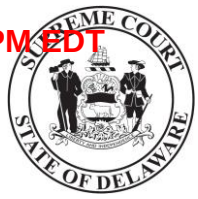
EFiled: Apr 05 2018 12:04PM EDT
Filing ID 61878605
Case Number 7,2018



IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMUR FINANCE COMPANY, INC., AMUR FINANCE IV LLC, AMUR AVIATION LLC, PMC AVIATION 2012-1 LLC, AND MOSTAFIZ SHAHMOHAMMED, Defendants/Counterclaim Plaintiffs-Below, Appellants, v. PINE RIVER MASTER FUND LTD. AND PINE RIVER FIXED INCOME MASTER FUND LTD., Plaintiffs/Counterclaim Defendants-Below, Appellees.	No. 7, 2018 Court Below: Court of Chancery in the State of Delaware Consol. C.A. No. 2017-0145-JRS PUBLIC VERSION - Filed: April 5, 2018

APPELLEES' ANSWERING BRIEF

YOUNG CONAWAY STARGATT & TAYLOR, LLP

C. Barr Flinn (No. 4092)
Emily V. Burton (No. 5142)
Lakshmi A. Muthu (No. 5786)
Rodney Square
1000 North King Street
Wilmington, DE 19801
Tel: (302) 571-6600

Attorneys for Plaintiffs/Counterclaim Defendants-Below, Appellees Pine River Master Fund Ltd. and Pine River Fixed Income Master Fund Ltd.

OF COUNSEL:

Jane E. Maschka
Michael F. Doty
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel: (612) 766-7559

Dated: March 21, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

NATURE OF THE PROCEEDINGS

The Court of Chancery determined on summary judgment that defendant Amur Finance IV LLC ("Amur IV") breached the Secured Revolving Credit Agreement ("Credit Agreement") governing Pine River's[1] loan to Amur IV (the "Pine River Loan"), giving rise to Events of Default. Amur IV, along with defendant Amur Finance Company, Inc. ("AFC" and together with Amur IV, "Amur") is now appealing that decision.

The breaches and Events of Default arose from Amur IV's unauthorized distribution of approximately $94,000 to its parent company, AFC, nearly every month since the inception of the Credit Agreement, for a total of more than $4 million (the "$94K Distributions"). This was a violation of the Credit Agreement's covenant restricting distributions to Amur IV's equity holders (Section 5.07(d)). It was also a violation of the covenant restricting transactions between Amur IV and its affiliates (Section 5.07(f)). These are crucial covenants that are designed to preserve Amur IV's equity as support for the Pine River Loan.

In an effort to avoid the consequences of its breaches, Amur claimed that, although the $94K Distributions were made with the proceeds of dividends on stock owned by Amur IV (the "Axis Dividends" on the "Axis Stock"), Amur IV did not own the Axis Dividends. Amur made this argument without any

---

1 Plaintiffs are referenced herein together as "Pine River."

documentary evidence that the ownership of the Axis Stock and its Dividends had been separated.

Indeed, the documentary evidence is to the contrary. Amur concedes that the Axis Stock itself was owned by Amur IV and constituted an "Asset" and therefore "Collateral" under the Security Agreement for the Pine River Loan. The Security Agreement provides that the proceeds of Assets, such as the Axis Dividends, are also Collateral. In connection with the pledge of the Axis Stock, AFC's counsel delivered the stock certificate for the Axis Stock to the Collateral Agent with a cover letter that makes no mention of any carve-out or reservation regarding the Axis Dividends. And, in the Security Agreement, Amur IV represented that it was the "legal and beneficial" owner of the Collateral, which included the Axis Stock – again without any carve-out or reservation regarding the Axis Dividends. This representation directly conflicts with the notion that AFC retained, in Amur's words, "partial ownership" of the Axis Stock. (Amur's Opening Brief ("OB") 5.)

Despite this documentary record, Amur claims that, even as it was carefully documenting all other aspects of its relationship with Pine River with the help of sophisticated counsel, Amur entered a supposed *oral* side agreement with Pine River. According to Amur, this supposed oral side agreement permitted AFC to retain the right to the Axis Dividends, such that the $94K Distributions involved

Amur IV simply passing along to AFC the latter's own property. Amur's story is particularly incredible because, as it concedes, the Axis Stock had been contributed to Amur IV to bolster Amur IV's equity in order to satisfy a required "Equity Ratio" under the Pine River Loan. This purpose would have been frustrated if AFC had retained ownership of the income from the Axis Stock. Moreover, after the supposed oral side agreement, the parties amended the Credit Agreement twice – with one amendment specifically addressing Section 5.07(d) – without any reference to a supposed oral side agreement.

When Pine River moved for summary judgment, the Court of Chancery properly rejected Amur's supposed oral side agreement. It determined that the Credit Agreement was fully integrated and contained an express integration provision, with the result that the supposed oral side agreement was barred. (Memorandum Opinion dated Oct. 12, 2017 ("Op." or "Opinion," OB Exhibit A) 43-45.) The Court of Chancery also observed that it was "not conceivable," in view of the thorough documentation of their relationship, that the parties would have entered an oral side agreement disconnected from the Credit Agreement. (Op. 44.) The Court of Chancery correctly determined that, in making the $94K Distributions, Amur IV distributed its own property to its parent, thereby breaching the prohibition on distributions in Section 5.07(d) as well as the prohibition on affiliate transactions in Section 5.07(f). (Op. 35-38.)

