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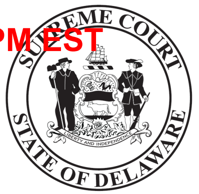

IN THE SUPREME COURT OF THE STATE OF DELAWARE

YOUNG MIN BAN	)	
	)	
Plaintiff Below, Appellant,	)	No.: 19, 2026
	)	
v.	)	Court Below: Court of Chancery
	)	of the State of Delaware
JOSEPH P. MANHEIM,	)	
DELAWARE VALLEY REGIONAL	)	C.A. No. 2022-0768-JTL
CENTER, and WEST 36TH, INC.	)	(Consolidated Lead Case)
	)	
Defendants Below, Appellees.	)	

APPELLANT'S OPENING BRIEF

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Dated: February 23, 2026

TABLE OF CONTENTS

NATURE OF PROCEEDINGS..1

SUMMARY OF ARGUMENT..4

STATEMENT OF FACTS..6

ARGUMENT..22

I. The Court of Chancery Erred And Abused Its Discretion In Not Accepting The Valuation of DVRC Contained Within Stephen J. Scherf's Supplemental Report Dated March 8, 2024........22

A. Questions Presented..22

B. Scope/Standard of Review..22

C. Merits of the Argument..23

i. The Court of Chancery Erred and Abused its Discretion in Not Considering the Supplemental Report Because the Parties Agreed that Supplemental Expert Reports Could Be Produced After the Expert Report Deadline and the Supplemental Report was Rendered Necessary by New Information Learned in Depositions..23

ii. The Court of Chancery Erred and Abused its Discretion in Not Considering the Supplemental Report Because Delaware Law Required the Court to Engage in a Balancing of Relevant Factors Before Excluding the Supplemental Valuation..27

iii. The Court of Chancery Erred and Abused its Discretion in Not Considering the Supplemental Report Because Defendants Accepted the Risk that Supplemental Expert Reports Would Be Produced Close to the Time of Trial...............32

iv. The Court of Chancery Erred and Abused Its Discretion in Not Accepting the Supplemental Expert Report Because the Supplemental Report Used Reliable Processes and Reached Reliable Conclusions 36

CONCLUSION...45

Post Trial Memorandum Opinion, dated May 19, 2025
C.A. No. 2022-0768-JTL...Exhibit A

Final Order and Judgment, dated December 12, 2025 of the Court of Chancery of the State of Delaware by Vice Chancellor Laster in C.A. No. 2022-768-JTL..Exhibit B

TABLE OF CITATIONS

CASES

Andaloro v. PFPC Worldwide, Inc.,
2005 WL 2045640 (Del. Ch. 2005) 38

Bäcker v. Palisades Growth Capital II, L.P.,
246 A.3d 81 (2021) 23

Bamford, et al. v. Penfold, et al.,
C.A. No. 2019-0005-JTL; 2022 WL 2278867 (Del. Ch. Jun. 24, 2022),
aff'd sub nom *Manheim v. Ban*, 319 A.3d 268 (Del. 2024 (TABLE))..................1, 8

Candlewood Timber Grp. LLC v. Pan Am. Energy LLC,
2006 WL 1382246 (Del. Super. Ct. May 16, 2006) 28

Cannon v. Poliquin,
2020 WL 1316833 (Del. Super. Ct. Mar. 16, 2020)...34

Coleman v. PriceWaterhouseCoopers LLC,
902 A.2d 1102 (Del.2006) 4, 22, 28, 29, 31, 32, 36

Christian v. Counseling Res. Associates, Inc.,
60 A.3d 1083 (Del. 2013) 4, 32, 33, 35

Highfields Cap., Ltd. v. AXA Fin., Inc.,
939 A.2d 34 (Del. Ch. 2007)..38

In re: Appraisal of Dole Food Company, Inc.,
114 A.3d 541 (Del. Ch. 2014)..41

In re U.S. Cellular Operating Co.,
2005 WL 43994 (Del. Ch. Jan. 6, 2005)...38, 39, 40

IQ Holdings, Inc. v. Am. Com. Lines Inc.,
2012 WL 3877790 (Del. Ch. Aug. 30, 2012) 4, 27, 28

Paron Capital Mgmt., LLC v. Crombie,
2012 WL 214777 (Del. Ch. Jan. 24, 2012) 41, 43

Weinberger v. UOP, Inc.,
457 A.2d 701 (Del. 1983) 23, 27, 43

Zachman v. Real Time Cloud Servs., LLC,
CV 9729-VCG, 2020 WL 1522840 (Del. Ch. Mar. 31, 2020),
judgment entered, CV 9729-VCG, 2020 WL 4210935
(Del. Ch. July 22, 2020), and aff'd, 251 A.3d 115 (Del. 2021) 41, 43

STATUTES

6 *Del. C.* § 2301 20

RULES

Chancery Rule 29..24

NATURE OF PROCEEDINGS

On August 29, 2022 and December 29, 2022, Plaintiff Young Min Ban ("Ban" or "Plaintiff"), commenced the above consolidated case by separate complaints. By order dated March 30, 2023, the Court consolidated the two actions. This consolidated action arises from prior litigation involving substantially the same parties and affiliated individuals, which litigation resulted in a judgment in favor of Delaware Valley Regional Center, LLC ("DVRC") and against Joseph P. Manheim ("Manheim"), who is a defendant in this case. The prior litigation was necessitated by Manheim's breach of his fiduciary obligations to DVRC. In that case, captioned, *Bamford, et al. v. Penfold, et al.*, C.A. No. 2019-0005-JTL (the "Penfold Litigation"), the Court of Chancery issued a Memorandum Opinion at 2022 WL 2278867 (Del. Ch. Jun. 24, 2022), aff'd sub nom *Manheim v. Ban*, 319 A.3d 268 (Del. 2024 (TABLE)), and then a Final Order and Judgment on September 6, 2023. This Court affirmed the Memorandum Opinion and the Final Order and Judgment by order dated April 22, 2024.

Following the entry of judgment against him, Manheim embarked on a brazen course of retaliation against Plaintiff, who had an interest in two entities, West 36th Inc. ("WestCo") and Penfold, L.P. ("Penfold"), which in turn had an interest in DVRC. The actions taken by Manheim as described more fully hereinafter were the product of impermissible self-dealing, antithetical to known fiduciary duties and

entirely unfair. The intent and purpose of these acts, established by decisions made and directed by Manheim and approved by a board of directors subject to the overmastering control of Manheim, was to improperly "squeeze out" Plaintiff and take for his own personal benefit the true and substantial value of Plaintiff's economic interests. The result of the transactions was the complete recirculation of Plaintiff's interests into the hands of Manheim through clear breaches of his fiduciary obligations. Plaintiff thus commenced this consolidated litigation seeking, *inter alia*, a judgment against Manheim for breach of fiduciary duty, and to recover the fair value of his indirect interest in DVRC.

Following a bench trial held from May 14, 2024 through May 16, 2024 and after the parties submitted post-trial briefs, on May 19, 2025, the Court of Chancery issued a Post-Trial Memorandum Opinion ("Post-Trial Opinion") in which it found in favor of Plaintiff and against Manheim on Plaintiff's breach of fiduciary duty claim. The Court of Chancery further stated that Judgment would be entered holding Manheim liable to Plaintiff, and awarded damages. A true and correct copy of the Post-Trial Opinion is attached hereto as Exhibit A.

