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IN THE

Supreme Court of the State of Delaware

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

APPELLEES/CROSS-APPELLANTS' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

In 2021, Plaintiff Leo Investments Hong Kong Limited, an affiliate of China-based Leo Group, sought to purchase shares of Space Exploration Technologies Corporation ("SpaceX") by becoming a limited partner in a fund, Tomales Bay Anduril III, L.P. (the "Fund"), maintained and managed by a general partner, Tomales Bay Capital Anduril III GP, LLC (the "General Partner" or "GP"), and its managing member, Iqbaljit Kahlon (together with the Fund and the GP, "Defendants").[1] Almost immediately after Leo became a limited partner, it publicly disclosed this development with its Chinese stock exchange (and various media outlets), and a wave of media coverage followed. Within days, a SpaceX executive contacted Kahlon expressing displeasure at the media coverage and conveying that the Fund could not purchase any shares, for any limited partner, if Leo remained a participant. Kahlon accordingly removed Leo from the Fund. Leo then sued Defendants for breach of contract and breach of fiduciary duty.

The trial court rejected nearly every aspect of Leo's case, concluding that there was no breach of contract, no breach of the duty of care, and no breach of the duty of loyalty. The court noted that Defendants owed fiduciary duties to the Fund and its partners as a whole; that Kahlon acted consistent with those duties, even if his conduct

[1] For this appeal only and consistent with post-trial opinion below, this brief refers to Leo Investments Hong Kong Limited and Leo Group collectively as "Leo."

was also motivated by a desire to stay in SpaceX's good graces; and that even if Kahlon had done exactly what Leo claimed he should have done, it would have made no difference, as the media coverage SpaceX disliked could not be undone. The court also held that, regardless, Defendants' conduct satisfied the "entire fairness" test.

Those determinations are correct and should be affirmed. Yet the trial court proceeded to hold that Kahlon violated his "duty of candor" to Leo based on three purported "misstatements," warranting $1 in nominal damages. Worse, the court leveraged this finding to award Leo *all* of its attorneys' fees for this case—nearly *$16 million*.

The trial court's "duty of candor" ruling and resulting fee award cannot stand. Even the trial court acknowledged that Leo did not rely on the purported "misstatements" and that they did not cause injury to Leo, defeating liability—and the "misstatements" are not material misrepresentations or omissions in the first place. Furthermore, there is no basis in law or fact to award Leo any attorneys' fees, much less its full amount of nearly $16 million, for a suit that was almost entirely unsuccessful. Accordingly, this Court should affirm the trial court's rulings that Defendants did not breach their fiduciary duties of care or loyalty, but reverse the court's rulings that Kahlon breached his "duty of candor" and that Leo is entitled to nearly $16 million in fees.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly held that Defendants did not violate their fiduciary duty of loyalty and the General Partner did not violate its duty of care. Leo does not challenge much of the trial court's analysis, contending only that the trial court failed to consider Defendants' actions before Kahlon's November 19 call with SpaceX. But the court accounted for this conduct, concluding that it did not demonstrate gross negligence and that other actions would not have made a difference regardless. Nor does Defendants' conduct demonstrate a violation of the duty of loyalty. Even if Kahlon's actions before the November 19 call were motivated in part by self-interest, that motivation aligned with his motivation to ensure the Fund could obtain SpaceX shares, consistent with his duty to the Fund. Furthermore, SpaceX demanded Leo's exclusion from the investment not because of any purported dissembling by Kahlon but rather, as the trial court found, because of media coverage following Leo's disclosure. Regardless, Defendants' actions satisfied the "entire fairness" test, and Leo's contrary argument is meritless.

2. The trial court nevertheless erred in holding that Kahlon breached his duty of candor. Leo never raised this duty below, and regardless, liability for violating a duty to deal honestly requires a material misrepresentation or omission, reliance, and causally related damages. But as the trial court correctly held, Leo did not demonstrate reliance or causation. Nor are any of the purported "misstatements" the trial court

identified material misrepresentations or omissions. The "communication plan" was never communicated to Leo and proposed a voluntary withdrawal by Leo that was never executed. As for "conflicting" accounts communicated to SpaceX and Leo, Defendants owed no duty to SpaceX, and Kahlon's letter to Leo regarding its removal did not contain material misrepresentations, as the court's findings reflect. Finally, the court's belief that Kahlon inaccurately depicted SpaceX's reaction to Leo is based on the court's incorrect interpretation of the Limited Partnership Agreement ("LPA") and the associated side letter and its failure to account for Kahlon's subjective understanding of those documents; moreover, any such characterization was not material because it could not have affected Leo's decisionmaking.

3. The trial court also erred in awarding Leo almost $16 million in attorneys' fees based on its duty of candor holding. Leo failed to demonstrate that Defendants' conduct satisfied any of the narrow, limited exceptions to the American Rule that this Court has recognized. Defendants' actions did not constitute bad faith, and the trial court's reliance on *William Penn Partnership v. Saliba*, 13 A.3d 749 (Del. 2011), is erroneous, as Defendants' conduct does not rise to the level of egregiousness in that case (and the court never so found), and the claim on which Leo prevailed was marginal to its case. Moreover, even if Leo were entitled to fees, an award of $16 million is unreasonable. First, the trial court failed to address the reasonableness factors that Defendants raised. Second, awarding Leo its entire requested amount is unreasonable

because Leo's suit was almost entirely *un*successful, and this Court has recognized that fees should be tailored to claims on which a party actually prevailed.

4. Denied. The trial court correctly held that the Subscription Agreement does not require Defendants to commence their fraud suit against Leo in Delaware. Leo's jury-trial argument was not raised below and is meritless regardless.

COUNTERSTATEMENT OF FACTS

A. SpaceX and TBC

SpaceX is a privately-owned company founded by Elon Musk. Op.3.[2] Investors cannot buy its shares on the open market. Op.3. Additionally, SpaceX has a right of first refusal ("ROFR") to purchase its shares that a holder wishes to sell. Op.3. SpaceX works with intermediaries to assemble investor groups to buy shares from those who want to sell. Op.3. An intermediary pools investors' capital in a fund, which then purchases SpaceX shares. Op.3. Once a fund becomes a SpaceX stockholder, SpaceX cannot control sales of the fund's equity. Op.3. Accordingly, SpaceX prefers to "work with a small group of intermediaries that it trusts." Op.3.

Tomales Bay Capital ("TBC") invests in late-stage technology companies, including SpaceX. Op.2-3. Kahlon is TBC's managing partner. Op.2-3. Kahlon has had a close relationship with SpaceX's senior management for many years. Op.4. TBC funds have invested in SpaceX shares through original issuances, tender offers, and acquisitions from other funds. Op.3-4; A375-76 at 206:7-207:13, 208:6-210:6.

[2] Citations to "Op.__" are to the post-trial opinion below, attached as Exhibit A to Leo's opening brief. Citations to "Br.__" are to Leo's opening brief.

B. The Fund and Leo

In 2021, Kahlon learned of an opportunity to acquire from another fund—the "Rizvi" Fund—SpaceX shares valued at $528 million (the "Investment"). Op.6-7. Accordingly, TBC deployed the Fund. Op.7. The Fund is managed by the General Partner; Kahlon is the General Partner's managing member. Op.7.

Leo is headquartered in the People's Republic of China. Op.7. Its shares trade publicly on the Shenzhen Stock Exchange ("SZSE"). Op.7. In October 2021, George Yang, a financial advisor and friend of Leo's head of investments, Steven Zhang, presented Leo with the opportunity to invest in SpaceX through TBC. Op.8; A307-08 at 8:17-9:13; B230-33. Farhan Hussain, Yang's partner, knew Kahlon and would assist in introducing Leo to TBC. A379 at 222:23-223:6.

C. The LPA and the Side Letter

TBC admitted investors to the Fund as limited partners through the LPA. A1008. The LPA constrains a limited partner's disclosure of information. Section 7.12(a) (entitled "Confidential Information") generally bars disclosure of *any* information regarding the Partnership: "Each Limited Partner shall keep confidential and shall not disclose … any information or materials regarding the Partnership Entities or the other Partners … except (and then only) to the extent that … the disclosure of such information or materials is expressly required by applicable law." A1078-79.

The LPA places three pre-conditions on a limited partner seeking to make even a required-by-law disclosure. First, "prior to such disclosure," the limited partner "shall promptly notify the General Partner … in writing of such anticipated disclosure" (the "Advance Written Notice Requirement"). A1079. Second, the notice "shall be accompanied by an Opinion of Limited Partner's Counsel that such disclosure is required by applicable law" (the "Opinion of Counsel Requirement"). *Id.* Third, the limited partner "shall cooperate with the General Partner to preserve the confidentiality of such information … (including by seeking relief from such disclosure requirements [or] minimizing the extent of such disclosure)" (the "Cooperate to Minimize Requirement"). *Id.*

At the outset of their discussions, Kahlon conveyed to Leo that SpaceX was "sensitive" about information disclosure, including that SpaceX is an investment target. A712. Leo expressed that, as a public company, it would have to make a regulatory disclosure regarding the Investment. Op.8. Accordingly, Kahlon, his counsel (Kirkland & Ellis) and Leo's counsel (MagStone) negotiated a side letter to the LPA addressing this issue (the "Side Letter"). Op.9-12.

During negotiations, MagStone agreed that "the confidentiality provision in the LPA regarding legally required disclosure," *i.e.,* §7.12(a), "should govern our client's disclosure to PRC regulatory agencies," but it "request[ed] to remove the [Opinion of Counsel Requirement]." B243. In response, Kirkland "confirm[ed] that

the LPA governs the investor's right to disclose Confidential Information" and commented, "We also have provided that the requirement for [an Opinion of Counsel] will be waived in connection with the disclosure contemplated by new Exhibit A." Op.15; A716; A384 at 242:6-244:15. Exhibit A was an outline of items for which public disclosure might be required, which Leo had prepared and MagStone had forwarded to Kirkland. Op.13-15; *see also* B279.

