon concealed, Johnsen did not even know that Leo had already been admitted as a Fund limited partner. A.368_p.177:13-24.

G. November 19–23: After lying to SpaceX, Kahlon prepares and executes a “game plan” to remove Leo.

Post-call, Kahlon immediately concluded that Leo had to go. A.423_p.399:23-400:1. Kahlon believed he “had to move quickly because showing contrition and loyalty was necessary for him to not become ‘*persona non grata*’ in SpaceX’s small circle of trusted intermediaries.” Ex.A_p.76. This had consequences. “[B]y acting quickly, Kahlon foreclosed the possibility that he could convince Johnsen to allow the Fund’s purchase to go forward with Leo Group as a limited partner.” Ex.A_p.57.

Kahlon soon drafted and sent Gulf Asia his “game plan” of “exactly what we are going to communicate with [L]eo” about removal. A.858-61; Ex.A_p.25. He admitted that his “game plan” was “basically bullshit written to make [Leo] feel better so they would do what was the right thing to do, in our view,” that is, “amicably withdraw,” obviating any dispute. Ex.A_p.26; A.422_p.395:4-12.

Kahlon would first pretend “[t]his isn’t anyone’s fault,” A.859, when, as the court below rightly concluded, *Kahlon* created this problem. He then would explain:

In the US, funds and their terms and underlying information is never shared with the public such that press can get involved. With SpaceX, no investor ever comments or releases information on any financing. We have never announced that we are invested in SpaceX or ever been in the press concerning SpaceX.

A.859. These statements, like many others (Ex.A_pp.26-28), “were not true.” Ex.A_p.26. Kahlon knew they were false given his experience with disclosures about SpaceX, including DeVos’s, his own, and many others. *Supra* p.9; *e.g.*, A.422_p.394:1-8.

Leo soon sent Kahlon a letter explaining that it made its disclosure “according to the [parties’] agreement and the Chinese regulatory requirements of listed companies.” A.863-66; Ex.A_p.28. Leo suggested that “it would be more rational for [the Fund] to continue to work with us and maintain active communication with SpaceX to help retain our LP share.” A.866; Ex.A_p.28. Leo suggested that it speak to SpaceX directly, and Kahlon refused, stating that “it would be a violation.” A.874; A.322_p.67:5-68:8.

Hours later, Kahlon sent Johnsen a misleading message stating “they are out of our fund.” Ex.A_p.29.⁶ Kahlon and Johnsen spoke briefly, and “Kahlon let[] Johnsen conclude that Leo Group was a ‘bad actor.’” *Id.* He covered up how the disclosure occurred: *Kahlon negotiated and agreed to it. Supra* p.10-13.

On November 22, Leo confirmed it would not agree to withdraw. A.869. Defendants returned Leo’s \$50 million via wire transfer. Ex.A_p.29.

⁶ At trial, Kahlon claimed he sent this message because Leo had agreed to a *mutual* withdrawal. A.391_p.270:9-18. In deposition, he said the opposite, admitting he sent this message because he had made the decision to remove Leo *unilaterally*. A.424_p.402:21-403:12.

Kahlon sent Leo a unilateral termination letter (the “Termination Letter”), which did not cite the LPA. *Id.* Instead, it claimed that Leo’s participation “would impose materially burdensome compliance obligations on the Partnership under U.S. and/or Chinese regulations.” A.868; Ex.A_p.29. Never did Kahlon identify these purported “materially burdensome compliance obligations.” A.322-23_pp.68:23-69:10; A.322-23_pp.68:23-69:10. In discovery, Defendants invoked privilege. A.426_p.409:1-7. Kahlon, however, admitted that certain of his claims in the letter were “untrue” and “bullshit.” A.423_p.397:4-5, 426_p.409:8-17.

“Later that afternoon, Kahlon sent Johnsen a letter purporting to document ‘what happened.’” Ex.A_p.29. It contained more falsehoods, including describing Leo as seeking “public notoriety.” Ex.A_p.29-30.

Not until MagStone sought the legal basis for the Termination Letter the next day did Kahlon invoke the LPA’s forced removal provision. Ex.A_p.30. Kahlon claimed that Defendants had exercised “reasonable judgment” in removing Leo because its “status as an LP would result in a significant and adverse delay” and because of “regulatory, media and other issues that arose.” Ex.A_pp.30-31. Kahlon further claimed (but refused to provide requested written proof) that SpaceX “simply would not do the deal with our fund if your client remained as an LP.” Ex.A_p.31.

H. December 2021–May 2022: SpaceX exercises its ROFR, causing the Fund to later purchase at a higher price.

On December 13, SpaceX exercised its ROFR over the shares the Fund was planning to purchase at \$56/share. Ex.A_p.31. Although SpaceX did not exercise its ROFR for all available shares, Kahlon’s other fund purchased those remaining shares leaving none for this Fund. Ex.A_p.32.