The primary issue relating to damages concerned the value of DVRC, as its value is determinative of the value of Plaintiff's indirect interest in DVRC, a component of Plaintiff's damages. In determining the value of DVRC, the Court of Chancery reviewed the trial testimony of Plaintiff's expert, Stephen J. Scherf,

CPA/ABV, CVA ("Scherf") concerning two expert reports that he prepared, which were referred to in the Post-Trial Opinion as the Original Report/Original Valuation and Supplemental Report/Supplemental Valuation. Critically, the parties entered into a written discovery agreement (JX353) expressly permitting supplemental expert reports after the close of depositions to address new fact deposition testimony impacting the experts' conclusions. Scherf's Supplemental Report was served in compliance with that agreement. In error and abusing its discretion, the Court of Chancery disregarded Scherf's Supplemental Valuation, finding that Scherf's Supplemental Valuation relied upon a new model not included within his Original Valuation, and that his reliance on "new inputs" was improper. The Court's decision substantially reduced the amount of damages awarded to Plaintiff despite that the Court of Chancery acknowledged that the facts supported a higher valuation and despite that it was Defendants' burden to prove fair value.

On December 12, 2025, Judgment was entered in favor of Plaintiff and against Manheim in the reduced damage amount, as set forth in the Order attached hereto as Exhibit B. It is from this final Order that Plaintiff now appeals on the ground that the Court of Chancery erred and abused its discretion in not accepting Scherf's Supplemental Valuation.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred and abused its discretion in not accepting the valuation of DVRC contained in the Supplemental Report of Stephen J. Scherf dated March 8, 2024 and supported by Scherf's testimony at trial because: a) the parties entered into a written discovery agreement that allowed for the production of supplemental expert reports after the close of depositions to address deposition testimony impacting expert conclusions; b) even if the Court of Chancery had discretion to question the timeliness of the Supplemental Report, Delaware law required it to engage in a careful balancing of relevant factors before excluding the Supplemental Valuation. Under *IQ Holdings, Inc. v. Am. Com. Lines Inc.,* 2012 WL 3877790, at *2 (Del. Ch. Aug. 30, 2012) and *Coleman v. PriceWaterhouseCoopers LLC,* 902 A.2d 1102, 1106 (Del.2006), cited by the Court of Chancery in its Post-Trial Opinion, courts must weigh the existence of good cause, the absence of prejudice, and the impact of exclusion on the merits of the case. The court performed no such balancing analysis. Had it done so, every factor weighed in favor of accepting the Supplemental Report; c) under *Christian v. Counseling Res. Associates, Inc*., 60 A.3d 1083 (Del. 2013), Defendants accepted the risk that supplemental expert reports would be produced close to the time of trial by agreeing to amend the discovery schedule without Court intervention; and d) it was inequitable for the Court not to accept the Supplemental Report and Supplemental

Valuation as the Court found the Supplemental Valuation was methodologically sound, that facts in the record supported a higher valuation and by improperly placing on Plaintiff the burden to establish fair value when in fact that burden always remained with Defendant under the entire fairness standard applied by the Court of Chancery.

STATEMENT OF FACTS

DVRC is an entity that managed investment funds offering foreign nationals the ability to qualify for U.S. residency under the EB-5 Immigrant Investor Program. *See* Exhibit A, Post-Trial Opinion at p. 1. WestCo held a 10% member interest in DVRC. *See id.* Manheim controlled WestCo through his ownership of 70% of its stock. *See id.* Plaintiff owned 15% of WestCo's stock and a third party owned the other 15%. *See id.* WestCo served as DVRC's sole manager, and thus through his control over WestCo, Manheim controlled DVRC. *See id.* Penfold owned the remaining 90% interest in DVRC, but had no authority over the business or affairs of DVRC. *See id.* Penfold had three limited partners: Manheim, Plaintiff, and a third party, Joseph Bamford ("Bamford"), each of whom held a one-third partnership interest. *See id.* at p. 1-2. Reath & Co., LLC ("ReathCo") served as Penfold's general partner. Manheim controlled ReathCo and through ReathCo, Manheim had the sole authority to act on Penfold's behalf. *See id.* at p. 2.

The EB-5 Immigrant Investor Program offers foreign nationals preferential access to permanent resident status if they invest at least $500,000 in a job-creating enterprise. *See id.* at p. 4. Manheim envisioned using EB-5 investments for public infrastructure projects, which would give foreign investors the benefit of an investment backed by a government agency. *See id.* In 2014, the United States Citizenship and Immigration Services ("USCIS") authorized DVRC to raise money

from foreign investors for purposes of the program, and in February 2016, the USCIS authorized DVRC to begin making investments. *See id.* at p. 6. At the time, DVRC was a wholly owned subsidiary of WestCo; Manheim ultimately convinced Plaintiff and Bamford to create Penfold, which as set forth above, would then own a 90% membership interest in DVRC, with WestCo owning 10%. *See id.* at p. 7. Thereafter, DVRC began making investments in public infrastructure projects through various funds. *See id.* at p. 7.

As the general partner of each fund, DVRC received a carried interest equal to 75% of the profits that each fund generated. *See id.* at p. 8. That meant DVRC received 75% of the 2% in annual interest paid on the funds' loans. DVRC also received a management fee equal to 0.25% of its assets under management ("AUM"). *See id.* Because the AUM equaled the total of the loans, DVRC received 87.5% of the 2% in interest that were paid. *See id.* at p. 9.

"With the money flowing, Manheim engaged in self-dealing." *See id.* Manheim began to reimburse himself "for lavish expenses" and diverted cash to another entity he controlled. *See id.* "…[W]orried that Ban or Bamford might challenge his actions [Manheim] sought to give himself the upper hand. In February 2018, Manheim unilaterally adopted a new LLC agreement for DVRC (the 'Fourth LLC Agreement')." *See id.* The Fourth LLC Agreement empowered WestCo (which was controlled by Manheim) to determine in its sole and absolute discretion that the

continued involvement of a member could cause DVRC to suffer a "Material Adverse Effect." *See id.* at p. 2. Upon making that determination, WestCo could cause DVRC to redeem the member's interest for the lesser of its appraised value or the amount of the member's capital account (the "DVRC Redemption Right"). *See id.* The LLC Agreement was further amended to eliminate all liability, prospectively and retrospectively for any fiduciary breach. *See id.* at pp. 9, 53-54.

Plaintiff thereafter expressed concern regarding Manheim's unlawful conduct and self-dealing transactions that were to the detriment of DVRC's members. *See id.* at p. 9. In retaliation for Plaintiff expressing his concerns, Manheim orchestrated a scheme to take further control of DVRC and its members by among other things terminating Plaintiff's position on WestCo's Board and further amending the entity documents to give himself more control. Certain of the self-dealing transactions became the subject of a separate lawsuit that was defined in the Post-Trial Opinion as the "Penfold Litigation." The Court in the Penfold Litigation found that the Fourth LLC Agreement was the product of Manheim's interested self-dealing, which Plaintiff never approved. *See Bamford v. Penfold, L.P.*, 2022 WL 2278867, at *34 (Del. Ch. June 24, 2022), aff'd sub nom. *Manheim v. Ban*, 319 A.3d 268 (Del. 2024); *see also* Exhibit A at p. 9. In the Penfold Litigation, the Court addressed the self-interested nature of the Fourth LLC Agreement, expressing concerns regarding the process by which Manheim unilaterally adopted the agreement and how he

employed it to his predominant, if not sole, benefit. *See id*. Finding that Manheim had engaged in a series of unlawful self-interested transactions, the Court entered judgment in the Penfold Litigation against Manheim in the amount of $2,515,809.22, which judgment was affirmed by the Delaware Supreme Court on April 22, 2024. *See id.*

Manheim did not pay the judgment entered in the Penfold Litigation, and DVRC, which is under the control of Manheim, made no effort to collect the final judgment from Manheim. *See* Exhibit A at p. 11. Instead, while owing DVRC in excess of $2,500,000, DVRC made a $2,000,000 distribution to Manheim. *See id.* Manheim directed this distribution knowing that the judgment in the Penfold Litigation had not yet been paid.

