IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

Submitted: July 15, 2026
Decided: August 21, 2026

Before **TRAYNOR**, **LEGROW**, and **GRIFFITHS**, Justices.

Upon appeal from the Court of Chancery. **AFFIRMED in part, REVERSED in part, and REMANDED.**

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**LEGROW**, Justice:

This appeal principally asks us to decide whether a party who seeks attorneys' fees as an element of damages, based on his adversary's pre-litigation conduct, may raise that claim for the first time after trial. We conclude that a party is entitled to notice of such a claim before trial in order to prepare a defense.

After finding that Joseph P. Manheim breached his duty of loyalty to Young Min Ban, the Court of Chancery awarded Ban $6,898,612 in damages. On a post-trial motion, the court also awarded Ban attorneys' fees and expenses, concluding that Manheim's pre-litigation conduct was a bad-faith effort to harm his beneficiary and that the fees Ban expended were part of his damages. Manheim cross-appeals that award, arguing that Ban waived the claim by failing to plead or otherwise raise it before trial. We agree. A claim for attorneys' fees as a measure of damages puts the character of a defendant's pre-litigation conduct at issue, and a defendant is entitled to notice of that claim before trial. Because Ban did not raise the claim before trial in a way that put Manheim on notice, the claim was waived. Ban separately appeals the court's refusal to consider his expert's supplemental valuation when fixing damages, and we conclude that the court acted within its discretion on that issue. We therefore **AFFIRM** in part, **REVERSE** in part, and **REMAND**.

## I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND[1]

Manheim controlled Delaware Valley Regional Center, LLC ("DVRC"), an EB-5 investment business, through his 70% ownership of West 36th, Inc. ("WestCo"), DVRC's sole manager.[2] Ban owned 15% of WestCo's stock and a one-third limited partnership interest in Penfold, L.P., which held a 90% member interest in DVRC. In 2022, Manheim eliminated both of Ban's interests. He unilaterally adopted a bylaw creating a call right and exercised it the same day to acquire Ban's WestCo shares for $100 per share, and he later caused DVRC to redeem Penfold's member interest for an amount that Manheim calculated himself. Ban initiated these consolidated actions by filing complaints on August 29, 2022 and December 29, 2022. The first action challenged Manheim's acquisition of Ban's ownership interest in WestCo; the second challenged DVRC's redemption of Penfold's member interest. In both cases, Ban asserted claims for breach of fiduciary duty, unjust enrichment, and conversion, and requested damages for the loss of his ownership interests.

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[1] Unless otherwise noted, the recited facts are taken from the Court of Chancery's May 19, 2025 Post-Trial Opinion. *See Ban v. Manheim*, 339 A.3d 41 (Del. Ch. 2025) [hereinafter the "Post-Trial Opinion at __"].

[2] The EB-5 Immigrant Investor Program allows foreign nationals to make job-creating investments in the United States in order to obtain permanent U.S. residency.

Ban sought an award of damages equal to the fair value of the indirect interest in DVRC that he held before the two transactions. To quantify his damages, Ban relied on expert testimony from Stephen J. Scherf. Manheim did not respond with a valuation of his own; he engaged James Canessa to act solely as a rebuttal expert. Scherf submitted what were effectively two opinions. In his original report, Scherf used a discounted cash flow methodology built on management's projections and opined that DVRC's fair value was $30,474,735, placing the fair value of Ban's interest at $9,599,541. After additional discovery, Scherf submitted a supplemental report that relied on a new set of projections—estimates of how long DVRC's approximately 800 remaining foreign investors would remain invested. Scherf's supplemental report more than doubled DVRC's claimed fair value to $77,777,828, equating to $24,511,386 for Ban's share.

None of Ban's pleadings or pre-trial filings presented a claim for attorneys' fees based on the defendants' pre-litigation conduct. In the pre-trial order, Ban sought only "attorneys' fees, expenses, and costs in connection with the derivative action on behalf of WestCo and Penfold."[3] Ban's pre-trial brief made no reference to or request for fees.[4] His post-trial briefs made only passing requests for an award

[3] App. to Appellant's Opening Br. at A421 (Pre-Trial Order ¶ 64(g)).

