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Re: *Kevin Kulak v. Itshak (“Itzik”) On, et al.*,
C.A. No. 2023-0011-KSJM

Dear Counsel, Mr. On, and Ms. On,

This decision addresses seven motions: Defendants’ Motion for Recusal and Random Re-Assignment;¹ Defendants’ Motion for Reargument;² Defendants’ Motion for Relief from Judgment;³ Defendants’ Motion for Leave to Submit the Supplemental Declaration of Patrick Devlyn;⁴ Plaintiff’s Motion for Voluntary Dismissal of Derivative Claim and for Final Judgment;⁵ and Plaintiff’s First and Second Motions for Sanctions.⁶

I assume the reader’s familiarity with this action and refer to my letter decision issued on April 24, 2026, (the “April 24 Letter Decision”) for the factual background.⁷

¹ C.A. No. 2023-0011-KSJM Docket (“Dkt.”) 162.

² Dkt. 163.

³ Dkt. 167.

⁴ Dkt. 174.

⁵ Dkt. 173.

⁶ Dkts. 55, 111.

⁷ Dkt. 161.

The parties have engaged in extensive motion practice, and I have ruled from the bench or issued letter decisions to resolve their disputes.⁸ Most recently, I issued the April 24 Letter Decision, where I denied Defendants' various motions and Plaintiff's motion to strike, entered summary judgment for Plaintiff on Plaintiff's fraudulent inducement claim, denied Plaintiff's motion for summary judgment as to Plaintiff's claim for breach of fiduciary duty, and resolved to hold Plaintiff's two Motions for Sanctions under advisement.⁹

I concluded the April 24 Letter Decision with words of caution directed to Defendants, explaining that Rule 11 gives me discretion to act when parties fail to meet acceptable standards of litigation conduct.¹⁰ I stated that I did not wish to impose sanctions and would prefer that Defendants proceed in a more focused and disciplined manner.¹¹ But I warned Defendants that I would not hesitate to enter sanctions under Rule 11 if Defendants' troubling litigation conduct continued.¹²

⁸ Dkt. 88 at 20:3–26:18 (ruling from the bench on aspects of cross-motions for sanctions and taking under advisement remaining issues and motions); Dkt. 89 (resolving remaining issues raised by cross-motions for sanctions, denying Defendants' motion to compel, and addressing Defendants' motion to limit deposition and Plaintiff's fee request); Dkt. 109 (denying Defendants' motion to recuse); Dkt. 161 (resolving multiple motions and holding Plaintiff's two motions for sanctions in abeyance).

⁹ Dkt. 161.

¹⁰ *Id.* at 34–35.

¹¹ *Id.*

¹² *Id.*

Defendants did not heed my warning. Instead, they filed three additional motions within a month of the April 24 Letter Decision.¹³ Plaintiff responded to each of the motions.¹⁴ Plaintiff also moved to voluntarily dismiss his derivative claim for breach of fiduciary duty, which would effectively resolve all pending claims.¹⁵ Defendants then filed another motion, forcing Plaintiff to respond.¹⁶

Defendants' motions are denied, and Plaintiff's motion for voluntary dismissal is granted. This decision also denies Plaintiff's two pending sanctions motions.

I. DEFENDANTS' MOTIONS

A. Motion For Recusal And Random Re-Assignment

The impartiality of the presiding judge “is a fundamental principle of the administration of justice.”¹⁷ The Delaware Supreme Court has held that “[a]s a matter of due process, a litigant is entitled to neutrality on the part of the presiding judge[,] but the standards governing disqualification also require the appearance of impartiality.”¹⁸

Determining whether the presiding judge has a personal bias or prejudice requires that the court engage in a two-part analysis.¹⁹ First, “[s]he must, as a matter

¹³ Dkts. 162, 163, 167.

¹⁴ Dkts. 164, 168, 170.

¹⁵ Dkt. 173.

¹⁶ Dkts. 174, 176.

¹⁷ *Los v. Los*, 595 A.2d 381, 383 (Del. 1991).

¹⁸ *Id.* (citing *Ungar v. Sarafite*, 376 U.S. 575, 588 (1964)).