Additionally, despite the Court's admonition in the Penfold Litigation regarding the Fourth LLC Agreement, Manheim proceeded to use the Fourth LLC Agreement to both effectuate and justify the unfair treatment of Plaintiff by exercising the DVRC Redemption Right to redeem Penfold's interest in DVRC. *See id.* at p. 17.

In the Post-Trial Opinion, the Court of Chancery further found that Manheim exercised the DVRC Redemption Right for his benefit and in service of his primary objective – the elimination of Plaintiff's interests and usurpation of ownership and total control of DVRC. *See* Exhibit A at pp. 2, 49. The Court also found that the

exercise of the DVRC Redemption Right failed to satisfy either the procedural or the substantive dimensions of the entire fairness test. *See id.* at p. 53. Specifically, the Court found that the exercise of the DVRC Redemption Right did not incorporate any devices designed to replicate arms' length bargaining, and the process unfolded unilaterally as Manheim intended when he adopted the Fourth LLC Agreement. *See id.* at p. 50. The Court also found that Manheim set the value of Penfold's capital account at an arbitrary amount, and that the value of Penfold's interest in DVRC was significantly higher than what was paid to Penfold. *See* Exhibit A at pp. 46, 52-53. Lastly, the Court found that the exercise of the redemption right was to Manheim's benefit as it nearly doubled Manheim's ownership interest in DVRC to the detriment of Plaintiff. *See id.* at p. 48.

Manheim attempted to justify his exercise of the DVRC Redemption Right by arguing that Bamford's interest in Penfold posed a risk to DVRC due to the enactment of the Reform Act that empowered the USCIS to revoke the regulatory approvals of a center that a foreign national owned or controlled. *See id.* at p. 49-50. However, as the Court of Chancery found in its Post-Trial Opinion, Manheim's reliance on the Reform Act was pretextual because the claimed Material Adverse Effect (the enactment of the Reform Act) which purportedly gave rise to the DVRC Redemption Right under the Fourth LLC Agreement only applied to Bamford, not Plaintiff. *See id.* at p. 50. Further, although the DVRC Redemption Right applied to

Penfold's equity as a whole, the WestCo Board, which exercised the redemption right on behalf of DVRC, did not consider issuing replacement equity to Plaintiff after it exercised the Redemption Right, as it did for Manheim. *See id.*

As set forth above, the Court of Chancery also found that Manheim breached his fiduciary duty in connection with the adoption of and exercise of the WestCo Call Right, and that it was procedurally and substantively unfair. Manheim, using his control over WestCo, acted by written consent to adopt a bylaw containing the WestCo Call Right. *See id.* at p. 14. The WestCo Call Right allowed for a stockholder holding a majority of the outstanding shares of WestCo to vote to purchase some or all shares of any or all other stockholders. *See id.* It further provided that the affected stockholder lost all rights as a stockholder immediately upon a "Repurchase Vote" and, from that time on, was a creditor of the company. *See id*. The bylaw called for the transaction to take place at "fair market value" and gave the purchasing stockholder ninety days from the date of notice to pay the affected stockholder "in one lump sum payment." *See id.* Subsequent to trial in the Penfold Litigation, Manheim adopted and exercised the WestCo Call Right using the unilaterally adopted bylaw to purchase Plaintiff's shares for $100 per share, an amount that Manheim admitted could not be justified as he had done nothing to determine the fair value of the shares. *See id.* at p. 15.

The Court of Chancery found that the WestCo Call Right was statutorily invalid because Plaintiff did not agree to or vote for it in contravention of Section 202(b) of the Delaware General Corporation Law. *See id.* at p. 24. The Court further found that in any event the transaction lacked procedural and substantive fairness because Manheim unilaterally adopted and exercised the WestCo Call Right, and Plaintiff received no compensation for "losing a stick in the bundle of rights associated with his shares", and because the price of the shares was arbitrarily determined by Manheim. *See id.* at p. 40. Similar to the DVRC Redemption, Manheim engaged in this self-interested transaction to eliminate Plaintiff's involvement in DVRC because Plaintiff had challenged Manheim's repeated self-interested dealings.

In its Post-Trial Opinion, the Court of Chancery found that Manheim's conduct breached his fiduciary duty to Plaintiff in connection with the adoption and exercise of WestCo's Call Right and the exercise of the DVRC Redemption Right. *See id.* at pp. 20-53. The Court found that through these actions, Manheim intended to and did deprive Plaintiff of his indirect interests in DVRC without fair compensation. *See id.*

The Court of Chancery then turned its focus to damages. Plaintiff confirmed during trial that his preferred outcome would be an award in an amount that represents the fair value of his direct equity interest in WestCo and his indirect

interest in DVRC through the redemption of the entire 90% interest of Penfold, each valued as of the relevant dates of the respective involuntary repurchase/redemption plus interest on such amounts from the date of redemption. A591-A601.

As stated in the Post-Trial Opinion, Plaintiff relied on expert testimony from Stephen J. Scherf, CPA/ABV, CVA to quantify Plaintiff's damages. *See* Exhibit A at p. 60. Scherf submitted two reports: an initial expert report dated December 28, 2023 containing a valuation of DVRC referred to by the trial Court as the "Original Report" and "Original Valuation". *See id.* at p. 61. On March 8, 2024, Scherf submitted a supplemental expert report with a revised valuation of DVRC (the "Supplemental Report" and "Supplemental Valuation"). *See id.;* A46-A100; A174-A300. The parties had entered into a Scheduling Order for the production of expert reports by December 21, 2023, with the Order providing the parties with the ability to extend the deadline by agreement. A23-A27. The parties agreed to extend the deadline for the initial production of expert reports to December 28, 2023. A29-A30.

While the Supplemental Report was produced subsequent to the parties' originally agreed upon expert report deadline of December 28, 2023, the Supplemental Report was timely served after the completion of depositions pursuant to an agreement between the parties. A30-A31. Specifically, the parties agreed to proceed with expert reports before the completion of fact depositions, as follows: "experts will be entitled, if needed, to submit a supplement to their reports to address

any testimony given at depositions taken after service of their report that impacts their conclusions, provided that the scope of any such supplements shall be limited to addressing testimony at such depositions and its impact on their conclusions." A30-A31. As set forth herein, Scherf's Supplemental Report was necessitated by the deposition testimony as it impacted Scherf's valuation conclusions.

Manheim did not respond to either the Original Report or Supplemental Report by retaining an expert to prepare a valuation of his own but instead engaged James Canessa ("Canessa") to act solely as a rebuttal expert and ask questions about Scherf's work. *See* Exhibit A at p. 61. Canessa prepared rebuttal reports to both the Original Report and the Supplemental Report, *see id,;* A101-A173; A301-A407, and depositions were taken relating to the projections set forth in the Supplemental Report. A704.

