

IN THE SUPREME COURT OF THE STATE OF DELAWARE

YOUNG MIN BAN)	
)	
Plaintiff Below,)	
Appellant/Cross-)	
Appellee,)	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/Cross-)	
Appellants)	

**APPELLEE’S ANSWERING BRIEF AND
OPENING BRIEF ON CROSS-APPEAL**

OF COUNSEL:

Joshua K. Bromberg
KLEINBERG, KAPLAN,
WOLFF & COHEN, P.C.
500 Fifth Avenue
New York, NY 10110
(212) 986-6000

PRICKETT, JONES & ELLIOTT, P.A.
Bruce E. Jameson (No. 2931)
Kevin H. Davenport (No. 5327)
John G. Day (No. 6023)
1310 N. King Street
Wilmington, Delaware 19801
(302) 888-6500
bejameson@prickett.com
khdavenport@prickett.com
jgday@prickett.com

*Attorneys for Joseph P. Manheim,
Delaware Valley Regional Center, and
West 36th, Inc.*

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NATURE OF PROCEEDINGS

This action was precipitated by plaintiff Young Min Ban’s scheme to wrest control of the Delaware Valley Regional Center, LLC (“DVRC”), an EB-5 regional center, from Joseph Manheim, DVRC’s founder and majority owner, after Ban was fired from DVRC. Ban falsely claimed in an earlier action in the Court of Chancery, *Bamford v. Penfold, L.P.*, C.A. No. 2019-0005 (the “Penfold Action”) that he and another DVRC owner were defrauded into giving control of DVRC to Manheim—a claim that was not just legally deficient, but based upon a made-up factual record.¹ Indeed, Manheim had to hire a forensic chemist and document-dating specialist to provide expert testimony rebutting Ban’s misrepresentations about when two critical documents establishing his ownership interest had been signed.²

Ban was largely unsuccessful in the Penfold Action, with the court leaving Manheim in control of DVRC while awarding a fraction of the requested derivative damages. Ban was, however, successful in getting the written partnership agreement for Penfold, L.P.—the vehicle through which he and his co-plaintiff owned their indirect interests in DVRC—invalidated. This, along with EB-5 reform legislation

¹ As the Court of Chancery put it, Ban “advanced wide-ranging arguments and theories, several of which turned out to lack factual support.” *Bamford v. Penfold, L.P.*, 2022 WL 2278867, at *52 (Del. Ch. June 24, 2022), *aff’d sub nom. Manheim v. Ban*, 319 A.3d 268 (Del. 2024) (TABLE).

² B80.

that barred foreign EB-5 center ownership, created an untenable situation where a Penfold limited partner's ownership interest threatened DVRC's status as an approved EB-5 regional center, but the limited partner could not be removed from the limited partnership because the partnership agreement and its partner-removal mechanism had been invalidated in the Penfold Action.

So Manheim and the remaining directors of West 36th, Inc. ("WestCo"), DVRC's managing member, after consultation with counsel, voted to redeem Penfold's interest in DVRC. Manheim—who understandably did not want to be in business with Ban anymore—also amended WestCo's bylaws to permit himself to buy out Ban's residual WestCo interest, and then exercised that right.

Ban sued over both transactions, leading to the consolidated Court of Chancery action that is being appealed here. Ban acknowledged at trial that he would prefer to receive money rather than continuing to be in business with Manheim, therefore the case focused on the valuation of DVRC in the summer of 2022. Ban's damages expert, Stephen J. Scherf, submitted an expert report (the "Original Report"), wherein he opined that Ban's DVRC interest had been worth \$9.6 million (the "Original Valuation"). But without authorization from the Court or an agreement of the parties, Scherf later submitted another report (the "Supplemental Report"), wherein his valuation more than doubled, to \$24.5 million (the "Supplemental Valuation"). The Supplemental Report was based upon

projections that Scherf thought were prepared by an EB-5 expert, but were later revealed to have been prepared by Ban himself (the “Supplemental Projections”). These projections extended the life of DVRC’s assets under management by nineteen additional years. And to justify the tardy and improper Supplemental Report, Ban relied on the parties’ agreement that expert reports could be updated to account for subsequent deposition testimony—even through the new projections pre-dated Scherf’s Original Report and Scherf’s Supplemental Report did not rely on deposition testimony to explain its new valuation.

In his post-trial brief, Ban sought \$36 million in damages, consisting of the \$24 million that he claimed represented the fair value of his indirect interests in DVRC, plus additional amounts related to an independent transaction and erroneous interpretations of financial statements.³ Manheim argued that Ban should receive no more than \$5 million for his Penfold and WestCo interests. The court ultimately awarded Ban \$6.5 million.

After hearing trial testimony from Scherf and reviewing the Supplemental Report, the court found that Scherf’s “Supplemental Valuation was not credible.”⁴ The court also ruled that an “expert can make adjustments to his opinions to reflect late-breaking discovery, account for the evidence adduced at trial, or respond to

³ The court’s denial of these latter amounts was not appealed by Ban.

⁴ *Ban v. Manheim*, 339 A.3d 41, 81–82 (Del. Ch. 2025) (the “Post-Trial Opinion”).

criticisms from the other side,” but it is improper for an expert to “come up with completely new inputs in a supplemental expert report.”⁵ The court found this is what Scherf had done in the Supplemental Report, so it rejected the Supplemental Valuation as both untimely and not credible. The Court then relied on parts of the Supplemental Report that were not based upon the Supplemental Projections, made adjustments to the Original Valuation, and valued Ban’s indirect DVRC interests at \$6,898,612. Following issuance of the Post-Trial Opinion, but before entry of final judgment, Manheim paid the principal amount of the judgment, \$6,898,612, to Ban. Final judgment was entered on December 12, 2025, in the amount of \$2,663,274.30, representing the award of legal fees to Ban (which Manheim contests through his cross-appeal) plus interest that had accrued on the judgment as of December 10, 2025.

Ban now appeals from that final judgment, portraying the Court of Chancery’s decision as a rejection of the parties’ agreement that Ban could supplement his expert report, thereby depriving Ban of significant value. That is not the case. The Court of Chancery considered the Supplemental Valuation and found it facially incredible. While the court agreed that it was served late and in contravention of the parties’ agreement, it merely discarded the late—and unreliable—portion of the report that

⁵ *Id.*

relied on the Supplemental Projections. That was not an abuse of discretion; rather, the Court’s rejection of Supplemental Projections was a credibility finding that is subject to a highly deferential standard of review. Accordingly, the Court of Chancery’s ruling should be affirmed.

Notwithstanding Ban’s limited success in the Penfold Action and the Court of Chancery’s calculation of damages that largely aligned with Manheim’s adjusted version of Ban’s valuation, Ban claimed, and the Court of Chancery awarded, Ban his legal fees and expenses pursuant to the bad faith exception to the American Rule.⁶ The bad faith exception is rarely applied and is implicated only in extraordinary cases where a plaintiff shows by clear evidence that the defendant engaged in egregious conduct. That is not this case. Manheim’s challenge of Ban’s changing and fantastical damage calculations was done in good faith. Moreover, Manheim’s underlying conduct was undertaken in good faith and in the honest belief that the redemption of Ban’s indirect interest in DVRC was permissible and in the best interests of the company, notwithstanding that there likely would be a dispute about the valuation of that interest. The Court of Chancery’s application of the bad faith exception in these circumstances constitutes an abuse of discretion.

⁶ *Ban v. Manheim, et. al.*, C.A. No. 2022-0768-JTL (Order Granting Expense Award) (Nov. 24, 2025) (“Fee Order”) (attached hereto as Exhibit A).

The Court of Chancery also applied the wrong legal standard when deviating from the American Rule. Numerous opinions of this Court have held that pre-litigation conduct cannot be the basis for an exception to the American Rule unless such conduct relates to conduct during the litigation. The Court of Chancery, however, applied the bad faith exception based solely on Manheim's pre-litigation conduct. That is contrary to Delaware law and constitutes legal error.

SUMMARY OF ARGUMENT

1. Denied. The Court did not abuse its discretion in fashioning an appropriate remedy when it placed no weight on the Supplemental Valuation provided in Scherf's Supplemental Report.

2. The Court of Chancery erred as a matter of law and abused its discretion in applying the bad faith exception to the American Rule because it applied the wrong legal standard in determining whether to apply that exception, and it abused its discretion in holding that (i) Ban had not waived his right to seek legal fees and expenses and (ii) implicitly determining that Manheim's conduct was so egregious or deplorable so as to make this an extraordinary case where the bad faith exception applies.

STATEMENT OF FACTS

A. Joseph Manheim Finds the Delaware Valley Regional Center.

DVRC was an EB-5 regional center that managed investments pursuant to the EB-5 Immigrant Investor Program, which allows foreign nationals to make qualifying job-creating investments in order to obtain permanent U.S. residency. Most EB-5 regional centers source investments in real estate development projects. While these projects often place the investors' funds in subordinated positions in risky enterprises, they fit the expected five-year timeline for investors to complete the EB-5 program.⁷

Manheim had the idea of using the EB-5 program to fund municipal infrastructure projects, which carried far less risk to investor capital. But the government agencies seeking funding usually borrowed on extended timelines, typically decades, far longer than the five-year period most participants intended to remain invested. To fix this timing mismatch, Manheim conceived a novel solution: make short-term loans to government agencies that could be repaid with long-term municipal bonds that the investors could sell when leaving the EB-5 program.⁸ He founded DVRC to make this a reality.

⁷ *Bamford*, 2022 WL 2278867.

⁸ *Id.* at *3–4.

WestCo held a 10% interest in DVRC, and was its managing member. Manheim owned 70% of WestCo, and Ban owned 15%.⁹ DVRC's non-managing member, which owned 90%, was Penfold. Penfold's three limited partners were Manheim, Ban and Joseph Bamford. Its manager was Reath & Co., LLC, which was owned and controlled by Manheim.¹⁰

B. The Penfold Action

The Penfold Action commenced on January 4, 2019. While the litigation continued, DVRC faced several challenges. One was redeployment—reinvesting funds under management that were being repaid by DVRC's original borrowers, the Pennsylvania Turnpike Commission and SEPTA. Federal law required these funds to remain “at risk” while DVRC's investors remained in the EB-5 program. Another challenge was the March 15, 2022, enactment of the EB-5 Reform and Integrity Act (the “Reform Act”), which prohibited participation in EB-5 regional centers by foreign nationals—a problem for DVRC because Bamford, one of the Penfold limited partners, was not a U.S. national.¹¹

Trial in the Penfold Action concluded on June 11, 2021. Because Ban's factual claims in his pleadings and through trial were so divorced from the evidence,

⁹ The remaining 15% of WestCo was owned by non-party Paula Mandle.

