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RE: *ATG Capital Opportunities Fund LP v. Ryan Lane, et al.*,
C.A. No. 2026-0447-LWW

Dear Counsel,

One challenge of deciding an expedited case is having much to say and little time to say it. On August 28, I issued a post-trial decision resolving the core merits of this expedited suit so that the parties could solicit proxies in advance of Empery Digital, Inc.’s annual meeting.¹ The defendants raised two arguments at trial that did not feature in my decision: unclean hands and spoliation. This supplemental letter opinion completes the record and explains why neither argument bars the relief granted to the plaintiff.

¹ Post-trial Mem. Op. (Dkt. 274) (“Mem. Op.”).

A. Unclean Hands

In their pre-trial brief, the defendants asserted unclean hands as a broad, affirmative defense to bar plaintiff ATG Capital Opportunities Fund LP from obtaining equitable relief.² After trial, they refined their unclean hands argument. Instead of asserting the defense as a general bar, they integrated it into their opposition to ATG's request to reopen the nomination window.³

I declined to reopen the nomination window.⁴ That holding effectively mooted the unclean hands defense as it was presented after trial. To the extent the defendants continued to advance an unclean hands defense against the equitable relief granted regarding ATG's nomination notice, it fails on the merits.

“[C]ases turning on matters related to unclean hands are infrequent as a matter of course[.]”⁵ The conduct must be “so offensive to the integrity of the court that [the party's] claims should be denied, regardless of their merit.”⁶ Although ATG was

² Defs.' Pre-trial Br. (Dkt. 224) 59-60.

³ Defs.' Post-trial Br. (Dkt. 261) 58-59.

⁴ See Mem. Op. 46-47.

⁵ *Nakahara v. NS 1991 Am. Tr.*, 718 A.2d 518, 522 (Del. Ch. 1998).

⁶ *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 81 (Del. Ch. 2008).

furtive in its coordination with Tice Brown,⁷ its actions do not meet this exacting standard.

The unclean hands doctrine is meant to protect the integrity of a court of equity—not to shield fiduciaries seeking to excuse their own inequitable behavior.⁸ As explained in the post-trial decision, ATG’s nomination notice complied with the bylaws provisions the board relied on in rejecting it, and the rejection breached the board’s fiduciary duties.⁹ Denying ATG relief due to its suspicious behavior would deprive Empery stockholders of their right to elect directors, creating further inequity.

B. Spoliation

The defendants also contend that ATG’s sole principal, Gabriel Gliksberg, spoliated evidence, entitling them to evidentiary and procedural remedies.¹⁰ The

⁷ See, e.g., Mem. Op. 7, 20-21 (discussing Gliksberg’s coordination with Tice Brown); *id.* at 9-10, 13 (discussing Gliksberg’s use of Signal with auto-delete enabled); *id.* at 41-42 (discussing Gliksberg instructing a nominee not to text him about an article regarding a DAT liquidation strategy).

⁸ See *Portnoy*, 940 A.2d at 81 (“[U]nclean hands is a doctrine designed to protect the integrity of a court of equity, not a weapon to be wielded by parties seeking to excuse their own inequitable behavior by pointing out a trifling instance of impropriety by their counterpart . . .”).

⁹ See Mem. Op. 38-39, 45.

¹⁰ See Defs.’ Mot. for Adverse Inferences Due to Spoliation of Evid. (Dkt. 212) (“Defs.’ Spoliation Mot.”) 1-3.

record shows that Gliksberg failed to preserve relevant data on his mobile device.¹¹

Depending on when the duty to preserve arose, the defendants asked that I either presume Gliksberg engaged in a coordinated and undisclosed plan for Empery or elevate ATG's burden of proof on disputed issues.¹²

The post-trial decision explained that the requested adverse inferences would not affect the outcome because, even assuming the lost messages showed coordination, no bylaw required ATG to disclose it.¹³ Thus, the defendants' request for an adverse inference was moot.¹⁴ Similarly, raising the burden of proof would not change the text of Empery's bylaws.¹⁵ But ATG is not blameless, leaving the question of whether a lesser sanction is warranted.¹⁶

Court of Chancery Rule 37(e) authorizes sanctions when electronically stored information (ESI) "that should have been preserved in the reasonable anticipation of . . . litigation is lost because a party failed to take reasonable steps to preserve it, and

¹¹ *See* Mem. Op. 10.

¹² *See* Defs.' Spoliation Mot. 15-16.

¹³ Mem. Op. 34 n.159.

¹⁴ *Id.*

¹⁵ That is, even if the defendants proved that ATG and Brown coordinated regarding Empery, elevating the burden of proof would be legally irrelevant to the contractual outcome.

¹⁶ *See, e.g., Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002*, 2018 WL 6331622, at *14 (Del. Ch. Dec. 4, 2018) (describing the court's consideration of "a range of possible sanctions that could be imposed").

it cannot be restored or replaced through additional discovery[.]”¹⁷ In such cases, “upon finding prejudice to another party” from the loss of ESI, the court may “order measures no greater than necessary to cure the prejudice[.]”¹⁸

The defendants assert that ATG’s duty to preserve attached in January 2026, when Gliksberg requested nomination materials, filed a Schedule 13D, retained counsel, and recruited nominees.¹⁹ ATG responds that its preservation obligation arose in late March, when Empery’s board rejected its nomination.²⁰ It correctly observes that planning a proxy contest is not equivalent to anticipating litigation.²¹

Determining when the duty to preserve arises is a fact- and context-specific inquiry. “An affirmative duty to preserve evidence attaches upon the discovery of facts and circumstances that would lead to a conclusion that litigation is imminent or should otherwise be expected.”²² It “attaches even before litigation has been

¹⁷ Ct. Ch. R. 37(e); *see Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. Ch. May 29, 2009) (“A party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit.”).