[4] App. to Appellees' Answering Br. at B518–B553 (Ban's Pretrial Br.).

of expenses, fees, and costs upon "appropriate application to the Court," without mentioning the defendants' pre-litigation conduct or the bad-faith exception to the American Rule.[5]

The Court of Chancery issued the Post-Trial Opinion on May 19, 2025, holding Manheim liable for breach of the duty of loyalty as to both transactions. The court first held that Manheim's exercise of the call right was statutorily invalid under Section 202(b) of the Delaware General Corporation Law because the call-right bylaw could not apply to Ban's already-issued shares without his assent.[6] The court further held that Manheim's adoption and exercise of the call right, as well as his exercise of the redemption right, were self-interested acts subject to entire-fairness review, and that Manheim failed to prove that either transaction was fair.[7]

As the court observed, "Manheim largely punted on the issue of liability, choosing to fight on the issue of damages."[8] As to damages, the court held that Ban was entitled to damages equal to the fair value of his equity interests, without discounts for lack of marketability or control, reasoning that using fair market value

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[5] App. to Appellant's Opening Br. at A1279 (Ban's Post-Trial Opening Br.); *see also id.* at A1238, A1261 (Ban's Post-Trial Opening Br.); *id.* at A1382 (Ban's Post-Trial Reply Br.).

[6] Post-Trial Opinion at 59–61.

[7] *Id.* at 61–76.

[8] *Id.* at 59.

and discounting Ban's stake would reward Manheim for his breaches of the duty of loyalty.[9] The court declined, however, to consider Scherf's supplemental valuation. Although Scherf permissibly could have relied on the new projections had he used them in his original report, the court found the supplemental valuation "not credible," explaining that "[a]n expert cannot come up with completely new inputs in a supplemental expert report" and that "Scherf went too far."[10] Accepting Scherf's original valuation, as corrected by Canessa's critiques and further adjusted by the court, the court fixed the fair value of Ban's interests at $6,898,612 and awarded Ban that amount, plus pre- and post-judgment interest.[11]

On July 10, 2025, Manheim paid Ban $6,898,612 in contemplation of the entry of a final judgment.[12] On August 25, 2025, the Court of Chancery issued a letter granting Ban leave to move for an award of expenses, including attorneys' fees, and holding that Ban had preserved the issue.[13] Ban so moved on September 19, 2025, seeking $422,483.12 in fees and expenses and arguing for the first time that Manheim's pre-litigation conduct supported fee shifting under the bad-faith

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[9] *Id.* at 76–79.

[10] *Id.* at 81–82.

[11] *Id.* at 82–83.

[12] Appellant's Opening Br. Ex. B at 2–3 [hereinafter the "Final Order & Judgment at __"].

[13] *See* App. to Appellees' Answering Br. at B662, B673–74.

exception to the American Rule.[14] Manheim opposed, contending that Ban had waived any such claim by failing to raise it in the pre-trial order or his trial briefs, and that the defendants had no notice of the claim and no chance to develop trial evidence on the character of their pre-litigation conduct.[15]

By order dated November 24, 2025 (the "Fee Order"), the court awarded Ban $253,324.37 in attorneys' fees and $6,492.79 in expenses, for a total of $259,817.16, but declined to award Ban's expert fees.[16] Rejecting Manheim's waiver argument, the court reiterated that "[w]hen the post-trial decision will make factual findings that could support or defeat an expense application, it makes sense to await those findings before making an application."[17] On the merits, the court concluded that Manheim "acted in bad faith by seeking to harm his beneficiary," and that the amounts a beneficiary must expend to establish such a wrong "are necessarily part of the beneficiary's damages."[18] The final order and judgment incorporated the award "as part of the damages incurred by Ban."[19]

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[14] *Id*. at B639–58 (Fee Mot.).

[15] *Id*. at B662–63 (Defs.' Opp'n to Fee Mot. ¶¶ 11–12).

[16] Appellees' Answering Br. Ex. A at 7, ¶¶ 10–12 [hereinafter the "Fee Order at __"].

[17] *Id.* at 7, ¶ 9.

[18] *Id.* at 6, ¶ 7(e)–(f).

[19] Final Order & Judgment at 2, ¶ 2(c).

Ban appealed the Court of Chancery's refusal to consider Scherf's supplemental valuation, and Manheim filed a cross-appeal challenging the fee award.

## II. STANDARD OF REVIEW

We review a trial court's decision to exclude or decline to consider late-submitted expert material for abuse of discretion.[20] We review an award of attorneys' fees under an exception to the American Rule for abuse of discretion.[21]

## III. ANALYSIS

On appeal, Ban argues that the Court of Chancery abused its discretion by refusing to consider Scherf's supplemental valuation, which the parties' discovery agreement, in his view, expressly permitted. Manheim urges us to affirm the damages award but cross-appeals the fee award, contending that Ban waived any claim to attorneys' fees by failing to raise it before trial, that pre-litigation conduct alone cannot support fee-shifting under the bad-faith exception to the American Rule, and that Manheim's conduct in any event was not sufficiently egregious to justify the award.

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[20] *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006).