¹⁰ Post-Trial Opinion, 339 A.3d at 50.

¹¹ *Id.* at 55.

the Court of Chancery took the unusual step of issuing two post-trial rulings: a findings of fact after trial, and then a post-trial opinion. This was done to force the parties to apply legal arguments to the same factual paradigm. The Certain Post-Trial Factual Findings was issued on July 21, 2021.¹² While the Factual Findings resolved many factual disputes, it left unresolved Ban’s claim that WestCo, despite its 10% membership interest in DVRC, was not entitled to any of DVRC’s profits, effectively rendering WestCo valueless.

C. The Call Right and Redemption

On May 10, 2022, Manheim acted by stockholder written consent to amend the WestCo bylaws to add a provision that permitted majority stockholders to purchase other stockholders’ shares at fair-market value (the “WestCo Call Right”). That same day, Manheim exercised the WestCo Call Right, purchasing Ban’s 150 WestCo shares for \$100 each, or \$15,000.¹³ Manheim came to the \$100 per-share price by considering (1) the possibility that the court would find WestCo was not entitled to DVRC’s profits (as Ban had argued), in which case it and its stock were worthless, and (2) Ban’s original per-share purchase price of \$1.00.¹⁴

¹² B142.

¹³ Post-Trial Opinion, 339 A.3d at 50–57. Manheim failed to provide Ban timely notice of the exercise of the WestCo Call Right, so he exercised the right again on June 17, 2022. *Id.*

¹⁴ A817–18.

On June 24, 2022, the Court of Chancery issued its post-trial opinion in the Penfold Action. The court affirmed Manheim’s control and ownership of DVRC, found that WestCo was entitled to distributions as part of its DVRC ownership interest, found Penfold’s limited liability partnership agreement was invalid, and found Manheim liable for \$2.4 million on derivative claims brought on behalf of DVRC.¹⁵

On August 1 and 2, 2022, the WestCo board of directors—composed of Manheim, his brother Frank Manheim, and Albert Mezzaroba—met to discuss the risks Bamford’s indirect ownership in DVRC posed after the passage of the Reform Act. Manheim, Bamford and Ban had long known that a prohibition against Bamford’s involvement in DVRC was a possibility, so Penfold’s limited partnership agreement (now invalidated) contained a mechanism for redeeming Bamford’s (or any other limited partner’s) interest.¹⁶ After consulting with both immigration-law counsel—Peng & Weber and Seyfarth Shaw, LLP—and corporate counsel—Cooley, LLP and Prickett, Jones & Elliott, P.A.—the board determined that Bamford’s DVRC ownership through Penfold constituted a “Material Adverse Effect” under DVRC’s LLC agreement.¹⁷ As a consequence, per DVRC’s LLC

¹⁵ *Bamford*, 2022 WL 2278867.

¹⁶ B14 § 4.03(a); *see also Bamford* 2022 WL 2278867 at *12, 14.

¹⁷ B166; B168.

agreement, Penfold’s membership interest would be redeemed at the lower of fair-market value and capital account value the (“DVRC Redemption”).¹⁸

DVRC retained Excel Partners to value Penfold’s 90% DVRC interest, which Excel determined to be worth \$8.82 million. Manheim and DVRC’s accountants determined Penfold’s capital account balance was approximately \$5 million.¹⁹ DVRC paid Penfold \$1.6 million, or 30% of the Penfold capital account balance, to be paid to Ban for this 30% interest in Penfold.²⁰

¹⁸ Post-Trial Opinion, 339 A.3d at 58. Ban asserts the Court of Chancery found the redemption was pretextual because Bamford, not Ban, caused the Material Adverse Effect. Appellant’s Opening Brief (Trans. ID 78531800) (“Opening Br.”) at 10. This is incorrect. The Court of Chancery found the “DVRC Redemption was not all bad,” but noted Manheim could have (but was not required to) go beyond the requirements of the LLC agreement after redeeming Penfold by having DVRC issue a direct DVRC interest to Ban himself, which is why the court was applying the entire fairness standard or review. Post-Trial Opinion, 339 A.3d at 72–75. The court did not find that there was not a Material Adverse Effect that required a redemption, or that Manheim had the ability to remove just Bamford from the ownership structure without removing Penfold and Ban’s interest through Penfold. The court did state that Manheim acted “pretextually” by relying on the Material Adverse Effect in ¶4 of the Fee Order. However, that statement is inconsistent with and not supported by the Post-Trial Opinion and, as discussed in the cross-appeal section below, is contradicted by the record.

¹⁹ B170; B199; A862. The Post-Trial Opinion notes that the underlying calculation of the capital account balance was not in the record. Post-Trial Opinion, 339 A.3d at 58. The record nonetheless permitted the recalculation of the capital account balance.

²⁰ B199.

D. This Action

1. The Litigation Delays and Agreement on Expert Reports

Ban commenced litigation related to the WestCo Call Right on August 29, 2022, and a separate suit related to the DVRC Redemption on December 29, 2022. The actions were consolidated.²¹ The scheduling order required fact discovery to be completed by November 10, 2023, and opening expert reports served on November 21, 2023.²² But Ban delayed taking depositions. On December 11, his counsel proposed a revised case schedule.²³ The schedule was unworkable and risked pushing back the trial date, and the deponents were not available for depositions during the proposed deposition period. So as a compromise—and in recognition that this was really a valuation dispute—Manheim’s²⁴ counsel proposed a schedule that called for serving expert reports before depositions, with the proviso 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.²⁵

²¹ Post-Trial Opinion, 339 A.3d at 59.

²² A23.

²³ A32.

²⁴ Consistent with the Post-Trial Opinion, this brief references Manheim when referring to positions taken by counsel for all three defendants.

²⁵ A30–31.

The parties agreed.

2. The Expert Reports

On December 28, 2023, Ban served the Original Report, wherein Scherf opined that the value of Ban’s former 31.5% indirect interests in DVRC had been worth \$9.6 million.²⁶ To reach this result, Scherf used DVRC’s management-prepared projections from 2022 and created his own expense projections by attempting to “normalize” historical expenses and then projecting those expenses to grow by 5% per year. Because DVRC was not planning on opening new funds and its current investors were completing or abandoning the EB5 process and withdrawing funds, the projections contained revenues through 2027, and wind-down expenses through 2030.²⁷ Ban also served an expert report from Wonjoon Kang (the “Kang Report”), which contained opinions regarding retrogression—the delay in the five-year timeline to complete the EB-5 process experiences by investors from certain countries due to oversubscription. The Kang Report was not mentioned in Scherf’s Original Report, and its relevance to the litigation was unclear.

On February 7, 2024, Manheim served the rebuttal expert report from James Canessa, which identified several errors in the Original Report and showed that, once

²⁶ A62.

²⁷ A99.

those errors are corrected, the value of Ban’s former DVRC interests ranged from \$3.4 million to \$4 million.

Depositions of Manheim and the two other WestCo board members were taken on February 16, February 27, and March 1, 2024.

On March 8, 2024, Ban served the Supplemental Report, which contained the Original Valuation with corrections to some of the mistakes identified by Canessa and responses to Canessa’s criticisms of the Original Report. The Supplemental Report also introduced the Supplemental Valuation, which valued Ban’s former DVRC interests at \$24.5 million—2.5-times greater than the Original Valuation.²⁸

Scherf wrote in the Supplemental Report that the basis of the Supplemental Valuation was new “revenue projections from Wonjoon Kang and Young Min Ban,” (i.e., the Supplemental Projections) which projected some of DVRC’s investors—who invested between 2014 and 2019, with the vast majority in 2017 or earlier—would remain invested in DVRC until 2046—nineteen years longer than projected in Scherf’s Original Report.²⁹

According to the Supplemental Report, these Supplemental Projections were “based upon the government statistics and information discussed in Section 2.2.2 . .

²⁸ A200.

²⁹ A238–39.

. and the Expert Report of Wonjoon Kang dated December 28, 2023.”³⁰ The referenced Section 2.2.2 contained three citations to depositions that describe a reserve fee DVRC assesses to some departing investors, but these fees (which were discussed in the Original Report) did not account for any other part of the Supplemental Projections, including its eye-popping conclusion that foreign investors would maintain their investments with DVRC for decades, well after they would complete the EB-5 program.

Ban did not produce the Supplemental Projections with the Supplemental Report. When he produced the Supplemental Projections on March 12, 2024, the metadata revealed they had been created by Ban himself on October 27, 2023—two months before the Original Report was served.³¹ In other words, the Supplemental Projections, and by extension the Supplemental Valuation that relied upon them, could not have been made to address deposition testimony, because the Supplemental Projections were created before depositions.

Although Manheim immediately made clear that the Supplemental Report violated the parties’ agreement,³² Manheim could not risk leaving the Supplemental Report unrebutted. Accordingly, he served a supplemental rebuttal report from

³⁰ A187.

³¹ *See* A314.

³² B203.

Canessa, which corrected the Supplemental Valuation and valued Ban's DVRC interests at \$6.7 million to \$7.9 million.³³

Manheim also served a rebuttal to the Kang Report which, until the Supplemental Report, had not been the basis of Ban's damages claim. In his report, Kang primarily relied upon public statements from Charlie Oppenheim, who was the Chief of the Visa Control Office at the U.S. Department of State, to contend DVRC's investors would remain invested for more than twenty years because of retrogression—the backlog in visa availability for persons from some countries, including mainland China.³⁴ To rebut this, Manheim served a rebuttal report from Oppenheim himself.