Reflecting these discussions, the final version of the Side Letter contained the following relevant language in §2(a):

> Notwithstanding anything to the contrary in Section 7.12(a) of the Partnership Agreement, to the extent 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.

Op.15; A723. Section 2(c) of the letter added: "For the avoidance of doubt, except as expressly modified by this Letter Agreement, the provisions of Section 7.12(a) of the Partnership Agreement will continue to apply to the Investor in full." A723§2(c).

The parties signed the LPA, Side Letter, and other related documents, and a closing packet was circulated on November 16, at 8:23 a.m. in China (November 15, 2021, 4:23 p.m. PST). B289. At that point, Leo became a Limited Partner of the Fund. Op.16.

D. Leo's Regulatory Disclosure and Media Campaign

Later on November 16 (China time), Leo made a disclosure to the Shenzhen Stock Exchange (the "SZSE Disclosure"). Op.18; B681; A314 at 36:3-10. The SZSE Disclosure built out the information outlined in Exhibit A to the Side Letter, including identifying SpaceX as the Fund's investment target. Op.18; B489-91; B685-88. Leo did not notify Kahlon or TBC in advance that it was going to make a disclosure, notwithstanding the Advance Written Notice Requirement in LPA §7.12(a). A381-82 at 232:20-233:6; A385 at 248:13-23. Leo also did not consult with the SZSE or any other government authority regarding the disclosure's scope or whether any information, such as SpaceX being the investment target, could be exempted, nor did it engage in any other minimization efforts pursuant to the Cooperate to Minimize Requirement in §7.12(a). A342 at 145:18-21; B708; B709, No. 46.

On the contrary, Leo disclosed information about its SpaceX investment beyond a regulatory filing. Unbeknownst to Kahlon or TBC, Leo had planned a media campaign around its SpaceX investment. Leo's public relations agency, Golden Wheat, wrote articles, including one that Leo had approved titled "Leo Group Co., Ltd. invests US $50 million in SpaceX to explore new investment track," and as soon as Leo made its regulatory disclosure, Golden Wheat disseminated the articles to numerous outlets, including Baidu (the dominant Chinese search engine),

media and financial websites, and major securities platforms. *See* Op.19; B497-98; B559-60; A324-A326 at 76:13-19, 78:18-24, 79:1-82:20; B754. Other media picked up on the articles, leading to misleading commentary, including that Leo would be in close cooperation and sharing resources with, and providing support to, SpaceX. B546; B553.

Leo executives also directly discussed its investment with reporters. *See* B532-34; B592-93; B664-66; B676; B578; B624-25. One executive was even given editorial discretion over a reporter's article, which was ultimately titled, "Investing in SpaceX? Why this A-share listed company is planning to build rockets with Musk?" and contained quotes attributed to the executive. *See* B532-33; B592-93; B756. Furthermore, Zhang instructed his subordinates to post published articles on social media, which they did. *See* B506; B523.

The campaign was a success: Leo's investment "drew considerable media attention," and the "[m]ultiple media articles" covering the investment "generated millions of views." Op.18. Kahlon was "genuinely surprised" if not appalled by these developments—both that Leo made the SZSE disclosure without prior notice and at the numerous articles regarding Leo and SpaceX. Op.20. Kahlon expressed concerns to Hussain, B540, who shared these concerns with Yang, who spoke with Zhang of Leo, who told Yang it was "not the case" that Leo was "taking the initiative to publicize" the investment—one of many falsehoods by Leo regarding its publicity

efforts. B646; A330 at 98:12-99:20; *see also* B258 (Zhang falsely assuring, before Leo becoming a Limited Partner, that Leo did "not need to publicize the investment"); A864 (Leo falsely asserting to Kahlon that it did not "provide press releases to any news media" or "organize any media reports").

E. SpaceX's Objection and Leo's Removal From the Fund

Following the wave of media articles, Kahlon sought to mitigate the situation (including by asking Leo to take down articles) and continued with the process of the Fund's purchasing SpaceX shares (including by sending a purchase agreement to SpaceX, which triggered the ROFR review period). Op.20-21; A386-87 at 252:4-254:12; A389 at 264:9-21. Informed by his prior dealings with SpaceX, Kahlon endeavored to alleviate the matter before bringing it to SpaceX's attention to maximize Leo's chances of remaining in the Fund and the Fund's chances of being able to acquire the Rizvi shares. Op.23; A387-88 at 255:3-257:3.

On November 19, three days after Leo joined the Fund and the media coverage ensued, SpaceX's Chief Financial Officer, Bret Johnsen, emailed Kahlon a link to an article titled, "Elon Musk gets backing from a prolific Chinese tech investor," with the question: "What is this?" Op.22-23. Kahlon immediately called Johnsen. A389 at 261:17-263:15.

During the call, Johnsen "expressed his surprise and displeasure" about media coverage stating that a China-based company was "backing" SpaceX, because

"SpaceX's competitors for sensitive government contracts could attack SpaceX" for "its 'backing' from a Chinese investor." Op.23. As Johnsen later testified:

> Q: What was objectionable to you, to SpaceX, was the fact of—that it disclosed the investment would ultimately be made at SpaceX?
>
> A: No, the objectionable part—look at the title of the article. Look at the title of the article. This is not an SEC regulatory filing. This is a specific title that is not helpful for SpaceX.

A369 at 184:2-9. Johnsen further testified: "[T]his is not helpful for our company as a government contractor because it, in essence, arms our competitors with something to use as a narrative against us in Washington, D.C." A373 at 199:7-11.

By the end of their call, Johnsen "made clear that he would not let the Fund buy SpaceX shares if Leo Group remained a limited partner." Op.24. As Johnsen later testified:

> Q: [A]fter Leo's disclosure, was there any point at which you were going to allow Leo to invest in SpaceX through Tomales Bay if Leo remained in investor in the fund?
>
> A: No.
>
> …
>
> Q: Did you make that clear to Kahlon?
>
> A: I believe I did.

Op.24-25; A374 at 203:22-204:2, 8-10. Kahlon "left the call with that understanding." Op.25. He "did not think there was any possibility that Johnsen

would change his mind," because "Johnsen had been upset over the media stories, and that coverage could not be changed." Op.25.

Kahlon thus "immediately sought to remove Leo Group from the Fund." Op.25. Kahlon believed he "had to move quickly" because "SpaceX was deciding whether to exercise its ROFR" or to allow TBC to purchase the Rizvi shares—which would affect all the limited partners in the Fund—and the closing was ten days away. Op.25.

Kahlon communicated with Hussain about approaching Leo regarding its withdrawal from the Fund. Op.25-26; A856; A389 at 264:3-6; A389-390 at 264:22-265:11; A422 at 394:9-18. On November 20, Yang informed Zhang that Kahlon intended to remove Leo from the Fund. Op.27. On November 21, Yang, Zhang, and Kahlon had a call, and Kahlon sent Zhang a letter proposing that Leo agree to withdraw from the Fund. Op.28. Leo refused. Op.27. The next day, Kahlon consulted with counsel and determined to unilaterally remove Leo from the Fund, informing Leo as such by letter. Op.29. That same day, Defendants returned Leo's capital contribution. Op.29.

On November 23, MagStone asked Kahlon to justify Leo's removal. Op.30. Kahlon responded that "it is the reasonable judgment of the GP that your client's status as an LP would result in a significant and adverse delay to the proposed deal we had discussed and therefore we had to exercise our rights under the LPA for a

unilateral withdrawal." Op.30. In particular, Kahlon explained, "the target company for investment simply would not do the deal with our fund if your client remained as an LP." Op.31.

On December 13, SpaceX exercised the ROFR on the Rizvi shares. Op.31. SpaceX did so because Musk himself wanted to buy the shares. Op.31.

F. Proceedings Below

1. Pretrial Rulings

On February 23, 2022, Leo sued Kahlon, the GP, and the Fund, alleging breach of contract and breach of fiduciary duty. B1. Defendants moved to dismiss. The trial court declined to dismiss the breach of contract claim but dismissed the fiduciary duty claim. B25.

On August 27, 2024, Leo filed an Amended Complaint, again alleging breach of contract and breach of fiduciary duty. B27. Defendants again sought to dismiss, arguing, *inter alia*, that Leo's claims rested in part on a misreading of LPA §7.12(a) and the Side Letter—specifically, that the Side Letter allowed Leo to make its regulatory disclosure without complying with the Advance Written Notice Requirement and Cooperate to Minimize Requirement in LPA §7.12(a).

On November 4, 2024, the trial court not only denied Defendants' motion to dismiss, but *sua sponte* granted partial summary judgment to Leo on the LPA/Side Letter issue (the "SJ Order"). The court held that "[t]he plain language of … the Side Letter renders §7.12(a) of the [LPA] inapplicable for purposes of the disclosures in

Exhibit A to the extent they were required by law." Ex. D at 2. In its view, this interpretation was "the only reasonable reading of how the Side Letter interacts with the [LPA]," and Defendants' interpretation was "frivolous." Ex. D at 3.

Shortly before trial, the court granted in part motions *in limine* by both parties alleging spoliation. B193; B196. The court "raise[d] the burden of proof one level"—to a clear and convincing evidence standard—"on issues where the defendants bear that burden." A199. The court precluded Leo from proffering testimony about the drafting of media disclosures or interactions with public relations firms. A191.