At trial, Scherf testified to an opinion of value as follows: Plaintiff's 1.5 percent interest in DVRC via West 36th is $1,161,199 as of June 30, 2022 and his 30 percent interest in DVRC via Penfold is $22,994,061 for a combined fair value of $24,155,260. A705-A706. In other words, the "Supplemental Valuation".

Scherf's opinion of value (as supported by the Supplemental Report) was based on the discounted cash flow method and adopted projections prepared by Plaintiff rather than management projections because those were more in line with reality than management's projections. A705-A712; A174-A300. Specifically,

management projections indicated that assets under management (AUM) used to calculate the management fee would be zero after 2027. *See id.* However, management projections ignored both government statistics on waiting times for conditional green card issuance and the virtual certainty of redeployment of capital that would further delay redemption. A709-A710.

The virtual certainty of redeployment of capital arose from the following facts. To address the need to keep the EB-5 investors' money at risk, Manheim pooled repaid capital in a new investment vehicle: Redeployment Partners LP ("RDLP"). *See* Exhibit A at p. 13. According to Manheim, the Turnpike and SEPTA did not need more capital, and he could not locate other infrastructure projects. *See id.* Manheim therefore shifted DVRC's focus to real estate. *See id.* In February 2022, he caused DVRC to contribute $300 million in repaid loan proceeds RDLP. *See id.* In November, Manheim caused DVRC to contribute another $233 million in repaid loan proceeds to RDLP. *See id.* Later that month, he caused RDLP to loan $233 million to a special purpose vehicle: 200 West Washington Square, LLC ("St. James LLC"). *See id.*

RDLP structured the loan to St. James LLC as a ten-year interest-only loan, with no principal repayments due until maturity. *See id.* The loan paid interest at a fixed rate of 4% annually. *See id.* At the time, Manheim owned a 68% interest in St. James LLC. *See id.* The loan was obviously a self-interested transaction. *See id.* That

same month, St. James LLC used the DVRC loan to fund 99.15% of the purchase price for the St. James Building, a forty-five story luxury residential building on the west side of Philadelphia's historic Washington Square. *See id.* at 14. DVRC's ability to support that acquisition suggests that DVRC had value far in excess of Penfold's capital account. *See id.*

Further, as found by the Court of Chancery in its Post-Trial Opinion, the foregoing record establishes that DVRC will continue to generate revenue beyond management's original projection period, where revenue ended in 2027, if only because RDLP loaned the funds to St. James LLC under a loan that will not come due until 2032. *Id.* at p. 66. As found by the Court, Management's projections thus meaningfully undervalued DVRC because they depicted a firm that will stop generating revenue in 2027. *See id.*

In the Supplemental Valuation, Scherf instead relied on projections based on estimates of the length of time that DVRC's approximately 800 remaining foreign investors would stay invested in DVRC. *See id.* at p. 65. Investors receive their capital back when they file an I-829 application to receive final approval for permanent resident status or when they decide to exit the EB-5 program voluntarily. *See id.*

To estimate DVRC's investment horizon, Plaintiff engaged Wonjoon Kang, who has worked on EB-5 matters since 2008. *See id.* The Court of Chancery found

that Kang was sufficiently qualified to address the subject. Kang opined on how long it would take for investors who entered the EB-5 program between 2014 and 2019 to obtain permanent resident status. *See id.* at pp. 65-66. The Court noted that there is no dispute that an EB-5 center must redeploy capital so it remains "at risk" until investors receive permanent resident status. Kang opined that DVRC therefore could not wind down its funds and would have to redeploy its investors' capital, resulting in cash flows for DVRC over a longer time period. *See id.* at p. 66. He further estimated that DVRC could earn returns exceeding 10% upon redeployment. *See id.* Kang's analysis that was used in Plaintiff's projections was far more reliable than management projections which assumed wind down as soon as 2027. *See id.* at p. 66. Plaintiff's projections upon which Scherf relied in his Supplemental Report incorporated this analysis. The Court recognized that "Scherf might have permissibly relied on this methodology…" *See id.*

Scherf further adopted Plaintiff's projections (which themselves adopted management's historical assumption) of 5% return on top-line revenue even though the actual redeployment was at a lower, but self-interested, rate and a more realistic market rate of return would be higher than 5%. Scherf, A711-A712. Scherf testified that, in preparing his Supplemental Report, he considered the facts disclosed in the fact depositions taken subsequent to his initial report, the projections prepared by

Plaintiff and adopted by Scherf, and also the criticisms offered by Canessa regarding Scherf's initial report. A696.

Scherf's testimony confirmed that his analysis was based upon a principled application of the facts as those facts developed during discovery in the case. Specifically, as facts were developed in discovery, Scherf critically evaluated and reevaluated the data and changed his opinions when appropriate – changes that were not only designed to increase valuation but in some cases served to reduce the valuation. To the extent data or facts (and indeed criticisms) were pointed out that required adjustment, Scherf adjusted his opinions accordingly. *See, e.g.* A408. In other words, new information received through the discovery process necessitated a change in Scherf's valuation of DVRC, and therefore warranted the preparation of the Supplemental Report. Indeed, Plaintiff did not know (and there was no way for Scherf to know) of the St. James LLC transaction until after depositions had been taken which established future activity would necessarily occur at DVRC after 2027.

Scherf's Original Valuation had used management revenue projections to determine DVRC's value, which projections were not reliable in this case as set forth herein, and testimony from Defendants' representatives necessitated the rejection of management revenue projections, despite that appropriate deference had been given to such projections in Scherf's initial report. A696-A698. That same testimony also

led to various changes that were favorable to Defendants and resulted in a lower valuation where appropriate.

Notwithstanding the foregoing which establishes the basis for Scherf's Supplemental Report and Supplemental Valuation, the Court of Chancery disregarded Scherf's Supplemental Report on the ground that it was improper for him to introduce another model in his Supplemental Report rather than "creating a more realistic model for years beyond [2027] in his [Original] Report." *See* Exhibit A at pp. 66-67. The Court did not find that the Supplemental Valuation was necessarily wrong, only that it was improper for Scherf to change the projections upon which he relied. *See id.* The Court made this finding despite that the parties had agreed that supplemental expert reports could be submitted after the completion of depositions to address deposition testimony that impacted the experts' conclusions, which had occurred here. Indeed, it was Defendants' own unreliable management projections that necessitated the supplemental report.

The Court of Chancery instead accepted Scherf's Original Valuation, which had used management revenue projections as set forth in his Original Report. *See id.* at p. 68. As the Court noted, Scherf's Original Report accepted management's revenue projections without adjustment, which was preferred. *See id.* at pp. 62-63. For expenses, Scherf took into account that projected expenses exceeded historical levels and include amounts the Penfold Litigation found excessive. *See id.* Scherf

therefore drew historic expenses from DVRC's audited financial statements and normalized them when projecting future expenses. *See id.* The Court of Chancery found that this was a reasonable approach, found the Original Valuation credible, and therefore accepted the Original Valuation. *See id.*

Having accepted the Original Valuation, the Court of Chancery awarded Plaintiff damages and on December 12, 2025, the Court of Chancery entered a Final Order and Judgment, entering judgment against Manheim in the following amount:

> (a) $363,085.00, plus pre-judgment interest from May 10, 2022 at the legal rate set forth in 6 *Del. C.* § 2301, compounded quarterly, representing the fair value of Ban’s WestCo interest as of May 10, 2022; and
>
> (b) $6,535,527, plus pre-judgment interest from August 2, 2022 at the legal rate set forth in 6 *Del. C.* § 2301, compounded quarterly, representing the fair value of Ban’s interest in Penfold L.P. as of August 2, 2022; and
>
> (c) $259,817.16, representing legal fees and expenses awarded by the Court as part of the damages incurred by Ban, plus interest from November 24, 2025 at the legal rate set forth in 6 *Del. C.* § 2301, compounded quarterly.