On May 26, 2022, the Fund purchased SpaceX common stock for a higher price of \$70/share. *Id.*

II. Procedural History

A. Leo sues and tries its claims for breaches of fiduciary duty and the LPA.

Leo commenced suit in February 2022. Ex.A_p.32. Post-fact discovery, Defendants moved to partially dismiss Leo’s amended complaint, which the Court of Chancery denied. Ex.A_p.33. The court *sua sponte* granted partial summary judgment for Leo, holding that the Side Letter rendered the Confidentiality Provision (A.1078-79 §7.12(a)) inapplicable to disclosure of the information in Side Letter Exhibit A. Ex.A_p.33. Defendants’ contrary argument was deemed “so unreasonable as to be frivolous.” A.886-87 ¶6.

On December 10, the court held that, due to spoliation by Kahlon and others, Defendants had to satisfy an increased (*i.e.*, clear and convincing) standard for any issue on which they bore the burden of proof. A.199:4-6.

Trial proceeded in mid-December, with six witnesses testifying live and two testifying by deposition. By trial, SpaceX common stock was \$185 per share; today, it is more.

B. The Court of Chancery concludes that Defendants breached the duty of candor but that Leo did not show other breaches.

Post-trial, the Court of Chancery found that Kahlon had breached his duty of candor because he spoke “falsely and partially” to Leo, including by formulating the “bullshit” “game plan,” sending letters containing inaccurate accounts, depicting SpaceX’s “reaction as capricious,” and concealing that SpaceX was “both uninformed and misinformed.” Ex.A_p.69.

But, by focusing on the termination period *after* Kahlon repeatedly lied to SpaceX’s CFO, the court concluded that Leo otherwise did not prove a fiduciary or contractual breach. Ex.A_p.1. The court found that Leo’s claims failed “largely because” Defendants “did not owe fiduciary duties to Leo Group” but “to the Fund and its partners as a whole.” Ex.A_p.35, *see* Ex.A_p.42 n.185 (citing, *sua sponte*, *McRitchie v. Zuckerberg*, 315 A.3d 518 (Del. Ch. 2024)).⁷ The court said

⁷ On this point, the court misconstrued Leo’s arguments. Leo’s claims arise from duties owed to the Fund and its limited partners, not just Leo specifically (Leo is merely the only plaintiff pursuing claims). Although Kahlon lied about Leo and ultimately caused it additional and unique harm as compared to other investors, Kahlon’s actions to protect his own interests created a risk for and harmed the Fund and all of its limited partners as a whole. *Contrast* Ex.A_p.78 (“Johnsen’s reaction to Leo Group’s involvement in the Fund caused a material adverse effect”), *with* Ex.A_pp.57-59 (finding that Johnsen’s reaction was a “problem [Kahlon] created”).

Defendants satisfied those duties *when terminating* Leo because they reasonably believed that SpaceX “would not permit the Fund to buy SpaceX shares if Leo Group remained in the Fund.” Ex.A_pp.48-50. The court similarly found that Defendants did not breach the LPA, finding that its removal terms (*e.g.*, a “reasonably likely” “material adverse effect”) were satisfied because SpaceX had made clear that it “would not let the Fund buy SpaceX shares as long as the Fund remained a limited partner.” Ex.A_pp.75-76.

On the candor claim on which Leo prevailed, the court concluded Leo had not proved that it led “to any meaningful loss” for Leo or “benefit” for Kahlon and therefore awarded nominal damages of \$1. Ex.A_p.1.

- C. The Court of Chancery awards Leo its expenses, including attorneys’ fees, because Kahlon “breached his duty of candor for [an] improper and bad faith purpose.”

A few weeks later, the court held that, given Kahlon’s breach of the duty of candor, Leo was entitled to its expenses, including attorneys’ fees, under *William Penn Partnership v. Saliba*, 13 A.3d 749, 758-59 (Del. 2011). Ex.B_p.5; *see generally* Ex.C. The court noted that “Kahlon’s conduct during the litigation reinforces the equities in having Kahlon bearing his beneficiary’s expenses[:] Kahlon spoliated documents and gave often not-credible testimony.” Ex.B_p.5.

D. The Fund and the General Partner file two related suits against Leo.

Shortly before trial, notwithstanding the compulsory counterclaim rule, the Fund and the General Partner filed two suits against Leo Group involving the same facts and circumstances relevant here.

First, although Defendants had waived a jury trial and agreed to bring all suits “relating in any way to the Subscription Documents” in Delaware, A.784-85, in August 2024, they filed suit in California federal court. Ex.A_p.34. They demanded a jury trial and advanced the same interpretation of the LPA’s Confidentiality Provision (§7.12(a)) and the Side Letter that the Court of Chancery later held was “so unreasonable as to be frivolous.” A.1114-15 ¶34; A.886-87 ¶6. In mid-November 2024, the General Partner and the Fund filed yet another (similar) lawsuit in the Delaware Superior Court. Ex.A_p.34. Those suits are pending.