Oppenheim reviewed the Supplemental Projections and Supplemental Report, and concluded they misapprehended Oppenheim's calculations about potential visa backlogs that could extend the anticipated five-year EB-5 process. Critically, the Supplemental Projections used Oppenheim's outdated calculations of what visa backlogs could be in what he labeled a "worst-case scenario" for investors who entered the EB-5 program in 2020, *after* DVRC's investors entered the EB-5 program. In this worst-case scenario, not a single applicant dies, divorces, has their application denied, or drops out—an impossibility, especially when, as here, most

³³ A301–53.

³⁴ *See* A37.

investors are attempting to get residency so their children can attend a U.S. college, and would drop out of the program if the process took too long to accomplish that.³⁵

As Oppenheim summarized it (referring to the Supplemental Projections as the “Ban Spreadsheet”):

Mr. Scherf’s valuation of DVRC as of June-August 2022 is not accurate or reliable because it is based on faulty assumptions from the Ban Spreadsheet regarding the timing of the EB-5 immigrant investor visa process, as well as the erroneous assumption that all EB-5 investors in the EB-5 visa backlog will continue throughout the process without a single death, divorce, denial, or dropout (withdrawal). Because Mr. Scherf’s revenue analysis is based on incorrect assumptions, it should be set aside when determining the valuation of DVRC.³⁶

Furthermore, because the Supplemental Projections relied on outdated calculations that predate the Reform Act, they did not account for the Reform Act’s allowance of unused visas to be carried over and allocated to visa applicants from countries that had otherwise reached their annual per-county visa limit, namely mainland China, the home to most of DVRC’s investors. This significantly shortens the times for DVRC’s investors to complete the EB-5 process and withdraw their investments from DVRC. As Oppenheim opined, the failure to acknowledge the

³⁵ B270–75.

³⁶ B277

Reform Act in “the Ban Spreadsheet and account for it in the Scherf Report’s projections is gross error.”³⁷

Depositions revealed that the Supplemental Projections were prepared by Ban without the assistance of either expert.³⁸ This came as a surprise to Scherf, who had believed, and stated in his report, that Kang had prepared the projections with Ban.³⁹ At his deposition, Scherf provided a new reason for accepting the Supplemental Projections: a November 2022 redeployment transaction where some of DVRC’s assets under management were used to fund the purchase of The St. James, a high-rise tower in Philadelphia. According to Scherf, because the loan period was ten years (2022–2032), the Supplemental Projections—which projected assets under management for more than two decades (through 2046)—seemed more reliable than DVRC’s management’s projections, which contemplated redemptions concluding in 2027.⁴⁰

3. Trial and the Post-Trial Opinion

Trial took place from May 14 to May 16, 2024. In his pre-trial brief, Manheim argued that the Supplemental Projections and Supplemental Valuation were both

³⁷ B274.

³⁸ B424 at 102; B381 at 144; B216–17 at 39–41.

³⁹ B217 at 40–42.

⁴⁰ B212 at 22–23.

unreliable and should be rejected because they were served late.⁴¹ At trial, Scherf testified about his Original Report and Supplemental Report, and the Vice Chancellor questioned Scherf about both valuations, and why Scherf felt he could rely upon Ban’s Supplemental Projections.⁴² After trial, both parties briefed both the reliability of the Supplemental Report, and whether it should be considered when produced in violation of the scheduling order.⁴³

The Court of Chancery issued its Post-Trial Opinion on May 19, 2025. It noted that it could be appropriate for Scherf to reasonably extend management’s projections if he thought they were too short, but “rather than creating a more realistic model for years beyond that point in his Opening Report, Scherf introduced another model in his Supplemental Report.” It noted the Supplemental Valuation “more than doubled DVRC’s fair value” and found the “Supplemental Valuation was not credible.”⁴⁴ Moreover, the court found that rather than adjusting his Opening Report to account for deposition discovery, as the parties had agreed was permissible, Scherf had gone well beyond that by relying on the Supplemental Projections. The court concluded that it would not rely on the portions of the

⁴¹ B497–B513.

⁴² A707–13.

⁴³ A1272–74; A1317–47; A1368–1377; A1394–A1405.

⁴⁴ Post-Trial Opinion, 339 A.3d at 81.

Supplemental Report that used the Supplemental Projections. It did consider and accept other portions of the Supplemental Report that addressed Canessa’s criticisms of Scherf’s Opening Report and Original Valuation, relied on those parts of the Supplemental Report, made certain corrections to the Original Valuation, and found Ban’s indirect interests in DVRC had been worth approximately \$6.9 million.⁴⁵

4. The Court of Chancery Shifts Fees.

After the Post-Trial Opinion had been issued, Ban sought leave to apply for an award of attorneys’ fees and expenses. Ban had not sought an award of attorneys’ fees in his pre-trial brief.⁴⁶ In the pre-trial stipulation and order, Ban sought an award of attorneys’ fees only to the extent he obtained derivative relief—something he had not accomplished at trial.⁴⁷ Thus, Manheim opposed Ban’s request, but the Court of Chancery granted it, and the parties briefed the issue.⁴⁸

On November 24, 2025, the Court of Chancery entered its Order Granting Expense Award, holding that Ban was entitled to a portion of the attorneys’ fees he

⁴⁵ *Id.* at 82–83.

⁴⁶ B518.

⁴⁷ A421. While Ban’s claim that Penfold’s DVRC interest was redeemed at an unfair price is a derivative claim Ban asserted on behalf of Penfold, because Manheim had made clear that any proceeds from the redemption attributed to Ban’s 1/3 interest in Penfold would be paid directly to Ban, instead of kept in the Manheim-controlled Penfold, the Court of Chancery awarded Ban direct damages.

⁴⁸ B639; B660; B672.

sought, \$259,817.16, pursuant to the bad-faith exception to the American Rule.⁴⁹ The court found (i) that Mannheim harbored a conflict of interest when exercising the WestCo Call Right and voting on the DVRC Redemption, (ii) the price set for these actions was arbitrarily low, and (iii) bad faith was evidenced by Mannheim's failure to pay the judgment in the Penfold Action (although he allocated to Ban his *pro rata* portion of the judgment by accounting for it as an asset when Penfold was redeemed) and exercising the WestCo Call Right, which the court found was statutorily invalid, rather than an established method for eliminating minority stockholders, such as a merger.⁵⁰ The court awarded Ban payment for his attorneys' fees, but not for expert expenses, because the Supplemental Report "did not help anyone, and it forced Mannheim to expend additional resources responding to the belatedly introduced opinions."⁵¹

⁴⁹ Exhibit A to this brief.

⁵⁰ Fee Order ¶ 4.

⁵¹ *Id.* ¶ 11.

ARGUMENT

I. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO RELY UPON THE PORTIONS OF THE SUPPLEMENTAL REPORT THAT USED THE SUPPLEMENTAL PROJECTIONS.

A. Question Presented

Did the trial court abuse its discretion when it (i) awarded Ban damages based upon the Supplemental Report’s reiteration of the Original Valuation, (ii) found “[t]he Supplemental Valuation was not credible,” (iii) concluded that Scherf improperly used “completely new inputs” for his Supplemental Valuation, and (iv) declined to assign any weight to “aspects of the Supplemental Report that rely on the new projections”?⁵²

These arguments were preserved at A1317–47, A1394–1405.

B. Scope of Review

This Court reviews “findings as to damages by the Court of Chancery for an abuse of discretion.”⁵³ It also defers to the discretion of the trial court on the trial court’s discovery rulings and reviews those rulings for an abuse of discretion.⁵⁴

⁵² *Ban*, 339 A.3d at 81–82.

⁵³ *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 866 (Del. 2015).

⁵⁴ *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1106-07 (Del. 2006). Citing *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81 (Del. 2021). *Ban* suggests the Court of Chancery’s failure to consider the Supplemental Report is subject to *de novo* review. This is a misreading of *Bäcker*, which holds the standard of judicial review for a transaction and whether, as a legal matter, a remedy exists is subject to *de novo* review. *Id.* at 94–95. But as the Court notes further in *Bäcker*,

C. Merits of Argument

Ban's arguments are all subject to the abuse of discretion standard of review, if not waived for failing to make the argument below. Under that standard, this Court does not substitute its "own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness."⁵⁵

The trial court's lengthy post-trial decision was based on facts derived from two sources. First, the trial court's prior experience in the Penfold Action.⁵⁶ Second, the court held a three-day trial where live testimony was presented from three fact witnesses and four expert witnesses.⁵⁷ The parties also introduced 369 exhibits and lodged eight deposition transcripts.⁵⁸ The trial court received four sets of post-trial briefs and held post-trial argument and rendered a thorough, reasoned decision and exercised its broad equitable discretion in awarding Ban a remedy. The trial court's

questions of how facts are applied to a legal standard are subject to review for abuse of discretion. *Id.*

⁵⁵ *William Penn P'ship v. Saliba*, 13 A.3d 749, 758 (Del. 2011) (citing *Dover Hist. Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006)).

⁵⁶ Post-Trial Opinion, 339 A.3d at 52 (citing *Bamford*, 2022 WL 2278867).

⁵⁷ *Id.* at 51. The Post-Trial Opinion states three expert witnesses provided testimony, but four (Scherf, Kang, Canessa, and Oppenheim) testified.

⁵⁸ *Id.*

ruling on the remedy was based on conscience and reason, was not capricious or arbitrary, and should be affirmed.

1. The Trial Court Did Not Abuse Its Discretion Awarding Damages Based on Scherf's Original Valuation.

The trial court awarded Ban damages based on Scherf's Original Valuation after correcting mistakes in the analysis, some of which Scherf acknowledged, and none of which Ban challenges as an abuse of discretion on appeal. Ban cannot credibly argue the trial court abused its discretion by using Ban's expert's valuation to award damages.

The Original Valuation was never abandoned by Ban or Scherf. Scherf included a corrected version of his Original Valuation in his Supplemental Report. Scherf presented his Original Valuation on direct examination and explained his corrected Original Valuation was included in his Supplemental Report because the trial court "may have a different point of view" on which revenue projections to use.⁵⁹ At post-trial argument, Ban's counsel repeatedly admitted Ban was providing the Court with "options," including the Original Valuation:

- Mr. Scherf "provided you with options."⁶⁰
- "Mr. Scherf has provided you with a panoply of options, I would say, to evaluate the evidence, to evaluate whether you agree with Mr. Scherf to depart from management's

⁵⁹ A709.