See Exhibit B. The Court noted that “the above amounts were partially satisfied by the payment of $6,898,612 to Ban on July 10, 2025, such that the outstanding amount of this Judgment against Manheim as of December 10, 2025 is $2,663,274.30, which amount shall accrue interest as specified in paragraph 2 ($656.70 daily as of December 10, 2025) until it is satisfied. This amount paid to Ban on July 10, 2025, included the amounts that had been distributed by DVRC to Penfold, L.P. on December 22, 2022 and October 13, 2023 totaling $1,668,414.10.” *See id.*

ARGUMENT

I. The Court of Chancery Erred And Abused Its Discretion In Not Accepting The Valuation Of DVRC Contained Within Stephen J. Scherf's Supplemental Report Dated March 8, 2024.

A. Questions Presented

Whether the Court of Chancery erred and abused its discretion in not accepting the valuation of DVRC contained in the Supplemental Report of Stephen J. Scherf dated March 8, 2024 and supported by Scherf's testimony at trial.

This issue was preserved when he presented expert testimony relating to the Supplemental Valuation at trial, and in his Post-Trial Brief wherein Plaintiff requested that the Court of Chancery accept the Supplemental Valuation of Stephen J. Scherf. A692-A713, A717-A796, A1270-A1274. The Court addressed the Supplemental Valuation in its Post-Trial Opinion. *See* Exhibit A at pp. 64-68.

B. Scope/Standard of Review

The Superior Court's evidentiary rulings restricting or allowing expert testimony are reviewed under an abuse of discretion standard. *Coleman v. PricewaterhouseCoopers, LLC,* 902 A.2d 1102, 1106 (Del. 2006). "When an act of judicial discretion is under review the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *See id.*

The Court's failure to consider relevant factors as required under Delaware law in deciding whether to accept the Supplemental Report, and the Court's failure to properly shift the burden relating to damages under the entire fairness doctrine (*See Weinberger v. UOP, Inc*., 457 A.2d 701, 711 (Del. 1983)) in the context of its consideration of the Supplemental Report and Supplemental Valuation were errors of law which the Court reviews de novo. *Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81 (2021).

C. Merits of the Argument

i. The Court of Chancery Erred and Abused its Discretion in Not Considering the Supplemental Report Because the Parties Agreed that Supplemental Expert Reports Could Be Produced After the Expert Report Deadline and the Supplemental Report was Rendered Necessary by New Information Learned in Depositions.

The Court of Chancery's decision not to consider the Supplemental Valuation was an abuse of discretion. Scherf's Supplemental Report/Valuation was timely produced under the parties' agreement. As evidenced by emails between the parties, the parties agreed to proceed with the production of expert reports before the completion of fact depositions, with the understanding that "experts will be entitled, if needed, to submit a supplement to their reports to address any testimony given at depositions taken after service of their report that impacts their conclusions, provided that the scope of any such supplements shall be limited to addressing testimony at such depositions and its impact on their conclusions." A30-A31. This

was permitted by the Scheduling Order and Chancery Rule 29 which allows for the parties to agree to extensions regarding certain discovery. A23-A27.

In accordance with this agreement, Scherf timely served his Original Report before the completion of depositions, and served his Supplemental Report shortly after the close of discovery in order to account for new information learned during depositions. A46-A100; A174-A300. The Court abused its discretion in not accepting the parties' agreement to produce supplemental expert reports to account for this new information.

The chronology of events confirms that Scherf acted in accordance with the parties' agreement. Scherf served his Original Report on December 28, 2023, before the completion of fact depositions, as the agreement contemplated. A29-A31; A46-A100. Deposition testimony taken after the service of the Original Report revealed that management's revenue projections, upon which Scherf had relied in the Original Report, were fundamentally unreliable because they assumed that DVRC's assets under management would be zero after 2027, a premise directly contradicted by testimony regarding the EB-5 visa backlog, the legal obligation to redeploy capital, and the St. James LLC loan structure that would not mature until 2032. A710; *see also* Exhibit A at p. 66. The delayed depositions revealed that through the St. James transaction, Manheim had locked redeployed EB-5 funds into a 10-year loan maturing in 2032, proving that the foundational premise of the original management

projections, a 2027 wind-down, was factually impossible. *Id.* There was simply no way for Plaintiff to be aware of the St. James transaction prior to depositions, and the existence of that transaction drastically altered the projections that should have been used to determine value given that it established that DVRC would not stop generating revenue in 2027 as set forth in management projections.

It was precisely this new deposition testimony, and its direct impact on Scherf's valuation conclusions, that the parties' agreement was designed to address. Scherf served his Supplemental Report on March 8, 2024, well before the May 14, 2024 trial date, addressing the new deposition testimony and its impact on his conclusions. A174-A300.

The Court of Chancery characterized the Supplemental Report as introducing a "new model" for computing DVRC's value. *See* Exhibit A at pp. 66-67. That characterization is incorrect and should be rejected. Scherf used the identical discounted cash flow ("DCF") methodology in both the Original Report and the Supplemental Report. A46-A100; A174-A300; A706; Exhibit A at pp. 61-65. The DCF methodology involving the projection of future cash flows and their discounting to present value was not new. What changed between the two reports were the revenue projections, specifically the projections of how long DVRC's assets would remain under management. That change was not a methodological departure;

it was a factual correction compelled by deposition testimony that exposed the unreliability of management's projections.

Because this testimony fundamentally impacted his conclusions regarding DVRC's long-term cash flows, Scherf was entitled to submit a supplemental report reflecting reality. This is not a case of an expert unilaterally expanding the scope of his opinions after a court-imposed deadline. It is a case of an expert doing exactly what the parties' written agreement authorized him to do. Indeed, the Court of Chancery itself acknowledged that the Original Report relied on management projections that it agreed were unrealistic and undervalued DVRC yet still declined to consider the Supplemental Report which corrected those errors. *See* Exhibit A at p. 66. This was an abuse of discretion, particularly in a case where the burden to establish fair value was Defendants' burden, and where Defendants never even undertook to introduce their own valuation.

Where Defendants had, at all times control of all information necessary to determine the true and correct value and in light of Defendants demonstrated and repeated fiduciary duty violations, it is patent error to blame Plaintiff for the struggle to obtain information timely that was necessary to establish valuation evidence when it was never Plaintiff's burden to establish the value issue in the first place. Accordingly, the Supplemental Report was in accordance with the parties' agreement and it was an abuse of discretion for the Court not to accept it and error

for the Court not to place the burden on Defendant to establish fair value in a transaction where entire fairness was the standard by which Defendants' fiduciary failures were measured. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

ii. The Court of Chancery Erred and Abused its Discretion in Not Considering the Supplemental Report Because Delaware Law Required the Court to Engage in a Balancing of Relevant Factors Before Excluding the Supplemental Valuation.