ARGUMENT

The Court of Chancery's opinion reads like the story of Jekyll and Hyde: scathing fact findings concerning Defendants' conduct coupled with the conclusion that they comported with their fiduciary duties. The court's detailed fact findings of Kahlon's lies and material omissions should have led it to hold that the business judgment rule was rebutted. That would have placed the burden on Defendants to prove the entire fairness of their actions, which they cannot satisfy on this record. Its failure to do so warrants reversal.

The court should have considered whether Defendants' misconduct that created the problem, namely Kahlon's deception, rebutted the business judgment rule. First, Kahlon concealed from SpaceX Leo's involvement and planned disclosure, in contravention of SpaceX's known preferences. Then, having seen Leo's contracted-for disclosure and attendant media coverage, he buried his head, hoping that SpaceX wouldn't notice. Then, once confronted by SpaceX's CFO with the very disclosure that Kahlon had contractually agreed Leo could make, Kahlon lied about Leo. At the end of that call, after Kahlon purposefully left the false impression that Leo had made an unauthorized disclosure, Johnsen indicated that the Fund could not invest with Leo as a limited partner.

Rather than address Kahlon's *creation* of this problem, the court focused on Kahlon's *response*. Through this unduly narrow lens, the court found that Kahlon

acted reasonably and in the best interest of the Fund when he decided to eject Leo via the LPA's forced withdrawal provisions, because Johnsen's reaction made it "reasonably likely" that the Fund would face a "material adverse effect" or "significant and adverse delay" on its business. Ex.A-pp.59-60, 64-65, 74.

The court's failure to adequately address Kahlon's creation of the problem was error. Consideration of that wrongful conduct leaves no doubt that Plaintiff rebutted the business judgment rule as to his (and the General Partner's) actions, and Defendants could not possibly have carried their entire fairness burden.

I. Plaintiff Rebutted the Business Judgment Rule by Showing that, from the Moment It Joined the Partnership, Defendants Acted Dishonestly for Self-Interested Reasons.

A. Question Presented

Can a fiduciary whose obfuscation and lies create a threat to a Delaware partnership and its limited partners escape responsibility by invoking the business judgment rule and provisions in the entity’s governing documents in responding to the very threat he created? A.588-608.

B. Scope of Review

Following a bench trial, this Court “reviews the Court of Chancery’s legal conclusions *de novo* but defers to the Court of Chancery’s factual findings supported by the record.” *Coster v. UIP Cos., Inc.*, 300 A.3d 656, 663 (Del. 2023). Legal conclusions reviewed *de novo* include the “proper allocation of the burden of proof.” *State Farm Mut. Auto. Ins. Co. v. Spine Care Del., LLC*, 238 A.3d 850, 857 (Del. 2020). This Court will not disturb factual findings unless “clearly wrong and the doing of justice requires their overturn.” *Coster*, 300 A.3d at 663 (citation omitted).

C. Merits of Argument

1. *The Court of Chancery erred by focusing on Kahlon’s response to the problem he created, not his creation of the problem in the first place.*

a. The trial court artificially limited its analysis to the period after SpaceX made clear Leo could not be an indirect investor, ignoring the period leading up to that call.

Defendants concede that Kahlon and the General Partner owed fiduciary duties to the Fund and its limited partners, including Leo, the moment it became a Fund limited partner on November 15. Ex.A_p.44. Those duties of loyalty and care are “unremitting.” *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998). Fiduciary duties “do[] not operate intermittently but [are] the constant compass by which all director actions for the corporation and interactions with its shareholders must be guided.” *Id.*

The trial court erred by focusing only on Kahlon and the General Partner’s conduct in responding to Johnsen’s reaction to Kahlon’s November 19 call, a reaction spurred by Kahlon’s deception. The court’s analysis failed to account for Defendants’ creation of the problem when Kahlon actively concealed facts from and then lied to SpaceX. Indeed, the court framed the issue as whether Leo proved “that Kahlon and the General Partner breached their fiduciary duties *when carrying out the Forced Withdrawal.*” Ex.A_p.34 (emphasis added). It repeated this category error throughout its analysis. Ex.A-pp.42-43, 48 (“fiduciary duties” and conflict of

interest “when exercising the Withdrawal Provision”); Ex.A-pp.52-54 (bad faith as to “Forced Redemption”); Ex.A_pp.54-55 (gross negligence/recklessness as to “Forced Withdrawal”); Ex.A_p.59 (business judgment rule as to “invok[ing] the Withdrawal Provision”); Ex.A_p.64 (fairness as to same); Ex.A_pp.68-69 (candor while “exercising the Withdrawal Provision”).

That framing error obscured Kahlon and the General Partner’s actions that caused the problem that led to the supposed need to force Leo out of the Fund via the Withdrawal Provision. Kahlon’s misconduct, beginning with concealment from SpaceX of information about Leo and culminating in his overt lies to SpaceX about Leo on November 19, breached Defendants’ fiduciary duties and caused the self-inflicted wound invoked by Kahlon to justify the forced withdrawal. The court erred by failing to appreciate the significance of that earlier period.

