

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

VALE VENTURES IA LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2022-1100-NAC
	)	
GRAY JAY MANAGEMENT	)	
INVESTMENTS LLC,	)	
	)	
Defendant.	)	

POST-TRIAL MEMORANDUM OPINION

Date Submitted: April 9, 2026

Date Decided: October 21, 2026

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In 2019, a private equity firm purchased an oilfield saltwater disposal company operating in the American southwest. Like many similar deals, the private equity firm sought to ensure operational continuity and leverage prior management's expertise by retaining certain key executives. The private equity firm also asked those executives to invest in the post-acquisition entity—which they agreed to do via another entity formed for that purpose. Due to the transaction's unique financing structure, the sides committed to a staggered investment structure tied to the private equity firm's repayment of a seller note used to help fund the acquisition. The document memorializing the investment agreement enumerates a series of circumstances under which the executives' obligation automatically terminates.

After the private equity acquisition, the saltwater disposal business struggled due to a series of micro- and macroeconomic factors. As a result, the private equity company risked defaulting on the loans it used to finance the transaction. Ultimately, the private equity firm entered a new transaction whereby it exchanged the saltwater disposal business for a minority stake in a competitor and the full repayment of the maturing debt. Afterward, the private equity firm demanded that the executives fulfill their remaining investment obligation. The executives refused, insisting that the transaction the private equity firm used to pay its debt caused the investment agreement's termination or excused their performance. The private equity firm filed this suit seeking to enforce the executives' investment obligation, through the executives' investment entity. In this post-trial decision, the Court concludes that the investment company breached its investment obligation and that its affirmative

defenses do not excuse its non-performance. Accordingly, the Court will enter judgment for Plaintiff.

I. FACTUAL BACKGROUND

The facts discussed herein are drawn from the extensive post-trial record.¹ Having evaluated the trial evidence, the Court makes the following findings of fact.²

A. The Parties, Relevant Non-Parties, And Vale’s Acquisition Of OWL

Plaintiff Vale Ventures IA LLC (“Vale”) is a Delaware limited liability company (“LLC”) ultimately owned by non-party Instar Asset Management (“Instar”), a Canadian private equity company.³ Instar formed Vale in August 2019 to facilitate its purchase (“Transaction”) of the membership interests of non-parties Owl Asset Co. 1, LLC, OWL Lea County LLC, and OWL WestWater LLC (collectively, “OWL”).⁴ OWL operates in the saltwater disposal business, handling the toxic “brine” that is a

¹ Citations to “Dkt.” refer to the docket in this matter. Citations to “JX” refer to the parties’ joint trial exhibits. Citations to “Tr.” refer to the Trial Transcript. *See* Dkt. 238; Dkt. 239; Dkt. 240. Citations to “PTO” refer to the parties’ joint Pre-Trial Order. *See* Dkt. 227.

² *See Stercula v. Wengert*, 2025 WL 1881783, at *4–5 (Del. Ch. July 8, 2025) (“[I]n a bench trial, the Court is the finder of fact and must weigh the credibility of each witness—fact and expert alike.”). Unless otherwise noted, the parties stipulated to the following facts or proved them by a preponderance of the evidence. *See Buck v. Viking Hldg. Mgmt. Co. LLC*, 2024 WL 4352368, at *7 (Del. Super. Sept. 30, 2024) (“In a bench trial, the judge . . . must assess the credibility of each witness and determine the weight given to the testimony. After reviewing all the evidence presented, the court in its discretion as the fact finder is free to accept or reject any and or all sworn testimony.” (internal quotation marks omitted)).

³ PTO ¶ 6; Tr. (Smith) at 251.

⁴ PTO ¶ 12; Tr. (Smith) at 11. *See also* JX005 (“Vale LLC Agreement”).

byproduct of extracting oil and natural gas via hydraulic fracturing.⁵ Instar indirectly owns Vale through its control of the non-party investment vehicle Oceanides Holding (“Oceanides”).⁶ After the Transaction, Vale controlled OWL through Minerva Infrastructure (“Minerva”), a holding company that owns Horus Infrastructure (“Horus”), the operating company that ran the business.⁷

Defendant Gray Jay Management Investments, LLC (“Gray Jay”) is a Delaware LLC whose members include former individual defendants Don N. Hines, Royce Preston Carr, Jr., Thomas Christian Cooper, and Roger Johnson (collectively, “Gray Jay Members”).⁸ Cooper and Johnson founded OWL after selling a different saltwater disposal company.⁹ Prior to the Transaction, Cooper served as OWL’s CEO and the other Gray Jay Members held key executive and operational roles.¹⁰ The Gray Jay Members formed Gray Jay to facilitate their investment in Vale as part of

⁵ Tr. (Cooper) at 435–38. Hydraulic fracturing is also referred to as “fracking.” Because the brine is “about five times saltier than seawater” and contains “chemicals, [] [] heavy metals, [] [and] hydrocarbons[.]” it needs to be injected “miles deep underneath the surface” by saltwater disposal wells, “beneath the fresh water aquifer.” *Id.* (Cooper) at 436–37.

⁶ *Id.* (Smith) at 12–13 (“Oceanides is owned by a series of funds managed by Instar[.]”).

⁷ *Id.* (Smith) at 12–13; *id.* (Cooper) at 457.

⁸ PTO ¶¶ 7–11

⁹ Tr. (Cooper) at 438–45.

¹⁰ *Id.* (Cooper) at 469–70.

the Transaction.¹¹ Due to that investment, Gray Jay owns 1.4% of Vale’s membership units and is the only other member besides Oceanides.¹²

On September 6, 2019, Vale entered into the Transaction, agreeing to purchase OWL for approximately \$480 million.¹³ That figure included cash, a \$135 million senior term loan from a third-party bank¹⁴ secured by OWL’s assets (“Senior Debt Agreement”), and a \$93.4 million unsecured vendor promissory note (“VPN”).¹⁵

The VPN matured April 25, 2023, six months after the Senior Debt Agreement.¹⁶ Under the VPN, Vale is “Borrower” and OWL AssetCo 1 Holdings, LLC (“OWL Lender”) serves as the “Administrative Lender.”¹⁷ OWL’s pre-Transaction private equity partner, NGP, controlled the OWL Lender and had ultimate decision

¹¹ *Id.* (Cooper) at 475–76. *See also* JX016 (“Gray Jay LLC Agreement”).

¹² *Tr.* (Smith) at 17; *id.* (Cooper) 456–57.

¹³ PTO ¶ 12

¹⁴ *Tr.* (Johnson) at 672; JX018 (“Senior Debt Agreement”). The Senior Debt Agreement also established a \$45 million revolving credit facility. JX018.

¹⁵ JX020 (“VPN”). Vale originally sought to finance the entire Transaction cost without taking the VPN; yet Vale had to turn to the sellers when other financing fell through. *Tr.* (Cooper) at 458–59; *id.* (Johnson) at 670–72.

¹⁶ VPN §§ 1.01, 2.02; Senior Debt Agreement § 1.1 (defining “Term Loan Maturity Date” as “October 25, 2022[.]”). Notably, the VPN was at the Vale level of the post-Transaction enterprise, while the Senior Debt Agreement was at the Horus level as Horus held the OWL Assets securing the senior debt. *See* Senior Debt Agreement; VPN.

¹⁷ VPN at Preamble, § 1.01. Vale did not actually receive any funds under the VPN. Instead, the VPN constituted “seller financing” such that “it was part of the purchase price that was just unpaid.” *Tr.* (Cooper) at 623–24. Once the VPN was paid off, funds flowed from the OWL Lender to its three members, including OWL’s pre-Transaction private equity partner NGP and a group called Palo Alto SWD Investors LP. *Id.* (Cooper) at 445–48, 623–24. Palo Alto SWD Investors LP had about 60 investors including Cooper and Johnson, such that when the VPN was repaid, they personally received funds. *Id.* (Cooper) at 624.

making authority for the lenders under the VPN.¹⁸ Several provisions of the VPN are central to the parties' dispute. Section 2.03 governs Vale's ability to prepay the VPN.¹⁹ Section 7.01 lists various circumstances that constitute an "Event of Default" under the VPN, with several limiting Vale's ability to dispose of OWL or its assets.²⁰ In turn, Section 7.02 details the lenders' remedies if an event of default occurs, including the ability to accelerate the VPN.²¹

The parties memorialized the Transaction's substantive terms in a Membership Interest Purchase Agreement ("MIPA").²² The MIPA designated certain OWL individuals, including Cooper, Johnson, Hines, and Carr, as "Key Employees"²³ whose post-Transaction employment was essential "to ensure continuity of operations."²⁴ Accordingly, the Gray Jay Members each executed materially identical employment agreements on the same day the parties signed the MIPA ("Employment

¹⁸ *Id.* (Cooper) at 624–25

¹⁹ VPN § 2.03.

²⁰ *Id.* § 7.01.

²¹ *Id.* § 7.02.

²² PTO ¶ 13; JX014 ("MIPA").

²³ MIPA at Schedule 1.1.

²⁴ Tr. (Smith) at 35–37. The MIPA stated that Vale's willingness to enter the Transaction was contingent upon the Key Employees' employment. MIPA at Recitals; *see* Tr. (Smith) at 36–37.

Agreements”).²⁵ Under those Employment Agreements, Cooper served as OWL’s post-Transaction CEO, with Johnson as Chief Commercial Officer.²⁶ The Employment Agreements detail the various scenarios in which the Key Employee or OWL can terminate employment. The employee can resign for “Good Reason” if there is “a material diminution in [the individual’s] . . . compensation or [] authority, duties and responsibilities with [OWL].”²⁷ Conversely, OWL can terminate for “Cause” if the employee commits a “material breach of th[e] [Employment] Agreement or . . . an act of gross negligence, willful misconduct, or breach of fiduciary duty[.]”²⁸

Beyond ensuring operational continuity through the Employment Agreements, Instar sought to create “alignment” between itself and the Key Employees concerning OWL’s post-Transaction operations.²⁹ Instar requested that the Key Employees

²⁵ *E.g.*, JX011 (Johnson’s Employment Agreement); JX012 (Cooper’s Employment Agreement). Those agreements provide for three primary forms of compensation including “annual awards under [OWL’s] long-term incentive compensation plan[.]” *E.g.*, JX011 § 3(c).

²⁶ *See id.*; JX012; Tr. (Cooper) at 470.

²⁷ JX011 §§ 5(b)(i), 14(j). The employees could also quit “at any time and for any reason, or no reason at all, upon thirty [] days’ advanced written notice to [OWL].” *Id.* § 5(b)(ii).

²⁸ *Id.* §§ 5(c)(i), 14(d). OWL could also terminate the Key Employees “for convenience at any time and for any reason, or no reason at all, upon not less than thirty [] days’ written notice[.]” *Id.* § 5(c)(ii).

²⁹ Tr. (Smith) at 47, 62, 76–77. Vale’s President, Greg Smith, testified that creating that “alignment [was] fundamental” to the Transaction’s long-term success to (1) ensure an “alignment of interest”; (2) leverage Key Employees’ “relationship . . . with key customers, suppliers, and regulators”; (3) promote “the continuity of the business”; and (4) prevent a “pump and dump” by the sellers. *Id.* (Smith) at 9, 63, 77.

make a significant equity investment in Vale.³⁰ The Gray Jay Members agreed and formed Gray Jay to pool and facilitate their investment.³¹ In the Gray Jay LLC Agreement the Gray Jay Members agreed to make “[c]apital [c]ontributions . . . when requested by the Managers [of Gray Jay] pursuant to a capital call notice” to fund their investment in Vale.³²

The parties memorialized the commitment to invest in Vale in an Equity Commitment Letter (“ECL”).³³ Critically, only Vale and Gray Jay signed the ECL; the Gray Jay Members are not individual parties to that agreement.³⁴ The ECL’s terms are central to the parties’ dispute.³⁵ Under the ECL, Gray Jay agreed to purchase \$10 million in Vale equity securities in a staggered investment “subject only to the conditions set forth [t]herein[.]”³⁶ Specifically, Gray Jay committed to invest

³⁰ *Id.* (Cooper) at 473–74.

³¹ *Id.* (Cooper) at 475–76. *See also* Gray Jay LLC Agreement.

³² Gray Jay LLC Agreement § 6.1(b).

³³ *See* JX013 (“ECL”). Vale and Gray Jay executed the ECL on September 6, 2019. *Id.* at 1. The ECL has a Delaware choice of law and forum selection clause. *Id.* at 3–4.

³⁴ *Id.* at Signatures.

³⁵ *See* Dkt. 171 (“SAC”) ¶¶ 4–5, 7, 20–27, 43–45, 48–52, 57.

³⁶ ECL at 1; PTO ¶¶ 16–17. The ECL allowed Gray Jay to buy Vale securities “at a cash purchase price equal to the purchase price [] [] at the [Transaction’s] Closing, unless [Vale] has more recently issued Securities at a more favorable purchase price and in such instance, [Gray Jay’s] purchase price shall be the lower of such amounts.” ECL at 1.

\$2 million when the Transaction closed and up to \$8 million following, and in proportion to, Vale's repayment of the VPN.³⁷

Recognizing that Vale's business could change over time, Gray Jay secured several protections in the ECL.³⁸ Namely, Gray Jay's obligation to purchase additional Vale securities:

will terminate automatically and immediately upon the valid termination of the MIPA in accordance with its terms, the bankruptcy or insolvency of [Vale], upon any default and acceleration of the [VPN] or at such point as InstarAGF Asset Management Inc., together with [Vale] and their respective affiliates, ceases to hold more than fifty percent (50%) of the issued and outstanding [Vale] [s]ecurities.³⁹

Additionally, Vale agreed in the ECL that:

(a) no remedy, recourse or right or recovery hereunder . . . may be had against any direct or indirect, prior, current or future securityholder, partner, manager or affiliate of [Gray Jay] . . . whether by the enforcement of any judgment or assessment or by any legal or equitable proceeding . . . and (b) no personal liability whatsoever will attach to, be imposed on or otherwise be incurred by any [such person] under this letter agreement . . . or for any claim based on, in respect of or by reason of such obligations or by their creation.⁴⁰

The ECL also states that:

(i) under no circumstances shall the maximum liability of [Gray Jay] hereunder exceed [\$10 million] . . . less any [purchase of Vale securities] made by [Gray Jay] for any reason; and (ii) under no circumstances shall

³⁷ ECL at 1; PTO ¶¶ 16–17.

³⁸ See ECL at 2–3; Tr. (Johnson) at 685 (“[B]ecause they needed the [VPN], which caused a delay in us getting paid, which further [] [] caused a delay in us putting money in, there was concern that our commitment today would not mirror, at the end of the day, what we were thinking we were getting into.”).

³⁹ ECL at 2.

⁴⁰ *Id.*

[Gray Jay] be liable for any special, incidental, consequential, indirect, exemplary, or punitive damages.⁴¹

In accordance with the ECL's terms, Gray Jay purchased \$2 million in Vale securities after the Transaction closed.⁴² On December 19, 2019, Gray Jay admitted more investors and purchased an additional \$2.875 million in Vale securities, bringing its total investment under the ECL to \$4.875 million.⁴³

B. The Post-Transaction Business

OWL underperformed in 2020 and 2021.⁴⁴ A variety of macroeconomic factors contributed to OWL's poor performance, including (1) the COVID-19 pandemic's disruption of global oil markets, (2) an OPEC price war which sent oil prices negative for the first time in history, and (3) Texas winter storm Uri.⁴⁵ Vale and Instar also ascribed OWL's post-Transaction struggles to Cooper and Johnson's poor management.⁴⁶ Instar's CEO, Greg Smith, testified that Cooper and Johnson (1) were unable to retain OWL's biggest client, Concho; (2) "dramatically overpaid" for a series of acquisitions; (3) engaged in several "related-party transaction[s]"; and (4)

⁴¹ *Id.* at 2–3.

⁴² *See* JX017; JX214.

⁴³ PTO ¶¶ 25, 30; *see* Dkt. 215 at 3.

⁴⁴ *See* Tr. (Smith) at 50–52, 253–58; *id.* (Cooper) at 505–09; *id.* at (Johnson) 692–95.

⁴⁵ *See id.* (Smith) at 253–58; *id.* (Cooper) at 505–09; *id.* (Johnson) at 692–95.

⁴⁶ *See, e.g., id.* (Smith) at 50–52.

implemented a culture “of ‘bullying’ and ‘gaslighting’” other employees.⁴⁷ Unsurprisingly, Cooper and Johnson dispute those assertions.⁴⁸

In August 2021, a low-pressure event (“Madera Event”) occurred at the Madera SWD Well #1 in New Mexico (“Madera Well”).⁴⁹ The low-pressure at the Madera Well occurred contemporaneously with “a geyser spewing [brine] water” at a relatively nearby “shallow, plugged, old water well.”⁵⁰ The Madera Event had an immediate negative impact on OWL’s business, causing the Madera Well to shut down for several months for repairs.⁵¹ The extent of the Madera Event was not immediately apparent; it was unclear whether all four of the Madera Well’s protective casing layers failed and the brine wastewater being pumped deep underground via the well had escaped the well and significantly contaminated the surrounding water table.⁵²

OWL reported the Madera Event to the New Mexico Oil Conservation Division (“OCD”), a state regulatory body in charge of overseeing oil production and its

⁴⁷ *Id.*

⁴⁸ Cooper and Johnson insist (1) OWL and Instar jointly agreed not to pursue Concho’s business, which required a \$200 million payment; (2) there was no bullying or gaslighting and any evidence to the contrary was fabricated; and (3) all transactions they approved were in OWL’s best interest. *See id.* (Cooper) at 500–05, 508–10, 534–35; *id.* (Johnson) at 694–96, 715.