¹⁹ *Id.* at 384–85.

of subjective belief, be satisfied that [s]he can proceed to hear the cause free of bias or prejudice concerning that party.”²⁰ “Second, even if the judge believes that [s]he has no bias, situations may arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge’s impartiality.”²¹ Delaware’s approach to recusal “reflects an obvious tenet: that there is a duty incumbent on judges not to unreasonably burden fellow judges by recusing in response to a weak argument for disqualification.”²²

Under this test, recusal is not warranted. I am satisfied that I can continue to hear this action free of bias and prejudice. And there have been no circumstances that have created an appearance of bias sufficient to cast doubt as to my impartiality.

Instead of identifying issues relevant to recusal, Defendants argue that I relied on inaccurate facts in the April 24 Letter Decision.²³ I did not. Defendants’ motion is based on stenographical errors in the transcript that were promptly corrected by the Chief Court Reporter at Defendants’ request. In fact, a copy of the corrected transcript was sent to Defendants the same day that Defendants sent a consolidated errata to the Chief Court Reporter.²⁴ I had the corrected transcript when I issued my

²⁰ *Id.*

²¹ *Id.* at 385 (citing *State v. Walberg*, 325 N.W.2d 687, 692 (Wis. 1982)).

²² *State v. Desmond*, 2011 WL 91984, at *12 (Del. Super. Jan. 5, 2011) (internal quotation marks omitted), *aff’d*, 29 A.3d 245 (Del. 2011) (TABLE).

²³ *See generally* Dkt. 162.

²⁴ Dkt. 168, Ex. A.

decision. The Chief Court Reporter also advised that if Defendants believed there were additional inaccuracies to contact my chambers on how to proceed. Defendants did not do so until after I issued the April 24 Letter Decision.

Defendants' Motion for Recusal is denied. I also see no basis for reassignment, which I can grant at my discretion. Defendants' Motion for Reassignment is denied.

B. Motion For Reargument

Defendants seek reargument under Court of Chancery Rule 59(f).²⁵ Under Court of Chancery Rule 59(f), "[t]he Court will deny a motion for reargument 'unless the Court has overlooked a decision or principle of law that would have a controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected.'"²⁶ A motion for reargument is "not a mechanism for litigants to relitigate claims already considered by the court, or to raise new arguments that they failed to present in a timely way."²⁷ If a motion for reargument "merely rehashes arguments already made by the parties and considered by the

²⁵ Dkt. 163. Rule 59 was amended after the motion was filed, eliminating Rule 59(f) effective June 1. The operative rule governing reargument is now Rule 59(c).

²⁶ *Nguyen v. View, Inc.*, 2017 WL 3169051, at *2 (Del. Ch. July 26, 2017) (quoting *Stein v. Orloff*, 1985 WL 21136, at *2 (Del. Ch. Sep. 26, 1985)).

²⁷ *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 975581, at *1 (Del. Ch. Mar. 4, 2010) (footnote and internal quotation marks omitted) (first quoting *Am. Legacy Found. v. Lorillard Tobacco Co.*, 895 A.2d 874, 877 (Del. Ch. 2005)), *aff'd*, 7 A.3d 485 (Del. 2010) (TABLE); and then citing *Oliver v. Boston Univ.*, 2006 WL 4782232, at *1 (Del. Ch. Dec. 8, 2006)).

Court” in rendering the decision for which reargument is sought, the motion must be denied.²⁸ On a motion for reargument, the movant bears a “heavy burden.”²⁹

Defendants have not identified any law or fact that I misapprehended. The motion for reargument is denied.

C. Motion For Relief From Judgment

Defendants argue that relief from judgment is warranted under Rule 60(b)(3) and the catchall provision under Rule 60(b)(6).³⁰

Rule 60(b)(3) permits a court to relieve a party from a judgment in the event of intrinsic or extrinsic fraud, misrepresentation, or other misconduct of an adverse party.³¹ Rule 60(b) motions are not opportunities for a do-over or an appeal.³² Nor are Rule 60(b) motions granted easily.³³ The court will exercise its discretion to deny an application under Rule 60(b)(3) “if it is merely an attempt to relitigate the case or if the court otherwise concludes that fraud or misrepresentation has not been

²⁸ *Wong v. USES Hldg. Corp.*, 2016 WL 1436594, at *1 (Del. Ch. Apr. 5, 2016).