- b. The trial court’s scoping error led it to incorrectly focus on Kahlon’s invocation of the LPA, even though the contract says nothing about Kahlon’s actions before his call with SpaceX.

Because the court limited its inquiry to the post-Johnsen-call period, it concluded that Defendants’ contract obligations exclusively defined their fiduciary duties. *See* Ex.A-pp.49-50 (Defendants did not breach fiduciary duties when they “effectuated the Forced Withdrawal” because they were “exercising contract rights” (citing *Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010) and *Riblet Products Corp. v.*

Nagy, 683 A.2d 37 (Del. 1996)). This is just another facet of the court’s error in limiting its legal analysis to that period.

Even if Defendants’ fiduciary duties were subsumed by their obligations under the LPA when they “effectuated the Forced Withdrawal,” Ex.A_pp.49-50, that says nothing about Kahlon’s behavior *prior* to doing so. The LPA (and the removal provision invoked by Defendants, Section 7.7(b)(ii), in particular) do not bear on Kahlon’s deceptive *problem-causing* behavior. *See* A.1068. Rather, Section 7.7(b)(ii) permitted the General Partner to force Leo’s withdrawal if the General Partner exercised a “reasonable judgment” that it was “reasonably likely” there would be a “material adverse effect” or a “significant and adverse delay” in the Fund’s activities. Ex.A_pp.73-74; A.1068. The Court held that this contractual removal standard was satisfied primarily because SpaceX had made clear that it would not let the Fund buy with Leo as an investor. Ex.A-p.75.⁸ But the LPA does not countenance Kahlon’s concealment of Leo’s agreed disclosure from SpaceX or his lies to SpaceX about Leo once confronted with it. Since Kahlon was not exercising contract rights when deceiving SpaceX,⁹ this contractual principle that the trial court invoked does not apply to Kahlon’s earlier deceptive conduct.

⁸ To be clear, Leo is not appealing this narrow contract-interpretation holding.

⁹ Indeed, as noted above (*supra* p.20), Kahlon first invoked the LPA’s removal terms *after* sending the Termination Letter, and Defendants refused to provide discovery about what they understood those terms to mean.

Consistent with this disconnect, compliance with contractual obligations at the end of a parties' relationship does not purge the taint of the many breaches of fiduciary duty that occurred beforehand.¹⁰ Any notion that a fiduciary can effectively do just that—steer the circumstances into a contract term whether by lying, cheating, stealing or otherwise and then invoke that contract to escape fiduciary review for that lying, cheating, or stealing—cannot be the law. To hold otherwise would turn contractual conditions into a fiduciary's get-out-of-jail-free card. Thus, nothing the trial court said about the LPA saves its decision from reversal.

2. *Kahlon and the General Partner's actions, from the moment Leo joined the Fund, should have been held to rebut the business judgment rule.*

Once the full scope of Defendants' actions is considered, it is plain that Kahlon's deception and lies rebutted the business judgment rule. Kahlon's concealment of information from and outright lies to SpaceX constituted disloyal, bad faith conduct, or non-exculpated¹¹ gross negligence at a minimum. That

¹⁰ Indeed, analogous doctrines support the opposite. For example, a party cannot rely on the failure of a contractual condition to excuse its own performance under the contract "when its own conduct materially caused the condition's failure." *WaveDivision Holdings, LLC v. Millennium Digital Media Sys., LLC*, 2010 WL 3706624, at *14 (Del. Ch. Sept. 17, 2010).

¹¹ Importantly, the LPA's exculpation provision specifically carves out and does not provide protection for, among other things, "gross negligence." A.1056-57 §6.10(a).

misconduct was more than sufficient to rebut the business judgment rule, putting the burden on Defendants to prove the entire fairness of their wrongful conduct. The court's factual findings demonstrate that they could not possibly have done so.

- a. The trial court's factual findings establish that Kahlon's creation of the problem constituted a breach of the duty of care.

The court's gross negligence analysis focused almost exclusively on Kahlon's reaction to the problem he created. *E.g.*, Ex.A_p.55 (Leo "failed to prove that the General Partner acted recklessly *when implementing the Forced Withdrawal.*" (emphasis added)); Ex.A_p.54 ("when engaging in the Forced Redemption"). But Kahlon failed to act with due care in his initial, dishonest interactions with SpaceX that created the problem that made the forced withdrawal of Leo purportedly necessary.

Indeed, the court recognized as much, in its brief consideration of Kahlon's earlier, problem-causing actions. In discussing gross negligence and the duty of care, the court found that:

Leo Group correctly points out that Kahlon was to blame for not going to Johnsen earlier. Leo Group also correctly points out that Kahlon hid his own responsibility by failing to mention the Side Letter and Exhibit A. But Leo Group did not make a convincing case that sharing that information would have changed Johnsen's mind.

Ex.A_p.57 (emphasis added).