⁴⁹ *See, e.g.*, JX087; Tr. (Smith) at 258. Two Horus subsidiaries, non-parties OWL Madera SWD, LLC and OWL SWD Operating, LLC, own and operate the Madera Well, respectively. JX074 at Schedule 3.3(c). The Madera Well is in the Permian Basin, which is where OWL operates. *E.g.*, Tr. (Cooper) at 436.

⁵⁰ *E.g.*, Tr. (Johnson) at 697.

⁵¹ *See* JX061; JX082; JX083; Tr. (Johnson) at 696.

⁵² *See, e.g.*, JX087; JX212.

environmental impact.⁵³ Under OCD's oversight, OWL investigated the Madera Event and repaired the Madera Well, while also regularly discussing the matter internally.⁵⁴ Notably, the contemporaneous record presented at trial does not describe the Madera Event as a catastrophic or unprecedented environmental disaster, or indeed as anything approaching such an event.⁵⁵

On January 18, 2022, the OCD cleared the Madera Well to resume operations.⁵⁶ The Madera Event did not result in any further action, until late 2023 as described below.⁵⁷

Although the parties dispute their cause, OWL's post-Transaction financial difficulties prompted Vale to hire Greg Pollard in September 2021 to help address the company's debt and liquidity concerns.⁵⁸ Hiring Pollard exacerbated existing tension between Cooper and Johnson on one hand and Instar and Vale on the other.⁵⁹ On October 13, 2021, Cooper and Johnson each provided notice that Pollard's supposed usurpation of their roles at OWL gave them "good reason" to terminate their

⁵³ See *e.g.*, Tr. (Smith) at 193, 266; *id.* (Cooper) at 437–38.

⁵⁴ See JX070; JX080; JX081; JX084; JX086; JX087; JX088; JX090; JX091; JX092; JX095; JX097; JX098; JX099; JX100.

⁵⁵ See JX070; JX080; JX084; JX086; JX087; JX090; JX091; JX092; JX095; JX097; JX098; JX099; JX100.

⁵⁶ See Tr. (Smith) at 193–97; JX114 ("Injecting 25K at Madera right now!").

⁵⁷ See, *e.g.*, Tr. (Smith) at 195.

⁵⁸ See JX082. The parties dispute whether Pollard's role was liquidity consultant or chief restructuring officer. See Tr. at 242–44, 527–28, 587, 709–10.

⁵⁹ See, *e.g.*, *id.* (Smith) at 244–46; *id.* (Johnson) at 709–11; JX351; JX352.

employment.⁶⁰ Instead of invoking the 30-day cure period,⁶¹ Vale purported to terminate Cooper and Johnson for cause.⁶² Ultimately, Cooper, Johnson, and Vale settled on December 23, 2021, with Vale’s termination of Cooper and Johnson being deemed termination for “convenience.”⁶³

C. The Pilot Transaction

The challenges discussed above left OWL financially distressed.⁶⁴ By August 2021, OWL was having difficulty paying vendors and was at risk of violating the Senior Debt Agreement’s debt-to-equity ratio covenant.⁶⁵ While Vale negotiated for additional headroom on the covenant, it faced a bigger problem—the soon-maturing \$270 million in debt from the Senior Debt Agreement and VPN.⁶⁶ Efforts to refinance were unsuccessful as lenders felt OWL was overleveraged and did not want to extend

⁶⁰ JX351; JX352.

⁶¹ *E.g.*, JX011 § 5(b)(i).

⁶² *See* JX353.

⁶³ JX103; *see* Tr. (Smith) at 43–44, 52–53; *id.* (Cooper) at 535–36. Cooper and Johnson received the same severance to which they would have been entitled if they resigned for “good reason” under the Employment Agreements. *See, e.g.*, JX103.

⁶⁴ *See, e.g.*, JX059 (discussing OWL’s “[n]egative EBITDA” forecast, “increased cash usage[,]” and “long-term risk to customer contracts[.]”); JX073 (highlighting micro and macro effects that “have led to a trough in EBITDA and covenant issues in the near term and [the] need to address maturing senior debt in the next twelve months.”).

⁶⁵ JX059; JX073.

⁶⁶ *See, e.g.*, Tr. (Johnson) at 700–03 (“the senior debt was maturing at or less than 12 months out . . . and then we had the vendor loan note right behind that.”).

the Senior Debt Agreement’s maturity date beyond the VPN’s.⁶⁷ After failing to extend the VPN’s maturity date,⁶⁸ Vale began exploring selling OWL as a means of paying off the VPN and Senior Debt Agreement.⁶⁹ OWL’s deteriorating financial condition caused the company to adopt a “merger or bust” strategy, believing that “[i]f [they] didn’t get [a] merger done . . . OWL was going to be no more.”⁷⁰

Vale explored a variety of strategic alternatives to address its financial problems.⁷¹ Throughout the merger exploration process, Vale executives considered how a potential deal could impact Gray Jay’s obligation to purchase securities under the ECL.⁷² Valuation disputes and potential acquirors’ concerns regarding OWL’s debt killed most potential interest in a deal at the starting gate.⁷³

In March 2022, OWL discussed a potential deal with Pilot Travel Centers LLC (“Pilot”), whereby Pilot’s saltwater disposal subsidiary, Pilot Water Solutions

⁶⁷ See JX073; JX076; Tr. (Cooper) at 523–24; *id.* (Johnson) at 703–04.

⁶⁸ See Tr. (Smith) at 278; *id.* (Johnson) at 704–05.

⁶⁹ See, e.g., *id.* (Johnson) at 705–07.

⁷⁰ *Id.* (Hines) at 807–08. See also *id.* (Hines) at 809 (“If [OWL] wouldn’t have got the merger done . . . OWL would have defaulted on our debt. We were insolvent.”). In the first half of 2022 OWL’s financial condition continued to deteriorate, and by June it had less than \$3 million cash on hand and owed over \$9 million to vendors who were “calling every day.” *Id.* (Hines) at 807, 853–54.

⁷¹ E.g., *id.* (Cooper) at 524–26; *id.* (Johnson) at 705–06; JX115.

⁷² See JX117; JX118; JX157.

⁷³ See Tr. (Cooper) at 526; *id.* (Johnson) at 706.

(“PWS”), would acquire OWL or its assets.⁷⁴ Critically, a deal with Pilot “didn’t require refinancing[.]” making it the only viable option.⁷⁵ OWL vigorously pursued the Pilot deal, using a “light-touch” in diligence,⁷⁶ being “very careful” with what it told PWS,⁷⁷ and “pulling every lever [it] could to boost EBITDA[.]”⁷⁸ On April 27, 2022, Instar and OWL signed a letter of intent with Pilot detailing a potential combination of PWS and OWL (“Pilot Transaction”).⁷⁹ Thereafter, the Pilot Transaction parties began exchanging draft purchase agreements.⁸⁰

On August 26, 2022, Minerva, Horus, and PWS executed a Contribution Agreement (“Contribution Agreement”) detailing the Pilot Transaction’s terms.⁸¹ Under the Contribution Agreement, PWS received Minerva’s interest in OWL in exchange for (1) providing Minerva a 20.5% passive interest in PWS and (2) agreeing

⁷⁴ See, e.g., JX119.

⁷⁵ See *id.* (Hines) at 835–36; JX119 (OWL noting Pilot “understands our refinancing timeline and is working to get ahead of that.”); JX123 (emphasizing that “[r]efinancing debt is not a condition precedent to closing” a deal with PWS).

⁷⁶ JX123.

⁷⁷ E.g., Tr. (Hines) at 816–17. Indeed, OWL’s general counsel told Hines, OWL’s then-president, that they did not need to inform PWS or Pilot about the Madera Event. See *id.* (Hines) at 817–19.

⁷⁸ E.g., *id.* (Hines) at 808–09.

⁷⁹ JX129.

⁸⁰ See, e.g., JX134; JX135. PWS’s initial draft contemplated a transaction between PWS, Vale, and Vale’s Members. See JX134. Instar, however, pushed for the transaction to occur “downstream of Vale.” JX144. Doing so would ensure Instar “continue[d] to hold at least 50% of Vale’s outstanding units” such that “no change of control [] occurred per the ECL.” JX156.

⁸¹ See JX151 (“Contribution Agreement”).

to pay off the VPN.⁸² Namely, “at the Closing Minerva agree[d] to contribute the Contributed Interest to [PWS] . . . and [PWS] agree[d] to assume the [VPN], admit Minerva as a member and issue Minerva a limited liability company interest in [PWS].”⁸³ PWS would then pay off the VPN “by wire transfer of immediately available funds” sent “[i]mmediately following the Closing[.]”⁸⁴

After signing the Contribution Agreement, Vale notified the OWL Lender’s private equity sponsor, NGP, about the Pilot Transaction.⁸⁵ NGP informed Cooper and Johnson about the Pilot Transaction and forwarded a draft payoff letter from Vale.⁸⁶ On September 23, 2022, Vale sent a final repayment notice to the OWL Lender (“Repayment Notice”) stating that:

(a) one or more Affiliates of [] [Vale] has entered into an agreement for the disposition, directly or indirectly, of [Horus] [], and (b) [PWS], the acquirer of [Horus], has agreed, concurrently with the consummation of th[at] Transaction, to assume, without relieving the Borrower of any liability thereunder, the Borrower's payment obligations under the [VPN] and pay in full all outstanding principal and interest thereunder.⁸⁷

The Repayment Notice included an attached “Payoff Letter” confirming that the VPN would be considered repaid if PWS deposited \$120,639,493 “by wire transfer in

⁸² See *id.* §§ 1.01–03, 1.05

⁸³ *Id.* § 1.01.

⁸⁴ *Id.* § 1.05(c).

⁸⁵ See Tr. (Cooper) at 538–39; *id.* (Johnson) at 721–22.

⁸⁶ JX155; JX280.

⁸⁷ JX161.

immediately available funds” to the OWL Lender “by 3:00 P.M., Dallas, Texas time, on September 30, 2022.”⁸⁸ On September 29, 2022, the OWL Lender sent Vale’s counsel executed signature pages for the Repayment Notice and Payoff Letter, to be released when the VPN was repaid.⁸⁹

On September 30, 2022, the Pilot Transaction closed. There is no dispute that PWS repaid the VPN the same day,⁹⁰ but the parties vigorously dispute the timing and sequence of events concerning the closing.⁹¹ Vale’s deal counsel and counsel for the OWL Lender exchanged emails throughout the day.⁹² At 9:49 a.m., Vale’s counsel emailed that “we had a few delays but just closed and understand wires are being sent now. I will check for a FedWire reference and send when available.”⁹³ After the OWL Lender’s counsel followed up, Vale’s deal counsel sent a further email at 4:31 p.m. CT attaching a wire transfer confirmation.⁹⁴ That confirmation states the payment request was entered at 10:08 a.m. CT, approved at 2:06 p.m. CT, released by PWS’s bank at 2:37 p.m. CT, received by OWL Lender’s bank at 2:37 p.m. CT, and

⁸⁸ *Id.*

⁸⁹ JX169.

⁹⁰ PTO ¶¶ 33–34.

⁹¹ *See, e.g., id.* ¶ 34 (“The parties dispute whether the payment was deposited by wire transfer in immediately available funds before the 3:00 P.M. Dallas, Texas time identified on the Payoff Letter.”).

⁹² JX350; *see* Tr. (Smith) at 208–12.

⁹³ JX350.

⁹⁴ *See id.*; JX187.

confirmed by OWL Lender’s bank at 3:32 p.m. CT.⁹⁵ Notwithstanding any contrary suggestion in the documents, Instar’s CEO, Greg Smith, insisted at trial that “the money flow[ed] first”—meaning PWS repaid the VPN before the Pilot Transaction closed.⁹⁶ In any event, no one objected to PWS’s repayment of the VPN at the time.⁹⁷

D. Gray Jay Refuses To Purchase More Vale Securities And Madera Resurfaces

With the VPN repaid, Vale sent Gray Jay a letter on October 3, 2022, demanding that Gray Jay perform its obligation to purchase additional Vale securities under the ECL.⁹⁸ Gray Jay responded two days later asserting that it had no further obligations under the ECL.⁹⁹ Thereafter the parties exchanged a series of letters taking various positions on whether Gray Jay was still obligated to perform

⁹⁵ JX187. Plaintiff’s expert testified that “domestic transfer[s]” like the one used to pay off the VPN “would [use] the Fed wire system, which settles instantaneously,” and is “generally considered immediately available funds[.]” Tr. (Spindler) at 998–99; JX272. Gray Jay did not call an expert witness to rebut Spindler’s testimony or provide a competing expert report.

⁹⁶ Tr. (Smith) at 120, 156, 211–20.

⁹⁷ *Id.* (Cooper) at 478–79, 615; *id.* (Johnson) at 679, 754–57; *id.* (Hines) at 828.

⁹⁸ JX179.

⁹⁹ JX181. The speed, thoroughness, and unequivocal nature of Gray Jay’s well-developed response is consistent with Johnson’s testimony that Gray Jay was aware of the Pilot Transaction before it occurred and was discussing how to respond. *See, e.g.*, Tr. (Johnson) at 780–82.

the ECL.¹⁰⁰ Ultimately, Gray Jay did not purchase additional Vale securities and Gray Jay’s managers did not issue any related capital call.¹⁰¹

Vale was relying on the anticipated capital infusion from selling Gray Jay securities under the ECL to pay expenses like the Pilot Transaction’s closing costs.¹⁰² After Gray Jay refused to perform, Vale secured covering performance via a related-party loan from Oceanides with a 13% annual interest rate memorialized in an October 5, 2022, promissory note (“Promissory Note”).¹⁰³ On May 28, 2025, after over two years with no repayment, Vale and Oceanides amended the Promissory Note to raise the interest rate to 20%.¹⁰⁴

In August 2023, long after the Madera Well resumed operations, OCD sent a letter to OWL initiating a further investigation of the Madera Event’s environmental impact.¹⁰⁵ PWS, OWL’s owner post-Pilot Transaction, corresponded with ODC

¹⁰⁰ See JX185; JX188; JX195; JX196.

¹⁰¹ PTO ¶¶ 41–42; see Tr. (Cooper) at 495–96, 556–57.

¹⁰² See, e.g., Tr. (Smith) at 177–81.

¹⁰³ JX180. See also Tr. (Spindler) at 1003–05 (Plaintiff’s expert testifying that the Promissory Note’s interest rate was reasonable given the “difficult lending situation”).

¹⁰⁴ JX278.

¹⁰⁵ JX209. See also JX273 (suggesting the two-year lag-time was highly unusual). *But see* JX131 (suggesting that OCD may have been considering a follow-up investigation as early as May 2022). The trial testimony suggested that OCD reopened its investigation in response to “an anonymous complaint in early 2024[.]” Tr. (Smith) at 960–62. In the course of trial and post-trial argument, Vale alluded to the idea that the anonymous complaint came from Gray Jay or the Gray Jay Members and was made to further their litigation position. Of course, given such a complaint’s anonymous nature, the record lacks evidence that would enable the Court confidently to verify or dispel that suggestion.

concerning the follow-up investigation,¹⁰⁶ eventually submitting a “Ground Water Assessment Workplan” in July 2025.¹⁰⁷ OCD’s follow-up investigation concerning the Madera Event remains ongoing.¹⁰⁸

E. Procedural History

Vale initiated this action on November 29, 2022, and filed an amended complaint in March 2023.¹⁰⁹ In January 2023, Gray Jay requested that Vale implement a litigation hold for certain employees including Jonathan Stone, an Instar partner and President of Vale at the time of the Transaction, and Noshir Irani, a principal at Instar and member of the OWL board until the Pilot transaction closed.¹¹⁰ In March of that year, Defendants moved to dismiss Vale’s amended complaint,¹¹¹ which the Court partially granted on November 7, 2023.¹¹² In that

¹⁰⁶ See JX212.

¹⁰⁷ JX282.

¹⁰⁸ See, e.g., Tr. (Smith) at 963–64, 988–89.

¹⁰⁹ See Dkt. 1; Dkt. 22.

¹¹⁰ JX201; Tr. (Smith) at 227; Tr. (Irani) at 878–880, 896. Notably, at the time of trial both Stone and Irani were no longer affiliated with Instar. It is not entirely clear why they left Instar. Vale’s counsel suggested at oral argument that, at least in Irani’s case, it had something to do with competence. Given Irani’s Swiss cheese memory at deposition—video excerpts of which were then played at trial—that may be the case. But the Court’s impression after trial is that it is at least equally likely that Smith may have been a difficult boss. In any event, the reason for Stone and Irani’s departure is extraneous to resolution of the parties’ dispute.

¹¹¹ See Dkt. 23.