²⁹ *In re ML/EQ Real Est. P’ship Litig., Consol.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000).

³⁰ Dkt. 167.

³¹ Ct. Ch. R. 60(b)(3).

³² *Erste Asset Mgmt. GmbH v. Hees*, 341 A.3d 1008, 1020–21 (Del. 2025) (quoting *Carlyle Inv. Mgmt. LLC v. Nat’l Indus. Gp. (Hldg.)*, 2012 WL 4847089, at *5 (Del. Ch. Oct. 11, 2012), *aff’d*, 67 A.3d 373 (Del. 2013)).

³³ *Id.* at 1020 (citing *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 634–35 (Del. 2001)).

established.”³⁴ Defendants have not identified any fraud, misrepresentation, or misconduct by Plaintiff as required by Rule 60(b)(3).³⁵

Rule 60(b)(6) permits the court to relieve a party from judgment for any other reason that justifies relief.³⁶ The Rule 60(b)(6) standard is stringent, and courts must find “extraordinary circumstances” before granting relief.³⁷ “Rule 60(b)(6) does not apply when one party has made a deliberate choice to handle a case in a certain way, suffers an adverse result, and therefore seeks to adopt a new strategy.”³⁸ For relief under Rule 60(b)(6), Defendants rehash their argument made in the motion for recusal and point to transcript errors that were promptly corrected.³⁹ Defendants were given an opportunity to contact my chambers if they believed there were any additional inaccuracies in the transcript but chose not to do so until after I issued the April 24 Letter Decision.⁴⁰ Defendants made a “deliberate choice to handle a case in a certain way” and thus cannot use a Rule 60(b)(6) motion to relitigate an adverse

³⁴ *Franklin v. Glenhill Advisors LLC*, 2023 WL 569192, at *10 (Del. Ch. Jan. 27, 2023) (quoting *Wilson v. Montague*, 19 A.3d 302, 2011 WL 1661561, at *3 (Del. May 3, 2011) (ORDER)).

³⁵ See Dkt. 167 at 3–4.

³⁶ Ct. Ch. R. 60(b)(6).

³⁷ *Carlyle*, 2012 WL 4847089, at *13 (first citing *Bachtle v. Bachtle*, 494 A.2d 1253, 1256 (Del. 1985); and then citing *Scureman v. Judge*, 1998 WL 409153, at *5 (Del. Ch. June 26, 1998)).

³⁸ *Id.* at *13

³⁹ See Dkt. 167, Exs. A–D.

⁴⁰ Dkt. 168, Ex. A.

result.⁴¹ Defendants therefore have failed to show extraordinary circumstances to warrant relief under Rule 60(b)(6).

Defendants' motion for relief under Rules 60(b)(3) and 60(b)(6) is denied.

D. Motion For Leave To Submit Supplemental Declaration

Defendants seek leave to submit the Supplemental Declaration of Patrick Devlyn.⁴² A court will allow such request when doing so is in the interests of fairness and substantial justice, but such matters are ultimately left to the court's discretion.⁴³ Because denying this motion and granting Plaintiff's motion, as explained below, will give finality to both parties, the motion is denied.

II. PLAINTIFF'S MOTIONS

A. Motion For Voluntary Dismissal, Final Judgment, And Fees

On September 16, 2026, Plaintiff filed a motion asking the court to dismiss his derivative claim against Defendants without prejudice, enter a final judgment on Count I of the Complaint that was granted partial summary judgment, shift fees, and grant the sanctions motions.⁴⁴

⁴¹ See *Carlyle*, 2012 WL 4847089, at *13.

⁴² Dkt. 174.

⁴³ *Whittington v. Dragon Gp., LLC*, 2012 WL 3089861, at *3 (Del. Ch. July 20, 2012) (quoting *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, 2010 WL 1818907, at *1 (Del. Ch. Apr. 23, 2010)).

⁴⁴ Dkt. 173.