Even notwithstanding the parties' agreement, the Court abused its discretion. In its Post-Trial Opinion, the Court of Chancery drew a distinction between permissible supplemental expert opinions, which can make adjustments to reflect late-breaking discovery, respond to the opposing expert's criticisms, or account for trial evidence, and impermissible ones that introduce wholly new methodologies after the expert discovery cutoff. *See* Exhibit A at p. 67. The Court of Chancery barred the use of the Supplemental Valuation finding that it improperly introduced a new methodology. *See id.* This finding was in error and an abuse of discretion.

The Court of Chancery in its Post-Trial Opinion cited to the following cases to support its holding that an expert cannot use completely new inputs in a supplemental report:

> *IQ Holdings, Inc. v. Am. Com. Lines Inc.,* 2012 WL 3877790, at *2 (Del. Ch. Aug. 30, 2012) ("For an expert to create a new analysis or materially change his opinions after the expert discovery cutoff risks trial by surprise and deprives the opposing party of orderly process in which to confront and

respond to the expert's views. Equally important, a new or materially changed analysis imposes burdens on the Court, which must attempt to evaluate the expert's opinions without the full benefits of adversarial testing."); *Candlewood Timber Grp. LLC v. Pan Am. Energy LLC,* 2006 WL 1382246, at *11 (Del. Super. Ct. May 16, 2006) (analyzing whether an expert's affidavit contained "new or supplemental opinions" or information submitted to assist the Court in evaluating the expert['s] methodologies and resolving any question about the reliability of the underlying analyses ... not to offer [a] new opinion." (citations omitted)); *see Coleman v. PriceWaterhouseCoopers LLC,* 902 A.2d 1102, 1106 (Del.2006).

The Court abused its discretion by misapplying *IQ Holdings* and *Coleman* to the facts of this case. First, the two cases are factually distinguishable. In *IQ Holdings*, the expert materially changed his cost of capital inputs after the discovery cutoff without a valid factual trigger, risking 'trial by surprise.' Here, Scherf did not simply change his mind and the Supplemental Report was not served after a deadline to do so (it was served in accordance with the deadline established by the Parties); rather, the delayed depositions compelled a new model because they proved the original management projections were entirely disconnected from Manheim's actual 2032 redeployment timeline. Furthermore, the core policy concern of *IQ Holdings*, trial by surprise and lack of adversarial testing, is absent here. Manheim received the Supplemental Report months before trial, deposed Plaintiff regarding the new inputs, and submitted a full supplemental rebuttal report from Canessa. The adversarial process functioned exactly as intended.

Further, the standard developed by Delaware Courts requires that "in deciding whether late production justifies excluding evidence, the Court "'must balance its duty to admit all relevant and material evidence with its duty to enforce standards of fairness and the Rules of Court.'" *Coleman,* 902 A.2d at 1106. Delaware courts have consistently engaged in a balancing of factors including considering the original scheduling order, whether there is good cause to allow the supplement, the prejudice to the opposing party, and possible trial delay. *Id.* at fn. 6. Here, most critically, the Court of Chancery did not balance the relevant factors and reach a conclusion with which Plaintiff disagrees. It performed no balancing analysis at all. The Post-Trial Opinion contains no discussion of good cause, no assessment of prejudice to Manheim, no consideration of the parties' agreement, and no weighing of the significant financial impact on Plaintiff. *See* Exhibit A. The failure to engage in the required analysis is itself an abuse of discretion, and its misapplication of the law by failing to apply these factors to the undisputed facts is an error of law which is reviewed de novo.

If the Court of Chancery had properly balanced the factors, they would have clearly favored admission of the Supplemental Report and Supplemental Valuation given the parties' agreement regarding the submission of supplemental reports, the lack of prejudice to Defendants, and because the Supplemental Report's

methodology and conclusions were clearly reliable and necessitated by depositions that established the unreliability of management projections.

As stated above, the Supplemental Report was required due to deposition testimony that exposed the unreliability of management projections. As the Court acknowledged and Scherf testified, it was entirely appropriate for Scherf to rely on management's projections in his Original Report when he had no reason to depart from them. Following the fact depositions, departure became appropriate and necessary. However, while the projections that were input into Scherf's model changed between reports, he did not change the underlying DCF methodology, and in any event Manheim cannot be surprised that management projections were deemed unreliable where he had the facts, didn't disclose them prior to fact depositions and didn't introduce any valuation – though it was his burden to do so.

Indeed, the Court of Chancery acknowledged that management's original projections necessarily undervalued DVRC because they depicted a firm that would stop generating revenue in 2027, when in reality DVRC's obligations and loan structures extended well beyond that date. *See* Exhibit A at p. 66. The court further acknowledged that "Scherf might have permissibly relied on this methodology had he used it in the Original Report." *Id.* In other words, the Court found that the Supplemental Valuation's methodology was permissible and that the Original Report's projections were inadequate, yet it rejected the corrective valuation on

purely procedural grounds and awarded damages based on projections it recognized as deficient. This outcome is internally inconsistent. A court cannot simultaneously find that the existing damages figure rests on projections that undervalue the subject entity, acknowledge that the corrective methodology was sound, and then exclude the correction on procedural grounds while awarding the admittedly insufficient figure as the measure of "fair value." That result is not a permissible exercise of judicial discretion; it is an abuse of it. Certainly, at least, the Court's findings on reliability should have factored into the Court's admissibility determination; yet it failed to balance the *Coleman* factors at all.

Additionally, Manheim clearly did not suffer any prejudice as a result of the Supplemental Report. Manheim had the opportunity to and did have his expert, Canessa, prepare a rebuttal report to Scherf's Supplemental Report. See A301-A407. The Defendants also took depositions a second time specific to the AUM projections Plaintiff had prepared that were used by Scherf in his Supplemental Report, and Manheim was in the possession of Scherf's Supplemental Report for more than two months prior to trial in the case. Both parties also fully addressed Scherf's Supplemental Report and Supplemental Valuation at trial. *See e.g.* A755. Accordingly, Manheim was not in any way prejudiced by the use of the Supplemental Report.

In sum, Scherf's Supplemental Report is exactly what *Coleman* permits: an update to an expert's opinions on valuation to account for late-breaking discovery that in this case exposed the inaccuracies of the management projections. Accordingly, even if the Court of Chancery believed the Supplemental Report was untimely, it was an abuse of discretion (and an error of law) for the Court not to consider Scherf's Supplemental Report or Supplemental Valuation as all of the factors identified in *Coleman* necessitated acceptance of the Supplemental Report and good cause existed to consider the report.

iii. The Court of Chancery Erred and Abused its Discretion in Not Considering the Supplemental Report Because Defendants Accepted the Risk that Supplemental Expert Reports Would Be Produced Close to the Time of Trial.