2. Post-Trial Opinion

Following a three-day trial and post-trial argument, the court issued its post-trial opinion on June 30, 2025. The trial court held that Leo failed to establish a breach of the fiduciary duties of care or loyalty or a breach of the LPA. At the outset, the court explained that "Leo Group misunderstands the nature of the fiduciary duties that the General Partner and Kahlon owed." Op.35. They "did not owe fiduciary duties to Leo Group; they owed fiduciary duties to the Fund and its partners as a whole." Op.35.

As to the duty of loyalty, the court rejected Leo's argument that "Kahlon acted disloyally by seeking to preserve his relationship with SpaceX rather than promoting the value of the Fund." Op.48. As the court explained, following Johnsen's call with Kahlon regarding media coverage of Leo's investment, Kahlon "believed—both subjectively and reasonably—that Johnsen would not permit the Fund to buy SpaceX

shares if Leo Group remained in the Fund." Op.48. Furthermore, "Kahlon also believed—both subjectively and reasonably—that to enable the Fund to acquire SpaceX shares, he needed to get back into Johnsen and SpaceX's good graces," which "meant eliminating the problem that Leo Group posed by ending their participation in the Fund." Op.48. "[E]nsuring that the Fund could close the Rizvi Shares transaction to invest in SpaceX shares" by "effectuat[ing]" Leo's withdrawal thus "was not a breach of the duty of loyalty to the Fund and its limited partners." Op.49.

The court also rejected Leo's contention that Kahlon and the GP "acted disloyally by failing to act in good faith." Op.51. The court observed that Kahlon sought "to protect his own relationship with SpaceX and its leadership" but also "to protect the Fund's ability to purchase SpaceX shares." Op.53. The "latter motivation was proper," so even if the "former was not," it "aligned with the proper motivation and led [Kahlon] to act in a way that served the best interests of the Fund." Op.53. Thus, Kahlon "did not commit disloyal acts, even though he acted with mixed motives." Op.53.

The court next rejected Leo's assertion that the GP breached its duty of care by acting with gross negligence when removing Leo. Although "Kahlon resolved to remove Leo Group as a limited partner after a single, short call with Johnsen, the implication of that call was clear: Kahlon had to remove Leo Group from the Fund or the Fund would not be able to purchase SpaceX shares." Op.55-56. The court explained that Kahlon "didn't" have "time to consider and weigh other options after the call."

Op.56. And it was "unlikely" Kahlon could have "convince[d] Johnsen to allow the Fund's purchase to go forward with Leo Group," because the "publicity that had already occurred"—the source of Johnsen's concerns—was "a bell that could not be unrung." Op.57.

The court also found that even if Kahlon had approached Johnsen earlier or mentioned the Side Letter, it would not "have changed Johnsen's mind," because the "press coverage about Leo Group's involvement would exist regardless." Op.57. The court explained that although Leo may be correct that Kahlon "was to blame for not going to Johnsen earlier" and that Kahlon "fail[ed] to mention the Side Letter and Exhibit A," these actions were immaterial; given Johnsen's expressed views, Kahlon had no viable alternative but to remove Leo in order to protect the Fund and its partners as a whole. Op.57.

The court held that Leo "failed to rebut any of the presumptions of the business judgment rule," and Kahlon's decision removing Leo to protect the Fund "was plainly rational"—indeed, "perhaps the only choice available." Op.59. Regardless, Defendants "proved that their actions were entirely fair to the Fund and its partners as a whole," even under a heightened clear-and-convincing standard. Op.64. Among other things, "if Kahlon had not acted quickly" and removed Leo, "the delay could have harmed the Fund by preventing it from ever having the opportunity to invest in SpaceX shares." Op.65.

Despite finding no breach of the duties of loyalty or care—and that entire fairness was satisfied anyway—the court held that "Kahlon breached his duty of candor" in three ways. Op.65. First, Kahlon formulated a disingenuous communication plan to convince Leo to withdraw from the Fund consensually. Op.69. Second, Kahlon "sent letters to Leo Group and SpaceX that contained conflicting accounts, neither of which was accurate." Op.69. Third, "in [his] discussions with Leo Group, Kahlon … depicted Johnsen's reaction as capricious and concealed that he was both uninformed and misinformed." Op.69.

Nevertheless, the court held, Leo "failed … to prove reliance or any causally related harm" because it "did not act to its detriment" on these "misstatements" by Kahlon. Op.69. Nor did Kahlon "gain any benefit" from them "other than through the exercise of the Withdrawal Provision," which he was already entitled to do and did so validly. Op.69. The court awarded "nominal damages" of $1 to Leo for the breach. Op.70.

Finally, the court held that Leo "failed to prove any of its contract claims." Op.35; *see also* Op.70-86. As relevant here, the court held that Defendants did not violate a forum-selection clause in Defendants' Subscription Agreement by suing Leo for fraud in federal court in California rather than Delaware. Op.84. The court

explained that the agreement contains a "one-way forum selection provision" that does not bind "the Fund, the General Partner, or their affiliates." Op.85.[3]

3. Fee-Shifting Orders

The post-trial opinion instructed the parties to "submit a proposed final order" and address any remaining issues. Op.86. The parties submitted competing forms of order and identified the remaining issues as Leo's request for attorneys' fees and Defendants' request for costs. B201. On August 3, the court granted Leo's proposed form of order and awarded Leo its "reasonable attorneys' fees and expenses." Ex. B at 3. The court gave two reasons for shifting fees. First, "Kahlon breached his fiduciary duty of disclosure by lying to his beneficiary," which "was a disloyal act." *Id.* at 5. Second, "Kahlon spoliated documents and gave often not-credible testimony." *Id.*

Leo submitted a Rule 88 fee application, which the court granted in full over Defendants' opposition on September 17, 2025. Conceding that Kahlon's conduct "did not result in compensable harm," the court nevertheless held that Kahlon's breach of the duty of candor "caused harm in the form of this dispute." Ex. C at 3. Accordingly, attorneys' fees were warranted "so that those who violated their fiduciary obligations and were the cause of this litigation bear the burden of the

[3] On appeal, Leo does not challenge the trial court's breach of contract ruling except its forum-selection provision ruling. *See* Br.30 n.8.

expenses they imposed." *Id.* The court rejected Kahlon's argument that fees were only warranted for the claims on which Leo prevailed and ordered Kahlon to pay *all* of Leo's requested attorneys' fees—$15,828,174.05, plus interest accruing from the date of the order. *Id.* at 4.

ARGUMENT

I. THE COURT CORRECTLY HELD THAT DEFENDANTS DID NOT BREACH THEIR FIDUCIARY DUTIES OF LOYALTY AND CARE AND, REGARDLESS, SATISFIED "ENTIRE FAIRNESS" REVIEW.

A. Question Presented

Whether the trial court correctly held that Defendants did not breach their fiduciary duty of loyalty and the General Partner did not breach its fiduciary duty of care and, regardless, Defendants' conduct was entirely fair. Op.48-65.

B. Scope of Review

Following trial, this Court reviews the trial court's conclusions of law *de novo* and its factual findings for clear error. *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015).

C. Merits of Argument

Leo does not challenge much of the trial court's thorough analysis holding that Defendants did not breach their fiduciary duty of loyalty nor the General Partner its fiduciary duty of care. Indeed, Leo does not seriously dispute that the trial court correctly held that Defendants did not breach any fiduciary duties when "carrying out the Forced Withdrawal," *i.e.*, Kahlon's interactions with Leo after his November 19 call with Johnsen of SpaceX (up to and including Leo's removal from the Fund). Br.28-29. Rather, Leo's entire argument turns on the premise that the trial court committed a "framing error" by failing to consider "Kahlon's actions *before* SpaceX refused Leo" as an investor on November 19. Br.5, 29. According to Leo, the court "erred by failing

to appreciate the significance of that earlier period," and wrongly "focus[ed] on Kahlon's response to the problem he created, not his creation of the problem in the first place." Br.28-29. Leo contends that "once the full scope of Defendants' actions is considered," not only has Leo rebutted the business judgment rule, but Defendants cannot satisfy the "entire fairness" standard. Br.31, 40-41. This argument is meritless.

1. The Court Correctly Held that the General Partner Did Not Breach Its Fiduciary Duty of Care.

The trial court held that the General Partner was not grossly negligent in removing Leo from the Fund, and thus did not breach its duty of care, because while the GP removed Leo only after Kahlon's "single, short call with Johnsen," the "implication of that call was clear: Kahlon had to remove Leo Group from the Fund, or the Fund would not be able to purchase SpaceX shares." Op.55-56. And because "[t]he general partner of a limited partnership owes fiduciary duties that run to the limited partnership for the benefit of the partners as a whole," not "to an individual limited partner," Op.41-42, the GP did not breach any duties in determining that the only way the Fund and the other limited partners would be able to obtain SpaceX shares was to remove Leo as an investor, Op.56-57. The trial court rejected Leo's arguments that "Kahlon had time to consider and weigh other options," that Kahlon could have "convince[d] Johnsen to allow" the Fund to buy shares even with Leo as a limited partner, and that if Kahlon had gone to Johnsen earlier or been more candid about his involvement, it "would have changed Johnsen's mind." Op.56-57.

Leo has almost nothing to say about any of this reasoning, which is correct. Instead, Leo argues that "Kahlon failed to act with due care in his initial, dishonest interactions with SpaceX that created the problem" that resulted in "the forced withdrawal of Leo." Br.32.[4] But the only "interaction[]" between Kahlon and SpaceX was the November 19 call between Kahlon and Johnsen, which the trial court addressed. Leo appears to contend that Kahlon's failure to affirmatively approach SpaceX *before* the November 19 call, or to explain to SpaceX his involvement in the Side Letter before or during that call, breached the GP's duty of care. *Id.* But the trial court expressly accounted for those considerations, finding that they would have made no difference. As the court observed, "[t]he press coverage about Leo Group's involvement would exist regardless," and "Johnsen was upset about the publicity that had already occurred, including the headline claiming that a Chinese company was backing SpaceX." Op.57. As such, if Kahlon had discussed "his own involvement and his failure to bring Johnsen into the loop" earlier, the result would be to "foreclose[] the Fund's ability to participate in any transactions," in dereliction of the GP's duties to the Fund. *Id.* Kahlon thus did not act negligently, much less with gross negligence, in interacting with SpaceX. *See, e.g.*, *Albert v. Alex. Brown Mgmt. Servs., Inc.,* 2005 WL 2130607, at *4 (Del. Ch.