⁶⁰ B559.

projections and whether you would choose to disregard them....”⁶¹

- “Mr. Scherf . . . offered different options. A menu, I’ll accept that, it’s a menu to some extent.”⁶²

The trial court did not abuse its discretion by awarding damages from Ban’s “menu” just because Ban wishes a different item was ordered.

2. The Trial Court’s Determination of the Proper Remedy Using the Original Valuation Was Based on Conscience and Reason.

This Court “defer[s] substantially to the discretion of the trial court in determining the proper remedy.”⁶³ The trial court has “greater discretion when fashioning an award of damages in an action for a breach of the duty of loyalty than it would when assessing fair value in an appraisal action.”⁶⁴ This Court will “not substitute [its] own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.”⁶⁵ A damages ruling is not capricious or arbitrary where the trial court’s calculations are described in detail and based on facts in the record.⁶⁶

⁶¹ B562–63.

⁶² B635.

⁶³ *Int’l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439 (Del. 2000).

⁶⁴ *Id.* at 441.

⁶⁵ *Saliba*, 13 A.3d at 758.

⁶⁶ *Gatz Props., LLC v. Auriga Cap. Corp.*, 59 A.3d 1206, 1221 (Del. 2012) (affirming award where the “trial judge very clearly detailed his reasons, based on

On appeal, Ban argues “the Court’s failure to properly shift the burden relating to damages under the entire fairness doctrine . . . were errors of law which the Court reviews de novo.”⁶⁷ This is wrong in every respect. The trial court ruled that Manheim had the burden of proving the exercise of the WestCo Call Right and the DVRC Redemption was entirely fair, and Manheim did not meet that burden.⁶⁸ But it was then Ban’s burden to provide a responsible estimate of damages.⁶⁹ The trial court recognized and applied its broad equitable powers to fashion appropriate relief.⁷⁰ This Court reviews that ruling only for an abuse of discretion.⁷¹

facts of record”); *RBC*, 129 A.3d at 868 (affirming award where “the Court of Chancery explained the reasons for its calculation of damages in great detail”); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1251 (2012) (affirming award where “the Court of Chancery explained the reasons for its calculation of damages with meticulous detail. That complete transparency of its actual deliberative process provided the Defendants with a comprehensive record to use in challenging the Court of Chancery’s damage award on appeal and for this Court to review”).

⁶⁷ Opening Br. at 23.

⁶⁸ Post-Trial Opinion, 339 A.3d at 74–75. Manheim did not proffer a valuation to prove entire fairness because the WestCo stock was difficult to value due to the specter of being rendered worthless due to the Penfold Action, and Manheim contended the DVRC Redemption was not subject to entire fairness review because he followed an LLC agreement that eliminated fiduciary duties.

⁶⁹ *In re Tesla, Inc. Deriv. Litig.*, --- A3d. ---, 2025 WL 3689114, at *15–17 (Del. Dec. 19, 2025); *Ravenswood Inv. Co., L.P. v. Est. of Winmill* 2018 WL 1410860, at *18–25 (Del. Ch. Mar. 21, 2018); *Lake Treasure Hldgs., Ltd. v. Foundry Hill GP LLC*, 2014 WL 5192179, at *12 (Del. Ch. Oct. 10, 2014).

⁷⁰ Post-Trial Opinion, 339 A.3d at 76 (citing, among other cases, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) and *Hogg v. Walker*, 622 A.3d 648, 654 (Del. 1993)).

⁷¹ *See supra* nn.53–54.

The trial court’s ruling was not arbitrary or capricious; it was the product of a thorough, deliberative process that was described in detail and based on facts in the record—primarily Scherf’s Original Valuation. The trial court made corrections to the Original Valuation, which Ban does not dispute on appeal. Specifically:

- the trial agreed with Canessa that Scherf’s Original Valuation mistakenly (i) omitted a material agent payment of \$3.4 million and (ii) included an extra month of revenue in 2022.⁷²
- the trial court agreed with Canessa that Scherf made improper adjustments to management’s projected litigation expenses,⁷³ which concerned the Reform Act.⁷⁴ Scherf testified that he was unaware of Reform Act litigation in submitting his Opening Report.⁷⁵
- The trial court agreed with Canessa that Scherf’s Original Valuation overstated the value of a non-operating asset by using estimated, rather than actual, assets under management.⁷⁶

The trial court’s thorough, deliberative process resulted in a ruling that Ban’s indirect interests in DVRC were worth \$6,898,612.

⁷² Post-Trial Opinion, 339 A.3d at 80.

⁷³ *Id.*

⁷⁴ A117.

⁷⁵ A758–59.

⁷⁶ Post-Trial Opinion, 339 A.3d at 80–81 (citing A123).

The trial court resolved multiple disputed issues in Ban’s favor. For example, the trial court awarded Ban damages based on the fair value of his DVRC equity, even though Defendants advocated for the use of the fair-market-value standard (which Scherf included in his reports).⁷⁷ The trial court accepted certain of Scherf’s modifications to management’s projected expenses and did not make all of the adjustments Canessa argued for after considering criticisms made by Scherf in his Supplemental Report. These adjustments would have reduced the award to \$3.2 million.⁷⁸ The trial court also declined to apply a size premium to DVRC’s cost of equity because Canessa objected to applying a size premium for the first time in his supplemental report, which the trial court found was too late.⁷⁹

The trial court’s judgment reflected credibility determinations of the experts and their reports and a careful weighing of the evidence and application of law to the facts it found. It was reasoned and thoughtful, not arbitrary and capricious. Accordingly, it should be affirmed.

3. The Trial Court Found the Supplemental Valuation Was Not Credible.

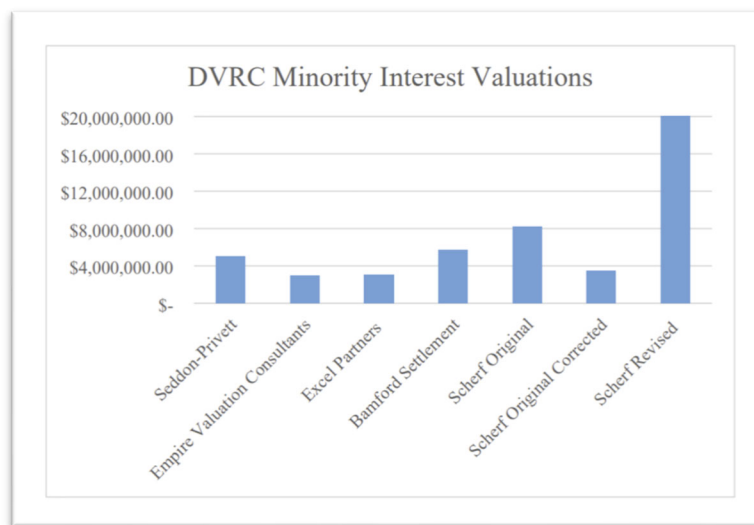
Ban misstates and mischaracterizes the trial court’s ruling, stating “[t]he Court did not find that the Supplemental Valuation was wrong, it instead declined to

⁷⁷ *Id.* at 76–79.

⁷⁸ *Id.* at 80 n.143.

⁷⁹ *Id.* at 82.

consider it.”⁸⁰ The trial court actually held: “After additional discovery, Scherf prepared the Supplemental Valuation. That valuation more than doubled DVRC’s fair value to \$77,777,828, resulting in Ban’s 31.5% share equating to \$24,511,386. *The Supplemental Valuation was not credible.*”⁸¹ That is correct; the Supplemental Report is facially incredible and an outlier compared to every other DVRC valuation that came to light in both the Penfold Action and the instant action.⁸²



There was nothing capricious or arbitrary about finding a valuation lacked credibility where it (i) was more than double the Original Valuation, (ii) was based

⁸⁰ Opening Br. at 36.

⁸¹ Post-Trial Opinion, 339 A.3d at 81 (emphasis added). For this reason, other statements that Ban makes in his brief are unsupported and contradicted by the trial court’s ruling, including Ban’s claims that “[t]he reliability of the Supplemental Report is not disputed on this record” and “the Court of Chancery abused its discretion by refusing to consider a reliable, authorized, and uncontroverted expert report.” Opening Br. at 36–37.

⁸² A1318.

on revenue projections created by Ban, who was directly interested in the outcome and not an expert, before the Original Valuation, but not used in it, (iii) used a completely different expense projection methodology created after the Original Valuation, and (iv) was uncorroborated by any other valuation evidence in the record.

Looking at the Supplemental Projections further shows how off the mark the Supplemental Valuation is. The Supplemental Projections are not an attempt to determine the likely case for DVRC's future, but a "worst-case scenario" for investors who entered the EB-5 program in 2020 (after DVRC's investors entered the EB-5 program), which is a best-case scenario for Ban, who wants assets under management as long as possible. The Supplemental Valuation is based on a prediction that not a single applicant in the entire EB-5 program (not just those invested through DVRC) dies, divorces, has their application denied, or drops out.⁸³ It ignores the reality that most of DVRC's investors are attempting to get residency for children who are approaching college age, and would drop out of the program if the process took too long to accomplish that.⁸⁴ It does not account for the Reform Act's allowance of unused visas to be carried over and allocated to visa applicants

⁸³ B270–73

⁸⁴ *Id.*; A874–75; A1084.

from countries, speeding the redemption timeline for DVRC’s investors.⁸⁵ And it treats every person invested throughout a year as if they invested on December 31 of that year, projecting that everyone who invested in one year will be redeemed together in the same year.⁸⁶

Ban’s statements throughout his brief that the Supplemental Report was not admitted or considered⁸⁷ are also wrong. The Supplemental Report was admitted and considered by the trial court; only the portions of it that used the Supplemental Projections were rejected. The trial court considered Canessa’s adjustments to Scherf’s Original Valuation that would have reduced damages to \$3.2 million. The trial court declined to make all of those adjustments after considering Scherf’s “criticisms . . . in the Supplemental Report.”⁸⁸ The trial court ruled that although it did not “accept all of Scherf’s criticisms, taken as a whole they warrant making normalizing adjustments to the projections along the lines of the Original Valuation.”⁸⁹

The trial court also ruled it would “not consider the aspects of the Supplemental Report that rely on the new projections” because of when the new

⁸⁵ B274.