This amounts to a breach finding in all but name. Kahlon knew about SpaceX's preferences and how to engage with SpaceX to ensure they were met and inexplicably failed to do so. *Id.* ("Kahlon was to blame for not going to Johnsen earlier.").

Kahlon's failure to even try to do so was quintessential gross negligence. A fiduciary acting on a fully informed basis would have discussed Leo's admission to the Fund and its contracted-for regulatory disclosure with SpaceX, consistent with its known preferences. Once confronted on November 19, rather than be honest and explain his agreement to the Side Letter and the reasons for it, Kahlon lied. *Id.* ("Kahlon hid his own responsibility by failing to mention the Side Letter."). These actions¹² should have been held to rebut the business judgment rule, placing the burden on Defendants to establish the entire fairness of these actions. And the court's failure to conduct an entire fairness analysis that considered all of Kahlon's conduct, while suggesting that Leo failed to prove causal harm, is itself reversible error. *Infra* p.40-45.

Other factual findings, which did not figure in the court's legal analysis given its artificially narrow scope, underscore that Kahlon's problem-causing actions constituted gross negligence. Kahlon's November 16 reaction to Leo's disclosure,

¹² As discussed below, this was also bad-faith conduct.

for example, speaks volumes. On November 15, after days of negotiation, Kahlon signed the Side Letter, which expressly permitted the disclosure of the information in its appended Exhibit A. Ex.A_pp.15-16. *The very next day*, Kahlon expressed purported shock and dismay at Leo having made *that very disclosure*. Ex.A_p.20; A.847-48 (“Fuck[,] Leo announced it[,] Motherfuckers[.]”).

Kahlon subsequently testified that he did not correctly understand the parties’ agreements; indeed, he said he harbored an interpretation of this agreement that the trial court had deemed frivolous. A.416_p.371:3-20; A.886-87 ¶6. Kahlon apparently did not understand that the Side Letter he signed that permitted Leo to make a legally required disclosure (a Side Letter that for good measure appended a draft disclosure titled “Content of Leo Group’s Intended Public Announcement”) meant that Leo Group would be making that very announcement. A.735. *But see* Ex.A_p.10 (citing documents showing Kahlon directly participated in the negotiations about the disclosures). These facts, which the court did not address in its due care analysis, confirm that the General Partner and Kahlon were grossly negligent. *E.g., Seaford Funding Ltd. P’ship v. M & M Assocs. II, LP*, 672 A.2d 66, 70 (Del. Ch. 1995) (“[G]eneral partners may not use the business judgment rule as a shield if they are not informed of material information reasonably available to them.”).

- b. The trial court's factual findings likewise establish that Kahlon's creation of the problem breached the duty of loyalty.

The Court of Chancery's loyalty (conflict and bad faith) analyses likewise focused on Kahlon's decision to "engag[e] in the Forced Withdrawal" and not the disloyal manner in which he conducted himself leading up to that decision. Ex.A_pp.48-54. This too was error. Consideration of the entire relevant period compels finding the business judgment rule rebutted; therefore, Defendants bore the burden of proving the fairness of their actions.

Kahlon had a personal financial interest in his relationship with SpaceX tied to lucrative future business opportunities. "He wanted to preserve his relationship with SpaceX and the Musk-iverse across time, multiple funds, and every possible Musk-controlled entity." Ex.A_p.49. The court recognized that Kahlon "conceivably might have sacrificed the Fund to protect his long-term relationship." *Id.*

Kahlon knew SpaceX's preference to not be surprised and therefore should have made SpaceX aware of Leo's admission as a limited partner, and its attendant (and negotiated) disclosure needs. *Supra* p.8-10. He should have engaged honestly. SpaceX's known dislike of surprises obviously meant that being silent about an inevitable public disclosure created risk. Instead, Kahlon acted as if he did not understand the Side Letter he personally negotiated and decided to say "nothing to SpaceX, hoping SpaceX would not find out." Ex.A_p.22.

Kahlon doubled down on his wrongful conduct when he and Johnsen spoke on November 19, after SpaceX discovered what he had concealed for days. Kahlon could have had the honest conversation hypothesized above. For example, he could have, but did not:

- “mention that he knew about the disclosure and authorized it in advance,” Ex.A_p.23;
- “recount the four days spent on hammering out disclosure terms, the Side Letter, or the agreed-upon disclosure,” *id.*;
- “explain that Leo Group’s announcement faithfully tracked the agreed-upon disclosure,” Ex.A_p.24; or
- “correct Johnsen’s misperception” regarding CFIUS, *id.*

Instead, he lied to protect his own lucrative relationship with SpaceX. As the court found:

For Kahlon, setting up Leo Group to take the blame was part of the plan. He wanted to preserve his relationship with SpaceX. As he later explained his hope in a text message to [Gulf Asia], “Sx is gonna blame leo on all this ... i should be fine.”

Id. (quoting A.963); *see* Ex.A-pp.58-59 (“He let Leo Group take the fall when they were blameless, and he did not reveal his own involvement or take responsibility for the problem he created.”).