1. Voluntary Dismissal

Whether to permit voluntary dismissal under Rule 41(a)(2) is a discretionary matter for this court.⁴⁵ “In exercising its discretion, the court considers whether dismissal would cause the defendants to suffer plain legal prejudice.”⁴⁶ Relevant factors include: (1) the defendants’ effort and expense in preparation for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; (3) insufficient explanation for the need to take a dismissal; and (4) any summary judgment filed by the defendants.⁴⁷ The court must deliver substantial justice to both parties.⁴⁸

The factors support granting Plaintiff’s request for voluntary dismissal. Defendants have spent comparatively less funds in defending this action. Defendants’ counsel withdrew from this matter in early 2024,⁴⁹ and Defendants have chosen to proceed self-represented. Plaintiff has litigated this matter promptly, so there is no record of excessive delay or lack of diligence by Plaintiff. Plaintiff has spent his own financial resources litigating this matter on behalf of an allegedly

⁴⁵ *Paragon Techs., Inc. v. Ocean Power Techs., Inc.*, 2024 WL 4235638, at *1 (Del. Ch. Sep. 19, 2024).

⁴⁶ *Id.* (internal quotation marks omitted) (quoting *Draper v. Paul N. Gardner Defined Plan Tr.*, 625 A.2d 859, 863 (Del. 1993)).

⁴⁷ *Id.* (quoting *Draper*, 625 A.2d at 864).

⁴⁸ *In re Marriott Hotel Props. II Ltd. P’ship Unitholders Litig.*, 1997 WL 589028, at *6 (Del. Ch. Sep. 17, 1997).

⁴⁹ Dkt. 54.

defunct company and has determined that it is no longer financially or practically feasible for Plaintiff—that is an adequate explanation for dismissal. There are no dispositive motions pending. Dismissal would result in substantial justice for the parties.

Rule 23.1(d)(3)(A) permits dismissal without notice if the dismissal is to be without prejudice.⁵⁰ Because Plaintiff seeks to dismiss the derivative claim without prejudice, I find that notice is not required.

Plaintiff's motion to voluntarily dismiss Count II of the Complaint is granted.

2. Entry Of Final Judgment

Plaintiff requests an entry of final judgment on Count I of fraudulent inducement,⁵¹ for which I granted summary judgment in the April 24 Letter Decision.⁵²

Under Rule 54(b), the court may direct entry of judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.⁵³ Entering final judgment on Plaintiff's fraudulent inducement claim would start the clock for Defendants' time to appeal and following any appeal, allow Plaintiff to recover. Therefore, there is no just reason for delay and

⁵⁰ Ct. Ch. R. 23.1(d)(3)(A).

⁵¹ Dkt. 173.

⁵² See Dkt. 161 at 14–20.

⁵³ Ct. Ch. R. 54(b).

final judgment on Count I can be entered. Plaintiff's request for pre- and post-judgment interest is also granted.

3. Fees

Delaware courts follow the American Rule that each party is expected to pay its own attorneys' fees regardless of the outcome of the litigation. This court, however, retains the ability to shift fees when faced with vexatious litigation conduct "to deter abusive litigation and to protect the integrity of the judicial process."⁵⁴ This court may award fees "in its discretion . . . 'where equity requires.'"⁵⁵ This court has used fee-shifting as "a method for reducing and appropriately allocating the costs of vexatious behavior sufficiently serious that justice requires such mitigation."⁵⁶ This exception is frequently referred to as the "bad faith" exception to the American rule, although the exception itself is perhaps more expansive, and there is "no single, comprehensive definition of 'bad faith' that will justify a fee-shifting award."⁵⁷ To capture the sorts of vexatious activities that the bad-faith exception is intended to address, this court employs the "glaring egregiousness" standard.⁵⁸

⁵⁴ *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

⁵⁵ *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 687 (Del. 2013) (quoting *Burge v. Fidelity Bond and Mortg. Co.*, 648 A.2d 414, 421 (Del. 1994)).

⁵⁶ *Martin v. Harbor Diversified, Inc.*, 2020 WL 568971, at *1 (Del. Ch. Feb. 5, 2020).

⁵⁷ *Montgomery Cellular*, 880 A.2d at 227.