⁸⁶ B273.

⁸⁷ Opening Br. at 23, 26–27, 29–32, 35–37, 43.

⁸⁸ Post-Trial Opinion, 339 A.3d at 80 n.143.

⁸⁹ *Id.*

projections first appeared in an expert report.⁹⁰ This further, additional ruling came after the trial court (i) considered aspects of the Supplemental Report that addressed Canessa’s adjustments to Scherf’s Original Valuation and (ii) concluded the Supplemental Valuation was not credible. The trial court did not abuse its discretion by declining to assign weight to projections used in an unreliable, non-credible valuation especially where those projections were prepared by Ban himself.⁹¹ Nothing about those projections was credible. Scherf was not aware that Ban was the sole creator of the projections when the Supplemental Report was prepared.⁹² Scherf believed Ban and his industry expert, Kang, prepared the projections, but subsequently learned that Mr. Kang actually was uninvolved.⁹³ Scherf used the projections—which more than doubled his valuation—based on a few calls with Ban, and admitted he did not go through the projections in any “detail.”⁹⁴

Ban again misquotes the trial court’s ruling, claiming the trial court “characterized the Supplemental Report as introducing a ‘*new model*’ for computing

⁹⁰ *Id.* at 81–82.

⁹¹ *Id.* (ruling Scherf went “too far” from permissible supplemental report adjustments to late-breaking discovery, evidence adduced at trial or criticisms from the other side).

⁹² A769.

⁹³ *Id.*

⁹⁴ A769–70.

DVRC's value."⁹⁵ The trial court never referred to a "new model," even though that would be accurate. The trial court ruled that it was "improper" for Scherf to "come up with completely *new inputs* in a supplemental expert report."⁹⁶ Ban does not dispute Scherf did exactly that when he used Ban's completely new revenue projections and a completely new expense projection methodology. The trial court's actual ruling was well supported by existing case law.⁹⁷

Ban next mischaracterizes the trial court's ruling, stating it "found that the Supplemental Valuation's methodology was permissible."⁹⁸ Again, what the trial court actually held was that the Supplemental Valuation was "not credible."⁹⁹ The trial court further addressed Kang's opinion, which Ban's expert rebutted, on how long it would take for investors to obtain visas in the EB-5 program and the need for capital to remain deployed. The trial court then ruled "Scherf *might have permissibly relied on this methodology* had he used [it] in the Original Report."¹⁰⁰ The

⁹⁵ Opening Br. at 25 (emphasis added).

⁹⁶ Post-Trial Opinion, 339 A.3d at 82 (emphasis added).

⁹⁷ *See infra* nn. 109–111.

⁹⁸ Opening Br. at 30.

⁹⁹ Post-Trial Opinion, 339 A.3d at 81.

¹⁰⁰ *Id.* (emphasis added). Ban's citation to *In re U.S. Cellular Operating Co.*, 2005 WL 43994 (Del. Ch. Jan. 6, 2005) is inapt, because no one is contending there is a prohibition against an expert making projections. Instead, Manheim and the Court of Chancery took issue with a party making projections that were shown through expert testimony to be unrealistic and which were not buttressed or deemed reliable by either of Ban's experts. Similarly, *Zachman v. Real Time Cloud Servs., LLC*,

“methodology” was a reference to longer-term projections, not a specific reference to Ban’s own projections, in which Kang was uninvolved. The trial court further ruled that Scherf could have extended the projections he used in his Original Valuation but could not rely on completely new inputs.¹⁰¹

4. Plaintiff’s Projections Were Not Permitted By Any Agreement of the Parties

Ban’s argument that the trial court “abused its discretion in not accepting the parties’ agreement to produce supplemental expert reports to account for . . . new information” again misstates the record and the trial court’s ruling.¹⁰²

After Ban deferred taking depositions to the point that it threatened the trial schedule, Manheim agreed to proceed with expert reports before fact depositions, with the proviso 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.¹⁰³

2020 WL 1522840 (Del. Ch. Mar. 31, 2020), *aff’d*, 251 A.3d 115 (Del. 2021) is inapposite because the Court of Chancery did not exclude the Supplemental Projections because a party had prepared them. *Paron Cap. Mgmt., LLC v. Crombie*, 2012 WL 214777, at *3 (Del. Ch. Jan. 24, 2012) merely holds that an expert report that relies on non-expert projections is not hearsay.

¹⁰¹ Post-Trial Opinion, 339 A.3d at 81.

¹⁰² Opening Br. at 24.

¹⁰³ A30–31.

On December 28, 2023, Scherf submitted the Original Valuation: \$9.6 million. The limited agreement to “supplement their reports” did not permit Ban to take his own projections—which he created before the Original Report—and give them to Scherf for use in the March 8, 2024 Supplemental Report where he valued Ban’s interest at \$20,834,678—more than 2.5x higher than the Original Valuation. That was not a “supplement,” it was an entirely new report wherein Scherf used completely new revenue projections and a completely new methodology for projecting expenses.

There was no deposition testimony that warranted a supplemental report, let alone one that added two decades to DVRC’s projections and more than doubled its value. The St. James transaction is mentioned thirteen times in Ban’s appeal brief as the supposed justification for new projections, but the Supplemental Report *does not mention it once*. That is unsurprising—a loan that may last through 2032 could not be the basis of projecting DVRC’s revenue through 2046. But the loan was structured with the ability, and expectation, that it would be repaid well before its ten-year term ended because of investors’ need to have their money returned sooner.¹⁰⁴ Regardless, Scherf and Ban knew, from examining the documentary record before depositions, that DVRC was in the midst of redeployment and placing

¹⁰⁴ See A849–52, A855–60.

its reinvested assets in a real-estate investment.¹⁰⁵ Thus, Ban’s assertions that he had no way of knowing about the St. James loan before depositions or that it was hidden from him,¹⁰⁶ is incorrect.

Ban was also aware of the visa backlog prior to Scherf submitting his Opening Report, because Ban’s other expert—Kang—submitted a report on it on December 28, 2023. Indeed, as Ban testified, everyone in the EB-5 industry knows about retrogression, and it was discussed in the Penfold Action.¹⁰⁷ Ban had everything he needed to prepare his Supplemental Projections before the Original Report was served and, as revealed by metadata in the native version of the Supplemental Projections, he in fact did prepare the projections before the Original Report was served.¹⁰⁸

The cases cited by the trial court support its ruling. In *IQ Holdings, Inc. v. Am. Commercial Lines Inc.*, the parties agreed that an expert could serve a supplemental report revising certain opinions, but the supplement went beyond the

¹⁰⁵ See A59 (Scherf stating the Original Report: “In addition, given that the assets are invested in AAA municipal bonds or as I understand reinvested in multifamily real estate and the wind down nature of the company and its operations, a size premium is unwarranted . . .”).

¹⁰⁶ Opening Br. at 18.

¹⁰⁷ B403–04 at 20–21.

¹⁰⁸ B402–03 at 14–18.

scope of the parties' agreed-upon topics.¹⁰⁹ Accordingly, the Court of Chancery refused to consider those portions of the supplemental report and ordered the expert to strike them in a revised report.¹¹⁰ Similarly, *Coleman v. PricewaterhouseCoopers, LLC*, this Court affirmed the exclusion of a supplemental expert report served after the deadline for expert reports, even though the supplemental report was served before the rebuttal report was due.¹¹¹ These cases stand for the unremarkable proposition that parties are bound to follow their agreements and scheduling orders.

The trial court did not abuse its discretion because nothing about its consideration of the timing of the Supplemental Report, Supplemental Valuation and Supplemental Projections was arbitrary or capricious. The trial court considered parts of the Supplemental Report that rebutted Canessa's adjustments to the Original Valuation and accepted certain of Scherf's criticisms. But the trial court determined the Supplemental Report's reliance on the Supplemental Projections was not credible and came too late. The trial court applied this approach in an evenhanded manner, rejecting Canessa's opinion about the use of a size premium because he raised it for the first time in his supplemental report: "Just as Scherf's new

¹⁰⁹ 2012 WL 3877790, *2–3 (Del. Ch. Aug. 30, 2012).

¹¹⁰ *Id.* at *3–4.

¹¹¹ 902 A.2d 1102, 1105–07 (Del. 2006).

projections came too late, so did Canessa’s objection to the absence of a size premium.”¹¹²

5. Ban’s Balancing-Analysis Argument Was Waived and Is Legally Incorrect.

Ban contends the trial court “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.”¹¹³ This argument was never raised below and is legally incorrect.

This argument is waived because Ban did not argue below that a balancing test applied to the trial court’s determination of whether to give any weight to the Supplemental Valuation in fashioning a remedy.¹¹⁴ Manheim argued in the court below that the Supplemental Valuation must be rejected because it was untimely, prejudicial, and impermissibly relied on the Supplemental Projections.¹¹⁵ In response, Ban did not argue that a balancing test applied. He did not cite *Coleman* or identify any factors he now criticizes the trial court for failing to balance, including, “good cause, . . . assessment of prejudice to Manheim, . . . consideration of the parties’ agreement, and . . . weighing of the significant financial impact on

¹¹² Post-Trial Opinion, 339 A.3d at 82.

¹¹³ Opening Br. at 27, heading (ii).

¹¹⁴ Supr. Ct. R. 8.

¹¹⁵ A1317–47, A1394–1405.

Plaintiff.”¹¹⁶ Instead, Ban simply maintained that the Supplemental Report was timely. Ban cannot argue on appeal that the trial court abused its discretion by not applying or misapplying a test that Ban never claimed was required. Nor did Ban cite *Christian v. Counseling Resource Associates, Inc.*¹¹⁷ to contend, as he does now, that Manheim was required to move to strike the Supplemental Report before trial.¹¹⁸

Ban’s argument also fails because the “balancing” analysis does not apply to the issues on appeal. The balancing analysis in *Coleman* concerns a trial court’s exercise of discretion to admit evidence, not whether to give admitted evidence any weight.¹¹⁹ The Supplemental Report *was* admitted as evidence, and the trial court found “[t]he Supplemental Valuation was not credible.”¹²⁰ The court considered and

¹¹⁶ Opening Br. at 29.

¹¹⁷ 60 A.3d 1083, 1088 (Del. 2013).