Even accepting the Court of Chancery's finding that the Supplemental Report improperly included a new model, the Court erred and abused its discretion by not considering the Supplemental Report. This case is akin in many ways to *Christian v. Counseling Res. Associates, Inc.*, 60 A.3d 1083 (Del. 2013). In *Christian*, the parties agreed informally that the Christians could file their expert report by the end of January 2011—three weeks after the extended deadline set forth in the amended scheduling order. *Id.* at 1086. The Christians did not file their expert report. *Id.* But, in early February 2011, their new counsel wrote to the trial court requesting a teleconference to discuss the discovery schedule and the fact that new counsel and

counsel for Cannon both had conflicts with the scheduled trial date. *Id.* The trial court refused to schedule a conference, and advised the parties that the trial date would not be changed. *Id.*

Over the next five months, the parties dealt with discovery issues on their own. *Id.* As of April 2011, the Christians still had not identified their experts or provided expert reports. *Id.* The Health Care Providers set up a teleconference on April 29, 2011, to work out new discovery deadlines. *Id.* During the month of May, the Christians identified three experts and provided two "preliminary disclosures" of their experts' opinions. Information concerning the third expert's opinions was provided in mid-June. *Id.* The experts were made available for depositions in late July. *Id.* On June 22, 2011, five weeks before the scheduled trial date, the Health Care Providers filed a motion to preclude the Christians' expert testimony. *Id.* They claimed to have been severely prejudiced by the Christians' delay. *Id.* The trial court granted that motion and a related motion for summary judgment. *Id.* An appeal followed.

This Court found that the trial Court in *Christian* abused its discretion by failing to hold a scheduling conference to discuss the scheduling issues that had arisen. In reaching its conclusion, this Court advised as to the appropriate manner in which to handle scheduling orders and the late production of expert reports. This Court noted that:

> Trial scheduling orders are typically issued as much as one year or more before the trial date, which is selected after input from counsel. With discovery deadlines in place, the trial court may have little or no involvement in the case until shortly before trial, when motions *in limine*, or other potentially dispositive motions must be filed. This procedure is efficient and works well in cases where the parties adhere to the discovery deadlines. There are times, however, when one or all of the parties miss those deadlines. In Delaware, where civility is a cherished value, attorneys are likely to grant their own extensions to opposing counsel without "bothering" the trial court. That practice is commendable, and fosters good will. But it also leads to the predicament that occurred here. The Health Care Providers kept making accommodations until they ran out of time. Indeed, the Christians were actively scheduling depositions when the Health Care Providers, without warning, filed a motion to preclude experts.
>
> To avoid this problem in the future, we now advise litigants that, if they act without court approval, they do so at their own risk. If one party misses a discovery deadline, opposing counsel will have two choices—resolve the matter informally or promptly notify the court. If counsel contacts the court, that contact can take the form of a motion to compel, a proposal to amend the scheduling order, or a request for a conference. Any one of these approaches will alert the trial court to the fact that discovery is not proceeding smoothly. With that knowledge, the trial court will be able to take whatever steps are necessary to resolve the problem in a timely fashion.
>
> If the party chooses not to involve the court, that party will be deemed to have waived the right to contest any late filings by opposing counsel from that time forward. There will be no motions to compel, motions for sanctions, motions to preclude evidence, or motions to continue the trial. It is entirely possible, under this scenario, that some vital discovery will not be produced until the day before trial. Still, the party prejudiced by the delay accepts that risk by failing to promptly alert the trial court when the first discovery deadline passes.

Id. at 1087-1088; *see also Cannon v. Poliquin*, 2020 WL 1316833, at *3 (Del. Super. Ct. Mar. 16, 2020)(denying defendant's motion for summary judgment where

the plaintiff submitted a late expert report because the defendant did not move to compel before seeking preclusion of the late report).

While the *Christian* case concerned a case in which the preclusion of the expert report would result in ultimate dismissal of the lawsuit—an outcome Courts disfavor, the Court's decision here to disregard the Supplemental Report was equally damaging to Plaintiff as it effectively reduced Plaintiff's damage award by nearly 17.6 million dollars. This outcome occurred despite the fact that the need for the Supplemental Report was the result of Defendants' conduct in creating unreliable management projections not discoverable until after depositions were taken in the case. Defendants should not be rewarded for their repeated dishonesty, not only in connection with their management projections, but also in the broader context of this case.

Further, this Court's decision in *Christian* establishes that a party who does not seek court intervention waives the right to contest late filings. Manheim not only failed to seek court intervention, he affirmatively participated in the agreed process by agreeing to the production of supplemental reports after depositions, having Canessa prepare a rebuttal to Scherf's Supplemental Report, and took depositions after the Supplemental Report was produced. A30-A31, A301-A407.

Thus, under the standard developed in *Christian,* the Court of Chancery abused its discretion by not considering the Supplemental Report. The parties in this

case agreed to extend the case management deadlines to allow for the production of supplemental expert reports after the close of depositions in the case. A29-A31. By not seeking court intervention to extend the deadlines, Defendants, including Manheim, accepted the risk that they would not be in receipt of any supplemental expert reports until close to the time of trial and accepted the risk that "vital" information would not be disclosed until after the court imposed deadline for the exchange of expert reports.

iv. The Court of Chancery Erred and Abused Its Discretion in Not Accepting the Supplemental Expert Report Because the Supplemental Report Used Reliable Processes and Reached Reliable Conclusions.

Scherf's Process and Conclusions were Reliable.

The Court of Chancery's failure to accept the Supplemental Valuation was an abuse of discretion for a fourth and independent reason: the Supplemental Report was methodologically sound, reliably prepared, and reached conclusions that were not only well-supported by the record but corroborated by the Court's own findings. The Court did not find that the Supplemental Valuation was wrong, it instead declined to consider it. Exhibit A at pp. 66–67. A court abuses its discretion when it excludes reliable expert testimony without identifying any methodological deficiency, particularly when doing so produces a damage award the court itself recognizes as insufficient. *See Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d

1102, 1106 (Del. 2006) (requiring court to "balance its duty to admit all relevant and material evidence with its duty to enforce standards of fairness and the Rules of Court").

The reliability of the Supplemental Report is not disputed on this record. The court found Wonjoon Kang sufficiently qualified to address the subject matter underlying the new projections. *See* Exhibit A at p. 65. The court acknowledged that "Scherf might have permissibly relied on this methodology" had it appeared in his Original Report. *Id.* at p. 66. Defendants' own expert, Canessa, conceded that management's expense projections were wrong and partially corrected for them himself. A1219-A1220; A1225-A1227. And the Court's own findings, crediting the $2 million Manheim distribution and the $233 million St. James LLC loan as evidence that "DVRC had value far in excess of Penfold's capital account," independently corroborate the Supplemental Report's higher valuation. *See* Exhibit A at p. 52. The question before this Court is therefore whether the Court of Chancery abused its discretion by refusing to consider a reliable, authorized, and uncontroverted expert report. It did.

Departure from Management Projections Was Not Only Permissible But Compelled by the Record.

The Court of Chancery acknowledged that the Court prefers valuations "based on contemporaneously prepared management projections," but also recognized that

adjusted projections are permissible "when the expert has provided sufficient support for the modifications." *See* Exhibit A at p. 62 (citing *Highfields Cap., Ltd. v. AXA Fin., Inc.*, 939 A.2d 34, 62 (Del. Ch. 2007); *Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *11 (Del. Ch. 2005); *In re U.S. Cellular Operating Co.*, 2005 WL 43994, at *11–15, *19 (Del. Ch. Jan. 6, 2005)). Here, Scherf provided far more than sufficient support for his departure from management projections and the Court itself conceded that those projections were deficient. The departure was not a choice; it was a necessity compelled by the record evidence and the timing of its disclosure was entirely within the control of Manheim who produced the materially inaccurate management projections despite actual knowledge of its material inaccuracy.