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

### A. The Court of Chancery acted within its discretion in declining to consider the supplemental valuation.

Ban contends that the Court of Chancery abused its discretion because the parties' discovery agreement permitted supplemental expert reports and because the court itself recognized that management's projections undervalued DVRC. We disagree. The parties' agreement permitted supplements addressing deposition testimony that affected the experts' conclusions; it did not authorize a new model built on new inputs. We affirm the court's evidentiary decision on the basis of and for the reasons stated in the Post-Trial Opinion.[22]

### B. Ban waived his claim for attorneys' fees as an element of damages.

Under the American Rule, each party ordinarily bears its own attorneys' fees regardless of the litigation's outcome.[23] The bad-faith exception to that rule applies only in extraordinary circumstances, and it typically does not depend on pre-litigation conduct. The exception exists to deter abuse of the litigation process. Courts have invoked it against parties who prolonged litigation without cause, falsified records, or knowingly asserted frivolous claims.[24] Consistent with that focus on litigation conduct, we have explained that "an award of fees for bad faith

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[22] Post-Trial Opinion at 79–82.

[23] *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005).

[24] *See id.*; *see also Jervis*, 129 A.3d at 877.

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,"[25] and that "the bad faith exception does not apply to conduct that gives rise to the substantive claim itself."[26]

Our decisions nonetheless leave room for a distinct, narrow category of cases in which a losing party's pre-litigation conduct bears on an award of fees. In *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, we recognized that the Court of Chancery's equitable authority to shift expenses extends to "cases in which . . . the action giving rise to the suit involved bad faith, fraud, 'conduct that was totally unjustified, or the like,' and attorneys['] fees are considered an appropriate part of damages."[27] *William Penn Partnership v. Saliba* is consistent with that principle. There, we affirmed an award of attorneys' fees, expert expenses, and costs to plaintiffs who prevailed on a duty of loyalty claim but whose recovery otherwise would have been nominal, because the fiduciaries' faithless pre-litigation

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[25] *Jervis*, 129 A.3d at 877 (quoting *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010)).

[26] *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 546 (Del. 1998).

[27] 68 A.3d 665, 687 (Del. 2013) (quoting *Barrows v. Bowen*, 1994 WL 514868, at *1 (Del. Ch. Sept. 7, 1994)).

conduct forced the plaintiffs to litigate to vindicate their rights.[28] In such exceptional cases, the fees are not a sanction for misuse of the judicial process; they are a component of the plaintiff's damages flowing from the conduct underlying the substantive claim.

That distinction matters critically for how such a claim for attorneys' fees must be raised. A request for fee shifting premised on an adversary's litigation conduct can arise only as the litigation unfolds and may appropriately be presented by application after trial. But when a party intends to pursue attorneys' fees as a measure of damages based on the opposing party's pre-litigation conduct, that claim must be pleaded so that the opposing party is on notice of the claim and can prepare its defense accordingly.[29] Whether pre-litigation conduct is sufficiently egregious to support an award of fees as damages is a fact-intensive inquiry, and a defendant is entitled to know before trial that the character of its pre-litigation conduct will be a basis for a fee-shifting claim.[30]

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[28] 13 A.3d 749, 758 (Del. 2011) (explaining that "where there has been a breach of the duty of loyalty . . . potentially harsher rules [than the American rule] come into play and the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly") (citation omitted).

[29] *See In re Mobilactive Media, LLC*, 2013 WL 1900997, at *6 (Del. Ch. May 8, 2013) (holding that a request for attorneys' fees under an exception to the American Rule was waived where the party did not seek fees in their complaint, their pretrial stipulation and order, or their trial briefs).

[30] We reiterate that such claims are appropriate only in a very narrow category of cases.

Here, Manheim was not on notice that his pre-litigation conduct would be a basis for Ban's fee application. Nothing in the complaints, the pre-trial order, or Ban's trial briefs presented such a claim, and the theory surfaced for the first time in a motion filed months after the Post-Trial Opinion was issued. The prejudice from the lack of notice is apparent from the record. As the Court of Chancery found, Manheim "largely punted" on liability and directed his trial presentation to damages.[31] Had he known that his pre-litigation conduct would be presented as a basis for fee shifting, Manheim could have structured his evidentiary presentation accordingly. Because Ban did not plead a claim for attorneys' fees as damages based on the defendants' pre-litigation conduct, the claim was waived, and the Court of Chancery erred in entertaining it after trial. The fee award therefore must be reversed.

## IV. CONCLUSION

For the foregoing reasons, the Court of Chancery's award of attorneys' fees and expenses reflected in the November 24, 2025 Fee Order and in Paragraph 2(c) of the December 12, 2025 Final Order and Judgment is **REVERSED**. In all other respects, the judgment is **AFFIRMED**.

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[31] Post-Trial Opinion at 59.