¹¹⁸ *Christian*, a wrongful death case where the plaintiffs’ counsel had withdrawn mid-discovery due to a suddenly realized conflict and thus identified their expert late, is inapposite here. In *Christian*, this Court reversed the Superior Court’s decision to exclude expert testimony for the plaintiffs after their counsel had, months earlier, asked for a scheduling conference due to discovery problems. This Court held the defendants could not accede to several extensions, and then object when, come trial, the schedule is compressed. In contrast, Manheim never agreed that Ban could supplement his expert report beyond the scope necessitated by depositions, and always contested the propriety of the Supplemental Report, with the rebuttal to it noting the extent the new opinions went beyond deposition testimony. A313–16; B203.

¹¹⁹ 902 A.2d at 1106.

¹²⁰ Post-Trial Opinion, 339 A.3d at 65.

accepted other points made in the Supplemental Report when declining to make further adjustments to the Original Valuation that would have made it lower.

Ban’s argument that a “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*” is wrong in every respect.¹²¹ The trial court did not misapply any law nor do so to any “undisputed facts.” Moreover, the trial court’s responsibility to balance factors in determining whether to admit evidence is an evidentiary ruling and the standard of review for any such ruling is abuse of discretion, not *de novo*.¹²² For the reasons set forth in the other sections herein, nothing about the trial court’s ruling in finding the Supplemental Valuation not credible and declining to assign any weight to aspects of the Supplemental Report that rely on the Supplemental Projections was capricious or arbitrary.

Finally, even if the Court of Chancery had performed a balancing test, it would have been well grounded in excluding the Supplemental Projections and Supplemental Report. Ban barely participated in fact discovery, producing only a 16-page PDF devoid of metadata, and a privilege log that consisted of his counsel’s emails (many not including Ban). When Manheim raised these deficiencies, Ban,

¹²¹ Opening Br. at 29.

¹²² *Coleman*, 902 A.2d at 1106–07.

through counsel, contended Ban had no relevant knowledge about the action.¹²³ Relying on that representation, Manheim did not move to compel. For Ban to then produce his Supplemental Projections after the close of fact discovery was highly prejudicial, because Manheim was deprived of Ban's document discovery that could impeach these projections. Ban cannot refuse to properly participate in discovery and then use his projections as the linchpin of more than \$20 million in damages.¹²⁴

Ban overstates the purported prejudice he suffered because the Court of Chancery supposedly rejected his Supplemental Report, claiming the "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."¹²⁵ This assumes the court would have accepted the Supplemental Report in toto, without a single adjustment. This assumption is counterfactual, because after finding the Supplemental Valuation was not credible, the Court made substantial adjustments to the Original Valuation based upon the management projections, and would have done so for the same errors in the Supplemental Valuation. Ban offers no reason to believe the court would not have made additional adjustments and corrections to

¹²³ See A1322.

¹²⁴ See *In re Appraisal of Dole Food Co., Inc.*, 114 A.3d 541 (Del. Ch. 2014).

¹²⁵ Opening Br. at 35.

errors in the Supplemental Projections had it accepted them, thereby bringing any damages award based upon the Supplemental Projections close to the actual award.

II. THE COURT OF CHANCERY APPLIED THE WRONG LEGAL STANDARD AND ABUSED ITS DISCRETION IN DEVIATING FROM THE AMERICAN RULE AND AWARDING BAN HIS LEGAL FEES AND EXPENSES.

A. Question Presented

Did the trial court’s ruling that Manheim was liable to pay Ban’s attorneys’ fees under the bad faith exception to the American Rule constitute an error of law or an abuse of discretion under this Court’s consistent guidance that pre-litigation conduct, by itself, cannot be the basis for application of the bad faith exception¹²⁶ and that the bad faith exception “only applies in ‘extraordinary cases?’”¹²⁷ This argument was preserved at B662–69.

B. Scope of Review

“This Court reviews the award of fees under exceptions to the American Rule to determine if the Court of Chancery abused its discretion in awarding such fees.”¹²⁸ The Court resolves issues of law de novo.¹²⁹ The Court of Chancery’s determination that Ban did not waive his right to request legal fees constitutes an abuse of discretion. The Court of Chancery’s determination that pre-litigation conduct, by

¹²⁶ *RBC*, 129 at 877.

¹²⁷ *Id*; see also *DeMatteis v. RiseDelaware Inc.*, 315 A.3d 499, 508 (Del. 2024) (citations omitted)

¹²⁸ *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998)); see also *DeMatteis*, 315 A.3d at 508 (citations omitted).

¹²⁹ *Sunder Energy, LLC v. Jackson*, 332 A.3d 472, 484 (Del. 2024).

itself, can support the bad faith exception to the American Rule constitutes an error of law. Even if the Court of Chancery applied the correct legal standard, its determination that Manheim’s conduct was sufficiently egregious to support the bad faith exception to the American Rule was an abuse of discretion.

C. Merits of Argument

1. **The Court of Chancery Abused its Discretion in Ruling that Ban did not Waive His Right to Seek Legal Expenses by Failing to Articulate the Basis for his Claim in the Pre-Trial Order or His Trial Briefs, Thereby Failing to Provide Defendants Notice of His Claims and a Fair Chance to Present Evidence to Refute Such Claims.**

In the pre-trial order, Ban sought “attorneys’ fees, expenses, and costs in connection with the derivative action on behalf of WestCo and Penfold.”¹³⁰ Ban’s pretrial brief made no reference to or request for fees.¹³¹ Ban’s opening and reply post-trial briefs made cursory requests for legal expenses but never referenced pre-litigation conduct or the bad-faith exception as a basis for any such request.¹³²

The Court of Chancery held, in the Fee Order, that Ban had not waived his right to request legal expenses based on pre-litigation conduct because “[w]hen the post-trial decision will make factual findings that could support or defeat an expense

¹³⁰ A421 ¶ 64(g).

¹³¹ B518.

¹³² A1238, A1261, A1279; A1382.

application, it makes sense to await those finding before making an application.”¹³³ But the vague references in post-trial briefs did not provide Manhim with any prior notice, let alone pre-trial notice, that Ban was seeking legal expenses for anything other than derivative claims (as Ban had stated in the pretrial order), including for pre-litigation conduct or based on the bad faith exception to the American Rule. As a result, Manheim had no notice that he was required to put on evidence to refute any assertion of vexatious, wanton or oppressive conduct at trial. Instead, and as the Court of Chancery correctly noted, “Manheim largely punted on the issue of liability, choosing to fight on the issue of damages.”¹³⁴ It was reasonable and efficient for Manheim to do so because Ban sought only money damages at trial. It is fundamentally unfair to award legal expenses after trial based upon a legal issue (*i.e.*, bad faith) that has never been asserted or litigated. It denies defendants a fair opportunity to present evidence at trial to refute the claim that their prelitigation conduct did not rise to the level of being deplorable or egregious sufficient to except it from the American Rule. As a result, the Court of Chancery abused its discretion when it held that Ban had not waived his right to request legal expenses for pre-litigation conduct or bad-faith litigation conduct.¹³⁵

¹³³ Fee Order ¶ 9.

¹³⁴ 339 A.3d at 59.

¹³⁵ *In re Mobilactive Media, LLC*, 2013 WL 1900997, at *6 (Del. Ch. May 8, 2013) (citations omitted) (Finding that any request for an exception to the American Rule

2. The Court of Chancery Erred as a Matter of Law by Holding that Pre-Litigation Conduct Alone Was Sufficient to Apply the Bad Faith Exception to the American Rule.

The Court of Chancery awarded legal expenses to Ban based solely on Manheim’s pre-litigation conduct, citing *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*,¹³⁶ and various Court of Chancery opinions.¹³⁷ However, subsequent to *Scion*, in 2015 the Delaware Supreme Court ruled that bad-faith pre-litigation conduct by itself cannot serve as grounds for an award of legal fees.¹³⁸ While the *RBC* opinion does not expressly discuss *Scion*, its reasoning, which post-dates *Scion*, bars an award of fees premised on bad-faith pre-litigation conduct. The Court of Chancery committed legal error in ignoring multiple and the most recent Supreme Court decisions that address this issue.

Multiple Supreme Court cases that pre-date *RBC*, and that *RBC* quoted or on which *RBC* relied, consistently confirm that pre-litigation conduct, by itself, cannot

was waived where plaintiffs “did not seek attorneys’ fees in his Complaint, the Joint Pretrial Stipulation and Order, his pre-trial briefs, or his post-trial briefs.”); *Vivint Solar, Inc. v. Lundberg*, 2024 WL 2755380, at *40 (Del. Ch. May 30, 2024), *as corrected* (June 18, 2024), *aff’d* 340 A.3d 541 (Del. 2025).

¹³⁶ 68 A.3d 665, 686 (Del. 2013).

¹³⁷ Fee Order ¶¶ 3, 5, 7.

¹³⁸ *RBC*, 129 A.3d at 877 (“[A]n 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.” (quoting *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010))).

support a bad faith exception unless such conduct can be tied to bad faith conduct during the litigation. The initial Supreme Court case that established this legal principle was *Johnston v. Arbitrium (Cayman Islands) Handels AG* in 1998, where the Court stated:

The Defendants object to the use of the pre-litigation evidence in determining bad faith. They correctly point out that the bad faith exception does not apply to conduct that gives rise to the substantive claim itself. But this does not preclude the Court of Chancery, in its discretion, from using this information as it did, for the sole purpose of determining whether the Defendants defended this action in bad faith, and not to enhance Vendel's recovery. The Court of Chancery, after careful deliberation, found that the conduct of the Defendants rose to the level of bad faith because they had no valid defense and knew it. The Court specifically found that they unnecessarily required the institution of litigation, delayed the litigation, asserted frivolous motions, falsified evidence and changed their testimony to suit their needs. Since the Defendants constructed their entire defense in bad faith, the Court of Chancery did not abuse its discretion in awarding Vendel his full reasonable attorneys' fees.¹³⁹

Applying the standard articulated in the *Johnston* case, this Court, in its 2005 *Montgomery Cellular* case, held that: "Although the bad faith exception does not apply to the conduct that gives rise to the substantive appraisal claim in a short form merger, evidence of a party's prelitigation conduct *can be relevant to show the*

¹³⁹ 720 A.2d at 546.

motive or intent driving that party's conduct during that appraisal litigation."¹⁴⁰ The Court reasoned that defendant's failure reasonably to ascertain the company's fair value before setting a merger price was a motive for the defendant later to lie under oath and to allow the destruction of documents to obstruct the petitioners' efforts to uncover evidence of the company's true value in the litigation.¹⁴¹

In the 2010 *Versata* case, this Court articulated the precise language ultimately quoted in *RBC* and applied the *Johnston* test to hold that: "However, even if the Court of Chancery's opinion is construed as finding that [defendant] acted in bad faith, *and even if that finding pertained to conduct that occurred during the litigation*, the Court of Chancery still had discretion to deny [plaintiff's] attorneys' fee request."¹⁴² The emphasized language demonstrates the Court intended the bad faith exception to apply only when premised on conduct that occurred during the litigation. Thus, from *Johnston* in 1998 through *RBC* in 2015, the Supreme Court has consistently and repeatedly held that pre-litigation conduct can support a bad faith exception to the American Rule *only when* it can be directly tied to bad faith conduct in the litigation.