Management's projections assumed that DVRC's assets under management would be zero after 2027. In other words, that DVRC would effectively cease to exist as a revenue-generating enterprise within five years of the valuation date. That assumption was demonstrably wrong for at least three independent reasons, each of which was established through deposition testimony taken after Scherf's Original Report was served. First, the EB-5 visa backlog for Chinese investors, the overwhelming majority of DVRC's approximately 800 remaining investors, created wait times of between 14.4 and 25.3 years for permanent resident status, as Kang credibly testified and the court found. *See* Exhibit A at pp. 65–66. An investor cannot

redeem their capital and exit the EB-5 program until permanent resident status is obtained, meaning DVRC's assets under management would remain in place far beyond 2027. Second, DVRC was legally obligated to redeploy capital as loans matured in order to keep the EB-5 investors' capital "at risk", a legal requirement under federal immigration law that the court itself acknowledged. *Id.* at p. 66. Redeployment necessarily extended DVRC's revenue-generating horizon far beyond management's projected wind-down date.

Third, and most concretely, DVRC had already deployed $233 million into the St. James LLC loan, which was structured as a ten-year interest-only loan not maturing until 2032. *Id.* at pp. 13–14. DVRC's revenue from that loan alone would continue well beyond the 2027 wind-down date assumed by management's projections. The court acknowledged all of these facts, yet rejected the corrective valuation that accounted for them. When management's projections are demonstrably inconsistent with known facts, particularly facts established through the very deposition testimony that the parties' agreement authorized Scherf to address, a Court that credits those projections over a reliable corrective analysis is not exercising legitimate discretion; it is committing reversible error.

In re U.S. Cellular Operating Co., 2005 WL 43994 (Del. Ch. Jan. 6, 2005), cited above, is directly supportive. There, the Court of Chancery accepted a DCF valuation based on expert-created forecasts rather than management projections

specifically finding the DCF was the most reliable evidence of value when the expert's forecasts better reflected the company's actual operating reality. *Id.* at *11–15, *19. The Post-Trial Opinion cites *U.S. Cellular* for the proposition that departing from management projections is permissible when the expert provides sufficient support, then declined to apply that principle to Scherf's Supplemental Report on procedural grounds.

Due to Plaintiff's history with DVRC and his profound knowledge of the EB-5 industry, the projections in this case were not created without a sufficient experiential basis. Indeed, the Court of Chancery acknowledged in its Post-Trial Opinion that Wonjoon Kang, who created the model on which Plaintiff's projections were based in part, was sufficiently qualified to address the subject. *See* Exhibit A at p. 65. Kang's analysis confirmed that management projections relating to future AUM numbers were wrong because they did not account for government statistics on waiting times for conditional green card issuance and the virtual certainty of redeployment of capital after 2007 that would further delay redemption. *See id.*

Also, the foreign investors whose funds were used to help Manheim and his cronies buy the St. James Building are locked in for another 10 years, which further supports Scherf's (1) departure from Management projections and (2) adoption of revenue projections in his Supplemental Report. Defendants offered no evidence to support management projections on revenue and, in fact, their own expert, believes

that revenue will be generated at DVRC well into the 2030s. This rendered necessary Scherf's use of Plaintiff's projections in the Supplemental Report to determine the value of DVRC.

Case law also supports that an expert can rely on financial data prepared by a lay witness, even when prepared from scratch. In *Zachman v. Real Time Cloud Servs., LLC*, CV 9729-VCG, 2020 WL 1522840, at *8 (Del. Ch. Mar. 31, 2020), judgment entered, CV 9729-VCG, 2020 WL 4210935 (Del. Ch. July 22, 2020), and aff'd, 251 A.3d 115 (Del. 2021), a dispute arose over the value of the plaintiff's membership interest in a company. The plaintiff's expert did not base his valuation report on Quick Books records of the company, but instead on company financials that were recreated from scratch by the plaintiff based on source documents. The defendant sought to exclude the plaintiff's expert report under Rule 703, arguing that the plaintiff's expert report was based on the plaintiff's own subjective conclusions regarding the company's expenses and income. The Court disagreed with the defendant, finding that the issues went to the credibility of the experts—as there was a disagreement regarding the fundamental facts underlying the reports. *Id.; see also In re: Appraisal of Dole Food Company, Inc*., 114 A.3d 541 (Del. Ch. 2014); *Paron Capital Mgmt., LLC v. Crombie*, 2012 WL 214777, at *3 (Del. Ch. Jan. 24, 2012).

In this case, Scherf ultimately determined that the revenue projections prepared by Plaintiff were reliable in light of the overwhelming evidence supporting

the extended time that assets would remain under management given the profound backlog of visa applicants (where cutoff-date was at December 2015 as of trial and has not moved since trial). Scherf adopted those revenue projections in his Supplemental Report because they were consistent with known facts and far more believable than the demonstrably unsupportable management projections made available to Plaintiff in discovery. Nevertheless, Scherf also presented an alternative set of valuations using management projections adjusted by Scherf in his Supplemental Report and in his testimony. As a result, there was no factual or legal basis on which to disregard Scherf's valuation opinions.

The Supplemental Report Should Have Been Accepted and the Damages Award Should Be Increased.

Lastly, the Court of Chancery's exclusion of the Supplemental Report directly contravened Delaware's equitable mandate that uncertainties in valuation must be resolved against a faithless fiduciary. The trial court explicitly acknowledged in its Post-Trial Opinion that the original management projections "meaningfully undervalued DVRC because they depicted a firm that will stop generating revenue in 2027." Exhibit A at p. 67. By enforcing an evidentiary exclusion, the trial court knowingly adopted a valuation model that artificially capped Plaintiff's damages. Consequently, the trial court awarded only $6,898,612, despite Scherf's reliable Supplemental Valuation demonstrating a true fair value of $24,155,260. *See* Exhibit

A; Exhibit B. Excluding a timely, procedurally compliant supplemental report, only to grant a nearly $17.6 million windfall to a controlling stockholder adjudicated to have breached his duty of loyalty, is arbitrary, capricious, and constitutes a clear abuse of discretion. Further, in the context of the entire fairness standard, Manheim bears the burden of proving that the transfers at issue in the case were entirely fair to include both fair dealing and fair price. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). However, the Court of Chancery essentially placed the burden of proving fairness on Plaintiff by ignoring the evidence in the record and failing to consider the Supplemental Report.

The misapplication of the entire fairness standard was not only an abuse of discretion but an error of law.

All of the foregoing establishes that the Court of Chancery had no legitimate evidentiary, methodological, or procedural basis to disregard Scherf's Supplemental Valuation. The methodology was identical to the Original Report. The departure from management projections was compelled by deposition testimony, authorized by the parties' agreement, and independently confirmed by the court's own factual findings. The reliance on Plaintiff's projections was permissible under *Paron Capital* and *Zachman*. The expense analysis was accepted by the Court in every other context in which it was applied.

Accordingly, this Court should amend the damage award to be in alignment with Scherf's Supplemental Valuation and/or remand the case so that the Court of Chancery may award damages to Plaintiff consistent with the Supplemental Valuation.

CONCLUSION

For all the foregoing reasons, the Court of Chancery erred in not accepting the Supplemental Valuation of DVRC as supported by Stephen J. Scherf's Supplemental Report dated March 8, 2024, and this Court should reverse the trial court's errors and accept the Supplemental Valuation of DVRC.

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CERTIFICATE OF SERVICE

I, Jeffrey S. Cianciulli hereby certify that on February 23, 2026, a true and correct copy of the foregoing Appellant's Opening Brief was electronically filed and served upon the following counsel of record via File and ServeXpress:

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