[4] Leo repeatedly argues that Kahlon breached the duty of care. But as the trial court held, and Leo does not challenge, Kahlon—as a general partner's managing member—does not owe a duty of care. *See* Op.54. Defendants address Leo's duty of care contentions regardless, but Leo's incorrect party references as to duty of care should be noted.

Aug. 26, 2005) (gross negligence "involves a devil-may-care attitude or indifference to duty amounting to recklessness").

Leo cites two "[o]ther factual findings" that supposedly "did not figure in the court's legal analysis given its artificially narrow scope." Br.33. Both are irrelevant. First, Leo invokes Kahlon's negative reaction to Leo's regulatory disclosure. Br.33-34. But it is entirely unclear what Kahlon's passing remark to Hussain has to do with the duty of care to Leo or how it "confirm[s]" that the GP breached its duty of care. Second, Leo notes that Kahlon testified that he did not think the Side Letter allowed Leo to make its regulatory disclosure without initially providing notice and attempting to minimize disclosure. But this merely explains Kahlon's negative reaction upon learning about the disclosure—*i.e.*, his "genuine[] surprise[]," as found by the trial court, Op.20.—as he expected prior notice and cooperation to minimize (not publicize) the disclosure. *See* pp.40-43, *infra*. None of this amounts to gross negligence.

2. The Court Correctly Held that Defendants Did Not Breach Their Fiduciary Duty of Loyalty.

The trial court also held that Defendants did not breach their duty of loyalty in removing Leo from the Fund. The court first concluded that Kahlon did not act disloyally by "seeking to preserve his relationship with SpaceX rather than promoting the value of the Fund," because "Kahlon's interests were aligned with the Fund's, so serving his own interests equated to acting loyally." Op.48. Coming out of the call with Johnsen, "Kahlon believed—both subjectively and reasonably—that Johnsen

would not permit the Fund to buy SpaceX shares if Leo Group remained in the Fund." Op.48. Kahlon thus removed Leo from the Fund, which, while "also serv[ing] Kahlon's self-interest," was "not a breach of the duty of loyalty to the Fund." Op.48-49. The court next concluded that Kahlon did not act in bad faith. Although he "sought selfishly to protect his own relationship with SpaceX and its leadership," he also "sought to protect the Fund's ability to purchase SpaceX shares." Op.53. The "latter motivation was proper," and the "former was not," but the former motivation "aligned with the proper motivation and led [Kahlon] to act in a way that served the best interests of the Fund." Op.53. Kahlon "therefore did not commit disloyal acts, even though he acted with mixed motives." Op.53.

Leo again challenges very little of this analysis. Instead, Leo contends that Defendants breached their fiduciary duty of loyalty because "[l]ies are inherently disloyal." Br.37-38. In the next breath, however, Leo acknowledges that the trial court held that Kahlon's conduct did not breach Defendants' duty of loyalty because "Kahlon was acting with two motivations, one Fund-focused and the other not." Br.38. Leo does not challenge that "mixed motives" holding, which Delaware law firmly supports. *See, e.g.*, *In re Speedway Motorsports, Inc. Deriv. Litig.*, 2003 WL 22400758, at *2 (Del. Ch. Oct. 14, 2003) (applying business judgment rule and finding no breach of fiduciary duties because director shareholders' interests in pursuing sale "aligned with the plaintiff's interests"); *McRitchie v. Zuckerberg*, 315 A.3d 518, 553-54 (Del. Ch.

2024). Rather, Leo pivots to arguing that the trial court failed to consider "the entire relevant period," again meaning the period after Leo's investment but before Kahlon's November 19 call with Johnsen. Br.35. Specifically, Leo contends that Kahlon's "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." Br.38. Leo's argument is again unavailing.

To begin, Leo's cited authorities for its assertion that "[l]ies are inherently disloyal" are inapposite because the defendant in those cases owed a fiduciary duty to those to whom the defendant allegedly made misrepresentations or withheld information. *See* Br.37-38. Here, as the trial court correctly held and Leo concedes, Defendants owed no fiduciary duties to SpaceX—the entity to which Leo alleges Kahlon was not sufficiently forthcoming during the "relevant period." *See* Op.68; Br.37 n.13.

Furthermore, Kahlon had a "Fund-centric concern" during the time between Leo's disclosure and the November 19 call. Leo essentially contends that Kahlon was required, as a matter of fiduciary duty, to have (i) affirmatively approached SpaceX before the November 19 call about Leo's investment and the Side Letter; or (ii) told Johnsen about his involvement in the Side Letter during the November 19 call, and that he failed to do so to avoid hurting his own relationship with SpaceX. Br.35-36. But if Kahlon had taken either step, there was a very substantial risk that SpaceX would have

refused to allow Kahlon to purchase *any* SpaceX shares for the Fund, for *any* limited partner, as the trial court found. *See* Op.57. Thus, *throughout* "the entire relevant period," even if Kahlon's decision not to disclose certain information to SpaceX benefited himself, that decision was not a breach of the duty of loyalty because Kahlon's self-interested motivation "aligned with" his second, "proper motivation" to "protect the Fund's ability to purchase SpaceX shares." Op.53.[5]

It also bears emphasizing that Kahlon's decision not to promptly approach SpaceX, and instead to try to mitigate the media coverage with Leo, was done for *Leo's* benefit. Kahlon testified that, in his view and based on his longstanding relationship with Johnsen, if he had immediately called Johnsen and told him, "all this stuff has happened," Johnsen would have simply said that Leo could not be an investor. A387 at 256:3-12. But if Kahlon could tell Johnsen that there was a "problem" yet everyone worked "collaboratively" to fix it, there was a higher chance that Johnsen would react more favorably and allow the Investment to go forward with Leo as a participant. A387-88 at 255:13-22, 256:13-257:3.

[5] To the extent Leo contends that Kahlon should have informed SpaceX about Leo's involvement *before* the disclosure and press coverage, that argument fails. The disclosure and press coverage occurred almost immediately after Leo joined the Fund, and before then, Defendants did not owe Leo any fiduciary duties. *See* Op.68 (trial court noting that "when [the parties] were negotiating Leo Group's investment in the Fund," Leo "was not yet a limited partner and so not yet a beneficiary of Kahlon's fiduciary duties").

Regardless, as with Leo's duty of care argument, the trial court took into account Kahlon's actions (or inactions) before the end of the November 19 call and concluded that even if Kahlon had affirmatively approached SpaceX earlier or disclosed his involvement with the Side Letter, it would have made no difference. Op.56-57. As trial testimony established, it was the media coverage following Leo's disclosure that compelled Johnsen to want Leo out of the Fund. A369 at 184:2-9. Thus, even if Kahlon had done everything that Leo says he "should have" done—such as making "SpaceX aware of Leo's admission as a limited partner" and its "disclosure needs," or describing to Johnsen his own involvement in the Side Letter, Br.35-36—the ensuing media coverage of the disclosure would have occurred, and Johnsen still would have demanded Leo's exclusion. *See* Op.57.

Leo has no answer to this fundamental defect in its argument and, instead, attempts to obfuscate it. Specifically, Leo repeatedly contends that Kahlon's "lies" led Johnsen to demand Leo's exclusion. *See, e.g.*, Br.2 ("Having been fed lies about Leo, SpaceX concluded that it did not want Leo as an indirect investor[.]"); Br.3 ("Kahlon's deception caused the problem in the first place."); Br.32 (Kahlon's "interactions with SpaceX … created the problem that made the forced withdrawal of Leo purportedly necessary."); Br.38 ("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."); Br.42 ("[A]bsent Kahlon's breaches, Leo's investment would have gone forward.").

But that is not what the trial court found, nor what the record establishes. The trial court found, consistent with Johnsen's testimony, that "Johnsen was upset about the publicity that had already occurred"—immediately after Leo became a limited partner and made its regulatory disclosure—and that that "press coverage about Leo Group's involvement would exist regardless" of any different conduct by Kahlon. Op.57. It is thus untrue that "in response to [Kahlon's] deception, SpaceX (predictably) indicated it did not want Leo as an indirect investor." Br.39. SpaceX did not want Leo as an investor not because of any purported "deception" by Kahlon, but because of the media coverage following Leo's disclosure—to which Leo contributed, and which would have occurred even if Kahlon were as forthcoming to SpaceX as Leo now claims he should have been.

3. The Court Correctly Held that Defendants' Conduct Was Entirely Fair Regardless.

Finally, the trial court correctly held that, even if Leo rebutted any of the business judgment rule's presumptions, Defendants satisfied the "entire fairness" test. Leo's contrary arguments lack merit.

Leo contends that the trial court "conducted a truncated entire fairness analysis" that was "limited to the conduct surrounding the Withdrawal Provision" rather than also covering "Kahlon's activities beginning when Leo joined the Fund." Br.40. Leo does not identify those "activities," but, as in Leo's other arguments, presumably they are merely that Kahlon should have approached SpaceX before the November 19 call or

explained his involvement in the Side Letter during that call. Those marginal considerations do not materially affect the "entire fairness" analysis, which, contrary to Leo's characterization, was hardly "truncated." It constituted almost seven pages of the post-trial opinion, in which the court thoroughly examined the facts under both the "substantive" and "procedural" dimensions of that analysis and concluded that Defendants' actions were entirely fair to the Fund and its limited partners as a whole. *See* Op.59-66. In contending otherwise, Leo again mischaracterizes the record, claiming that "*All* the evidence and facts found by the trial court demonstrate that, absent Kahlon's breaches, Leo's investment would have gone forward." Br.42. As explained, however, that is demonstrably wrong. *See* pp.33-34, *supra*.