¹¹² See Dkt. 47.

ruling, the Court dismissed Vale’s breach of contract and implied covenant claims against the individual Defendants as well as its alter ego claim.¹¹³

This matter then proceeded to discovery. While discovery was ongoing, Defendants moved for sanctions against Vale for allegedly “refusing to collect and preserve relevant information from current and former officers and employees.”¹¹⁴ The Court deferred its ruling on the motion for sanctions until after trial.¹¹⁵ Defendant renewed its request for sanctions post-trial, based on supposed spoliation of documents and text messages held by Stone and Irani.¹¹⁶

With leave of Court, the parties filed motions for partial summary judgment in early 2025.¹¹⁷ While briefing on the motions for summary judgment was ongoing, Vale sought leave to file a Second Amended Verified Complaint.¹¹⁸ The Court granted

¹¹³ *See id.* at 102. The Court also deferred ruling on “the question of whether the Court has personal jurisdiction over defendants Hines and Carr pending jurisdictional discovery on that issue.” *Id.* at 102–03. The parties later conducted that discovery and provided supplemental briefing on the personal jurisdiction issue. *See* Dkt. 79; Dkt. 83. Ultimately, the Court granted the motion and dismissed Defendants Hines and Carr pursuant to Rule 12(b)(2) for lack of personal jurisdiction on November 26, 2024. Dkt. 125; Dkt. 147.

¹¹⁴ Dkt. 113. Specifically, Defendants argue Vale failed to preserve key non-recoverable text messages concerning the Pilot Transaction and Madera Event and did not conduct custodian interviews for all relevant Vale officers and employees. *See generally id.*

¹¹⁵ *See* Dkt. 161; Dkt. 173.

¹¹⁶ *See* Post-Trial Opp’n Br. at 31–34; Tr. (Smith) at 395–98; *id.* (Irani) at 908–09, 918–19; JX246.

¹¹⁷ *See* Dkt. 165; Dkt. 167.

¹¹⁸ *See* Dkt. 164.

that unopposed request and Vale filed its operative complaint on January 30, 2025.¹¹⁹ That complaint advanced three causes of action: Count I – Breach of the ECL against Gray Jay; Count II – Breach of the Covenant of Good Faith and Fair Dealing against Gray Jay; and Count III – Unjust Enrichment alleged in the alternative against Cooper and Johnson.¹²⁰

After Defendants answered the SAC,¹²¹ Vale moved to strike portions of that Answer, arguing Defendants improperly “substantially modified past defenses and included entirely new defenses.”¹²² On April 22, 2025, the Court held oral argument on Vale’s motion to strike and the parties’ motions for partial summary judgment.¹²³ Through two separate rulings, the Court denied Vale’s motion to strike and granted both partial motions for summary judgment.¹²⁴ In its summary judgment ruling, the Court held that (1) the ECL’s “Release Provision” barred “plaintiff’s unjust enrichment claim against the individual defendants”;¹²⁵ (2) Vale’s insolvency “must

¹¹⁹ See Dkt. 170; SAC. The SAC did not add new claims, but instead (1) removed allegations concerning previously dismissed Defendants Hines and Carr, (2) deleted the causes of actions that the Court dismissed in its ruling on Defendants’ motion to dismiss, and (3) withdrew allegations that Defendants breached the Gray Jay LLC Agreement. See SAC, Ex. A.

¹²⁰ SAC ¶¶ 48–63.

¹²¹ Dkt. 176.

¹²² Dkt. 183 ¶ 7; see *id.* ¶¶ 9–19. Defendants opposed that motion to strike. See Dkt. 192.

¹²³ See Dkt. 210 (“MSJ Tr. 1”).

¹²⁴ See *id.* at 104; Dkt. 213 (“MSJ Tr. 2”) at 19.

¹²⁵ MSJ Tr. 1 at 75–87.

be measured at or before the time of Gray Jay’s funding obligation”;¹²⁶ (3) the “ECL requires both default and acceleration to [] terminat[e]” Gray Jay’s investment obligation;¹²⁷ and (4) “Gray Jay’s possible remaining investment obligation to plaintiff, if any, is no greater than \$5.125 million[.]”¹²⁸

The Court conducted a three-day trial on the remaining disputed issues from September 10 to September 12, 2025.¹²⁹ While the parties proffered four expert witnesses only one testified at trial, with the parties agreeing to rely on the reports of the remaining three.¹³⁰ After trial, the parties submitted post-trial briefing,¹³¹ and the Court heard post-trial oral argument on April 9, 2026.¹³²

¹²⁶ *Id.* at 87–88.

¹²⁷ *Id.* at 88–89.

¹²⁸ MSJ Tr. 2 at 6–15, 19.

¹²⁹ *See generally* Tr.

¹³⁰ *See* Tr. at 990–1014; PTO ¶ 52 (“The Parties agree to rely on the expert reports for the following experts, who will not be called either live or by deposition testimony: John Kondziolka[,] Alan Ratliff[,] Chad Kronkosky[.]”). The parties’ approach at trial to experts seems highly unusual, to say the least. To state the obvious, live expert testimony is important as it allows the Court to assess an expert’s qualifications, ask questions, and observe cross examination which often tests the basis on which the expert formed his or her opinions. Here, not only did three of the parties’ experts not appear at trial, there is no evidence in the record of any of them being deposed. Nevertheless, in the pre-trial order both parties agreed to rely on the reports of the experts who did not testify and both parties cite those reports in their post-trial briefing without any objection. PTO ¶ 52; *see* Dkt. 247 (“Post-Trial Opening Br.”) at 2 (citing JX274); Dkt. 252 (“Post-Trial Opp’n Br.”) at 50 (citing JX273).

¹³¹ *See* Post-Trial Opening Br.; Post-Trial Opp’n Br.; Dkt. 257 (“Post-Trial Reply Br.”).

¹³² *See* Dkt. 265 (“OA Tr.”).

II. STANDARD OF DECISION

The party alleging a breach of contract or breach of the implied covenant of good faith and fair dealing must prove the elements of each claim by a preponderance of the evidence.¹³³ Conversely, the party advancing an affirmative defense must prove that defense by a preponderance of the evidence.¹³⁴ A preponderance of the evidence “means proof that something is more likely than not.”¹³⁵ In a bench trial such as this, the Court “sits as both arbiter of law and factfinder[.]”¹³⁶ As factfinder, the Court weighs the evidence, “judge[s] the credibility of the witnesses and assign[s] the appropriate weight, if any, to their testimony.”¹³⁷

III. ANALYSIS

Vale claims that Gray Jay breached the ECL by failing to purchase Vale securities after the VPN was repaid. To prevail on a breach of contract claim, the plaintiff must prove “(1) the existence of a contract; (2) the breach of an obligation

¹³³ *E.g., Diekman v. Regency GP LP*, 2021 WL 537325, at *18 (Del. Ch. Feb. 15, 2021) (citations omitted).

¹³⁴ *E.g., Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *2 (Del. Ch. July 6, 2018), *aff’d sub nom., Davenport v. Basho Techs. Holdco B, LLC*, 221 A.3d 100 (Del. 2019).

¹³⁵ *In re Coinmint, LLC*, 261 A.3d 867, 888 (Del. Ch. 2021) (internal quotation marks omitted); *see Martin v. Med-Dev Corp.*, 2015 WL 6472597, at *10 (Del. Ch. Oct. 27, 2015) (“By implication, the preponderance of the evidence standard also means that if the evidence is in equipoise, Plaintiffs lose.” (internal quotation marks omitted)).

¹³⁶ *Jackson v. State*, 21 A.3d 27, 38 (Del. 2011).

¹³⁷ *Cruz v. State*, 12 A.3d 1132, 1136 (Del. 2011).

imposed by the contract; and (3) damages suffered because of the breach.”¹³⁸ Gray Jay does not dispute that the ECL is a valid contract that requires it to purchase Vale securities after the VPN is repaid.¹³⁹ Gray Jay admits it “declined to invest” after PWS repaid the VPN.¹⁴⁰ It is axiomatic that the “non-payment of amounts due under [a] contract” constitutes damages.¹⁴¹ Indeed, Gray Jay offers no response to Vale’s extensive argument that Gray Jay breached the ECL by not fulfilling its investment obligation.¹⁴² Accordingly, the Court concludes it is undisputed that Vale has proved that Gray Jay failed to perform under the ECL.

Gray Jay argues it was not obligated to purchase additional Vale securities under the ECL because (1) its obligation under the ECL terminated before PWS

¹³⁸ *Zayo Gp., LLC v. Latisys Hldgs., LLC*, 2018 WL 6177174, at *10 (Del. Ch. Nov. 26, 2018).

¹³⁹ See Post-Trial Opp’n Br. at 8 (“Gray Jay’s commitment under the ECL was simple: Gray Jay would purchase an initial \$2 million in Vale securities at the close of the OWL Transaction, and thereafter would purchase up to an additional \$8 million [] no later than, and in proportion to, principal payments made on the V[P]N.”).

¹⁴⁰ *Id.* at 29.

¹⁴¹ *Delta Eta Corp. v. Univ. of Del.*, 2 A.3d 73, 2010 WL 2949632, at *1 (Del. 2010) (TABLE).

¹⁴² Compare Post-Trial Opening Br. at 11–18 (“the evidence shows Gray Jay breached the ECL[.]”), with Post-Trial Opp’n Br. (not responding to Vale’s breach argument). See also *Raj and Sonal Abhyanker Family Tr. v. Blake*, 2021 WL 2477025, at *4 n.24 (Del. Ch. June 17, 2021) (“Because [Defendant] failed to respond to th[at] argument in its answering brief, any response is deemed waived.” (citing *Emerald P’rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999))).

repaid the VPN; and (2) its performance should be excused.¹⁴³ The Court evaluates each argument in turn.

A. The ECL Did Not Terminate Before Gray Jay’s Obligation To Purchase Additional Vale Securities Was Triggered

Gray Jay argues the ECL terminated under its terms before its obligation to purchase additional Vale securities was triggered.¹⁴⁴ The ECL states that:

[Gray Jay’s] obligation to . . . purchase the [Vale] Securities under this letter agreement will terminate automatically and immediately upon the valid termination of the MIPA in accordance with its terms, the bankruptcy or insolvency of [Vale], upon any default and acceleration of the [VPN] or at such point as InstarAGF . . . together with [Vale] and their respective affiliates, ceases to hold more than fifty percent (50%) of the issued and outstanding Securities.¹⁴⁵

Based on that language, Gray Jay asserts that the ECL terminated because (1) Vale defaulted under the VPN, which was then accelerated; and (2) Vale was insolvent at the time of the Pilot Transaction.¹⁴⁶

“Condition-laden contracts . . . complicate the burden allocation.”¹⁴⁷

In disputes over contractual conditions, the *Restatement (Second) of Contracts* instructs courts to look to the nature of the condition at issue. If a condition must be satisfied before a duty of performance arises (formerly known as a condition precedent), then the burden of proof rests with the party seeking to enforce the obligation. If a condition would extinguish a party’s duty of performance (formerly known as a

¹⁴³ Post-Trial Opp’n Br. at 35–57.

¹⁴⁴ *Id.* at 35–51.

¹⁴⁵ ECL at 2.

¹⁴⁶ Post-Trial Opp’n Br. at 35–51.

¹⁴⁷ *Desktop Metal, Inc. v. Nano Dimension Ltd.*, 2025 WL 904521, at *22 (Del. Ch. Mar. 24, 2025).

condition subsequent), then the burden of proof rests with the party seeking to avoid the obligation.¹⁴⁸

The occurrence of any of the two conditions in the ECL on which Gray Jay focuses would extinguish Gray Jay’s obligation to purchase additional Vale securities. As a result, to prevail, Gray Jay bears the burden of proving either that a default and acceleration under the VPN occurred or that Vale was insolvent at the time of the Pilot Transaction.

While evaluating each argument, the Court applies well-settled principles of contract interpretation.¹⁴⁹ Caselaw also suggests that the Court should strictly enforce the terms under which an agreement “automatically and immediately terminate[s].”¹⁵⁰

1. Gray Jay Did Not Carry Its Burden of Proving That A Default And Acceleration Terminated The ECL

Gray Jay insists that its obligation to purchase Vale securities terminated automatically upon a default and acceleration of the VPN. To prevail on that argument “Gray Jay must establish [] the satisfaction or excuse of both conditions that (i) there was a default under the [VPN], and that (ii) the [VPN] was accelerated,

¹⁴⁸ *Id.* (quoting *AB Stable VIII, LLC v. Maps Hotels and Resorts One LLC*, 2020 WL 7024929, at *49 (Del. Ch. Nov. 30, 2020)) (internal quotation marks omitted).

¹⁴⁹ *See, e.g., BitGo Hldgs., Inc. v. Galaxy Digital Hldgs., Ltd.*, 319 A.3d 310, 322–23 (Del. 2024).

¹⁵⁰ *Realogy Hldgs. Corp. v. SIRVA Worldwide*, 2020 WL 4559519, at *7–9 (Del. Ch. Aug. 7, 2020); *accord Advent Int’l, L.P. v. Servicios Funerarios GG S.A. de C.V.*, 2024 WL 4598884, at *10–12 (Del. Ch. Oct. 29, 2024).

at or before the time that such investment obligation arose under the ECL.”¹⁵¹ Therefore, Gray Jay must prove there was a default and acceleration of the VPN before it was repaid as part of the Pilot Transaction.

The VPN contains several provisions relevant to the question of whether there was a default and acceleration thereunder. “Default” is an “Event of Default,”¹⁵² which occurs when (1) “[Vale] [] fail[s] to perform or observe any term, covenant, condition, or agreement contained in . . . Section 6.02,¹⁵³ or Section 6.03(a)[;]”¹⁵⁴ (2) “[a] Change in Control [] occur[s];”¹⁵⁵ or (3) “a Fundamental Change [] occur[s].”¹⁵⁶ Upon an Event of Default, “the [OWL] Lender[] may by notice to [Vale] declare th[e] [VPN] . . . to be due and payable in whole . . . and thereupon the [amounts] so

¹⁵¹ Dkt 207 ¶ 2(b).

¹⁵² VPN § 1.01.

¹⁵³ The negative covenants in Section 6.02 include that “[Vale] will not, and will not permit [Minerva] to . . . sell, transfer, lease, or otherwise dispose of . . . all or substantially all of its property or assets” and “[Vale] will not, and will not permit [Minerva] to, directly or indirectly sell, assign, transfer, lease, convey, or otherwise dispose of any asset or property.” *Id.* §§ 6.02(b)–(c).

¹⁵⁴ *Id.* § 7.01(d). Section 6.03(a) reads: “Until a Repayment Event, [Vale] covenants and agrees that it will furnish to the Administrative Lender . . . [a]s soon as possible and in any event within five (5) Business Days after the occurrence of each Default, a written notice detailing such Default.” *Id.* § 6.03(a).

¹⁵⁵ *Id.* § 7.01(j). “Change in Control” means in part when “[Minerva] shall cease (i) to be the owner of all the Capital Stock of [Horus] or (ii) to Control [Horus].” *Id.* § 1.01. “Control” means “the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract, or otherwise.” *Id.*

¹⁵⁶ *Id.* § 7.01(k). “Fundamental Change” means, in part, when “[Horus and its subsidiaries] . . . dispose of or agree to . . . dispose of all or substantially all of their assets[.]” *Id.* § 1.01.

declared . . . shall become due and payable immediately[.]”¹⁵⁷ Notably, “in the case of an Event of Default described in Section 7.01(f) . . . all of the [] amounts payable by [Vale] hereunder, shall automatically and immediately become due and payable, without presentment, demand . . . or other notice of any kind, all of which are hereby waived by [Vale].”¹⁵⁸

Based on that language, Gray Jay argues Vale defaulted under the VPN by “(i) permitting Minerva to merge Horus into PWS; (ii) effecting a Change of Control by causing Minerva to give up control of Horus; (iii) effecting a Fundamental Change by allowing Minerva and Horus to agree to dispose of all their assets; and (iv) failing to timely report any such defaults.”¹⁵⁹ Importantly, none of those arguments invoke § 7.01(f).¹⁶⁰ Vale insists there was no default because “the [Pilot] [T]ransaction was structured and executed so the VPN was paid before any change-of-control[.]”¹⁶¹ Thus, the dispute concerning a possible default largely turns on whether the Pilot

¹⁵⁷ *Id.* § 7.02.

¹⁵⁸ *Id.* That the parties agreed to forgo any notice to accelerate the VPN in the event of a default under § 7.01(f), but not for other types of default, suggests that the notice requirement was a material part of the parties’ bargain. *See Genworth Fin., Inc. v. AIG Specialty Ins. Co.*, 2025 WL 688987, at *9, n.124 (Del. Super. Feb. 21, 2025) (citing *City of Lewes v. Nepa*, 212 A.3d 270, 279, n.37 (Del. 2019)) (endorsing the meaningful variation canon); *Benchmark Invs. LLC v. Pacer Advisors, Inc.*, --- A.3d ---, 2026 WL 1179508, at *6 (Del. Apr. 30, 2026) (“[T]he use of different language in different sections of a contract suggests the difference is intentional[.]” (quoting *Soleimani v. Hakkak*, 2024 WL 1593923, at *6 n.75 (Del. Ch. Apr. 12, 2024), *aff’d*, 327 A.3d 1060 (Del. 2024))).

¹⁵⁹ Post-Trial Opp’n Br. at 35–47.

¹⁶⁰ *See* VPN § 7.01(f) (stating it is an Event of Default if “[Vale], [Minerva], or [Horus] or any subsidiary of [Horus] . . . shall become subject to a Bankruptcy Event[.]”).

¹⁶¹ Post-Trial Reply Br. at 13–14; *see also* Post-Trial Opening Br. at 30–35.