Lies are inherently disloyal.¹³ *E.g.*, *In re Oracle Corp. Deriv. Litig.*, 339 A.3d 1, 22-23 (Del. 2025) (“Fiduciaries, corporate or otherwise, may not use superior information or knowledge to mislead others in the performance of their own fiduciary obligations.... When a fiduciary ... engages in deceptive conduct ... he has failed to act in good faith and therefore acted disloyally” (cleaned up) (quoting *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1989)); *City of Fort Myers Gen. Emps.’ Pension Fund v. Haley*, 235 A.3d 702, 718 (Del. 2020) (same); *Morrison v. Berry*, 2019 WL 7369431, at *22 (Del. Ch. Dec. 31, 2019) (“In other words, the difficult situation the Board faced in December 2015 was due, in part, to Berry As alleged, Berry’s silence, falsehoods, and misinformation conceivably violated the basic principle that fiduciaries ... may not use superior information or knowledge to mislead others in the performance of their own fiduciary obligations.” (cleaned up) (quoting *Mills*)); *In re Dole Food Co.*, 2015 WL 5052214, at *39 (Del. Ch. Aug. 27, 2015) (“[G]ood faith requires that the decision-maker act ‘honestly and without pretext.’ Bad faith involves the opposite.... A corporate fiduciary thus acts

¹³ The trial court noted without citation in its candor analysis (the only other place in which it analyzed Kahlon’s deceptive conduct) that Kahlon “did not owe a duty of candor to SpaceX.” Ex.A_p.68. *Of course* Kahlon did not owe SpaceX fiduciary duties. But it was a breach of Kahlon’s duties to the Fund and its limited partners (including Leo) to lie to SpaceX *about Leo* to protect himself, thereby creating risk for the Fund and its limited partners. Lying to your beneficiaries’ most important business partner is not acceptable, let alone doing so for a self-interested reason.

in bad faith when motivated by a purpose other than that of advancing the best interests of the corporation and its stockholders.” (citation omitted)); *Desimone v. Barrows*, 924 A.2d 908, 933 (Del. Ch. 2007) (“deception is itself a disloyal act”); *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 753-54 (Del. Ch. 2005) (“Good faith has been said to require an honesty of purpose, and a genuine care for the fiduciary’s constituents”), *aff’d*, 906 A.2d 27 (Del. 2006).

The trial court effectively forgave this conduct and held that the business judgment rule was not rebutted by concluding that Kahlon was acting with two motivations, one Fund-focused and the other not. First, that “[c]oming out of [the November 19] call, Kahlon believed—both subjectively and reasonably—that Johnsen would not permit the Fund to buy SpaceX shares if Leo Group remained in the Fund.” Ex.A_p.48. Second, that Kahlon’s actions also “served Kahlon’s self-interest” and “Kahlon’s interests were not fully aligned with those of the Fund and the partners as a whole.” Ex.A_pp.48-49. Critically, however, that Fund-centric concern was not extant *at any point before* Johnsen indicated at the end of the November 19 call, in *response to Kahlon’s lies*, that the Fund could not invest if Leo were involved. Before Kahlon heard Johnsen’s misinformed reaction, Kahlon could not have been motivated by that reaction. What remains is his self-interest.

* * *

Had Kahlon been honest with SpaceX about the reasons he thought Leo was an appropriate investor and why it made its disclosure, and Johnsen had still refused to permit the Fund's investment, and then Kahlon thoughtfully reasoned to remove Leo from the Fund, this would have been a very different case. An honest fiduciary who through no fault of their own is put in the difficult position of choosing between harm to an entity or harm to a minority investor should prioritize and protect the former.

But that is not what happened here. Rather, (i) everyone believed Leo's investment to be viable at the outset; (ii) Kahlon failed even to try to address SpaceX's known preferences as he had done successfully in the past; (iii) when SpaceX expressed surprise, Kahlon concealed and lied to blame Leo and protect himself; and (iv) in response to this deception, SpaceX (predictably) indicated it did not want Leo as an indirect investor. Kahlon's bad faith and dishonesty infected everything that followed, including his decision to invoke "the problem he created" to forcibly remove Leo from the Fund. Ex.A_p.59.

The trial court's fact findings establish that Plaintiff rebutted the business judgment rule, and the court erred as a matter of law in holding otherwise.

- c. The trial court erred by failing to analyze whether Defendants met their burden to prove the entire fairness of their creation of the problem, and misallocating that burden to Leo.

As outlined above, the court should have found Kahlon's woefully uninformed and deceptive *creation of the problem* rebutted the business judgment rule and shifted the burden to Kahlon and the General Partner to prove that their actions in creating the problem were entirely fair. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 371 (Del. 1993) ("A breach of either the duty of loyalty or the duty of care rebuts the presumption that the directors have acted in the best interests of shareholders, and requires the directors to prove that the transaction was entirely fair."), *modified on other grounds*, 636 A.2d 956 (Del. 1994). A plaintiff need not establish causation or harm to effectuate this burden shift. *Id.* at 367 (requiring plaintiff "to prove a proximate cause relationship between the [fiduciary's] presumed breach of its duty of care *and* the shareholder's resultant loss [] is contrary to well-established Delaware precedent").