Moreover, Leo's argument about the "entire fairness" analysis contradicts its prior arguments with respect to the duties of care and loyalty. Leo contends the trial court "omitted its factual findings about the earlier period from its entire fairness analysis." Br.41; *see also* Br.40-41 (referring to "the trial court's stark factual findings related to that period (which the court did not discuss in its legal analysis of fairness)"). According to Leo, "[h]ad 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." Br.41. But the entire premise of Leo's arguments as to the duties of care and loyalty is that the trial court did *not* consider that "earlier period."

See, e.g., Br.28 (contending that court "failed to account for Defendants' creation of the problem"). In reality, as noted, the trial court did consider the "earlier period" and explained why that conduct did not give rise to breaches of fiduciary duty. And those considerations were ultimately marginal to Defendants' decision to remove Leo from the Fund, which the court thoroughly analyzed and concluded was entirely fair to the Fund as a whole.

II. THE COURT ERRED IN HOLDING THAT KAHLON BREACHED HIS "DUTY OF CANDOR."

A. Question Presented

Whether the trial court erred in determining that Kahlon breached his "duty of candor." Op.65-70.

B. Scope of Review

This Court reviews the trial court's legal conclusions *de novo* and its factual findings for clear error. *RBC*, 129 A.3d at 861.

C. Merits of Argument

Despite holding that Defendants did not breach their fiduciary duties of loyalty and care, the trial court nevertheless concluded that Kahlon "breached his duty of candor" and awarded Leo nominal damages of $1. Op.65, 70. That ruling cannot be sustained.

Leo never once contended below that Kahlon breached his "duty of candor"—a phrase that this Court has repeatedly deemed "confusing," "imprecise," and "unhelpful." *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992); *accord Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 113 n.3 (Del. 1992). This Court has instead held that the phrase "duty of candor" means only "the well-recognized proposition that directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action." *Stroud*, 606 A.2d at 84. But even that "duty to disclose" is not implicated here, as it does not apply

unless a fiduciary "request[s] discretionary stockholder action" by "a large number of stockholders" who are "forced to make a decision." *Dohmen v. Goodman*, 234 A.3d 1161, 1168, 1171 (Del. 2020); *see also id.* at 1171 (holding that there is no "fiduciary duty of disclosure for individual transactions").

To be sure, in an "individual transaction[]," even though there is no "duty of disclosure," a fiduciary's "duties of care and loyalty" require the fiduciary to "deal honestly" with its beneficiary. *Id.* at 1169, 1171. But in those circumstances, a beneficiary must establish "reliance, causation, and damages" in order to establish liability for breach of fiduciary duty. *See id.* at 1169 & n.32. The trial court here appeared to agree, stating that a beneficiary "must prove (1) a material misrepresentation or omission, (2) reliance, and (3) causally related damages." Op.68. Yet Leo did not even try to prove these elements, and the trial record establishes that it cannot do so.

First and foremost, even the trial court recognized that Leo "failed … to prove reliance or any causally related harm." Op.69. Leo "did not act to its detriment in reliance on Kahlon's misstatements." Op.69. It "did not agree to a consensual withdrawal, could not avoid the Forced Withdrawal, and did not suffer any other harm." Op.69. Leo thus failed to prove the second and third elements of a breach of fiduciary duty claim for purported dishonesty in an individual transaction. This Court need go no further to conclude that Leo has not established liability.

Regardless, Leo also has not proved the first element, a "material misrepresentation or omission" to the beneficiary. In a single paragraph, the trial court briefly identified three purported "misstatements" as constituting breaches of Kahlon's "duty of candor," Op.69, but none constitutes a material misrepresentation or omission to Leo.

Kahlon's "communication plan". The trial court first pointed to the "communication plan" that "Kahlon formulated … to convince Leo Group to withdraw from the Fund consensually," which Kahlon later described as "bullshit." *Id.* The "plan" consisted solely of WhatsApp messages from Kahlon *to Hussain* over the course of thirty minutes. Op.22-26; A421 at 391:3-10; A856. There was no evidence that Kahlon or Hussain ever communicated *to Leo* any aspects of the "plan." *E.g.*, A321 at 62:18-63:12; A422 at 394:9-18. There was thus no communication, much less a material misrepresentation, to Leo. Additionally, the plan simply reflected how Kahlon proposed to message a mutual parting to Leo. But that never occurred, since Leo declined to withdraw, and thus it could not have been material. *See Appel v. Berkman*, 180 A.3d 1055, 1060 (Del. 2018) (explaining that "[i]nformation is material" if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to" act).

"Conflicting accounts" to SpaceX and Leo. The court also faulted Kahlon for "send[ing] letters to Leo Group and SpaceX that contained conflicting accounts, neither

of which was accurate." Op.69. Kahlon's letter to SpaceX is irrelevant to any fiduciary duty applicable here, since Kahlon indisputably owed no such duties to SpaceX. Op.68. And Kahlon's letter to Leo removing it from the Fund was not a misrepresentation. The letter stated that keeping Leo in the Fund would be "materially burdensome" to the Fund. A868. The trial court itself found that it was "a reasonable judgment" for Defendants to conclude that retaining Leo as a limited partner was "reasonably likely" to result in both a "significant and adverse delay" with respect to the Fund's activities and "a material adverse effect on" the Fund. Op.75-77. Regardless, the letter was not material. Even if it also had informed Leo that Leo was being removed from the Fund in part so that Kahlon could preserve his relationship with SpaceX, it could not have made any difference to Leo's decisionmaking, as Leo was being removed regardless. *See* Op.69 (noting that Leo "could not avoid the Forced Withdrawal").

"Depict[ing] Johnsen's reaction" to Leo. Last, the court stated that Kahlon "depicted" to Leo "Johnsen's reaction as capricious and concealed that [Johnsen] was both uninformed and misinformed." Op.69. The court did not specify what Kahlon "depict[ed]" to Leo about his conversation with Johnsen. Regardless, any such statements were not material misrepresentations or omissions. As a critical threshold matter, the trial court's characterization of Kahlon's conversation with Johnsen (that Johnsen was "uninformed and misinformed") and Kahlon's subsequent discussion with Leo about that conversation (allegedly depicting Johnsen's reaction as "capricious") is

based on the court's erroneous interpretation of the Side Letter and LPA §7.12(a), as well as its failure to acknowledge Kahlon's unrebutted subjective view of the Side Letter.

In one paragraph in its SJ order, with little reasoning, the court held that the "plain language of Section 2(a) and 2(c) of the Side Letter renders Section 7.12(a) of the [LPA] inapplicable for purposes of … the disclosures in Exhibit A to the extent they were required by law." Ex. D at 2. Indeed, in the court's view, this was "the only reasonable reading" of the two documents such that *sua sponte* summary judgment was warranted, and Defendants' interpretation was "frivolous." *Id.* That analysis lacks merit.

Under LPA §7.12(a), to make a required-by-law disclosure about the Partnership, the Limited Partner must satisfy three pre-conditions: the Advanced Written Notice Requirement, the Opinion of Counsel Requirement, and Cooperate to Minimize Requirement. Section 2(a) of the Side Letter supersedes one—but not all—of these three requirements. It provides:

> Notwithstanding anything to the contrary in Section 7.12(a) of the Partnership Agreement, to the extent 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.

A723§2(a). In using the phrase "[n]otwithstanding anything to the contrary," §2(a) overrides provisions of §7.12(a) in conflict with it—but only those provisions. "[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the

provisions of the 'notwithstanding' section override conflicting provisions of any other section." *In re Est. of Crist*, 863 A.2d 255, 258 (Del. Ch. 2004), *aff'd,* 879 A.2d 602 (Del. 2005); *see also EMSI Acquisition, Inc. v. Contrarian Funds, LLC*, 2017 WL 1732369, at *10 (Del. Ch. May 3, 2017). But where "there is no conflict between the two provisions at issue," there is "no reason to read" the "notwithstanding [anything to the contrary]" clause "as overriding the plain language of" other sections. *Crist*, 863 A.2d at 258.

Section 2(a) clearly allows an Investor to make a required-by-law disclosure "without the consent of the General Partner" and without satisfying the Opinion of Counsel Requirement. But it just as clearly says nothing about—and thus does not override—the Advance Written Notice Requirement or the Cooperate to Minimize Requirement in LPA §7.12(a). Section 2(c) reinforces the point, providing that "[f]or the avoidance of doubt," "except as *expressly modified* by this Letter Agreement, the provisions of §7.12(a) of the Partnership Agreement will continue to apply to the Investor in full." A723§2(c) (emphasis added). The only condition of §7.12(a) that was "expressly modified" was the Opinion of Counsel Requirement; thus, the other two remain in force, and the SJ Order was in error.

Johnsen, therefore, was not "uninformed and misinformed" about Leo's non-compliance with the Side Letter. Leo had not provided advanced written notice before making its required-by-law disclosure, nor did it seek to minimize any disclosures, as

§7.12(a) required and the Side Letter did not abrogate. Equally important, as Kahlon testified without contradiction, he *did not believe* the Side Letter negated Leo's need to comply with these other requirements. A384-85 at 244:16-245:24. That is precisely why he "was genuinely surprised" by Leo's disclosure, as the trial court found. Op.20. Kahlon's subjective view gave him no reason to tell Johnsen about the Side Letter, as it certainly would not have helped Leo if Kahlon told Johnsen that Leo had breached the Side Letter. Accordingly, there was no "misrepresentation or omission" in what Kahlon conveyed to Leo about his conversation with Johnsen. *See Dohmen*, 234 A.3d at 1169 (noting that obligation to "deal honestly" requires scienter).