Transaction closed before PWS repaid the VPN.¹⁶² Indeed, Vale seems to acknowledge that conclusion in its post-trial briefing.¹⁶³

The evidence is mixed concerning whether PWS repaid the VPN before the Pilot Transaction closed. The Contribution Agreement’s text suggests that PWS repaid the VPN “[i]mmediately *following* the Closing[.]”¹⁶⁴ Emails between Vale’s Pilot Transaction counsel and the OWL Lender support that suggestion.¹⁶⁵ Yet Smith, who was not a member of the deal team,¹⁶⁶ testified that based on his prior experience “[t]he money flow[ed] first.”¹⁶⁷ Vale focuses on evidence suggesting that PWS repaid the VPN before the 3:00 p.m. Dallas time deadline in the Repayment Notice.¹⁶⁸ True, the weight of trial evidence indicates that PWS repaid the VPN

¹⁶² Namely, if the Pilot Transaction closed before PWS repaid the VPN, (1) Minerva ceased to “Control” Horus; and (2) Vale allowed Minerva to dispose of assets, its membership interest in Horus.

¹⁶³ See Post-Trial Opening Br. at 40 (“[E]ven if there was any technical default . . .”).

¹⁶⁴ Contribution Agreement § 1.05(c).

¹⁶⁵ JX350 (“[J]ust closed and understand wires are being sent now.”). At trial, Instar’s CEO explained that email as a “misstate[ment]” from a “junior attorney[.]” but did not offer contrary documentary evidence or testimony from someone with firsthand knowledge of the Pilot Transaction’s closing timeline. Tr. (Smith) at 362–63.

¹⁶⁶ See Tr. (Smith) at 285, 417–18. Indeed, the only member of the Pilot Transaction deal team that testified was Nosh Irani—who did not recall most of the details and did not come off as a credible witness. Tr. (Irani) at 878–919.

¹⁶⁷ See Tr. (Smith) at 117–22, 142–46, 154.

¹⁶⁸ See Post-Trial Opening Br. at 33–35; Post-Trial Reply Br. at 13–14.

before the 3:00 p.m. deadline.¹⁶⁹ Yet, whether PWS met the deadline does not inform whether it repaid the VPN before the Pilot Transaction closed. The Court need not resolve that factual question, however, because even if a default occurred there was no acceleration.

Gray Jay asserts that the ECL's acceleration condition was fulfilled for two reasons.¹⁷⁰ First, Gray Jay argues the "ECL's acceleration condition was satisfied when the Payoff Letter effectively advanced maturity of the V[P]N."¹⁷¹ Second, Gray Jay contends that "the ECL's acceleration condition is excused because Vale induced the [OWL] Lender not to act."¹⁷² Both arguments fail.

The Payoff Letter did not accelerate the VPN because it was a prepayment not an acceleration. Section 2.03 of the VPN concerns "[p]repayments" and states that:

[Vale] may, from time to time upon the delivery of an irrevocable Repayment Notice (stating the proposed date of repayment . . . and the aggregate principal amount of the repayment) to the Administrative Lender by no later than 3:00 p.m. (Dallas, Texas, time) at least five []

¹⁶⁹ The wire transfer summary shows that payment was "Entered" at 10:08 AM, "Approved" at 2:06 PM, "Released" at 2:37 PM, and "Received" at 2:37 PM. JX187. Plaintiff's expert James Spindler opined that PWS's repayment occurred over "the Fed wire system, which settles instantaneously [and is] generally considered immediately available funds, as opposed to something like a check . . . or ACH transactions, which take[] days to settle." Tr. (Spindler) at 998–99; *see* JX272. Although Johnson testified there was "zero" "question in [his] mind that the money on September 30 came in after 3:00 PM," he admitted that belief was not based on first-hand knowledge. Tr. (Johnson) at 732–47.

¹⁷⁰ *See* Post-Trial Opp'n Br. at 39–47.

¹⁷¹ *Id.* at 39–42.

¹⁷² Post-Trial Opp'n Br. at 42–47.

Business Day's prior to such proposed repayment date, repay all or any portion of the outstanding aggregate principal[.]¹⁷³

Section 7.02(a) covers accelerations and reads in relevant part that:

[i]n the case of an Event of Default other than one described in Section 7.01(f) . . . *the Lenders may by notice to [Vale] declare this Note and the Advances then outstanding to be due and payable in whole . . . and thereupon the principal of the Advances so declared to be due and payable . . . shall be come due and payable immediately[.]*¹⁷⁴

That the VPN uses “acceleration” and “prepayment” separately shows that the parties intended those terms to have separate meanings.¹⁷⁵ Indeed, Plaintiff's expert credibly testified that there are important practical differences between a prepayment and acceleration.¹⁷⁶

The VPN and ECL do not define “acceleration” or “prepayment.” “Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract.”¹⁷⁷ Black's Law Dictionary defines a

¹⁷³ VPN § 2.03(a).

¹⁷⁴ *Id.* § 7.02(a) (emphasis added).

¹⁷⁵ *See, e.g., Williams Cos. Inc. v. Energy Transfer LP*, 2020 WL 3581095, at *12 n.123 (Del. Ch. July 2, 2020). Gray Jay makes a passing argument that “from the perspective of the ECL parties, there is no practical difference between a V[P]N default coupled with either [a] notice of acceleration, or [] any other pre-maturity payoff.” Post-Trial Opp'n Br. at 40–41. Perhaps, but it is the contract's language that controls meaning, not the parties' unexpressed, subjective intent. *See, e.g., In re Alexion Pharms., Inc. Ins. Appeals*, 339 A.3d 694, 702 (Del. 2025).

¹⁷⁶ *See, e.g., Tr. (Spindler)* at 997–98 (“[I]f prepayment and refinancing were equal to acceleration, pretty much every M&A transaction that has a refinancing element to it would be unwound. It would be busted up. You'd have accelerations, cross-accelerations, everybody would be going into bankruptcy, and you wouldn't be able to do corporate deals anymore.”).

¹⁷⁷ *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).

“prepayment clause” as a “provision that permits a borrower to satisfy a debt before its due date.”¹⁷⁸ Conversely, “acceleration” means “[t]he advancing of a loan agreement’s maturity date so that payment of the entire debt is due immediately.”¹⁷⁹ Thus, an acceleration requires advancing the loan’s maturity date—*i.e.*, declaring it “due and payable.”¹⁸⁰ That understanding is consistent with § 7.02(a), which allows the OWL “Lender[] [] by notice to [Vale] [to] *declare* th[e] [VPN] . . . to be due and payable in whole[.]”¹⁸¹ Thus, acceleration is a lender protection¹⁸² that requires advancing the loan’s maturity date, while prepayment is a borrower right that does not affect the maturity date.

Based on that understanding, PWS’s repayment of the VPN was a prepayment under § 2.03(a). On September 23, 2022, Vale sent the Repayment Notice to the OWL Lender stating that the VPN would be repaid in full seven days later.¹⁸³ The Repayment Notice did not purport to alter the VPN’s maturity date. Gray Jay argues the Repayment Notice was not “irrevocable notice” of repayment as § 2.03(a) requires,¹⁸⁴ but ignores that the notice was explicitly “irrevocabl[e]” upon completion

¹⁷⁸ *Prepayment Clause*, BLACK’S LAW DICTIONARY (12th ed. 2024).

¹⁷⁹ *Acceleration*, BLACK’S LAW DICTIONARY (12th ed. 2024).

¹⁸⁰ JX272 at 12; *see In re AMR Corp.*, 730 F.3d 88, 99 n.13 (2d Cir. 2013).

¹⁸¹ VPN § 7.02(a) (emphasis added).

¹⁸² *Jeffery v. Seven Seventeen Corp.*, 461 A.2d 1009, 1010 (Del. 1983) (“The purpose of an acceleration clause is solely to protect the lender.”).

¹⁸³ JX161.

¹⁸⁴ *See* Gray Jay Opp’n Br. at 41–42.

of the Pilot Transaction.¹⁸⁵ Moreover, after the Pilot Transaction occurred and PWS repaid the VPN, the OWL Lender signed the Payoff Letter confirming receipt of the payment without any objection or reservation of rights.¹⁸⁶ Critically, there is no dispute that the OWL Lender never gave any notice advancing the VPN’s maturity date.¹⁸⁷ Accordingly, PWS’s repayment of the VPN for Vale’s benefit as detailed in the Repayment Notice was a repayment under § 2.03(a), not acceleration pursuant to § 7.02(a).¹⁸⁸

Notwithstanding § 7.02(a)’s notice requirement, Gray Jay invokes the prevention doctrine to argue that the Court should not credit the lack of any affirmative declaration of acceleration. Under the prevention doctrine, a party cannot rely on the failure of a condition precedent “where the party wrongfully prevented performance of that condition precedent.”¹⁸⁹ The doctrine only applies where the

¹⁸⁵ JX161.

¹⁸⁶ JX169; *see* Tr. (Johnson) at 731–33.

¹⁸⁷ *See, e.g.*, Tr. (Cooper) at 620. As noted, Gray Jay does not argue that there was a default under § 7.01(f) the VPN such that the requirement to provide notice of acceleration is waived.

¹⁸⁸ Gray Jay argues that only Vale, not a party acting on its behalf, can prepay under § 2.03. Post-Trial Opp’n Br. at 41–42. Gray Jay relies on § 2.03(a)’s language that “[Vale] may, from time to time . . . repay all or a portion of the outstanding aggregate principal amount of the Advances[.]” VPN § 2.03(a). Although not used in § 2.03, the VPN defines a “Repayment Event” as “the payment in full in cash of the [VPN] . . . by or on behalf of the Borrower,” and nothing in the VPN explicitly prohibits a prepayment by a party acting on Vale’s behalf. VPN § 1.01. Moreover, the OWL Administrative Lender signed the Payoff Letter and accepted payment from PWS without any objection. JX169.

¹⁸⁹ *BitGo*, 319 A.3d at 333 (internal quotation marks omitted); *see Chordia v. Lee*, 2024 WL 49850, at *37 (Del. Ch. Jan. 4, 2024) (“[W]here a party’s breach by non-performance

preventing act “constitutes a breach of a duty imposed by the terms of the agreement[.]”¹⁹⁰ The question is whether that breach “contribute[d] materially to the non-occurrence of a condition.”¹⁹¹

Gray Jay argues Vale prevented acceleration by (1) only disclosing the Pilot Transaction after executing the Contribution Agreement, (2) sending notice of the Pilot Transaction to NGP, instead of the OWL Lender, and (3) promising in the Repayment Notice that the VPN would be paid off within weeks.¹⁹² None of those arguments show that Vale wrongfully prevented an acceleration.

First, Gray Jay does not explain why the promise to promptly repay the VPN prevented an acceleration. Gray Jay just cites testimony that the OWL Lender “simply wanted their money,” suggesting it would not accelerate the VPN and risk nonpayment.¹⁹³ Indeed, Johnson testified that leading up to the Pilot Transaction he

contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.” (quoting Restatement (Second) of Contracts § 245 (1981))).

¹⁹⁰ *Snow Phipps Gp., LLC v. KCake Acq., Inc.*, 2021 WL 1714202, at *53 n.576 (Del. Ch. Apr. 30, 2021) (internal quotation marks omitted).

¹⁹¹ *Id.* at *53 (internal quotation marks omitted). The preventing act need not make the occurrence of the condition precedent impossible, it is enough that “the conduct made satisfaction of a condition less likely.” *Id.* at *52 (internal quotation marks omitted). Delaware recognizes an “assumption of risk exception to the prevention doctrine . . . when contract terms condition the consummation of a[n] [act] upon the approval of the other party, or subject one party to the discretion . . . of the other party[.]” *Murphy Marine Servs. of Del., Inc. v. GT USA Wilm., LLC*, 2022 WL 4296495, at *13 (Del. Ch. Sept. 19, 2022) (internal quotation marks omitted).

¹⁹² Post-Trial Opp’n Br. at 44.

¹⁹³ Tr. at (Johnson) 778–79, 784–85; see Post-Trial Opp’n Br. at 44 (“Even though NGP was concerned about the lack of disclosure, it was told full payment was imminent.”).

and NGP discussed how to respond, including whether to declare a default, but did not object because they “d[idn’t] want to rock the boat too much . . . [they] want[ed] to keep the pressure on [Vale] to give [the OWL Lender] [its] money back.”¹⁹⁴ That the OWL Lender prioritized repayment instead of the “drastic remedy” of acceleration¹⁹⁵ does not suggest that Vale prevented acceleration. Instead, if anything, it strongly suggests the OWL Lender would never choose to accelerate in these circumstances—and jeopardize the imminent repayment of the VPN—even if the OWL Lender received all the notice Gray Jay says was missing. Of course, it is well-settled that “if [a] condition would not have occurred regardless of the other party’s actions, the prevention doctrine does not apply.”¹⁹⁶

Second, Gray Jay points to no contractual provision that required Vale to disclose the Pilot Transaction’s terms.¹⁹⁷ Johnson admitted he “d[id]n’t think there’s a notice obligation in the documents” concerning the Pilot Transaction.¹⁹⁸ The

¹⁹⁴ Tr. (Johnson) at 780–85. Johnson was empowered to sign on behalf of the OWL Lender, and when discussing the Pilot Transaction with NGP he would “have [his] lender hat on . . . not Gray Jay.” *Id.* (Johnson) at 778.

¹⁹⁵ JX272 at 8–9, 12 (“[A]cceleration is a drastic remedy that threatens to send the borrower into bankruptcy and . . . imperil the ability of the lender to recover its unpaid principal and interest.”).

¹⁹⁶ *Twin Willows, LLC v. Pritzkur*, 2022 WL 3039775, at *8 n.115 (Del. Ch. Aug. 2, 2022).

¹⁹⁷ See Post-Trial Opp’n Br. at 44. No provision of the ECL or VPN obviously creates such an obligation. See ECL; VPN. The VPN requires Vale to provide notice of any default thereunder, but after a default occurs not before. VPN §§ 6.03(a), 7.01(e).

¹⁹⁸ Tr. (Johnson) at 781. Even if such an obligation did exist, Gray Jay would have to overcome the fact that Cooper, Johnson, and NGP had actual notice that Vale “entered in[to] a transaction that w[ould] result in the full repayment of the V[P]N” on September 2, 2022,

prevention doctrine only applies when the preventing act breached the preventing party's obligations.¹⁹⁹ Thus, Vale's non-disclosure of the Pilot Transaction's terms does not support applying the prevention doctrine.

Finally, Section 2.03(a) requires Vale to provide notice of any prepayment "at least five [] Business Day's prior to such proposed repayment date[.]"²⁰⁰ Vale fulfilled that requirement by sending the Repayment Notice on September 23, 2022.²⁰¹ Defendants note that Vale also sent a draft repayment notice to NGP three weeks earlier—which Cooper and Johnson received from NGP.²⁰² But, that Vale provided extra notice does not mean it breached the notice requirement.²⁰³

but did not inquire further. JX280; *see Trifecta Multimedia Hldgs. Inc. v. WCG Clinical Servs. LLC*, 318 A.3d 450, 472 (Del. Ch. 2024) ("Delaware law is concerned with actual notice, rather than technicalities that elevate form over substance.").

¹⁹⁹ *See, e.g., Snow Phipps*, 2021 WL 1714202, at *53 n.576; *S'holder Rep. Servs. LLC v. Alexion Pharms., Inc.*, 341 A.3d 513, 549–50 (Del. Ch. 2025).

²⁰⁰ VPN § 2.03(a).

²⁰¹ JX161.

²⁰² JX280. That Vale gave NGP notice makes sense given that Gray Jay admits "NGP controlled the Administrative Lender and had ultimate decision-making authority over accelerating the V[P]N." Post-Trial Opp'n Br. at 28 (citing Tr. (Cooper) at 624–26).

²⁰³ JX161. Grasping at straws, Gray Jay also quibbles with whether Vale addressed the Repayment Notice in strict conformity with the VPN's notice provision. *See* Post-Trial Opp'n Br. at 27 & n.155, 44 (citing JX280; JX350; JX161). But, as noted in the text above, Vale circulated the draft repayment notice and associated payoff letter weeks earlier. Cooper and Johnson both received the draft at that time and had the opportunity to comment; and no one, including OWL Lender, objected. *See, e.g., JX155; JX280.* Quite to the contrary, following Vale's circulation of timely notice on September 23, OWL Lender returned signed copies of both the Repayment Notice and Payoff Letter on September 29, which expressly state that Vale provided notice to OWL Lender. JX169.003 (Repayment Notice) ("Borrower hereby irrevocably gives written notice to the Administrative Lender"); JX169.006 (Payoff Letter) ("Reference is also made to the Repayment Notice delivered by the Borrower to the Administrative Lender on September 23, 2022[,] and acknowledged and agreed to by the

In sum, Gray Jay has not proven that Vale breached an obligation which hindered the OWL Lender's ability to accelerate the VPN. Instead, the evidence suggests Cooper and Johnson discussed whether to declare a default and accelerate the VPN with NGP, which controlled the OWL Lender, and NGP opted to prioritize repayment.²⁰⁴ Thus, the prevention doctrine does not excuse the fact that the OWL Lender never accelerated the VPN. Therefore, Gray Jay's obligations under the ECL did not terminate due to a prior default and acceleration of the VPN.

2. Gray Jay Did Not Carry Its Burden Of Showing That Vale Was Insolvent At The Time Of The Pilot Transaction

Gray Jay also argues its obligations under the ECL terminated upon Vale's insolvency.²⁰⁵ To prevail on that argument, "Gray Jay must establish that Vale was insolvent at or before the time that such investment obligation arose under the ECL"²⁰⁶—*i.e.*, when PWS repaid the VPN. Generally, a party can show insolvency through "either the 'balance sheet' test or the 'cash flow' test."²⁰⁷ Gray Jay argues

Administrative Lender on the date hereof[.]"). What is more, *Johnson* signed both documents as an "Authorized Person" on behalf of OWL Lender. JX169. Thus, for a multitude of reasons, Defendants' quibble with the notice must be rejected. *Trifecta Multimedia Hldgs.*, 318 A.3d at 472 ("Delaware law is concerned with actual notice[.]").