The trial court conducted a truncated entire fairness analysis in the alternative. Ex.A_pp.59-60, 64-65. But that analysis (again) was limited to the conduct surrounding the Withdrawal Provision. Properly analyzed to include Kahlon's actions beginning when Leo joined the Fund, and in view of the trial court's stark factual findings related to that period (which the court did not discuss in its legal

analysis of fairness), there is only one possible result: Defendants cannot carry their burden to show that their actions were entirely fair.

i. The trial court omitted its factual findings about the earlier period from its entire fairness analysis.

First, again, the Court erred by not evaluating the entire fairness of Kahlon's disloyal conduct in creating the problem. *See* Ex.A_pp.59-60, 64-65 (analyzing the "entire fairness" solely of the decision to invoke Forced Withdrawal). Notwithstanding the unremitting nature of fiduciary duties, the court's analysis erroneously focused on Kahlon's invocation of the withdrawal provision *after* he created the problem by concealing information from and lying to SpaceX. *See, e.g.,* Ex.A_p.65 ("Kahlon acted in a fair manner towards the Fund and its partners as a whole by acting quickly to eliminate the problem that Leo Group posed.").

Had the court conducted an entire fairness analysis that encompassed its own findings regarding Defendants' problem-causing concealment and lies, Defendants could not have proved the entire fairness of their problem-causing concealment and lies. This would be true under any standard, but particularly so here because Defendants' spoliation led the trial court to require that they prove by clear and convincing evidence any matter on which they bore the burden. A.199:4-6.

From a process perspective, Kahlon's concealment and lies, made to protect himself (as found by the trial court), are indefensible. *See, e.g.,* Ex.A_pp.21-22 (hoping "SpaceX would not find out" about the disclosure); Ex.A_pp.23-24, 57

(describing lies and omissions to SpaceX); Ex.A_pp.58-59 (finding that Kahlon “let Leo Group take the fall when they were blameless, and he did not reveal his own involvement or take responsibility for the problem he created”). *Cf. Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1046 (Del. 2014) (“Our courts do not approve the use of deception as a means by which to conduct a Delaware corporation’s affairs”); *supra* p.37-38 (gathering cases regarding disloyal, bad faith conduct). The court found that his understanding of the parties’ agreement regarding disclosure was frivolous. *See* A.886-87 ¶6; *Smith v. Van Gorkom*, 488 A.2d 858, 879-80 (Del. 1985) (merger agreement “on its face cannot be construed” as directors testified because directors “had no rational basis” to interpret agreement as such). And Kahlon’s decision to remain silent about the agreed-upon disclosure, notwithstanding SpaceX’s preference to avoid surprise, was inexcusable given his prior experience in successfully navigating investor disclosures and his express agreement that Leo could make one. *Supra* p.9. Although it made these factual findings, the court did not consider them in its entire-fairness analysis. These facts show that Defendants could not possibly meet their burden to show entire fairness.

All the evidence and facts found by the trial court demonstrate that, absent Kahlon’s breaches, Leo’s investment would have gone forward. Kahlon testified that he admitted Leo because he believed it was appropriate. *See* A.380_p.228:8-13 (acknowledging that allowing Leo to be a limited partner would be acceptable to

SpaceX even if it “would at some point have a public disclosure obligation”). Defendants’ post-trial brief likewise admitted that the investment was “viable” at the outset, explained that Leo’s geographic location and disclosure needs were navigable, and that Kahlon had experience doing just that. A.643-44. As the trial court found, “[a]lthough SpaceX does not want to be surprised, the company has always permitted legally required disclosures” and “many investors have disclosed their investments in SpaceX.” Ex.A_p.5 & n.18 (citing examples). Critically, with reference to Kahlon’s prior experience obtaining SpaceX’s approval for another investor (DeVos) to disclose her investment in SpaceX, Kahlon testified:

Q: Akin to what happened with Ms. Devos, if there wasn’t a dispute over the propriety of Leo Group’s announcement, you’re confident that you would have worked things out with SpaceX, and plaintiff would have been able to make its investment, correct?

A: Yes, I am.

A.402_p.315:8-13.¹⁴ Given the trial court concluded that Leo’s disclosure was entirely consistent with the parties’ agreement (*e.g.*, Ex.A_pp.18-19), Kahlon’s admission speaks volumes.

As for price, Leo’s investment that should-have-been was tied to the Fund’s planned purchase of SpaceX common stock at \$56/share. SpaceX instead exercised its ROFR, leaving the Fund unable to purchase as planned. *See* Ex.A_pp.31-32. The

¹⁴ The trial court’s opinion did not address this testimony.