⁵⁸ See, e.g., *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 879 (Del. 2015) (affirming this court's evaluation of fee shifting under the "glaring egregiousness" standard); *Isr. Disc. Bank of N.Y. v. First State Depository Co.*, 2013 WL 2326875, at *28–29 (Del. Ch. May 29, 2013) (applying the "glaring egregiousness" standard in assessing

Delaware courts have shifted fees for glaringly egregious conduct, such as forcing a plaintiff to file suit to “secure a clearly defined and established right,”⁵⁹ “unnecessarily prolong[ing] or delay[ing] litigation, falsif[ying] records, or knowingly assert[ing] frivolous claims.”⁶⁰

Although there is a fine line between glaringly egregious conduct and an aggressive litigation position, Defendants crossed the line in this case. Failing to heed my warning, Defendants filed three motions within a month of the April 24 Letter Decision challenging the decision and a fourth later, forcing Plaintiff to spend more financial resources to respond and needlessly increasing the cost of litigation for Plaintiff.

potential fee shifting); *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 46–48 (Del. Ch. 2010) (same); *In re Charles Wm. Smith Tr.*, 1999 WL 596274, at *2–4 (Del. Ch. July 23, 1999) (same).

⁵⁹ *McGowan v. Empress Ent., Inc.*, 791 A.2d 1, 4 (Del. Ch. 2000) (quoting *Abex v. Koll Real Estate Gp., Inc.*, 1994 WL 728827, at *20 (Del. Ch. Dec. 22, 1994)) (“If McGowan had a clearly established legal right to inspect Empress's books and records, and Empress's conduct forced him to bring this action to secure that right, then the defendant can be found to have acted in bad faith and be ordered to pay the plaintiff's legal fees and expenses.”); *accord. Donnelly v. Keryx Biopharms., Inc.*, 2019 WL 5446015, at *6 (Del. Ch. Oct. 24, 2019); *Norman v. US MobilComm, Inc.*, 2006 WL 1229115, at *4 (Del. Ch. Apr. 28, 2006).

⁶⁰ *RBC Cap. Mkts., LLC v. Educ. Loan Tr. IV*, 2016 WL 703852, at *3 (Del. Super. Feb. 17, 2016) (quoting *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998)); *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 2013 WL 5152295, at *10 (Del. Ch. Sep. 16, 2013) (quoting *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005)); *In re SS & C Techs., Inc. S'holders Litig.*, 948 A.2d 1140, 1150 (Del. Ch. 2008) (quoting *Johnston*, 720 A.2d at 546).

Although Delaware courts have described the bad faith standard as “subjective,” this court has shifted fees based on litigation conduct without launching a fact-intensive investigation into the offending party’s state of mind.⁶¹ Moreover, where this court shifts fees to curb and correct for overly vexatious litigation behavior, a showing of glaringly egregious litigation conduct is enough. To the extent that a finding of bad faith is necessary, then the court can infer bad faith based on the litigation conduct alone. In this case, such an inference is appropriate.

Plaintiff requests fees and expenses he incurred responding to Defendants’ Motion for Recusal, Motion for Leave to Submit the Supplemental Declaration, and Motion for Relief from Judgment under Rule 60. The fee requests are granted.

B. Motion For Sanctions

There are two pending sanctions motions. In his first motion for sanctions, Plaintiff argues that Defendants spoliated evidence and sought an adverse inference on that basis.⁶² I took that motion under advisement to allow the trial record and arguments to inform a resolution. I also held Plaintiff’s second motion in abeyance to allow development of a fuller record.⁶³

⁶¹ See, e.g., *McGowan*, 791 A.2d at 4 (holding that the defendant “acted in subjective bad faith by failing to honor its promises to produce its books and records, and later by opposing [the plaintiff’s] § 220 action to enforce his legal right to inspect those books and records,” despite there being no record of the defendant’s state of mind).

⁶² See Dkt. 161 at 26.

⁶³ *Id.* at 29.

Because this decision grants Plaintiff's voluntary dismissal of the only remaining claim in his complaint, there is no reason or opportunity for development of a fuller record. Accordingly, the sanctions motions are denied.

III. CONCLUSION

Defendants' motions are denied. Plaintiff's motion for voluntary dismissal is granted and Plaintiff's First and Second Sanctions Motions are denied. Plaintiff is instructed to submit a proposed form of final order implementing this decision.

Sincerely,

/s/ Kathaleen St. J. McCormick

Chancellor

cc: All counsel of record (by *File & ServeXpress*)