²⁰⁴ See Tr. (Johnson) at 778–82.

²⁰⁵ Post-Trial Opp'n Br. at 47–51.

²⁰⁶ Dkt 207 ¶ 2(a).

²⁰⁷ *Quadrant Structured Prods Co., Ltd. v. Vertin*, 102 A.3d 155, 176 (Del. Ch. 2014).

Vale was insolvent under both tests.²⁰⁸ As discussed above, Gray Jay has the burden of proving Vale was insolvent at the time of the Pilot Transaction.²⁰⁹

a. Gray Jay Did Not Prove That Vale Was Balance Sheet Insolvent

Under a balance sheet test, “an entity is insolvent if it has liabilities in excess of a reasonable market value of assets held.”²¹⁰ A company’s balance sheet alone is not determinative of whether it is balance sheet solvent.²¹¹ Rather, the “test also requires a deficiency of assets below liabilities with *no reasonable prospect that the business can be successfully continued in the face thereof*.”²¹² At bottom, to determine whether a company is balance sheet solvent, the “court should ask: What would a buyer be willing to pay for the debtor’s entire package of assets and liabilities? If the price is positive, the firm is solvent; if negative, insolvent.”²¹³

Applying that test here shows that Gray Jay failed to carry its burden to prove that Vale was balance sheet insolvent at the time of the Pilot Transaction. Gray Jay strangely does not cite Vale’s financials to support its balance sheet insolvency

²⁰⁸ Post-Trial Opp’n Br. at 47–51.

²⁰⁹ *Desktop Metal*, 2025 WL 904521, at *22.

²¹⁰ *Quadrant*, 102 A.3d at 176 (internal quotation marks omitted).

²¹¹ *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 115 A.3d 535, 560 n.31 (Del. Ch. 2015).

²¹² *In re Geneius Biotechnology, Inc.*, 2017 WL 6209593, at *8 (Del. Ch. Dec. 8, 2017) (emphasis in original) (internal quotation marks omitted).

²¹³ *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 2015 WL 6157759, at *16 (Del. Ch. Oct. 20, 2015) (quoting *Covey v. Commercial Nat’l Bank of Peoria*, 960 F.2d 657, 660 (7th Cir. 1992) (Easterbrook, J.)).

argument. Nor did Gray Jay introduce any financial expert report or testimony to support its assertion that Vale was balance sheet insolvent.

Instead, the sole document Gray Jay cites is an internal Instar slide deck from mid-July 2022 discussing the potential transaction with PWS, six weeks before the parties signed the Contribution Agreement and two-and-a-half months before the Pilot Transaction closed.²¹⁴ Gray Jay offers no context for the document or discussion of its preparation in its post-trial briefing. But, on slide 4, text in the lower left-hand corner of the slide provides that the “Deal Team [was] seeking Advisory Board and Investment Committee approval to enter into definitive legal agreements” for a merger.²¹⁵ So I surmise that is what the document concerns.

As proof of insolvency, Gray Jay points out that one slide at the beginning of the deck states that “OWL’s Fair Market Value as of June 30, 2022 is \$263 million” and another slide, 16 pages later in a different context, states that “OWL has \$278 million of consolidated debt[.]”²¹⁶ But that is a far cry from proving that Vale was balance sheet insolvent. As Vale points out, Gray Jay seems to be incorrectly comparing debt (a liability) with an estimate of the amount a “buyer [would] be willing to pay for the [] entire package of assets and liabilities” of the OWL

²¹⁴ See Post-Trial Opp’n Br. at 48–49 (citing JX145).

²¹⁵ JX 145; *see also* Tr. (Smith) at 283–90.

²¹⁶ JX145; Post Trial Opp’n Br. at 17, 48–49 (citing JX145) (“OWL had a fair market value of only \$263 million compared to debt of \$278 million.”).

enterprise.²¹⁷ Yet, as *Quadrant* explained, if the latter amount “is positive, the firm is solvent.”²¹⁸ This is all the more head-scratching when one sees that, immediately preceding the \$263 million fair market value figure, the slide also reports two separate transaction offers with implied nine-figure equity values for OWL, including PWS’s at significantly over \$200 million (after accounting for consolidated debt).²¹⁹

Gray Jay’s sparse evidence and conclusory assertion of insolvency stand in stark contrast to the robust evidence Vale cites to show it was balance sheet solvent at the time of the Pilot Transaction. Vale’s 2021 audited consolidated financials show that on December 31, 2021, it had total assets of just over \$574 million and total liabilities of around \$291 million, meaning its net assets were \$283 million.²²⁰ Vale’s 2022 Q1 unaudited financials, prepared as part of the Pilot Transaction diligence,

²¹⁷ *Quadrant*, 2015 WL 6157759, at *16 (internal quotation marks omitted) (emphasis added); Post-Trial Reply Br. at 16; see *DFC Glob. Corp. v. Muirfield Value P’rs, L.P.*, 172 A.3d 346, 368 (Del. 2017) (“[T]he fair market value of a company is what it would sell for when there is a willing buyer and willing seller without any compulsion to buy.”).

²¹⁸ *Quadrant* 2015 WL 6157759, at *16 (internal quotation marks omitted).

²¹⁹ JX 145.008; JX145.011 (incorporating “OWL Revolving Credit Facility[,] “OWL Term Loan[,]” and “OWL Vendor Loan Note” in calculating implied equity value); *Quadrant* 2015 WL 6157759, at *17 (“The fact that Merced paid money for Athilon’s equity in a market transaction is powerful evidence that the equity actually had value.”). Gray Jay fails to engage in any meaningful way with the details of the slide deck, including the \$263 million “Fair Market Value” figure. But it seems worth noting that, given the references in the slide deck to an “OWL” revolving credit facility, term loan, and VPN (e.g., JX145.011), the slide deck seems to lump the various entities within the enterprise together as “OWL.” Indeed, it seems that the only references to Horus, Minerva, and Vale in the 49-page deck appear on two “Transaction Structure” slides. The first slide reflects the “OWL Current Structure” with an extensive organizational chart labelled “OWL Structure Diagram[,]” JX145.019, and the second slide lays out a potential post-transaction “Pro Forma Structure Diagram[,]” JX145.020.

²²⁰ JX203. These financials include OWL’s assets and debt. *Id.* (“[T]he consolidated financial statements of Vale . . . and subsidiaries[.]”).

also show assets exceeding liabilities.²²¹ Based on those financials, Vale’s expert, Alan Ratliff, issued an un rebutted report concluding that “there is no evidence that would support a determination that Vale was bankrupt or insolvent for accounting purposes pursuant to GAAP . . . at the time of the [Pilot Transaction].”²²² Although the Court can reject uncontradicted expert testimony,²²³ Gray Jay’s failure to proffer its own expert to rebut Ratliff’s conclusion severely undermines its insolvency argument.²²⁴

Gray Jay instead relies on testimony from the Gray Jay Members suggesting Vale “could have been insolvent.”²²⁵ For example, Hines testified that “if we wouldn’t have got the [Pilot Transaction] done . . . OWL would have defaulted on our debt. We

²²¹ JX130. In terms of other contemporaneous evidence, beyond the financial statements already discussed, Gray Jay relies on Vale’s September 2021 hiring of Greg Pollard to work at OWL. See Post-Trial Opp’n Br. at 13–17; Tr. (Smith) at 242–45; *id.* (Cooper) at 527; *id.* (Johnson) at 709. As discussed, the parties dispute whether Pollard was a “consultant” or a “chief restructuring argument.” Compare *id.* (Smith) at 242–45 (insisting Instar “hired Greg Pollard as a consultant), and *id.* at 922–24 (same), with *id.* (Cooper) at 527–28 (testifying that Pollard was a “chief restructuring officer.”), and *id.* (Johnson) at 709 (testifying that “Instar brought in what they refer to as a chief restructuring officer, which was Greg Pollard.”). But regardless of his title, Pollard’s hiring does not prove that Vale was insolvent. Indeed, Cooper testified that he did not “think that a chief restructuring officer was necessary at OWL,” which, if anything, suggests Vale was solvent. Tr. (Cooper) at 529–30.

²²² JX274 ¶ 20.

²²³ *E.g. Williams v. White Oak Builders, Inc.*, 2006 WL 1668348, at *8 n.103 (Del. Ch. June 6, 2006).

²²⁴ See, e.g., *In re Appraisal of Jarden Corp.*, 2019 WL 3244085, at *26–31 (Del. Ch. July 19, 2019).

²²⁵ See, e.g., Tr. (Cooper) at 564. Notably, the non-expert testimony on Vale’s solvency was contradicting. See *id.* (Smith) at 204–05 (testifying that Grant Thorton issued Vale a “clean opinion,” showing Vale was “[n]ot insolvent.”); *id.* (Johnson) at 760 (Johnson testifying that he was “not certain” whether Vale was insolvent at the time of the Pilot Transaction).

were insolvent.”²²⁶ Yet, that testimony does not overcome the contemporaneous financial documents or Vale’s un rebutted expert report. The Court did not find Hines credible on that point.²²⁷ Generally “after-the-fact testimony” from interested individuals “is not as credible as contemporaneous documentary evidence.”²²⁸ The Gray Jay Members seem highly motivated to say Vale was insolvent at the time of the Pilot Transaction,²²⁹ and as discussed the extremely limited contemporaneous evidence Gray Jay cites does not support their testimony.

Perhaps recognizing that the contemporaneous documents do not support its balance sheet insolvency argument,²³⁰ Gray Jay asserts that possible, yet-to-be-incurred remediation costs from the Madera Event “likely pushed Vale over the line of being balance sheet insolvent.”²³¹ Assuming such costs would flow up to Vale,²³²

²²⁶ *Id.* (Hines) at 809.

²²⁷ For one, Hines seemingly contradicted himself by testifying that he was not “aware of any finding that Vale was insolvent[.]” *Id.* (Hines) at 854–55.

²²⁸ *Golden Rule Fin. Corp. v. S’holder Rep. Servs. LLC*, 2026 WL 1182159, at *21 (Del. Ch. Apr. 30, 2026) (citation modified); *see also Triple H Fam. Ltd. P’ship. v. Neal*, 2018 WL 3650242, at *2 (Del. Ch. July 31, 2018).

²²⁹ *See* ECL at 2 (“[Gray Jay’s] obligation to . . . purchase the [Vale] [s]ecurities under th[e] [ECL] will terminate automatically and immediately upon . . . the bankruptcy or insolvency of [Vale].”).

²³⁰ *See* Post-Trial Opp’n Br. at 48–49 (“Vale was on the brink of balance-sheet insolvency in July 2022[.]”).

²³¹ *Id.*

²³² To be clear, that point is highly disputed. Vale invokes principles of corporate separateness and points out that “the Madera Well is owned and operated by two companies several corporate layers removed from Vale,” such that it is not clear that Vale would be liable for any remediation cost imposed by OCD. Post-Trial Reply Br. at 23; *see* JX74 at Schedule 3.3(c). *See also In re Aeero Techs. LLC*, 346 A.3d 584, 596 (Del. 2025) (“[W]e respect the separateness of distinct legal entities.”). Gray Jay does not respond to that argument. Although Delaware of course respects the separateness of distinct entities, Vale’s argument is not as cut and dry as the briefing suggests. For one, Vale had no other assets apart from

Gray Jay did not prove that it is proper to account for any uncertain, contingent Madera Event liability or that doing so would make Vale balance sheet insolvent. The parties' briefs do not squarely address how Delaware law accounts for possible contingent liabilities for purposes of an insolvency analysis. At post-trial oral argument, Plaintiff's counsel suggested that GAAP's "probable and reasonably estimable" standard applies.²³³ Rankin's expert report similarly states that:

[u]nder the U.S. Accounting Standards Codified . . . a lost contingency event . . . must be recognized by a charge to income for accounting purposes [] only if . . . (a) [] it is probable that that a liability has been incurred or an asset has been impaired as of [the] relevant date, and (2) the amount of loss can be reasonably estimated.²³⁴

To be "probable" such that a contingent event should be recorded, practice under GAAP suggests that the event should have "a 75% or greater likelihood" of occurring.²³⁵ Gray Jay did not oppose that standard at oral argument or submit any contrary expert report. Nor did Gray Jay offer a competing framework for evaluating the effect of the Madera Event on Vale's balance sheet in their post-trial briefing.

OWL. Thus, it seems reasonable to believe that a decrease in the value of the OWL assets at the subsidiary level due to environmental remediation costs could cause Vale to be insolvent. *See* JX203 (Vale's 2021 consolidated financials, including assets and liabilities at the subsidiary level). Regardless, the Court need not resolve the parties' dispute on this point because, for the reasons to be discussed, Gray Jay did not prove that the Madera Event made Vale balance sheet insolvent at the time of the Pilot Transaction even assuming remediation costs could affect Vale's balance sheet.

²³³ OA Tr. at 19–28.

²³⁴ JX274 ¶ 30.

²³⁵ *Id.* ("While a formal numeric standard does not exist, 'practice generally considers an event that has a 75% or greater likelihood of occurrence to be probable.'" (quoting PriceWaterhouseCoopers US IFRS & US GAAP guide, Chapter 9, 9.2 Recognition of provisions (Nov. 30, 2022))).

Accordingly, for purposes of this decision, the Court adopts the probable and reasonably estimable standard.

Under that standard, the evidence does not suggest that any potential Madera Event liability was probable or reasonably estimable at the time of the Pilot Transaction.²³⁶ When the Pilot Transaction occurred the OCD had cleared the Madera Well to resume operations without suggesting any massive environmental catastrophe occurred or imposing commensurate sanctions.²³⁷ Similarly, contemporaneous OWL documents do not describe the Madera Event as anything like a catastrophic environmental disaster.²³⁸ Those documents extensively discuss the Madera Event, its impact on OWL, and the company's remediation efforts, yet do not suggest that anyone at the time—including the Gray Jay Members serving as OWL management—considered the Madera Event an environmental catastrophe.²³⁹

²³⁶ Indeed, Gray Jay admits that “it is difficult to estimate the additional balance-sheet impact of the Madera Breach given OCD’s ongoing investigation.” Post-Trial Opp’n Br. at 49. To reiterate, Gray Jay bears the burden here. Yet, even if one assumes for the purpose of argument that Gray Jay proved Madera Event liability was sufficiently probable, Gray Jay still points to no evidence—or frankly, numbers—that would enable the Court, with any remote degree of confidence, to estimate or to reasonably estimate the extent of that liability. Basically, Gray Jay seems to suggest, via speculative litigation-driven testimony by interested parties, that the liability exposure must have been “big” and that is enough. This is post-trial. That is not enough.

²³⁷ JX110; JX113; JX114.

²³⁸ See JX080; JX086; JX088; JX090; JX091; JX092; JX095; JX097; JX098; JX099; JX100.

²³⁹ See JX080; JX086; JX088; JX090; JX091; JX092; JX095; JX097; JX098; JX099; JX100.

The Gray Jay Members’ testimony at trial in support of Gray Jay’s insolvency defense was starkly different. They claimed the Madera Event was an immense environmental disaster that they knew occurred on their watch and, in turn, rendered Vale insolvent. But, if true, they apparently remained knowingly silent, failing to alert authorities as to the scale of the claimed disaster. It is also hard to believe that OWL personnel—including several Gray Jay Members—oversaw “the largest . . . freshwater contamination caused by produced water in U.S. history” without sending a single email or creating a single document to that effect.²⁴⁰

To support its argument that the Madera event rendered Vale balance sheet insolvent, Gray Jay points to documents associated with OCD’s ongoing follow-up investigation. The relevance of that evidence is questionable given that the OCD did not reopen its investigation until August 2023. That is well after PWS’s repayment of the VPN as part of the Pilot Transaction triggered Gray Jay’s obligations under the ECL.²⁴¹

Nevertheless, the facts do not support Gray Jay’s argument. Gray Jay primarily relies on a June 2024 analysis prepared by Lonquist Sequestration LLC at non-party PWS’s request to inform PWS’s response to the OCD’s reopened

²⁴⁰ Tr. (Cooper) at 578; *see, e.g., Camaisa v. Pharm. Res. Assocs., Inc.*, 2025 WL 3049891, at *11 (Del. Ch. Oct. 28, 2025) (“Just as glaring is the lack of contemporaneous record evidence one would expect if . . . the alleged” events occurred).

²⁴¹ JX209; Tr. (Smith) at 960–62. Although a single email suggests that the OCD may have been considering a follow-up investigation in May 2022, there is no dispute that any such investigation did not begin until August 2023. *See* JX131; JX209.

investigation.²⁴² Lonquist’s report analyzes whether a plume of brine from the Madera Well could reach any other nearby wells, including the capped well that first alerted OWL and OCD to the possibility of a leak.²⁴³ Notably, Lonquist assumes a complete breach of the Madera Well casing and substantial leak that continued for three months.²⁴⁴ To be clear, whether any of that occurred—and, if so, to what extent—was heavily disputed at trial.²⁴⁵ But, even assuming a hole through all of the well’s casing layers, and using parameters that produced “the largest . . . brine contamination plume,” Lonquist concluded any leak “remains far away from any nearby water wells.”²⁴⁶

Despite the illustrative nature of Lonquist’s analysis, Gray Jay submitted an expert report criticizing Lonquist’s model as overly conservative.²⁴⁷ Vale submitted

²⁴² JX227. PWS led the response to the OCD’s renewed investigation because ownership of the Madera Well and any Madera Event liability passed to PWS as part of the Pilot Transaction. *See, e.g.*, Tr. (Smith) at 963–64, 988–89; JX282.