Regardless, what Kahlon said to Johnsen—and how Kahlon conveyed that conversation to Leo—was not material, as it could not have affected Leo's decisionmaking. As the court acknowledged, Johnsen had made up his mind and wanted Leo out of the Fund given the media coverage of its investment; for Kahlon to have shared information about the Side Letter with Johnsen would not "have changed Johnsen's mind." Op.57. No matter what Kahlon subsequently conveyed to Leo about the content and tenor of his conversation with Johnsen, therefore, it would not have had an impact on Leo, and thus was not a material misrepresentation or omission.

III. THE COURT ERRED IN AWARDING ATTORNEYS' FEES TO LEO.

A. Question Presented

Whether the trial court erred in awarding Leo nearly $16 million in attorneys' fees despite rejecting nearly all of Leo's claims and awarding Plaintiff $1 in nominal damages. *See* B201; B214.

B. Scope of Review

An award of attorneys' fees is generally reviewed "for abuse of discretion," *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010), but where "the challenged award of fees 'requires the formulation of legal principles …. that formulation is subject to *de novo* review,'" *In re Del. Pub. Schs. Litig.*, 312 A.3d 703, 715 (Del. 2024).

C. Merits of Argument

The trial court rejected nearly all of Leo's claims, holding only that Kahlon violated the "duty of candor" based on three "misstatements." Op.69. Even then, the court held that Leo did not rely on those misstatements or suffer "any causally related harm," and Leo only obtained nominal damages of $1. Op.69-70. Yet the court awarded Leo the *full* amount of its requested attorneys' fees—nearly *$16 million*. Because the award rests on the erroneous duty-of-candor ruling, it should be reversed for that reason alone. But it is deeply flawed in other respects and cannot stand.

1. Leo Failed to Prove that Defendants' Conduct Warrants Fee-Shifting.

a. Delaware permits fee-shifting only under limited, narrow exceptions.

Delaware "follows the 'American Rule' in awarding attorneys' fees, which provides that 'a litigant must, himself, defray the cost of being represented by counsel.'" *In re Del. Pub. Schs. Litig.*, 312 A.3d at 715. This Court recently observed that "Delaware recognizes only a limited number of exceptions to the American Rule," including "if: (i) recovery of fees is provided by statute or court rule; (ii) there is a contractual provision regarding entitlement to attorneys' fees; (iii) a party has acted in bad faith in connection with the conduct of the litigation process; (iv) a party fails to abide by a court order or is held in contempt; and (v) the action results in the creation, protection or distribution of a common fund or confers a corporate benefit." *Id.* These exceptions "are construed narrowly." *Id.* at 721.

The conduct the trial court identified as justifying fee-shifting does not satisfy any of these exceptions. The only even arguably relevant exception is for "bad faith in connection with the conduct of the litigation process," *id.* at 715, but that exception is applied only "in 'extraordinary circumstances,'" *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005). The "party seeking to invoke that exception must demonstrate by 'clear evidence' that the party from whom fees are sought acted in subjective bad faith." *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014) (ellipsis

omitted). Leo has not met that burden, and the trial court's orders awarding fees providing no basis for so concluding.

b. Defendants' pre-litigation conduct does not satisfy the bad-faith exception.

The trial court first pointed to Defendants' pre-litigation conduct. Specifically, the court's first fee order stated that an award was justified because "Kahlon breached his fiduciary duty of disclosure by lying to his beneficiary." Ex. B at 5. Its second order stated that "Kahlon breached his duty of candor for the improper and bad faith purpose of protecting his own relationship with SpaceX," and Kahlon's speaking "'falsely and partially' … caused harm in the form of this dispute." Ex. C at 3. While the court's orders did not identify Kahlon's specific conduct, its reference to Kahlon speaking "falsely and partially" makes clear that the court was referring to the three alleged "misstatements" it identified in its post-trial opinion, where it used the same language in concluding that Kahlon breached his "duty of candor"—the only basis on which Defendants were held liable. Op.69.

But these alleged "misstatements" do not support fee-shifting under the bad-faith exception for several reasons. First, an "award of fees for bad faith conduct must derive from either the commencement of an action in bad faith or bad faith conduct taken during litigation, and not from conduct that gave rise to the underlying cause of action." *RBC*, 129 A.3d at 877; *see also Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010) ("[T]he bad faith exception … 'does not apply to the conduct that gives rise

to the substantive claim itself.'"). Each of Kahlon's supposed "misstatements"—(1) the "communication plan to convince Leo Group to withdraw"; (2) the "letters to Leo Group and SpaceX that contained conflicting accounts"; and (3) the "discussions with Leo Group … depict[ing] Johnsen's reaction as capricious," Op.69—is alleged in Leo's Amended Complaint as a basis for Defendants' liability. *See* B65-67 ¶¶ 91-94, 96-99, B72-73 ¶ 113. The facts here are thus on all fours with *Versata*, which held that because the facts invoked by the plaintiff in requesting attorneys' fees were also "facts constitut[ing] the substance of [plaintiff's] claim," they "cannot provide a basis to award attorneys' fees" under the bad-faith exception. 5 A.3d at 608.

Second, the three "misstatements" do not comprise "clear evidence" that Kahlon "acted in subjective bad faith" as to satisfy the "extraordinary" circumstances necessary for fee-shifting under the bad-faith exception. *Lawson*, 91 A.3d at 552. The trial court barely spilled any ink on them, devoting all of one paragraph (one sentence each) to them in its post-trial opinion, *see* Op.69—which is understandable given their relatively trivial nature. The "communication plan" comprised several WhatsApp messages from Kahlon to Hussain—*not* to Leo—that took up "about thirty minutes" of Kahlon's time and addressed how to message a mutual parting that never occurred. Op.25-26; A421 at 391:6-10. As for the "conflicting accounts," Kahlon owed no duties to SpaceX when communicating with it, and his termination letter to Leo was not false. Op.29; *see* A868. And the court's belief that Kahlon misleadingly "depict[ed]" his conversation with

Johnsen was based on its erroneous interpretation of the Side Letter and LPA and its failure to account for Kahlon's own subjective view of those documents; moreover, Johnsen was concerned not with the investment's disclosure but its media coverage (to which Leo contributed), so any different conduct by Kahlon would have made no difference. Op.57; *see* pp.39-43, *supra*.

None of these purported "misstatements" rises to the "high level of egregiousness" required for fee-shifting under the bad-faith exception. *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 706 (Del. Ch. 1996), *aff'd,* 693 A.2d 1082 (Del. 1997) ("The plaintiffs must carry the burden of persuading the Court that the defendants acted with *scienter* sufficient to warrant a finding of bad faith."). For example, in *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911 (Del. Ch. May 11, 2001), the court shifted fees after finding the defendants "operat[ed] a competing business venture" and "knew, from the outset, that their acts were designed to challenge directly the core business of the plaintiff and that those acts were in derogation of the partnership agreement," all of which constituted "an egregious breach of the partnership agreement and their duty of loyalty." *Id.* at *4. By contrast, in *Ryan*, the court held, and this Court affirmed, that the fact that defendants "failed to carry their burden of showing entire fairness" did not "rise[] to the highly egregious level." 709 A.2d at 706.

Here, of course, Defendants did not even "fail[] to carry their burden of showing entire fairness," *id.*; indeed, that test was not even triggered. Instead, nearly all of Leo's

claims failed. The few communications that the trial court found to breach the "duty of candor" were tangential at best, and the court held that Leo did not rely on them and they did not cause any harm. *See* Op.69. These circumstances do not remotely constitute "clear evidence" that Defendants "acted in subjective bad faith" or acted with the "high level of egregiousness" or scienter that permits fee-shifting.

c. Defendants' conduct during litigation does not satisfy the bad-faith exception.

The trial court also cited Defendants' actions during litigation—specifically, that "Kahlon spoliated documents" and gave "not-credible testimony." Ex. B at 5. That conduct, too, does not comprise "extraordinary" circumstances justifying fee-shifting.

When addressing litigation-based conduct, this Court has reserved fee-shifting under the bad-faith exception for the most "egregious" cases. *Montgomery Cellular*, 880 A.2d at 227; *see also RBC*, 129 A.3d at 876, 878-79 (declining to accept argument that bad-faith exception does not require "glaring egregiousness"). Thus, for example, in *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542 (Del. 1998), the Court affirmed fee-shifting under the bad-faith exception where the defendants "delayed the litigation, asserted frivolous motions, falsified evidence and changed their testimony to suit their needs." *Id.* at 546. Likewise, in *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500 (Del. 2005), plaintiff "made excessive and duplicative discovery requests while ignoring [his] discovery obligations," plaintiff "refused to facilitate the schedule of" a key witness's deposition, and that witness "refused to answer questions" during

his deposition, aided by plaintiff's counsel. *Id.* at 507. And in *Montgomery Cellular*, plaintiff "repeatedly refus[ed] to produce documents" and "destroyed [documents] *after* the trial court had ordered their production," while its CEO "lied under oath." 880 A.2d at 228-29.

Defendants' litigation conduct identified by the trial court—that "Kahlon spoliated documents" and gave "not-credible testimony"—comes nowhere close to these circumstances. *See* Ex. B at 5. The "spoliation" arose from the fact that, before litigation, Kahlon had set his messaging apps to auto-delete mode for certain recipients, including Hussain. B179 ¶¶ 2, 6; B187-88 ¶ 30. The trial court granted Leo's motion for sanctions "only in limited part," declining to impose most of the sanctions that Leo requested—including a rebuttable presumption that any lost messages would have supported a conclusion that Kahlon failed to exercise reasonable judgment—because they were not "necessary to fix the prejudice that resulted here." A180 at 62:15-16; A199 at 81:18-82:2. Instead, the court raised Defendants' burden of proof for issues on which they bore the burden. A199 at 81:4-6.