¹⁸ Ct. Ch. R. 37(e)(1).

¹⁹ Defs.’ Spoliation Mot. 8-9.

²⁰ Pl.’s Opp’n to Defs.’ Mot. for Adverse Inferences Due to Spoliation (Dkt. 233) 7-10.

²¹ *Id.* at 8-9.

²² *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *8 (Del. Ch. May 18, 2009).

commenced ‘when a party should have known that the evidence may be relevant to future litigation.’”²³

Here, ATG reasonably anticipated litigation by February 12, 2026, when Empery’s counsel rejected ATG’s February 5 demand for “board refreshment.”²⁴ At this point, ATG knew that its attempt at friendly engagement with Empery was over and a contentious battle lay ahead. ATG began strategizing with litigation counsel, assembling a dissident slate of director nominees, and directing those candidates to coordinate with its lawyers.²⁵

ATG also knew that litigation was likely. It had touted the strategic use of litigation in materials soliciting investments.²⁶ Gliksberg had also engaged in prior proxy campaigns that resulted in litigation.²⁷

²³ *TR Invs., LLC v. Genger*, 2009 WL 4696062, at *17 (Del. Ch. Dec. 9, 2009) (quoting *Acierno v. Goldstein*, 2005 WL 3111993, at *6 (Del. Ch. Nov. 16, 2005)), *aff’d*, 26 A.3d 180 (Del. 2011).

²⁴ JX 252; *see* Trial Tr. Vol. I (Dkt. 265) Gliksberg (“Gliksberg Tr.”) 54.

²⁵ Gliksberg Tr. 56; *see Triton*, 2009 WL 1387115, at *8 (finding that a duty to preserve arose when an employee engaged in a confrontation with management shortly before resigning to moonlight for a direct competitor); *TR Invs.*, 2009 WL 4696062, at *17 (finding that a sophisticated party’s secretive deletion of documents during a period of contentious discussions preceding a control dispute violated the duty to preserve).

²⁶ JX 117 (highlighting the “strategic use of litigation” as a fund tool).

²⁷ *See* Gliksberg Tr. 24-25, 106-07, 112-15.

Yet Gliksberg communicated with Brown and his director nominees over Signal and WhatsApp with the auto-delete function enabled until April 14—over two weeks after receiving a formal litigation hold from counsel.²⁸ In fact, he affirmatively turned on the WhatsApp auto-delete function while communicating with one of his board nominees on February 16—four days after ATG’s duty to preserve attached.²⁹ Leaving auto-delete enabled during this period was at least negligent. Failing to disable it after receiving a litigation hold was at least reckless. Affirmatively turning it on while litigation grew increasingly likely evidences an intentional disregard for ATG’s preservation obligations.³⁰

To impose monetary sanctions, I need only find that ATG had a duty to preserve evidence and breached that duty.³¹ Gliksberg’s conduct forced the defendants to expend significant resources chasing lost communications, pursuing substitute discovery, and moving for spoliation sanctions. ATG’s argument that this substitute discovery eliminated any prejudice ignores the financial burden it imposed and that the discovery was an incomplete substitute for contemporaneous messages.

²⁸ *See id.* at 30-31, 42, 50, 69-70, 153-56.

²⁹ *See* Kirschenbaum Dep. 150-53 (testifying that Gliksberg first raised the nomination on February 16, and confirming that a WhatsApp auto-delete notification appeared that same day).

³⁰ *See* Ct. Ch. R. 37(e)(2).

³¹ *See Beard Rsch.*, 981 A.2d at 1194.

A proportionate remedy is required to cure this prejudice.³² I award the defendants their reasonable attorneys' fees and expenses incurred in connection with their motion for spoliation sanctions and pursuit of supplemental discovery to compensate for the lost evidence.³³

* * *

The defendants' unclean hands defense fails, and their motion for spoliation sanctions is granted in part and denied in part. The defendants are directed to file a Rule 88 affidavit detailing the reasonable fees and expenses incurred in prosecuting the spoliation motion and pursuing the resulting supplemental discovery. ATG will have ten days to file any opposition to the defendants' fee request.

IT IS SO ORDERED.

Sincerely yours,

/s/ Lori W. Will

Lori W. Will
Vice Chancellor

³² See *id.* at 1189-90 (“The Court has wide latitude to fashion an appropriate remedy, but the remedy must be tailored to the degree of culpability of the spoliator and the prejudice suffered by the complaining party.”).

³³ See *Goldstein v. Denner*, 310 A.3d 548, 558 (Del. Ch. 2024) (ordering the defendants to pay the plaintiffs' fees and expenses for a spoliation motion and to “confirm that the ESI was not available from other sources” where the plaintiff was “prejudiced by having to spend time and resources” on the issue).