²⁴³ The report expressly “[a]ssum[ed]” that “[b]rine is leaking through a 3’ hole” that penetrated all layers of the Madera Well’s casing and that the “leak continue[d] for 3 months.” JX227; *see also* Tr. (Johnson) at 763–66; Tr. (Cooper) at 607.

²⁴⁴ JX227.

²⁴⁵ The parties put forward significant competing witness testimony at trial. As to documents, a September 2023 email from OCD to PWS suggests a leak breached all the Madera Well’s protective casing layers. JX212 (“While OWL may not visually detect a release, however the C-103 submissions . . . indicate that the injection created a hole and continued to do so through all casing strings around this depth.”). But other contemporaneous emails from when the Madera Event was ongoing suggest that any leak did not penetrate all four of the Madera Well’s protective layers. JX067; *see* Tr. (Smith) at 185–88.

²⁴⁶ JX227.

²⁴⁷ *See* JX273 (expert report of Chad Kronkosky).

a rebuttal expert report identifying a host of problems with the Gray Jay expert report. The Court does not rely on the Gray Jay report.²⁴⁸

Thus, the evidence simply does not support the conclusion that, at the time of the Pilot Transaction, the Madera Event was a massive environmental catastrophe sufficient to make Vale balance sheet insolvent under the probable and reasonably estimable standard. Therefore, Gray Jay has not carried its burden of showing that Vale was balance sheet insolvent such that the ECL automatically terminated before Gray Jay's obligation to purchase Vale securities was triggered.

b. Gray Jay Did Not Prove That Vale Was Cash Flow Insolvent

Separately, Gray Jay argues that Vale was cash flow insolvent at the time of the Pilot Transaction. An entity is “cash-flow insolvent” if it is “unable to pay its debts as they come due.”²⁴⁹ A sufficiently certain showing that an entity will be “unable to timely meet maturing obligations in the ordinary course of business” can

²⁴⁸ See *Kruse v. Synapse Wireless, Inc.*, 2020 WL 3969386, at *8 (Del. Ch. July 14, 2020) (“The court’s fact-finding role allows it to consider reliable and credible expert testimony and to reject unreliable or incredible expert testimony.”). Kronkosky primarily challenges Lonquist’s assumptions and proposes his own models to suggest that the Madera Event did cause a massive contamination of freshwater with toxic brine. See JX273. Yet, Vale’s rebuttal expert, John Kondziolka insists that Kronkosky’s “model was flawed in multiple respects . . . [his] results are inconsistent with observations . . . [his] conclusions have no basis . . . [and] [his] report has internal inconsistencies and is unreliable.” JX275 (“Mr. Kronkosky’s model is inconsistent with the available data because the volume that he assumes leaked from the well exceeds the volume injected at the well.”). Indeed, Kondziolka insists that Kronkosky “arbitrarily ma[d]e up model inputs without any basis,” which necessarily “produce[s] inaccurate model results.” *Id.* Kronkosky did not appear at trial or, it seems, sit for a deposition. Thus, Kondziolka’s sharp criticism of Kronkosky’s model and methodology is unrebutted, and I do not give Kronkosky’s opinions any weight.

²⁴⁹ *TCV VI, L.P. v. TradingScreen Inc.*, 2015 WL 1598045, at *4 (Del. Ch. Feb. 26, 2015).

support a finding of cash flow insolvency.²⁵⁰ But a company is not cash flow insolvent if there is “no evidence that [it] [] defaulted on any . . . obligations; . . . no evidence that [it] has any judgment against it for any payables; [] [] no evidence of any liens on the [c]ompany’s assets; and [] [] no evidence that it would be impossible for [the company] to raise capital in the future.”²⁵¹

Under that standard, Gray Jay did not carry its burden to prove by a preponderance of the evidence that OWL was cash flow insolvent. True, the record shows OWL was experiencing financial difficulties in 2021–2022 and had \$9 million in accounts payable.²⁵² Hines testified that those accounts payable were “past due [to] vendors” who were “calling every day,” and that OWL could “not . . . keep up with interest payments.”²⁵³ Yet, Gray Jay points to no contemporaneous evidence supporting this testimony. For example Gray Jay cites no evidence that OWL missed any payments, such as a creditor demand letter or liens on OWL’s assets—which one would expect if OWL was cash flow insolvent.²⁵⁴ Instead the record shows OWL was

²⁵⁰ *NEC Fund VI HE Lender, LLC v. Hecate Hldgs. LLC*, 2026 WL 527007, at *11 (Del. Ch. Feb. 25, 2026).

²⁵¹ *Geneius*, 2017 WL 6209593, at *10.

²⁵² *E.g.*, JX062 (OWL’s Q2 2021 “Operations Committee Report”); JX145. *But see* JX145 (“OWL’s liquidity situation has significantly improved, with AP decreasing from approximately \$12.5 million in 4Q21 to \$9.2 million in July 2022.”).

²⁵³ Tr. (Hines) at 809, 853–54.

²⁵⁴ *See, e.g., Camaisa*, 2025 WL 3049891, at *11 (“Just as glaring is the lack of contemporaneous record evidence one would expect if . . . the alleged” events occurred).

actively exploring different ways of paying its debts—including by hiring Pollard.²⁵⁵ Gray Jay points out that OWL also had “over \$270 million [in] . . . maturing [debt] from the Senior Debt Agreement and V[P]N,” which it could not refinance.²⁵⁶ While that debt caused management to adopt a “merger or bust” strategy,²⁵⁷ OWL repaid its debts via the Pilot Transaction.²⁵⁸ Thus, while OWL was in a financially precarious position in early 2022, the preponderance of trial evidence does not show it was cash flow insolvent.

In conclusion, Gray Jay did not carry its burden to prove that Vale was insolvent at the time of the Pilot Transaction such that the ECL automatically terminated. As discussed, Gray Jay relies on a smattering of questionable documents and self-serving testimony from the Gray Jay Members. Gray Jay did not offer any financial expert to challenge Ratliff’s conclusion, based on Vale’s audited financials, that Vale was not insolvent at the time of the Pilot Transaction. Accordingly, the Court concludes that Gray Jay did not carry its burden to prove by a preponderance

²⁵⁵ The record does suggest that OWL was organizing and prioritizing its bills based on how “critical” each creditor was to its operations and negotiating extensions with other, less critical creditors. JX062. But the fact that management is “negotiating in good faith with creditors for the benefit of the company” while making a “bona fide effort to overcome [OWL’s] current financial difficulty” is not, without more, sufficient to show cash flow insolvency. *Geneius*, 2017 WL 6209593, at *11.

²⁵⁶ Post-Trial Opp’n Br. at 48; see Tr. (Cooper) at 523–24; *id.* (Johnson) at 700–04; JX073; JX076.

²⁵⁷ Tr. (Hines) at 807–08.

²⁵⁸ *E.g.*, JX161.

of the evidence that Vale was insolvent under either a cash-flow or balance-sheet test. Thus, Gray Jay’s insolvency defense does not justify its non-performance of the ECL.

B. Gray Jay’s Performance Under The ECL Was Not Excused

Gray Jay also insists that, even if the ECL remained in effect, its performance should be excused because (1) Vale committed a prior material breach of the implied covenant; and (2) the ECL’s purpose was frustrated.²⁵⁹ The Court considers each argument.

1. The Implied Covenant Does Not Excuse Gray Jay’s Performance Under The ECL

Gray Jay argues its performance of the ECL should be excused because Vale committed a prior material breach of the implied covenant of good faith and fair dealing.²⁶⁰ The implied covenant “inheres in every contract and ensures that neither party acts arbitrarily or unreasonably to frustrate the fruits of their bargain.”²⁶¹ “The implied covenant operates in two primary ways.”²⁶² First, it “functions as a limited gap-filler” to address “circumstances that the[] [parties] could not foresee and did not address in their written agreement[.]”²⁶³ The gap-filler implied covenant (1) cannot “be used to rewrite or contradict express terms”;²⁶⁴ (2) “only applie[s] to

²⁵⁹ Post-Trial Opp’n Br. at 51–57.

²⁶⁰ *Id.* at 51–56.

²⁶¹ *Johnson & Johnson v. Fortis Advisors LLC*, 352 A.3d 229, 253 (Del. 2026).

²⁶² *Id.*

²⁶³ *Id.* at 251 (internal quotation marks omitted).

²⁶⁴ *Id.*

‘developments that could not be anticipated, not developments that the parties simply failed to consider’;²⁶⁵ and (3) “cannot be invoked when the contract addresses the conduct at issue.”²⁶⁶ The second form of the implied covenant applies when the agreement “allocates discretionary authority to one party over a central aspect of the contract” and that party “exploits that discretion in a manner that defeats the overarching purpose of the bargain[.]”²⁶⁷

In its briefing, Gray Jay only invokes the gap-filler version of the implied covenant.²⁶⁸ But Gray Jay pivoted at post-trial oral argument, asserting that its implied covenant argument “has to be [the] discretion” variety.²⁶⁹ Thus, it is not clear that any implied covenant gap-filler argument is before the Court. Regardless, any such argument fails because Gray Jay has not identified any valid gap in the ECL or VPN for the implied covenant to fill.

Gray Jay argues the ECL has a “gap” that allowed Vale to structure the Pilot Transaction to avoid a default, because “[n]o party to the ECL anticipated that Vale

²⁶⁵ *Id.* at 254 (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010)). “If a development could have been anticipated, even if it was unlikely to occur, the implied covenant cannot be invoked to provide protections that ‘easily could have been drafted’ at the bargaining table.” *Id.* at 257 (quoting *Nationwide Emerging Mgrs., LLC v. NorthPointe Hldgs., LLC*, 112 A.3d 878, 897 (Del. 2015)).

²⁶⁶ *Glaxo Gp. Ltd. v. DRIT LP*, 248 A.3d 911, 919–20 (Del. 2021) (internal quotation marks omitted); accord *Cincinnati SMSA Ltd. P’ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998).

²⁶⁷ *Johnson & Johnson*, 352 A.3d at 253–54 (internal quotation marks omitted).

²⁶⁸ Post-Trial Opp’n Br. at 51–56.

²⁶⁹ OA Tr. at 74–75, 130, 138.

would secure a third-party's payment of the V[P]N via a transaction to which Vale was not a party and technically offered no consideration.”²⁷⁰ Yet, the ECL specifically enumerates circumstances under which Gray Jay's obligations thereunder terminate, including a default and acceleration of the VPN.²⁷¹ The VPN contains numerous restrictions on Vale's ability to dispose of OWL or its assets—the same restrictions Gray Jay invokes in its default and acceleration defense. Thus, the contracts are not silent regarding the types of transactions Vale could enter; they simply do not prohibit a deal like the Pilot Transaction. As such, adopting Gray Jay's position “would be to grant [], by judicial fiat, contractual protections that [Gray Jay] failed to secure for [itself] at the bargaining table.”²⁷² That is not a proper application of the implied covenant's gap-filler role.²⁷³ Thus, to the extent it remains a live issue, Gray Jay's gap-filler implied covenant argument falls flat.

²⁷⁰ Post-Trial Opp'n Br. at 54–55.

²⁷¹ ECL at 2.

²⁷² *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 707 (Del. Ch. 2004).

²⁷³ See *Winshall v. Viacom Int'l., Inc.*, 76 A.3d 808, 816 (Del. 2013); accord *Johnson & Johnson*, 352 A.3d at 257. Gray Jay's reliance on *Dieckman v. Regency GP LP* does not compel ruling otherwise. 155 A.3d 358 (Del. 2017). The *Dieckman* court explained that an implied term should be so “obvious and provocative” that “the parties must have intended [it] and [] only failed to express [it] because [it] [was] too obvious to need expression.” *Id.* at 368 (internal quotation marks omitted). Here, Gray Jay does not seek to add a term to the ECL or VPN that is similarly obvious and provocative—rather it seeks to extend the existing restrictions to cover situations the parties “could [have] [] anticipated, . . . [but] simply failed to consider,” or did not agree to prohibit in the VPN. *Johnson & Johnson*, 352 A.3d at 254. That is not a proper application of the implied covenant.

Gray Jay’s discretion-based implied covenant argument also fails for several reasons. First, as Gray Jay admitted at oral argument, it did not make any “discretion” argument in its post-trial brief.²⁷⁴ “[A]n issue not raised in post-trial briefing has been waived[.]”²⁷⁵ Thus, that Gray Jay’s post-trial brief did not discuss the discretion-based implied covenant is sufficient to reject that argument.

But even if Gray Jay properly raised the issue, the discretion version of the implied covenant does not apply. The ECL does not give Vale any discretionary right, and the VPN references discretion once in an irrelevant provision.²⁷⁶ The discretion variant of the implied covenant only applies where the contract affirmatively gives a party “discretion to act as to a certain subject[.]”²⁷⁷ Gray Jay does not identify any provision in the ECL or VPN that grants Vale a discretionary right that it supposedly exercised in bad faith. Instead, Gray Jay seemingly argues that because the VPN restricts Vale’s ability to dispose of the OWL assets, any deal designed to avoid those

²⁷⁴ Post-Trial OA at 138–39.

²⁷⁵ *Oxbow Carbon & Mins. Hldgs., Inc. v. Crestview-Oxbow Acq., LLC*, 202 A.3d 482, 502 n.77 (Del. 2019); *accord Menn v. ConMed Corp.*, 2022 WL 2387802, at *22 n.308 (Del. Ch. June 20, 2022).

²⁷⁶ *See* ECL; VPN § 8.05 (“In addition, upon any assignment of this Note pursuant to Section 8.05 by a Lender then acting as the Administrative Lender, such Lender may in its discretion resign as the Administrative Lender on behalf of such assignee[.]”).

²⁷⁷ *SerVaas v. Ford Smart Mobility LLC*, 2021 WL 3779559, at *10 (Del. Ch. Aug. 25, 2021) (internal quotation marks omitted); *accord Policemen’s Annuity and Benefit Fund of Chicago v. DV Realty Advisors LLC*, 2012 WL 3548206, at *12 (Del. Ch. Aug. 16, 2012); *Zync, Inc. v. Porsche Inv. Mgmt., S.A.*, --- A.3d ---, 2026 WL 1507812, at *20 (Del. Ch. May 29, 2026); *Guilbeau v. Footprint Int’l Holdco, Inc.*, 358 A.3d 248, 275–76 (Del. Ch. 2026). Of course, a contract need not use the word “discretion” to create a discretionary right. *See, e.g., Zync*, 2026 WL 1507812, at *19–20.

restrictions violates the implied covenant. In essence, Gray Jay tries to use the implied covenant to apply a freestanding good faith gloss on Vale’s ability to take actions the VPN and ECL do not prohibit. That is not a proper application of the implied covenant,²⁷⁸ and Gray Jay’s failure to identify a specific discretionary contractual right Vale exercised in bad faith defeats its discretion-based implied covenant defense.²⁷⁹

2. The Frustration of Purpose Doctrine Does Not Excuse Gray Jay’s Performance Of The ECL

Gray Jay also invokes the frustration of purpose doctrine to excuse its non-performance of the ECL.²⁸⁰ The frustration of purpose doctrine “excuses future performance under a contract: ‘[w]here, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was

²⁷⁸ See, e.g., *Priveterra Cap., Mgmt., LLC v. Pixium Vision, LLC*, 2026 WL 940227, at *6 (Del. Super. Apr. 7, 2026) (“[Plaintiff] doesn’t point to an implied, breached obligation. Instead, [Plaintiff] vaguely suggests that the Defendants breached the good-faith covenant by entering into safeguard proceedings when there were other options on the table. That’s not enough. General allegations of bad-faith conduct are insufficient[.]”).

²⁷⁹ Even if Gray Jay’s textually untethered discretion argument was cognizable, a preponderance of the evidence does not show that Vale acted in bad faith. The record does not show anything “unreasonable or nefarious about” the Pilot Transaction. *Star Am. Rail HoldCo, LLC v. Cathcart*, 2024 WL 5239938, at *9 (Del. Ch. Dec. 17, 2024). True, the evidence suggests that Vale intentionally structured the Pilot Transaction to avoid triggering a default under the VPN that would eliminate Gray Jay’s obligations under the ECL. See, e.g., JX48; JX118; JX135. But even assuming that is true, it does not evidence bad faith. Sophisticated parties routinely structure transactions around contractual restrictions, and “[i]n the abstract, efforts to structure a transaction to avoid tripping the terms of an indenture are perfectly permissible.” *Wilm. Sav. Fund Soc’y, FSB v. Foresight Energy LLC*, 2015 WL 7889552, at *9 (Del. Ch. Dec. 4, 2015).