It blinks reality that this "spoliation" constitutes "egregious" conduct justifying fee-shifting. Kahlon's use of auto-delete predated any anticipated litigation and was his ordinary routine for years. A133 at 15:20-23; A175 at 57:9-12.[6] There is no suggestion

[6] By contrast, Leo's spoliation—which the court also found—occurred *during* this litigation. A183 at 65:9-65:21; A184-86 at 66:23-68:4.

that Kahlon intentionally deleted messages or sought to evade his discovery obligations. The court even declined to impose most of the sanctions that Leo requested, because they were not "necessary" to mitigate any prejudice. A199-200 at 81:18-82:2. Conduct insufficient even to warrant a rebuttable presumption cannot be sufficient to warrant the "extraordinary" remedy of fee-shifting.

So too for Kahlon's supposed "not-credible testimony." The trial court never identified the "not-credible testimony" that warranted fee-shifting. Nor are Defendants aware of any case, particularly by this Court, endorsing the proposition that "not-credible testimony"—an unremarkable development in many cases—can support fee-shifting under the bad-faith exception. To be sure, perjury or false testimony can support bad faith. *See Montgomery Cellular*, 880 A.2d at 228-29. But unspecified observations regarding "not-credible testimony" do not support a conclusion that Defendants' conduct was "egregious," much less "glaringly egregious," as to justify fee-shifting.

d. This Court's decision in Saliba *does not support fee-shifting*.

The trial court also based its fee award on *William Penn Partnership v. Saliba*, 13 A.3d 749 (Del. 2011). But *Saliba* is plainly distinguishable, and utilizing it to shift fees here would conflict with this Court's decisions and have pernicious consequences.

Saliba arose from the sale of a motel, the sole asset of an LLC owned 50% by defendant and 50% by the two plaintiffs and a third individual. The Lingo family—

which owned defendant—were the LLC's managers and "owe[d] fiduciary duties of loyalty and care" to the LLC's members. *Id.* at 756. Nevertheless, the Lingos orchestrated the motel's sale to a corporation they controlled on terms "favorable to them," despite plaintiffs' opposition and desire to purchase the property. *Id.*

Plaintiffs sued for breach of fiduciary duty, and the trial court held that because the Lingos stood "on both sides of the transaction," they had to demonstrate "entire fairness." *Id.* They could not do so because they "manipulated the sales process through misrepresentations and repeated material omissions," including by (1) imposing an artificial deadline for false reasons; (2) failing to inform plaintiffs they would match plaintiffs' own purchase offer; (3) failing to inform plaintiffs they had already committed to selling the property; (4) failing to inform plaintiffs the other LLC member already signed a sales contract and their separate entity approved the motel's purchase; and (5) failing to hold a vote on the transaction as legally required. *Id.* at 757. Plaintiffs suffered no damages, however, because a court-ordered appraisal of the property was lower than the property's sale price. *Id.* at 758-59. The trial court nevertheless awarded attorneys' fees to plaintiffs because "it would be unfair and inequitable for [plaintiffs] to shoulder the costs of litigation arising out of improper prelitigation conduct attributable to the Lingos that amounted to a violation of their fiduciary duties." *Id.* at 759.

This Court affirmed. Detailing the Lingos' many transgressions, the Court held that "the Lingos prevented a fair and open process by withholding full information, providing misleading information, and imposing an artificial deadline on the transaction." *Id.* at 758. It then upheld the fee award, holding that defendants' "prelitigation conduct rose to egregiousness," such that "[a]bsent" fee-shifting, plaintiffs "would have been penalized for bringing a successful claim" for defendant's "outright acts of disloyalty." *Id.* at 751, 759.

Saliba does not justify fee-shifting here for numerous reasons. To begin, as explained, the three instances of "prelitigation conduct" that the trial court identified as supporting fee-shifting do not "r[i]se to egregiousness." *Id.* at 751; *see* pp.47-49, *supra*. In fact, the trial court did not make that necessary finding, nor even engage in that inquiry. Defendants' conduct certainly does not bear any resemblance to the conduct of the *Saliba* defendants, whose "manipulation … tainted the entire transaction." *Id.* at 758. Indeed, Defendants' conduct did not even trigger "entire fairness" review, unlike in *Saliba*, and Defendants proved their actions were entirely fair regardless.

Further unlike *Saliba*, the claim on which Leo prevailed—violation of the "duty of candor"—was at the periphery of its case, which centered on Defendants' alleged breach of contract and violations of the duties of loyalty and care. In stark contrast, the *Saliba* plaintiffs' successful claim for breach of the duty of loyalty was at the core of

their suit; in fact, the *Saliba* trial court did not even rule on many of plaintiffs' other claims (like aiding-and-abetting and conspiracy). *See* Op.34-35.

Employing *Saliba* to authorize fee-shifting here—where Defendants' conduct was not "egregious," the trial court made no such finding, and Leo's only successful claim was marginal to its case—would conflict with this Court's jurisprudence and create a gaping exception to the American Rule. It is well-established that a breach of fiduciary duty alone does not justify fee-shifting. *See In re Del. Pub. Schs.*, 312 A.3d at 721 n.75; *Ryan*, 709 A.2d at 706. That principle cannot be reconciled with the proposition that a plaintiff may recover attorneys' fees based on a breach of fiduciary duty simply because, by virtue of receiving no (or little) damages, he would be "penalized" for bringing a successful claim. *Saliba*, 13 A.3d at 759. Put differently, if the American Rule requires "each party … to pay only his or her own attorneys' fees, whatever the outcome of the litigation," *RBC*, 129 A.3d at 877—even where a party recovers substantial damages—it cannot be the case that a party is entitled to attorneys' fees just because the outcome of the litigation did *not* result in any (or nominal) relief since the party suffered no (or little) injury. The requirement that the other party's conduct rise to "egregiousness" ensures that the *Saliba* exception does not swallow the rule.[7]

[7] It also ensures that *Saliba* does not conflict with this Court's recognition that pre-litigation conduct does not justify shifting fees under the bad-faith exception. *See, e.g.*,

The trial court was thus quite mistaken to hold that fee-shifting was justified here under *Saliba* because Defendants' "breach … caused harm in the form of this dispute." Ex. C at 3; *see also id.* (awarding attorneys' fees "so that those who violated their fiduciary obligations and were the cause of this litigation bear the burden of the expenses they imposed"). Merely "causing" litigation to take place—by engaging in the acts that gave rise to that litigation—cannot itself be a basis for shifting fees. This Court has never endorsed such a proposition, which would blow a hole in the American Rule.

That principle is especially misguided here, moreover, because the handful of supposed breaches of the "duty of candor" that the trial court identified were *not* "the cause of this litigation." Ex. C at 3. Leo brought suit alleging that its removal from the Fund violated the LPA and breached the duties of loyalty and care. Even if Kahlon had been as forthcoming as the trial court would have preferred during the three instances it identified, Leo *still* would have brought suit alleging that its removal from the Fund violated the LPA and the duties of loyalty and care. The trial court's reasoning only underscores that awarding attorneys' fees to Leo based on three "misstatements" before litigation, and unexceptional conduct during litigation, cannot stand.

RBC, 129 A.3d at 877; *Versata*, 5 A.3d at 607-08. That precedent would be a nullity if attorneys' fees were available based on pre-litigation conduct that is not egregious or in bad faith, but nothing more than the basis for the plaintiff's claim in the first place.

2. At a Minimum, Leo Failed to Prove that Defendants' Conduct Warrants Leo's Entire Requested Amount of Nearly $16 Million in Fees.

Even if Leo were entitled to an award of attorneys' fees, an award of the full amount it requested—nearly *$16 million*, or nearly 16 million times the one dollar in nominal damages it received—should be vacated for two reasons.

First, the trial court failed to properly assess the reasonableness of Leo's requested fees. "Delaware law dictates that, in fee shifting cases, a judge determine whether the fees requested are reasonable." *Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007). "To assess a fee's reasonableness, case law directs a judge to consider the factors set forth in the Delaware Lawyers' Rules of Professional Conduct." *Id.* at 245-46; *see also Wayman Fire Protection, Inc. v. Premium Fire & Sec., LLC*, 2014 WL 2918671, at *2 (Del. Ch. June 27, 2014) ("It is 'settled Delaware law'" that a court must consider the factors stated in Delaware Lawyers' Rules of Professional Conduct … in deciding the reasonableness of attorneys' fees.").

Below, Defendants squarely challenged the reasonableness of Leo's requested fees. They explicitly set forth the factors in Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct. *See* B219-20. And they expressly argued that these factors—

specifically, the fourth factor, "the amount involved and the results obtained"—required rejecting Leo's request for its full amount of nearly $16 million in fees. *Id.*[8]

The trial court nevertheless did not address any of the Rule 1.5(a) factors. Nowhere in the court's order deeming Leo's request for nearly $16 million in attorneys' fees "reasonable" does the court even cite Rule 1.5(a). In particular, the court did not assess "the amount involved and the results obtained," notwithstanding that Defendants emphasized this factor and despite the self-evident chasm between the nearly $16 million in fees requested by Leo and the fact that nearly all of Leo's claims were rejected and it received one dollar in nominal damages. For this reason alone, the trial court's fee order cannot stand. *See Mahani*, 935 A.2d at 245.