¹⁴⁰ *Montgomery Cellular Hldg. Co., Inc. v. Dobler*, 880 A.2d 206, 228 (Del. 2005) (emphasis added).

¹⁴¹ *Id.*

¹⁴² *Versata*, 5 A.3d at 608 (Del. 2010) (emphasis added).

The *holdings* of *RBC* and its predecessors are the law of Delaware. In contrast, the language of *Scion* cited by the Court of Chancery was not part of any holding, but rather was part of a general discussion explaining the Supreme Court's decision to remand the fee issue to the Court of Chancery and its recognition that some decisions had improperly conflated the Court of Chancery's inherent equitable power to award fees in a proper case with the statutory authority to award costs where the equities dictate under 10 *Del. C.* § 5106.¹⁴³ The passage cited by the Court of Chancery was not part of the holding of this Court.

Here, the Court of Chancery did not make any determination that Manheim's litigation conduct constituted bad faith or that there was any bad faith conduct during the course of the litigation by Manheim. Therefore its determination to deviate from the American Rule based solely on pre-litigation conduct constitutes legal error.

3. Even if the Court Holds that Pre-Litigation Conduct by itself can Support the Bad Faith Exception, the Court of Chancery Record does not Support a Finding that Manheim's Breach was Egregious or the Product of Deplorable Behavior; Therefore the Court of Chancery Abused its Discretion in Awarding Legal Expenses to Ban.

Even were this Court to find that *Scion* or other authorities permit application of the bad faith exception based solely on pre-litigation conduct, the Court of Chancery abused its discretion in awarding legal expenses because it did not find,

¹⁴³ *Scion*, 68 A.3d at 687.

and the record does not support, that Manheim’s conduct was egregious. “The party seeking a fee award bears the stringent evidentiary burden of producing ‘clear evidence’ of bad-faith conduct.”¹⁴⁴ “The bad faith exception applies only in extraordinary cases, and 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.”¹⁴⁵ For decades, the Court of Chancery has recognized the risks of permitting exceptions to the American Rule in that absence of anything other than “unusually deplorable behavior.”

While this court can imagine situations which may be so egregious as to warrant an award of attorney's fees on the basis of fraud, the American Rule would be eviscerated if every decision holding defendants liable for fraud or the like also awarded attorney's fees. Even more harmful would be to extend this narrow exception to situations involving less than unusually deplorable behavior. See *Weinberger v. U.O.P., Inc.*, Del. Ch., 517 A.2d at 656 (holding that the defendant’s behavior was not sufficiently grave as to warrant attorney’s fees even though the defendant had treated minority shareholders unfairly and therefore breached its fiduciary duty in a manner which could not be characterized as “minor or technical”).¹⁴⁶

Here, the Court of Chancery found no clear evidence of subjective bad-faith conduct that would support a finding that this case was extraordinary. To the

¹⁴⁴ *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005) (citations omitted).

¹⁴⁵ *RBC*, 129 A.3d at 877 (citations omitted).

¹⁴⁶ *VGS, Inc. v. Castiel*, 2001 WL 1154430, at *1 (Del. Ch. Sept. 25, 2001) (quoting *Barrows v. Bowen*, 1994 WL 514868 (Del. Ch. Sept. 7, 1994)).

contrary, the Court ultimately found that Manheim’s estimate of what Ban was entitled to receive was far more reasonable than the changing and ultimately fantastical damages claim made by Ban. That finding corroborated Manheim’s evidence that Ban, despite wanting to be bought out, would never engage with Manheim in meaningful discussions about an amount.

Other than *Scion*, the other authorities relied on by the Court of Chancery were Court of Chancery opinions. None discussed in any meaningful way the distinction between pre-litigation and litigation conduct as it relates to the American Rule. The Court of Chancery in *Straight Path* acknowledged the potential impediment *RBC* posed to relying on pre-litigation conduct to support a bad faith exception to the American Rule, but failed to address the issue because it was not necessary to the court’s decision.¹⁴⁷ And even those authorities consistently recognize that a very high burden exists to trigger the exception. The underlying conduct must “involve bad faith, fraud, conduct that was totally unjustified, or the like.”¹⁴⁸ As the Court of Chancery correctly recognized, a breach of the fiduciary duty of loyalty does not

¹⁴⁷ *In re Straight Path Commc ’ns Inc. Consol. Stockholder Litig.*, 2024 WL 4602914, at *4, n.48 (Del. Ch. Oct. 29, 2024)

¹⁴⁸ *Scion*, 68 A.3d at 687.

itself result in fee shifting; the “breach must be ‘egregious’ or the product of ‘unusually deplorable behavior.’”¹⁴⁹

The Court of Chancery acknowledges that *Straight Path* and *VGS* are correct in holding that a finding of breach of fiduciary does not automatically justify a shifting of fees.¹⁵⁰ The court, however, then states in conclusory fashion that “Manheim acted in bad faith by seeking to harm his beneficiary.”¹⁵¹ It offers no explanation or specific factual finding that supports that conclusion and the conclusion is contradicted by the record which shows that Manheim’s valuations of Ban’s interest were realistic, in contrast to Ban’s changing and ultimately fantastical ones.

The court’s post-trial rulings demonstrate that Manheim did not engage in egregious or unusually deplorable behavior. First, the parties agreed that Manheim and Ban should no longer be business partners. Ban testified that, as the Penfold Action was winding up in 2022, if DVRC was valued fairly, he would “gladly be

¹⁴⁹ Fee Order ¶ 7.a (citing *VGS*, 2001 WL 1154430, at *2 (“Of course, merely being adjudicated a wrongdoer under our corporate law is not enough to justify fee shifting. Not even a finding of breach of fiduciary duty, without more, will justify an award of fees. Were it otherwise, the American Rule would be substantially undermined in practice before this court.” (citations omitted))); *In re Straight Path Commc’ns Inc. Consol. Stockholder Litig.*, 2024 WL 4602914, at *5; *see also Macrophage Therapeutics, Inc. v. Goldberg*, 2021 WL 2582967, at *19 (Del. Ch. June 23, 2021).

¹⁵⁰ Fee Order ¶ 7.a.

¹⁵¹ Fee Order ¶ 7.f.

purchased out at that value.”¹⁵² This litigation occurred to determine that value because Ban would never meaningfully engage with Manheim on that topic.¹⁵³ Prior to litigation, Manheim contended Ban was legally entitled to \$1,683,414.20, part of which was based upon Ban’s *pro rata* portion of the judgment in favor of DVRC that had yet to be issued in the Penfold Action.¹⁵⁴ Manheim set aside \$1,668,414.20 in Penfold for Ban,¹⁵⁵ but expected to negotiate a final separation price.

In this litigation, Manheim contended that if the Court awards damages reflecting the value of Ban’s indirect interest in DVRC, they should not exceed \$5 million.¹⁵⁶ Ban initially contended that he was due approximately \$10 million. At that level a settlement of the parties’ claims seemed plausible. Ban, however, then made any agreed-upon resolution impossible by increasing his damage claim to \$36 million.¹⁵⁷ The Court ultimately awarded Ban \$6,898,612, demonstrating that

¹⁵² A563.

¹⁵³ A389–90 (“for a long time, since 2018, at least, it’s really every – trying to get to a settlement or to negotiate or discuss something with Young has always been . . . feels like I’m – or it feels like I’m talking to Bartleby, the scrivener;”); A823–25 (“there was no number that [Ban] wanted . . . we have made offers and that, for a long time were not countered or acknowledged. And then as we’ve gotten closer in time, the valuation or the number that have been indicated to us just don’t make sense; they’re so high”).

¹⁵⁴ The amount included \$15,000 for Ban’s WestCo interests.

¹⁵⁵ *See* B199; A985–88.

¹⁵⁶ A1347.

¹⁵⁷ A1279.

Manheim’s valuation (and Ban’s expert’s Original Valuation) were in the world of reality, while Ban’s subsequent damage analysis was, at best, litigation spawned fantasy. A divorce between Manheim and Ban made sense because the original expectation and basis for Ban’s receipt of equity in the EB-5 venture—that Ban would be actively involved in running the company—had changed.¹⁵⁸ Manheim paid the principal amount of the judgment of \$6,898,612 (exclusive of legal fees) to Ban on July 10, 2025. Only the award of legal fees and interest component of the judgment remain outstanding.

The Court of Chancery cites Manheim’s failure to pay the judgment in the Penfold Action as an element of bad faith supporting an exception from the American Rule.¹⁵⁹ That ignores material contradictory facts. No judgement had been entered when Ban’s interests were redeemed. The anticipated judgment (based upon the post-trial opinion) was a receivable asset reflected on DVRC’s books, the value of which was included in the calculation of the amount set aside in Penfold for Ban, and used in both experts’ damages models. Thus, in calculating the amounts Ban was owed, the full amount of the judgment was included and Ban suffered no adverse consequence from the lack of payment of that receivable.¹⁶⁰ The Court of

¹⁵⁸ See e.g. *Bamford*, 2022 WL 2278867, at *6, 22.

¹⁵⁹ Fee Order ¶ 4.