²⁸⁰ Post-Trial Opp’n Br. at 56–57.

made[.]”²⁸¹ The frustrated purpose “must be so completely the basis of the contract that . . . without it the transaction would make little sense.”²⁸² The doctrine is “very difficult to invoke,” because “Delaware courts are extremely reluctant to allow parties to disavow obligations that they have agreed to.”²⁸³ It “is generally limited to cases where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party.”²⁸⁴ The doctrine does not apply if the non-performing party “assumed the risk” that the frustrating event would occur²⁸⁵ or if the frustrating event “was reasonably foreseeable, and could . . . have been anticipated by the parties and provided for in the contract.”²⁸⁶

A frustration of purpose analysis logically starts with ascertaining the at-issue contract’s purpose. Gray Jay argues “it was a basic assumption of the ECL that Vale would either manage the OWL assets . . . or Gray Jay would be relieved of its investment obligations” such that the Pilot Transaction “frustrated the parties’

²⁸¹ *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 (Del. 2006) (quoting Restatement (Second) of Contracts § 265 (1981)); *accord Level 4 Yoga, LLC v. CorePower Yoga, LLC*, 2022 WL 601862, at *26 (Del. Ch. Mar. 1, 2022).

²⁸² Restatement (Second) of Contracts § 265, cmt. a (1981).

²⁸³ *Promise Easy Ltd. v. Moon*, 2023 WL 5152173, at *19 (Del. Ch. Aug. 10, 2023) (internal quotation marks omitted).

²⁸⁴ *McReynolds v. Trilantic Cap. Prs IV L.P.*, 2010 WL 3721865, at *4 (Del. Ch. Sept. 23, 2010) (internal quotation marks omitted); *accord Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, 2021 WL 2886188, at *40 (Del. Ch. July 9, 2021).

²⁸⁵ *McReynolds*, 2010 WL 3721865, at *4 (citation omitted).

²⁸⁶ *Wal-Mart*, 2005 WL 5757652, at *6 (Del. Ch. Apr. 1, 2005), *aff’d*, 901 A.2d 106 (Del. 2006).

expectations.”²⁸⁷ Yet, that “basic assumption” seems less like the ECL’s primary purpose and more like one of several assumptions Gray Jay made to support its decision to enter into the ECL. As Vale points out, the ECL’s text simply memorializes Gray Jay’s investment in Vale—a necessary component of the broader Transaction of which the ECL was only one part.²⁸⁸ The ECL itself does not require Vale to control OWL or its assets. Instead, those restrictions are imposed via the ECL’s reference to the VPN—further confirming that the ECL must be viewed as a component of the broader Transaction.²⁸⁹ When viewed in that way, the most natural reading of the ECL shows its purpose was to facilitate Gray Jay’s investment in Vale as part of the Transaction in which the Gray Jay Members received a substantial payout. Having enjoyed the benefits of the broader transaction, they cannot now seek to redefine the ECL’s purpose to advance a litigation strategy.

But even if Gray Jay’s articulation of the ECL’s primary purpose is correct, the frustration of purpose doctrine does not apply because the parties implicitly allocated

²⁸⁷ Post-Trial Opp’n Br. at 56–57.

²⁸⁸ Post-Trial Reply Br. at 26; *see* ECL at 1 (“This letter agreement will confirm the agreement and irrevocable commitment of [Gray Jay] to and in favor of Vale . . . to purchase, subject only to the conditions set forth herein, (a) \$2,000,000 in equity securities of [Vale] [] simultaneous to the [Transaction] and (b) . . . an additional \$8,000,000 in [s]ecurities . . . following receipt of . . . payment . . . [of] the [VPN].”). *See also Ashland LLC v. Samuel J. Heyman 1981 Cont. Tr. For Heyman*, 2017 WL 1224506, at *6 (Del. Super. Mar. 30, 2017) (“Delaware law allows for agreements related to the same business transaction and subject matter, and entered into in close temporal proximity of one another, to be read together as one overall agreement.”); *Benchmark*, 2026 WL 1179508, at *7 (“When interpreting contracts, it is important to read the relevant provisions in the context of the business relationship reflected in the Agreement.”).

²⁸⁹ *See* ECL at 2.

the risk of the Pilot Transaction. As discussed, the ECL conditions Gray Jay's investment obligation on the lack of a default and acceleration under the VPN.²⁹⁰ The VPN in turn contains numerous restrictions on Vale's ability to dispose of OWL or its assets.²⁹¹ That indicates the parties were aware of the risk that Vale would dispose of the OWL assets and could have addressed transactions like the Pilot Transaction.²⁹² The fact that the parties did not squarely prohibit the Pilot Transaction in the VPN suggests that they allocated "by omission" the risk of it occurring to Gray Jay.²⁹³ To the extent the VPN's prohibitions do address the Pilot Transaction, the ECL only alleviates Gray Jay of its investment obligations upon a default and acceleration.²⁹⁴ Thus, the parties expressly conditioned the VPN's protections on the OWL Lender declaring a default, which as discussed, did not occur and was unlikely given the OWL Lender's preference for repayment of the VPN. Therefore, adopting Gray Jay's position would reallocate a foreseeable risk that the parties could have accounted for during negotiations, and that is not a proper application of the frustration of purpose doctrine.²⁹⁵ Accordingly, Gray Jay has not

²⁹⁰ ECL at 2.

²⁹¹ See VPN § 7.01.

²⁹² *Wilmington Savings*, 2015 WL 7889552, at *9 ("sophisticated parties can anticipate efforts to evade the terms of an agreement" and can address those efforts "through provisions triggered by efforts to evade the literal terms.").

²⁹³ *Aspen Advisors*, 843 A.2d at 707.

²⁹⁴ ECL at 2.

²⁹⁵ *Wal-Mart*, 2005 WL 5757652, at *6; *McReynolds*, 2010 WL 3721865, at *4.

carried its heavy burden to show that this is one of the rare cases where the frustration of purpose doctrine relieves a party of its prior contractual obligation.

To bolster its frustration of purpose argument, Gray Jay invokes its pending motion for sanctions, which seeks “an inference that Vale intentionally structured the Pilot Transaction in an effort to frustrate the purpose of the ECL and avoid the ECL’s Conditions, and such actions constituted bad faith.”²⁹⁶ But granting Gray Jay’s requested inference would not alter the analysis. The evidence in the record already indicates that Vale did structure the Pilot Transaction to avoid the ECL’s termination conditions.²⁹⁷ Indeed, Vale does not dispute that fact.²⁹⁸ But the fact that Vale designed the Pilot Transaction around the ECL’s conditions does not evidence bad faith or support applying the frustration of purpose doctrine. Generally, “efforts to structure a transaction to avoid tripping the terms of an [agreement] are perfectly permissible,”²⁹⁹ and a party “do[es] not breach [its] contractual obligations by structuring transactions to avoid triggering [protections] . . . in favor of [a counterparty].”³⁰⁰ This Court will not redraft a contract’s terms simply because one

²⁹⁶ Post-Trial Opp’n Br. at 66; *see* Dkt. 113.

²⁹⁷ *See, e.g.*, JX042; JX048.

²⁹⁸ Post-Trial Opening Br. at 38 (“The record confirms that the Pilot Transaction was deliberately structured to ensure the VPN was paid off before any change in control or asset transfer occurred.”).

²⁹⁹ *Wilmington Savings*, 2015 WL 7889552, at *9.

³⁰⁰ *Law Debenture Trust Co. of New York v. Petrohawk Energy Corp.*, 2007 WL 2248150, at *7 (Del. Ch. Aug. 1, 2007); *accord Concord Real Estate CDO 2006–1, Ltd. v. Bank of Am. N.A.*, 996 A.2d 324, 339 (Del. Ch. 2010).

party structured a transaction through a “loophole” the parties could have addressed at the bargaining table.³⁰¹ Similarly, Gray Jay cannot use its motion for sanctions as a means to prop-up its deficient frustration of purpose defense—especially given that Gray Jay could have negotiated for a term in the VPN or ECL that prohibited the Pilot Transaction but failed to do so. Thus, the Court denies the request for an adverse inference contained in Gray Jay’s motion for sanctions as moot.³⁰²

In sum, Gray Jay did not prove that its performance of the ECL should be excused under either theory it advances. Because the Court rejects the affirmative defenses, Gray Jay remains liable for its proven breach of the ECL.

³⁰¹ See *Mangano v. Pericor Therapeutics, Inc.*, 2009 WL 4345149, at *5 & n.49 (Del. Ch. Dec. 1, 2009).

³⁰² Gray Jay’s request for attorney’s fees incurred in connection with its motion for sanctions, however, is granted. “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.” *ATG Cap. Opportunities Fund LP v. Lane*, 2026 WL 2592407, at *2 (Del. Ch. Sept. 2, 2026) (quoting *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *8 (Del. Ch. May 18, 2009)). The record suggests Vale was aware that it needed to preserve text messages held by Stone and Irani in advance of filing this action in November 2022, and Vale was certainly aware by the time Gray Jay requested that Vale implement a litigation hold for these individuals in January 2023. JX201. The record shows that Vale made negligible efforts to collect text messages from either Stone or Irani when they left Instar. Moreover, the record suggests that Vale made no effort to prevent Irani from engaging in a practice of routinely deleting text messages between 2020 and 2023. JX246; Tr. (Smith) at 400. While a far cry from the most egregious failures to preserve ESI seen by this Court, this conduct was, at a minimum, negligent. Negligence is sufficient to support the imposition of monetary sanctions. *Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1194 (Del. Ch. 2009); *ATG*, 2026 WL 2592407, at *3. As a result of Vale’s failure to preserve evidence, Gray Jay unduly incurred attorney’s fees bringing a motion for sanctions.

C. Vale's Implied Covenant Claim Fails

In addition to breach of contract, Vale also pled a claim for breach of the implied covenant of good faith and fair dealing.³⁰³ Yet, Vale's opening post-trial brief does not mention or address its implied covenant claim.³⁰⁴ Although Vale's reply brief addresses the implied covenant claim in a single-page argument,³⁰⁵ the failure to raise the issue in its opening brief "constitutes a waiver of the claim."³⁰⁶ But even absent any waiver, Vale's implied covenant claim fails.

Vale argues the implied covenant fills any "gap" in the ECL concerning Gray Jay's obligation to invest "even if [Vale's] equity value declined."³⁰⁷ "It is a basic principle of Delaware law that the implied covenant cannot be invoked where the contract itself expressly covers the subject at issue."³⁰⁸ The ECL details "[Gray Jay's]

³⁰³ PTO ¶ 4.

³⁰⁴ See generally Post-Trial Opening Br.

³⁰⁵ Post-Trial Reply Br. at 29. It seems highly questionable that this one-page argument, which cites no record evidence, could be sufficient to carry Vale's burden of proof on its implied covenant claim. Post-trial a "plaintiff[] must present [its] claims in a cogent and persuasive manner, supported by admissible evidence[.]" *Ruggerio v. Estate of Poppiti*, 2005 WL 2622716, at *6 (Del. Ch. Oct. 5, 2005); see *Roca v. E.I. du Pont de Nemours and Co.*, 842 A.2d 1238, 1242 n.12 (Del. 2004) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived[.]").

³⁰⁶ *Brown v. State*, 198 A.3d 176, 2018 WL 6181657, at *2 n.9 (Del. Nov. 26, 2018) (TABLE); *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001).

³⁰⁷ Post-Trial Reply Br. at 29.

³⁰⁸ *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2017 WL 2729860, at *32 n.307 (Del. Ch. June 26, 2017) (internal quotation marks omitted); *Johnson & Johnson*, 352 A.3d at 253 ("[T]he covenant is a narrow gap-filling tool of last resort. Used properly, the implied covenant functions like a scalpel, not a brush.").

obligation to . . . purchase [Vale] Securities,” including the limitations on that obligation.³⁰⁹ It also provides that Gray Jay can purchase Vale’s securities “at a cash purchase price equal to the [] price of [Vale] Securities at the [time of the Transaction], unless [Vale] has more recently issued Securities at a more favorable purchase price and in such instance, [Gray Jay’s] purchase price shall be the lower of such amounts.”³¹⁰ Thus, the ECL addresses Gray Jay’s requirement to purchase Vale securities if Vale’s value declines—the exact issue at the heart of Vale’s implied covenant claim. There is no gap for the implied covenant to fill. Accordingly, even if fairly raised, Vale’s implied covenant claim fails.

D. Vale’s Available Remedy

Having found that Gray Jay breached the ECL and its performance was not excused, the Court must determine Vale’s available remedy. Vale seeks (1) an order “directing Gray Jay to specifically perform its obligations under the ECL and purchase the [Vale] securities . . . necessary to fulfill its [] [] investment obligation”; (2) an order directing Gray Jay to specifically perform a capital call under the Gray Jay LLC Agreement to fund the investment obligation; (3) damages associated with securing substitute performance; (4) its litigation costs; and (5) its attorneys’ fees.³¹¹

³⁰⁹ ECL at 1.

³¹⁰ *Id.*

³¹¹ Post-Trial Opening Br. at 52.

The Court previously held that “Gray Jay’s possible remaining investment obligation to [Vale], if any, is no greater than \$5.125 million.”³¹² With that in mind, the Court evaluates Vale’s relief requests.

1. Vale Is Entitled To An Order Directing Gray Jay To Specifically Perform Its Obligations Under The ECL, But Not An Order Directing Gray Jay To Issue A Capital Call.

Specific performance “is an extraordinary remedy” that “departs from the ordinary contractual remedy of money damages.”³¹³ As such, “[i]f damages would provide adequate relief, then specific performance is not available.”³¹⁴ The party seeking specific performance must prove by “clear and convincing evidence” that “a valid contract exists, [] he is ready, willing, and able to perform, and [] that the balance of equities tips in favor of the party seeking performance.”³¹⁵ Whether to order specific performance “rests in the sound discretion of the court.”³¹⁶

³¹² Dkt. 215 at 3.

³¹³ *26 Cap. Acq. Corp. v. Tiger Resort Asia Ltd.*, 309 A.3d 434, 438 (Del. Ch. 2023).

³¹⁴ *Id.* at 464 (citing *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010)).

³¹⁵ *Snow Phipps*, 2021 WL 1714202, at *51, 55 (internal quotation marks omitted). The considerations the court balances include (1) “the complexity of the undertaking and the associated difficulty of providing meaningful judicial oversight”; (2) “whether the order can be enforced”; (3) if “performance of the contract by the defendant is possible”; (4) if the party seeking specific performance engaged in “inequitable conduct”; and (5) whether the agreement has a “specific performance provision.” *26 Cap.*, 309 A.3d at 465–74 (internal quotation marks omitted).

³¹⁶ *Peden v. Gray*, 886 A.2d 1278, 2005 WL 2622746, at *3 (Del. Oct. 14, 2005) (TABLE).

Vale makes two specific performance requests.³¹⁷ First, Vale requests an order “directing Gray Jay to specifically perform its obligations under the ECL and purchase the [Vale] securities . . . necessary to fulfill its [remaining] investment obligation[.]”³¹⁸ Gray Jay does not respond to that argument in its opposition brief, despite specifically opposing Vale’s other specific performance request.³¹⁹ It is well-established that “[i]ssues not briefed are deemed waived,”³²⁰ such that where a party “failed to address [an] argument in [an] answering brief, [] any response is [] waived.”³²¹ Thus, Gray Jay waived any opposition to Vale’s first specific performance request. The Court grants Vale’s first specific performance request and orders Gray Jay to fulfill its remaining \$5.125 million investment obligation.³²²

³¹⁷ See Post-Trial Opening Br. at 53–55.

³¹⁸ *Id.* at 52. See also *id.* at 53 (arguing that “the ECL is a valid and enforceable contract between Vale and Gray Jay. Vale has been and remains ready, willing, and able to perform its obligations thereunder. . . . Equity favors performance because Gray Jay bargained for the right to defer its investment, in accordance with the ECL’s terms, and assumed the risk that its capital would be required upon VPN [p]ayouts.”).

³¹⁹ See Post-Trial Opp’n Br. at 61–62.

³²⁰ *Emerald P’s*, 726 A.2d at 1224.

³²¹ *E.g., Rust v. Rust*, 2025 WL 752325, at *6 (Del. Ch. Mar. 10, 2025).

³²² See *ATR-Kim Eng Fin. Corp. v. Araneta*, 2006 WL 3783520, at *22 (Del. Ch. Dec. 21, 2006) (“[Plaintiff] requested monthly compounding in their opening brief. The defendants did not respond to this request . . . Suffice it to say, the defendants are therefore in no position to quibble about the interest rate I now award, having forsaken their chance to respond.”). Vale has a strong argument in support of its first specific performance request. “This court has recognized that specific performance of a stock purchase is appropriate in situations where the stock is not available in the market, is unique, or has unique value to the purchaser[.]” *Gildor v. Optical Solutions, Inc.*, 2006 WL 4782348, at *11 n.33 (Del. Ch. June 5, 2006) (citing *Amaysing Techs. Corp. v. Cyberair Commc’ns, Inc.*, 2004 WL 1192602, at *3 (Del. Ch. May 28, 2004)). In the case of a privately held entity like Vale, “[s]pecific performance [is] justified . . . because of the difficulty in ascertaining the stock’s value.”