Second, in any event, the court's award of nearly $16 million in fees—Leo's entire requested amount—was "capricious or arbitrary." *Mahani*, 935 A.2d at 245. Leo was almost entirely *unsuccessful* in its suit. It alleged two causes of action—breach of contract and breach of fiduciary duty. B74-78. Yet as the trial court held, it "failed to prove any of its contract claims" and "did not succeed in a meaningful way on any of its claims for breach of fiduciary duty." Op.34-35. The court concluded that it proved only a breach of the "duty of candor"—a duty it never even mentioned before, during, or after trial—and in only three respects so marginal that Leo did not rely on them and

[8] Defendants did not challenge whether Leo's counsel's rates or hours expended were appropriate.

suffered no harm from them. Op.69. Leo's "victory" was so inconsequential that even Leo acknowledged that it did not "constitute[] a 'prevailing party.'" B203. That concession is at odds with obtaining any attorneys' fees at all. *See DeMatteis v. RiseDelaware Inc.*, 315 A.3d 499, 516 (Del. 2024) (noting that "fee shifting is available only against a losing party in favor of a prevailing party"). But at the very least, awarding such a party its *full* amount of requested fees—nearly *$16 million* at that—beggars belief.

Delaware courts consistently award only partial fees commensurate with a party's success or the time and expense devoted to successful claims—and this Court has in turn approved that approach. In *PharmAthene, Inc. v. Siga Techs., Inc.*, 2011 WL 4390726 (Del. Ch. Sept. 22, 2011), for example, the trial court awarded plaintiff "only a portion of the attorneys' fees and expenses it actually incurred," because the "exceptions to the American Rule that justif[ied] attorneys' fees" related only to a subset of claims, and because plaintiff "devoted the majority of its pretrial and trial arguments, as well as time and expense, to its ultimately unsuccessful requests for relief." *Id.* at *44. On appeal, this Court not only upheld that determination but observed that the trial court "properly tailored the award to the bases for liability on which PharmAthene prevailed." *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 353 (Del. 2013); *see also Sorrento Therapeutics, Inc. v. Mack*, 2025 WL 2172268, at *19 (Del. Ch. July 31, 2025) (awarding plaintiffs one-third of requested fees because plaintiffs "were only

partially successful in their pursuit of claims that, in many respects, arose from a common factual predicate"); *Wayman*, 2014 WL 2918671, at *1, *3 (concluding that requested amount of fees was "unreasonable" because plaintiff "only succeeded in proving that they suffered less than 25% of that amount in damages"). The same result should follow here.

The trial court's basis for awarding Leo all its requested fees is misguided. The court relied almost entirely on *Saliba*, observing that *Saliba* "shows that fee-shifting for the case as a whole can be warranted even though a plaintiff only succeeds on one of several claims and cannot show damages." Ex. C at 3. But *Saliba* is easily distinguishable on the law and the facts. As to the law, *Saliba* did not address whether all or just some of the requested fees should be awarded. Accordingly, it does not stand for the proposition that shifting all fees is appropriate where a plaintiff only succeeds on one claim.

As to the facts, the *Saliba* plaintiffs prevailed on the claim central to their case: defendants' breach of their duty of loyalty. The trial court did not even bother to address the plaintiffs' other claims. The expenses plaintiffs incurred to prevail on that principal claim were thus shifted to defendants because, in the trial court's view, "it would be unfair and inequitable for [plaintiffs] to shoulder the costs of litigation arising out of improper prelitigation conduct attributable to [defendants] that amounted to a violation of their fiduciary duties." *Saliba,* 13 A.3d at 759.

Here, Leo *lost* on almost every claim, including the claims that prompted and were central to the litigation. It prevailed only on a narrow and inconsequential breach of a "duty of candor" that Leo did not even previously identify and as to which it showed neither reliance nor causation. It is hardly "unfair and inequitable" for Leo to receive less than the $16 million it cost to prosecute a case that was almost entirely *un*successful. And awarding Leo less than $16 million does not "penalize [it] for bringing" a suit against Defendants that almost entirely failed. If anything, affirming Leo's nearly $16 million fee award will incentivize would-be plaintiffs to bring suits that may have little overall chance for success but will be litigated in every respect to the bitter end—burdening parties and courts alike—in the hopes of prevailing on at least one claim, even if only nominally, thereby allowing for recovery of all attorneys' fees. That prospect has nothing to recommend it.

In the end, even the trial court appeared to concede that attorneys' fees must be "tailored" to liability, as this Court has held. *See* Ex. C at 3 (observing that "[e]quitable relief … if appropriate, will be tailored to suit the situation as it exists"); *PharmAthene*, 67 A.3d at 353. Yet it declined even to engage in such tailoring here, claiming that "parsing by claim is both unnecessary and impractical, because Kahlon's lies permeated the case." Ex. C at 3.

This reasoning is perplexing. The court itself had already identified the three (and only three) instances of Kahlon's "lies." Op.69. All three instances predated

litigation and thus did not "permeate[] the case." Furthermore, the court had already held that those three "misstatements" pertained only to a breach of the "duty of candor," and it had already rejected Leo's core claims for breach of contract and breach of the duties of loyalty and care. Op.69-70, 80, 84, 86. Thus, the court had already "pars[ed] by claim," and could have easily done so with respect to attorneys' fees—or at least done something more than nothing.

Indeed, in opposing Leo's fee request, Defendants identified a number of examples of time entries by Leo's counsel that were segregable by claim, including those on which Leo did not prevail. *See, e.g.*, B222-23 (entries including "Draft breach of contract section of prehearing brief" and "Conduct legal research regarding breach of contract cases for specific performance"). The trial court thus could have "properly tailored" Leo's fee award to the claims on which it prevailed, *PharmAthene*, 67 A.3d at 353, or otherwise accounted for the "results obtained," DLRPC 1.5(a). Its refusal even to attempt to do so constitutes an abuse of discretion and an additional reason for overturning the fee award.

IV. THE COURT PROPERLY HELD THAT DEFENDANTS DID NOT VIOLATE THE SUBSCRIPTION AGREEMENT'S FORUM-SELECTION PROVISION.

A. Question Presented

Whether the Subscription Agreement's forum-selection provision required Defendants to commence their fraud suit against Leo in Delaware.

B. Scope of Review

This Court reviews contractual interpretation questions *de novo*. *Osborn ex rel. Osborn v. Kemp,* 991 A.2d 1153, 1158 (Del. 2010).

C. Merits of Argument

The trial court correctly held that the Subscription Agreement "contains a one-way forum selection provision" that requires a limited partner, but not the Fund or the GP (or its affiliates), to sue in Delaware. Op.85. In relevant part, that provision states:

> [A]ny action or proceeding brought by the Subscriber against the General Partner or the Management Company (or their [affiliates]) or the Partnership, or relating in any way to the Subscription Documents or any other Offering Materials, shall be brought and enforced in the courts of the State of Delaware or … of the United States District Court for the District of Delaware[.]

A784-85. Leo's only argument is that this sentence must be read as follows: "[A]ny action or proceeding [i] brought by the Subscriber against the General Partner or the Management Company (or their [affiliates]) or the Partnership, or [ii] relating in any way to the Subscription Documents or any other Offering Materials, shall be brought and enforced in [Delaware courts]." Br.47. This conclusory assertion is flawed.

First, the more natural reading of that sentence is the following: "[A]ny action or proceeding brought by the Subscriber [i] against the General Partner or the Management Company (or their [affiliates]) or the Partnership, or [ii] relating in any way to the Subscription Documents or any other Offering Materials, shall be brought and enforced in [Delaware courts]." The provision thus requires all suits by a subscriber against the Fund or GP (or its affiliates), or all suits by a subscriber in any way relating to the Subscription Documents, to be brought in Delaware courts. That reading makes sense because there are numerous subscribers from around the United States or even the world, militating in favor of a single, consistent forum for all subscriber lawsuits that might be brought regarding the Fund, the GP, or the Subscription Documents. Leo contends that this reading "renders the second clause surplusage," Br.47, but that is incorrect. There could be cases by a subscriber against other parties besides the Fund, GP, or affiliates that still relate to the Subscription Documents, which the second clause channels to Delaware courts.

Second, Leo ignores key language in the rest of the forum-selection provision. In pertinent part, the provision further states:

> *[T]he Subscriber irrevocably submits* to the non-exclusive jurisdiction of such courts in respect of any action or proceeding between it and the General Partner or the Management Company (or their [affiliates]) or the Partnership, or relating in any way to the Subscription Documents or any other Offering Materials. *The Subscriber irrevocably waives* … any objection that it may now or hereafter have to the laying of venue of any such action or proceeding in the [Delaware] courts … and any claim that

> any such action or proceeding brought in either court has been brought in an inconvenient forum.

A784-85 (emphases added). By stating that "the Subscriber" submits to personal jurisdiction, waives venue, and waives *forum non conveniens* for "any such action" in the Delaware courts, the forum-selection provision underscores that it is the *Subscriber* who is bound by its terms, not Defendants.

Leo also argues that the forum-selection provision precludes Defendants from demanding a jury trial in their California suit. Br.47. But this argument "was never fairly presented to the trial court"—or raised at all—and is thus forfeited. *In re Phila. Stock Exch., Inc.,* 945 A.2d 1123, 1134-35 (Del. 2008). Moreover, the placement of the jury-trial language in the forum-selection provision indicates that it, too, relates only to actions brought by a subscriber. Regardless, it is entirely unclear that this Court (or the trial court) can or should award damages based on an argument not that another forum is improper, as in *El Paso Nat. Gas Co. v. TransAmerican Nat. Gas Corp.*, 669 A.2d 36, 40 (Del. 1995), but that a particular aspect of a suit otherwise properly brought in another forum is unavailable—much less before that other forum decides the issue for itself.

CONCLUSION

The court should reverse the trial court's holdings that Defendants breached the duty of candor and are entitled to nearly $16 million in attorneys' fees but affirm the judgment in all other respects.

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