¹⁶⁰ A862, A985-88 (Manheim testifying that he included the Penfold Action judgment and interest to calculate book value); A358–65 (Canessa’s corrected

Chancery failed to acknowledge that fact or explain how such behavior, which gave Ban full credit for the value of the judgment, could constitute egregious or deplorable behavior justifying an exception to the American Rule. As a result, the Court of Chancery abused its discretion.

Finally, the Court of Chancery stated in its Fee Order that Manheim’s invocation of the Material Adverse Effect was pretextual and did not apply to Ban.¹⁶¹ That misapprehends or ignores the trial record and the Court’s own opinion. That Material Adverse Effect resulted from a federal statutory amendment—the Reform Act—that the Court of Chancery itself characterized as an “existential threat” to DVRC.¹⁶² The Reform Act required that any person involved in an EB-5 center be a United States citizen or permanent resident.¹⁶³ Because Bamford, one of Penfold’s three limited partners, was a British citizen, Penfold’s membership in DVRC presented a potential violation of the Reform Act.¹⁶⁴

After the passage of the Reform Act, the board of WestCo, DVRC’s managing member, consulted immigration counsel at Seyfarth Shaw LLP, including a former

valuations, all of which include a judgment receivable with interest, and adjustments to extend the rulings on expenses from the Penfold Action post-trial opinion forward from the time between trial and the post-trial ruling).

¹⁶¹ Fee Order ¶ 4.

¹⁶² Post-Trial Opinion, 339 A.3d at 11.

¹⁶³ *Id.* at 12.

¹⁶⁴ *Id.* at 7, 11.

USCIS director, Peng & Weber, PLLC, and WestCo's and DVRC's counsel.¹⁶⁵ After those consultations and discussion among the board members, no WestCo director was willing to sign a required annual certification declaring DVRC was in compliance with the Reform Act.¹⁶⁶ The board also considered the risks posed by potential lawsuits from the over-1,000 investors in the funds managed by DVRC if DVRC lost its certification and the investors' immigration process were disrupted, and whether a Material Adverse Effect had occurred under DVRC's Fourth Amended and Restated LLC Agreement (the "Fourth LLC Agreement").¹⁶⁷ After consulting counsel and discussing the risks posed by Bamford's association with DVRC, the board proceeded with the DVRC Redemption, which the Court found "was not all bad."¹⁶⁸

In accordance with Section 9.7 of the Fourth LLC Agreement, DVRC then determined both the capital account balance and fair market value of Penfold's DVRC interest, the lesser of which would constitute the redemption price.¹⁶⁹ To

¹⁶⁵ B166; B168.

¹⁶⁶ B167; A832–34.

¹⁶⁷ Post-Trial Opinion, 339 A.3d at 17–18; B167.

¹⁶⁸ Post-Trial Opinion, 339 A.3d at 73.

¹⁶⁹ Section 9.7 sets the Redemption price as "(x) the Determined Amount or (y) the then balance of such Member's Capital Account (without any adjustments pursuant to Section 4.6), whichever is lower." B53–54. Section 9.5 states *Determined Amount* is an agreed-upon price or the "Appraised Value." *Id.* Annex II defines *Appraised Value* as "the fair market value enterprise valuation of the Company and its

determine the fair market value, DVRC engaged Excel Partners, which determined that DVRC's value as of August 2, 2022 was \$9.7 million.¹⁷⁰ DVRC and its accountants also calculated Penfold's capital account balance, which was approximately \$5 million, including the value of the anticipated \$2,515,809.22 derivative judgment from the Penfold Action.¹⁷¹ Per Section 9.7, the capital account balance, as the lesser of the two values, was determined to be the price for the redemption. That deliberative process, even though ultimately found to be flawed by the Court of Chancery, undermines any argument that Manheim's conduct was egregious or deplorable. As a result, the Court of Chancery abused its discretion in failing to follow the American Rule.

Section 9.7 did not permit the direct redemption of the Penfold's individual limited partners' interests. Instead, it permitted DVRC to purchase the "Member's" interest. The Member of DVRC was Penfold. Thus, Section 9.7 of the Fourth LLC Agreement permitted redemption of Penfold's interest, but not individual redemptions of Penfold's limited partners. Because the Material Adverse Effect provision provided no authority to redeem Ban's or Bamford's interests in Penfold

subsidiaries as a whole and as a going concern. It is understood that the Appraised Value shall be reduced or decreased by any minority or other applicable and appropriate discount." B74–75.

¹⁷⁰ B194.

¹⁷¹ See B194; B199; A862.

individually, the Court of Chancery’s observation that the Reform Act did not apply to Ban is legally irrelevant.¹⁷² Section 9.7 provided no mechanism for the redemption of individual Penfold limited partners and therefore the Court of Chancery’s determination that its exercise was pretextual because the Reform Amendment did not apply to Ban is an abuse of discretion.

As to Ban’s WestCo interest, the Court of Chancery recognized that Manheim had the ability to eliminate Ban’s WestCo equity legally, but simply disagreed with the appropriateness of the method that Manheim sought to use.¹⁷³ In that way this case is similar to *eBay Domestic Holdings, Inc. v. Newmark* where the Court of Chancery declined to award legal fees in part because the defendant director “subjectively believed the 2008 Board Actions, despite their uniqueness, were legally permissible under Delaware law.”¹⁷⁴ It was an abuse of discretion for the Court of Chancery to conclude that Manheim’s choice of what the court determined to be a wrong procedure constitutes egregious or deplorable conduct sufficient to support the bad faith exception, while at the same time acknowledging that the result was legally permissible had it only been done using different mechanics.

¹⁷² Fee Order ¶ 4.

¹⁷³ *Id.*

¹⁷⁴ *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 47 (Del. Ch. 2010).

The Court of Chancery’s ruling, if upheld, carries the risk of turning every case in which a breach of fiduciary duty of loyalty is found into a bad faith exception to the American Rule. That concern is not academic. Good faith is an inherent part of the duty of loyalty.¹⁷⁵ Thus, in theory, every breach of the fiduciary duty of loyalty constitutes bad faith. However, the court below correctly held, and Delaware case law consistently states that not every breach of fiduciary duty will support the bad faith exception to the American Rule.¹⁷⁶ The court below acknowledged that bad faith can have different definitions. It cited the *Disney* decision for its explanation of what a “bad faith breach of the duty of loyalty” is.¹⁷⁷ It cited this Court’s *Disney* decision, which discussed the interplay of bad faith and the duty of care, for its explanation of what a “bad faith breach of the duty of loyalty” is.¹⁷⁸ This Court, in *Disney*, recognized that defining bad faith is difficult.

For these reasons, we uphold the Court of Chancery’s definition as a legally appropriate, although not the exclusive, definition of fiduciary bad faith. We need go no further. To engage in an effort to craft (in the Court’s words) “a definitive and categorical definition of the universe of acts that would constitute bad faith” would be

¹⁷⁵ *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

¹⁷⁶ *Supra*, n.149.

¹⁷⁷ Fee Order ¶ 7.b. (citing *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006)).

¹⁷⁸ *Id.*

unwise and is unnecessary to dispose of the issues presented on this appeal.¹⁷⁹

It identified three categories of bad faith, with the worst one being conduct that is “motivated by actual intent to do harm.”¹⁸⁰ The *Disney* Court did not refer to conduct that was egregious or deplorable suggesting, at least, that the standard of conduct necessary to support the bad faith exception is beyond what the *Disney* Court described as the worst-case standard of fiduciary behavior that can constitute bad faith.

Regardless of the precise definition, Delaware cases have consistently held that conduct sufficient to support the bad faith exception to the American Rule will exist in only in extraordinary cases where the conduct is egregious or deplorable. The record here does not support such a finding, or a finding that Manheim had an actual intent to do harm. The parties agreed that it was appropriate for Ban to be bought out of his interests in Penfold and WestCo. The changed nature of Ban’s relationship to the Manheim and DVRC also supports a reasonable belief that Ban’s departure from the company was in the best interests of the company. Manheim, and the other directors, followed an appropriate process that included consultation with legal and financial advisors. Manheim’s acquisition of Ban’s WestCo interest

¹⁷⁹ *Disney*, 906 A.2d at 67.

¹⁸⁰ *Id.* at 64.

was, as the lower court found, legally permissible, but was simply accomplished by a method that the lower court deemed deficient. As to the Penfold redemption, the court below acknowledged that the Reform Act, which was the catalyst for the redemption of Penfold and therefore Ban's indirect interest in DVRC, posed real threats to DVRC. As stated in the Penfold Opinion, the parties had been concerned about the potential for that risk for years. While the parties ultimately disagreed about the value of Ban's interests, the record reflects that Manheim's views regarding that value were far more realistic than Ban's. On the facts of this case, it was an abuse of discretion for the court below to award legal fees based on the bad faith exception to the American Rule because the record does not support a finding that Manheim's conduct was egregious, deplorable or the product of an actual intent to do harm. Minority investors are regularly bought out of companies for a variety of reasons. There is nothing inherently nefarious about such buy-outs and, as the lower court acknowledged, they are sanctioned by Delaware law if appropriate procedures are followed. The lower court's award of fees here would, in effect, create precedent for an argument that every minority stockholder buyout, if accomplished in a procedurally deficient way, supports an award of legal fees and expenses under the bad faith exception to the American Rule. That is not and should not be the law of Delaware.

CONCLUSION

For the foregoing reasons, Manheim respectfully requests that the Court of Chancery's rulings in the Post-Trial Opinion be affirmed, and the Fee Order be reversed.

PRICKETT, JONES & ELLIOTT, P.A.

OF COUNSEL:

Joshua K. Bromberg
KLEINBERG, KAPLAN,
WOLFF & COHEN, P.C.
500 Fifth Avenue
New York, NY 10110
(212) 986-6000

/s/ Bruce E. Jameson
Bruce E. Jameson (No. 2931)
Kevin H. Davenport (No. 5327)
John G. Day (No. 6023)
1310 N. King Street
Wilmington, Delaware 19801
(302) 888-6500
bejameson@prickett.com
khdavenport@prickett.com
jgday@prickett.com

*Attorneys for Joseph P. Manheim,
Delaware Valley Regional Center, and
West 36th, Inc.*

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