Vale also seeks an order “directing Gray Jay . . . to issue a capital call to its members to ensure that Gray Jay has the ability to and actually fulfills its investment obligations.”³²³ Under the Gray Jay LLC Agreement, only Gray Jay’s “Managers”—Cooper and Johnson—have the authority to issue a capital call.³²⁴ The ECL provides that “[n]o remedy, recourse or right of recovery hereunder . . . may be had against any direct or indirect, prior, current or future security holder, partner, *manager* or affiliate of [Gray Jay] . . . whether by the enforcement of any judgment or assessment or by any legal or equitable proceeding[.]”³²⁵ Thus, the ECL seemingly disclaims Vale’s capital-call specific performance request. Just as the Court credits when “the parties contract[] for specific performance,”³²⁶ a contractual provision barring specific performance is strong evidence that such a remedy is improper.³²⁷

In addition, the capital call request seeks to dictate how Gray Jay fulfills its investment obligation by requiring performance under a contract to which Vale is not

Manchester v. Narragansett Cap., Inc., 1989 WL 125190, at *5 (Del. Ch. Oct. 19, 1989) (citing *U.S. Dimension Products, Inc. v. Tassette, Inc.*, 290 A.2d 634, 635 (Del. 1972)); see *Darby Emerging Mkts. Fund, L.P. v. Ryan*, 2013 WL 6401131, at *5 n.17 (Del. Ch. Nov. 27, 2013) (“[S]pecific performance can be an appropriate remedy in cases such as this where it would be difficult to ascertain [the] stock’s value.”). So too here. An award of money damages, instead of an order requiring Gray Jay to purchase Vale securities, would seem to require, among other things, undertaking a valuation of Vale.

³²³ Post-Trial Opening Br. at 52.

³²⁴ Gray Jay LLC Agreement § 6.1, Ex. B.

³²⁵ ECL at 2 (emphasis added).

³²⁶ *Fortis Advisors, LLC v. Krafton, Inc.*, 354 A.3d 906, 948 (Del. Ch. Mar. 16, 2026).

³²⁷ See, e.g., *Snow Phipps*, 2021 WL 1714202, at *51–52.

a party. Generally, parties have discretion regarding how they fulfill a judgment and the Court “will not intervene to deploy coercive remedies on the claimant’s behalf.”³²⁸ While the Gray Jay LLC Agreement describes Gray Jay’s purpose as facilitating the Gray Jay Members’ investment in Vale,³²⁹ it could fulfill that obligation by issuing a capital call, taking a loan, or any other manner of performance. The Court will not limit it to Vale’s preferred method.³³⁰ That is especially true given that Vale is not a party to the Gray Jay LLC Agreement and “only a party to a contract has standing to enforce it.”³³¹ For these reasons, the Court concludes that ordering Gray Jay to specifically perform a capital call is not proper.

³²⁸ *Gandhi-Kapoor v. Hone Capital LLC*, 305 A.3d 707, 715 (Del. Ch. 2023); see *Chambers v. Delaware Dept. of Correction*, 2010 WL 847802, at *1 (Del. Super. Mar. 11, 2010) (“[W]hile [the court] may compel performance of a duty, it may not dictate the manner of performance of any particular result.”).

³²⁹ Gray Jay LLC Agreement § 3.1. The Gray Jay LLC Agreement contemplates a capital call as one method of performance. *Id.* § 6.1. But as discussed, only Gray Jay’s Managers can issue a capital call. Vale did not argue that it is a “creditor” of Gray Jay such that 6 *Del. C.* § 18-502(b) might apply. See *Hassanein v. NTO Fund I*, --- A.3d ---, 2026 WL 2240127, at *25 (Del. Ch. Aug. 4, 2026).

³³⁰ To the extent Vale suggests that an order requiring Gray Jay to perform its investment obligation, without also requiring it to issue a capital call, would be toothless, that is not the case. It is axiomatic that “[n]o person may with impunity disregard an order of the court[.]” *Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1240 (Del. 2018) (internal quotation marks omitted); see *Schmidt v. Schmidt*, 610 A.2d 1374, 1377 (Del. 1992) (“A litigant who displays defiance to a court by refusing to comply with its order should not be permitted to appeal that order while persisting in his defiance. . . . A litigant is not free to determine to what extent he will comply with the law.”).

³³¹ *Florida Chem. Co., LLC v. Flotek Indus., Inc.*, 262 A.3d 1066, 1084 (Del. Ch. 2021). Vale does not invoke any of the recognized exceptions to that well-established principle.

2. Vale Is Not Entitled To Money Damages Associated With The Oceanides Promissory Note

In addition to specific performance, Vale seeks damages associated with interest paid on the Oceanides Promissory Note it used “to cover costs [Gray Jay’s investment] was supposed to fund.”³³² Vale insists that sum constitutes reasonable “[e]xpectation damages [that] put Vale where it would have been absent Gray Jay’s breach.”³³³ Gray Jay argues Vale’s requested monetary damages are consequential damages which the ECL disclaims.³³⁴ Gray Jay also asserts that the ECL’s damages cap precludes any monetary damage award.³³⁵

Delaware law distinguishes “between general (or direct) damages and consequential (or special) damages.”³³⁶ “General damages are those that flow directly and immediately from the [breach] . . . while consequential damages do not flow directly from the breach but result from its consequences.”³³⁷ Academic sources also

³³² Post-Trial Opening Br. at 55–56. Vale maintains the note’s interest rates—“first 13%, then 20%—were reasonable and appropriate given the company’s risk profile and the nature of the financing.” *Id.*

³³³ *Id.*; see *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1131 (Del. 2015).

³³⁴ Post-Trial Opp’n Br. at 58.

³³⁵ *Id.* at 58–59; see Dkt. 215 at 3; ECL at 2–3.

³³⁶ *Byborg Enters. S.A. v. Vertex, Inc.*, 2025 WL 1911338, at *3 (Del. Super. July 11, 2025); accord *WSFS Fin. Corp. v. Great Am. Ins. Co.*, 2019 WL 2323839, at *4–5 (Del. Super. May 1, 2019).

³³⁷ *Byborg*, 2025 WL 1911338, at *3; accord *WSFS Fin.*, 2019 WL 2323839, at *4–5 (“Direct damages are the necessary and usual result of the defendant’s wrongful act; they flow naturally and necessarily from the wrong. . . . Consequential damages, also known as special damages, are those that result naturally but not necessarily from the wrongful act, because they require the existence of some other contract or relationship.”).

recognize that distinction.³³⁸ “The distinction between direct and consequential damages is the degree to which the damages are a foreseeable and highly probable consequence of a breach.”³³⁹

Under that standard, Gray Jay seemingly has a strong argument that Vale’s requested Oceanides Promissory Note Interest damages are consequential damages precluded by the ECL’s text.³⁴⁰ Those damages do not flow necessarily from Gray Jay’s breach of the ECL—*i.e.*, Gray Jay could have breached the ECL without Vale entering into the Oceanides Promissory Note and incurring related damages.³⁴¹ Instead, damages associated with the Oceanides Promissory Note are based on a separate contractual relationship necessitated by Vale’s special circumstances—the need to cover the Pilot Transaction’s closing costs.³⁴² Thus, those damages seem to be consequential because they did not flow directly from Gray Jay’s breach, but rather

³³⁸ Glenn D. West, *Consequential Damages Redux: An Updated Study of the Ubiquitous and Problematic ‘Excluded Losses’ Provision in Private Company Acquisition Agreements*, 70 Bus. Law. 971, 985 (2015) (“[C]onsequential damages [are] damages that do not flow directly and immediately from the injurious act, but that result indirectly from the act.” (internal quotation marks omitted)). Consequential damages “can include losses directly caused by the breach, and that are the probable result of the breach . . . , but that are nevertheless beyond the ordinary course of events normally expected from a breach of this type of contract.” *Id.* at 986 (internal quotation marks omitted).

³³⁹ *WSFS Fin.*, 2019 WL 2323839, at *5; see West, *supra* n.338, at 986–87.

³⁴⁰ ECL at 3 (“[U]nder no circumstances shall [Gray Jay] be liable for any special, incidental, consequential, indirect, exemplary or punitive damages.”); *eCommerce Indus., Inc. v. MWA Intelligence, Inc.*, 2013 WL 5621678, at *45 (Del. Ch. Sept. 30, 2013) (“[L]imitation on liability clauses that preclude various types of damages, such as consequential damages, are typically enforceable.”).

³⁴¹ See West, *supra* n.338, at 986–87.

³⁴² See JX180; JX278; Tr. (Smith) at 177–82.

its consequences. Yet, the Court need not conclude whether Vale’s requested monetary damages are direct or consequential because the ECL’s damages cap bars their recovery either way.³⁴³

Delaware courts routinely enforce contractual damages caps.³⁴⁴ Gray Jay specifically invokes the ECL’s damages cap in its opposition brief, but Vale did not respond to that argument.³⁴⁵ That alone defeats Vale’s request.³⁴⁶ Indeed, Vale’s insistence that its damages are direct belies any argument that the ECL’s damage cap does not apply. The Court will order Gray Jay to purchase the Vale securities needed to fulfill its full investment obligation of \$10 million—which under the ECL constitutes Gray Jay’s “maximum liability . . . for any reason[.]”³⁴⁷ Thus, even absent waiver there is no room left under the damages cap to award Vale’s requested damages.

³⁴³ See ECL at 2–3 (“[U]nder no circumstances shall the maximum liability of [Gray Jay] hereunder exceed the Investor Vendor Note Equity Commitment Cap less any Investor Equity Commitment Payments made by Investor for any reason.”).

³⁴⁴ See, e.g., *LG Elecs. Inc. v. Invention Inv. Fund I, L.P.*, 362 A.3d 1266, 1282–88 (Del. 2026).

³⁴⁵ See Post-Trial Opp’n Br. at 58–59; Post-Trial Reply Br. at 30–33.

³⁴⁶ *Robinson v. Darbeau*, 2021 WL 776226, at *10 n.114 (Del. Ch. Mar. 1, 2021) (“[A] failure to brief an argument constitutes a waiver of the argument.” (citing *Emerald P’rs*, 726 A.2d at 1224)).

³⁴⁷ ECL at 2–3.

3. Vale Is Entitled To Its Costs, But Not Its Attorneys' Fees; Supplemental Briefing Is Needed On Interest

Vale requests its litigation costs.³⁴⁸ Gray Jay waived any opposition to Vale's request for costs by not opposing that ask in its post-trial brief or at oral argument.³⁴⁹ Regardless, the Court awards the prevailing party its costs as a matter of right.³⁵⁰ Accordingly, Vale is entitled to its costs.

Vale also seeks pre- and post-judgment interest.³⁵¹ Although Vale seeks interest in the context of its unsuccessful request for monetary damages, this Court has granted prejudgment interest in the context of an order to fulfill a purchase requirement.³⁵² The decision to do so is rooted in the idea that “an order of specific performance ‘seldom results in performance within the time the contract requires’” and “damages for the delay will usually be appropriate.”³⁵³ Yet, the Court has also recognized that strict contractual limitations on the types of recoverable damages or caps on the amount of damages might support declining to grant such an interest

³⁴⁸ Post-Trial Opening Br. at 56–57.

³⁴⁹ See Post-Trial Opp'n Br. at 63–66; *Emerald P'rs*, 726 A.2d at 1224.

³⁵⁰ 10 *Del. C.* § 5106 (“The Court of Chancery shall make such order concerning costs in every case as is agreeable to equity.”); see *Mack Bros. v. Keypoint Intelligence, LLC*, 2025 WL 3041804, at *14 (Del. Ch. Oct. 29, 2025) (citing Ct. Ch. R. 54(d)).

³⁵¹ Post-Trial Opening Br. at 56–57.

³⁵² See, e.g., *Osborn v. Kemp*, 2009 WL 2586783, at *12 (Del. Ch. Aug. 20, 2009), *aff'd*, 991 A.2d 1153 (Del. 2010).

³⁵³ *Snow Phipps*, 2021 WL 1714202, at *55 (quoting Restatement (Second) of Contracts § 358 cmt. c).

award.³⁵⁴ On the other hand, Delaware courts have awarded prejudgment interest in cases involving a monetary damages cap.³⁵⁵ The parties did not address how the specific language of the ECL’s damages cap affects Vale’s request for pre- and post-judgment interest in either post-trial briefing or oral argument. Accordingly, the parties will confer on and file a schedule to provide supplemental submissions addressing that narrow issue.

That leaves Vale’s request for Attorneys’ fees. Delaware follows “the American Rule, where the prevailing party ordinarily pays its own fees and costs.”³⁵⁶ An exception exists “where the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”³⁵⁷ “Invoking the bad faith exception is exceedingly rare[.]”³⁵⁸ This Court has awarded attorney’s fees under the bad faith exception when, for example, “parties have unnecessarily prolonged or delayed litigation,

³⁵⁴ *Id.* at *55–56 (ordering supplemental briefing on the issue of prejudgment interest where stock purchase agreement limited available remedies to either specific performance or a termination fee).

³⁵⁵ *See, e.g., LG Elecs.*, 362 A.3d at 1288 (directing “entry of judgment in LG’s favor in the amount of [the damages cap]” and “remand[ing] with instructions to award prejudgment interest to LG.”); *River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2025 WL 3094942, at *6, 20 (Del. Super. Nov. 5, 2025) (finding damages sufficient to “trigger the indemnification cap of \$55 million” and that “[i]nterest must be added to the damage calculation.”).

³⁵⁶ *Trematerra v. Affinity Project, Inc.*, 2025 WL 3706541, at *12 (Del. Ch. Dec. 22, 2025).

³⁵⁷ *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 506 (Del. 2005) (internal quotation marks omitted).

³⁵⁸ *Trematerra*, 2025 WL 3706541, at *12.

falsified records or knowingly asserted frivolous claims.”³⁵⁹ That both sides “prevailed on portions of [a] case” suggests that fee shifting is not justified.³⁶⁰

Vale has not met the high burden to show that it is entitled to its attorneys’ fees under the bad faith exception.³⁶¹ For one, Gray Jay (1) secured a dismissal of several claims and the prior individual defendants³⁶² and (2) enforced the ECL’s damages cap to reduce the amount in controversy.³⁶³ Additionally, Vale’s factual arguments in support of fee shifting do not show that Gray Jay litigated in bad faith.³⁶⁴ The evidence does not show that Gray Jay, “for no legally valid reason, refuse[d] to honor a clear legal obligation and force[d] . . . litigation for the sole purpose of causing delay.”³⁶⁵ Instead, Gray Jay advanced several cognizable defenses

³⁵⁹ *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998).

³⁶⁰ *Trematerra*, 2025 WL 3706541, at *12.

³⁶¹ In its reply brief, Vale asserts that the “ECL permits recovery of enforcement costs upon breach.” Post-Trial Reply Br. at 35–36. But that the ECL does not preclude an award of attorneys’ fees is very different from a contract that affirmatively creates a right to fee shifting.

³⁶² See Dkt. 47; Dkt. 147.

³⁶³ Dkt. 215.

³⁶⁴ Post-Trial Opening Br. at 56–62 (arguing Gray Jay’s conduct generally constitutes bad faith because its “refusal to perform was deliberate, strategic, and entirely unsupported by the contract or record.”).

³⁶⁵ *Abex Inc. v. Koll Real Estate Gp., Inc.*, 1994 WL 728827, at *21 (Del. Ch. Dec. 22, 1994).

to defend its non-performance of the ECL. That trial disproved those defenses does not mean Gray Jay litigated in bad faith.³⁶⁶

Vale specifically challenges Gray Jay’s Madera Event insolvency argument, which it characterizes as “manufactured after the fact” and unsupported by the evidence.³⁶⁷ That argument has some merit. As discussed, (1) no contemporaneous documents describe the Madera Event as a massive environmental disaster; (2) the Madera Well had resumed operation at the time of the Pilot Transaction; and (3) Gray Jay relied on a 2024 hypothetical report which *supports* the conclusion that the Madera Event did not contaminate the freshwater aquifer.³⁶⁸ But Gray Jay’s Madera Event insolvency argument was not entirely frivolous given OWL’s precarious financial position in 2022.³⁶⁹ Moreover, this Court has recognized that a party’s own misconduct can support denying a request to shift fees under the bad faith exception.³⁷⁰ Vale’s incomplete document collection was troubling. This was a hard-fought litigation where both sides advanced several arguments with varying degrees of success, each winning intermediate victories along the way. Accordingly, the Court

³⁶⁶ *E.g., Brown v. Wiltbank*, 2012 WL 5503832, at *1 (Del. Ch. Nov. 14, 2012) (“The fact that [a party] did not succeed on the merits . . . does not necessarily mean that she acted in bad faith or vexatiously.”).

³⁶⁷ Post-Trial Opening Br. at 59–62; *see* Post-Trial Reply Br. at 36–37.

³⁶⁸ *See, e.g., JX227*.

³⁶⁹ *See, e.g., JX145*.

³⁷⁰ *See, e.g., Auriga Cap. Corp. v. Gatz Properties*, 40 A.3d 839, 880–82 (Del. Ch. 2012). *See also POSCO Energy Co., Ltd. v. FuelCell Energy, Inc.*, 2020 WL 6194693, at *3, n.23 (Del. Ch. Oct. 22, 2020) (“An unwarranted motion for fee shifting under the bad faith exception can itself justify a finding of bad faith and fee shifting.” (internal quotation marks omitted)).

concludes that Vale has not made the difficult showing that fee shifting is warranted under the bad faith exception.

IV. CONCLUSION

For the reasons discussed, Vale proved that Gray Jay breached its obligation to purchase Vale securities under the ECL, but not its implied covenant claim. Gray Jay's defenses to excuse its non-performance fail. Vale is entitled to an order requiring Gray Jay to specifically perform its investment obligation, but not an order requiring Gray Jay's Managers to issue a capital call. Moreover, Vale is not entitled to its requested monetary damages or attorneys' fees. The parties are instructed to submit a proposed implementing order consistent with this opinion within ten business days. Gray Jay will file a Rule 88 affidavit detailing the reasonable fees and expenses incurred in bringing the spoliation motion. Additionally, the parties will promptly confer and file a schedule for the submission of supplemental briefing on whether Vale is entitled to pre- and post-judgment interest.