Fund did not do so until May 2022, and then had to pay a higher price of \$70/share, which harmed all Fund investors. Ex.A_p.32. At the time of trial, SpaceX common stock was \$185/share; public information places its latest sales of common stock at \$212/share.¹⁵

- ii. *The trial court also erroneously placed the causation burden on Leo in its limited earlier period analysis, compounding its error in not analyzing those facts in its entire fairness analysis.*

As explained above, the court’s gross negligence analysis briefly recognized that Kahlon had failed to act appropriately when he created the problem. *Supra* p.32; Ex.A_p.57. (“Kahlon was to blame for not going to Johnsen earlier”; “Kahlon hid his own responsibility”). But it immediately went on to suggest that the claim failed because *Leo* did not establish causal harm: “But Leo Group did not make a convincing case that sharing that information would have changed Johnsen’s mind.” *Id.*

This was error. As *Cede* explains: “To require proof of injury as a component of the proof necessary to rebut the business judgment presumption would be to convert the burden shifting process from a threshold determination of the appropriate standard of review to a dispositive adjudication on the merits.” *Cede*, 634 A.2d at

¹⁵ See Loren Grush, Katie Roof, and Ed Ludlow, *Musk’s SpaceX Plans Share Sale that Would Value Company at About \$400 Billion*, Bloomberg (July 15, 2025), <https://www.bloomberg.com/news/articles/2025-07-15/musk-spacex-share-sale-to-value-company-at-about-400-billion>.

371 (trial court erred by “inject[ing] into the duty of care element a burden of proof of resultant injury or loss”). Had the trial court done otherwise, and analyzed the facts it found in this earlier time period, Defendants could not possibly have satisfied their burden. As Defendants conceded (and the evidence shows), Leo’s investment was “viable” and would have come to fruition had Kahlon acted appropriately from the outset. *Supra* p.42-43.

* * *

In sum, Leo rebutted the business judgment rule. Defendants then had the burden to prove the fairness of their conduct in creating the problem—not just Kahlon’s response to it. The court’s detailed fact findings leave no doubt that Kahlon and the General Partner failed to meet that burden.

II. Defendants Violated the Subscription Agreement’s Forum Selection and Jury Trial Waiver Clauses.

A. Question Presented

Whether the Subscription Agreement’s forum selection clause, by its plain language, requires all signatories to file in Delaware any suit “relating in any way to the Subscription Documents or any other Offering Materials.” A.618–19.

B. Scope of Review

This Court reviews questions of contract interpretation *de novo*. *City of Newark v. Donald M. Durkin Contracting, Inc.*, 305 A.3d 674, 679 (Del. 2023).

C. Merits of Argument

The Court of Chancery erred in holding that the Subscription Agreement’s forum selection provision did not bar Defendants’ suit in California. Ex.A_p.84. The court wrongly interpreted the forum selection provision in the Subscription Agreement as a “one-way forum selection provision” that “does not bind the Fund, the General Partner, or their affiliates.” Ex.A_p.85. The provision requires litigation in Delaware of:

any action or proceeding brought by the Subscriber against the General Partner or the Management Company (or their respective direct or indirect owners, officers, directors, managers, agents or employees in their capacity as such, or in any related capacity) or the Partnership, *or relating in any way to the Subscription Documents or any other Offering Materials.*

A.784 (emphasis added).

The provision is written as two clauses separated by the disjunctive “or,” thereby governing two distinct categories of covered actions: (i) those “brought by the Subscriber against the General Partner,” or (ii) those “relating in any way” to the specified documents. *Id.* Read naturally, the latter clause applies to an action brought by either party regarding any action relating to the Subscription Documents, including the claims brought by Defendants in California. *See, e.g., Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1045 n.22 (Del. 2023). The trial court’s contrary reading effectively renders the second clause surplusage. *Id.* at 1056.

The provision additionally precludes any party from demanding a jury trial:

The Subscriber and the General Partner, on behalf of itself and the partnership, irrevocably waive, to the fullest extent not prohibited by applicable law, any right to a jury trial in connection with any action or proceeding by or against the General Partner or the Management Company (or their respective direct or indirect owners, officers, directors, managers, agents or employees in their capacity as such, or in any related capacity) or the partnership, or in any way relating to the Subscription Documents or any other offering materials.

A.785. Defendants’ demand for a jury trial in their California suit, which relates to the Subscription Documents, likewise violates this provision.

Because Defendants should have, but failed, to file their California complaint in Delaware and have sought a trial by jury despite waiving one, Leo is entitled to legal fees incurred litigating in California. *El Paso Nat. Gas Co. v. TransAmerican*

Nat. Gas Corp., 669 A.2d 36, 40 (Del. 1995) (holding successful invocation of forum selection clause as a defense triggers cost shifting).

CONCLUSION

For the foregoing reasons, this Court should hold that (i) Kahlon and the General Partner breached their fiduciary duties; (ii) the trial court's fact findings compel the conclusion that their actions were not entirely fair; (iii) Defendants breached the Forum Provision; and (iv) the trial court should, on remand, determine the appropriate relief.

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