On appeal, Amur ignores the central predicate for the Court of Chancery's determinations of breach: that, because there was no enforceable oral side agreement separating ownership of the Axis Stock and Axis Dividends, the Axis Stock and Axis Dividends were owned by Amur IV. Instead, in its principal arguments, Amur proceeds as if the Court of Chancery had reached the opposite conclusion and determined that AFC, rather than Amur IV, owned the Axis Dividends. It argues that, *because AFC owned the Axis Dividends*, Amur IV did not distribute its own property to AFC through the $94K Distributions, with the result that Section 5.07(d) does not apply. It argues that, *because AFC owned the Axis Dividends*, the $94K Distributions were not a "transaction" between Amur IV and AFC to which Section 5.07(f) applies. It further argues that, *because of the supposed oral side agreement*, the $94K Distributions had been pre-approved and did not constitute separate "transactions" subject to Section 5.07(f). Finally, it argues that, *because the Axis Dividends were not owned by Amur IV*, they were not Collateral for the Pine River Loan. This entire line of argument falls apart, however, because the Court of Chancery determined that the Axis Stock and Dividends *were* owned by Amur IV.

Amur has not appealed the Court of Chancery's ruling that any supposed oral side agreement is barred. For purposes of this appeal, and the remainder of this litigation, the Court of Chancery's ruling regarding the supposed oral side

agreement must be taken as correct. As detailed herein, *because Amur IV owned the Axis Dividends*, each of Amur's principal arguments is wrong.

Lacking any colorable argument on appeal, Amur attempts to impugn Pine River's motives. The attempt is both irrelevant and wrong. Pine River replaced the Administrative Agent, commenced this action and declared Events of Defaults solely to protect the interests of its investors. Given Amur's breaches, which involved siphoning off cash that constituted Pine River's Collateral, Pine River's actions were necessary. The Court of Chancery has already determined twice that Amur breached the Credit Agreement. It first determined, in a ruling that Amur has not appealed, that Amur IV improperly paid more than $3 million in legal expenses of AFC's affiliates that were unrelated to the Credit Agreement (the "Improper Legal Fee Payments"). More recently, it determined that the $94K Distributions, totaling more than $4 million, breached the Credit Agreement and constituted Events of Default – which determination is the subject of this appeal.

Moreover, even as Amur has been depleting Pine River's Collateral, Amur IV's monthly payments to Pine River have fallen off precipitously, from approximately $[redacted] million, $[redacted] million, $[redacted] million, and $[redacted] million in July, August, September, and October of 2016, respectively, to just $635,717.30 in each month thereafter. (B285; B315; B351; B355; *see, e.g.*, B359; B450; B454; B466.) Since October 2016, unpaid interest has been accumulating at the rate of more than

$[redacted] million per month – Amur is falling farther and farther behind. (*See, e.g.*, B355-56; B359-60; B450-51; B454-55; B466-67.) Meanwhile, Amur IV's loans and investments in "Operating Companies" – which were funded by the Pine River Loan, constitute Amur IV's principal assets, and are additional Collateral for Pine River – have been deteriorating. Amur IV's loan to one of the Operating Companies has been in default since August 2016. (*See* B009; B001; B477.) The management of another Operating Company has been deadlocked for years, with the result that Amur IV sought to dissolve it. (B263.) And the management of three of the five Operating Companies is the subject of pending litigation. (B202; B289-93; B318; B366-72.)

Contrary to Amur's suggestion, there was nothing inappropriate about Pine River's addressing the $94K Distributions by means of a second motion for summary judgment. Pine River did not discover the $94K Distributions until after the first motion for summary judgment concerning the Improper Legal Fee Payments was briefed.[2]

---

[2] There is no merit to Amur's suggestion that Pine River's motion concerning the $94K Distributions was procedurally improper. The parties were discussing both the $94K Distributions and the calculation of "Cash Interest Accrual," when Amur precipitously filed its motion concerning only one of the issues. (*See, e.g.*, B470-74.) Pine River filed its motion so that the Court of Chancery could efficiently address both pending issues at the same time.

SUMMARY OF ARGUMENT

1. Denied. According to Amur, the Court of Chancery erred by holding that, although AFC owned the Axis Dividends, Section 5.07(d) applies to the $94K Distributions because the Axis Dividends were derived from stock owned by Amur IV. (OB 4-5.) Amur is wrong because the Court of Chancery did not so hold. It instead correctly held that *Amur IV* owned the Axis Dividends, that Amur IV distributed its own property via the $94K Distributions, and that Section 5.07(d) therefore applies. (Op. 41-44.) Because Amur has not appealed the Court of Chancery's determination that Amur IV owned the Axis Dividends, the Court of Chancery's decision that Section 5.07(d) was breached should be affirmed.

2. Denied. According to Amur, the Court of Chancery also erred by holding that Section 5.07(f) applies to Amur IV's mere pass through to an affiliate, such as AFC, of property already owned by the affiliate. (OB 7.) The Court of Chancery made no such holding. Having determined that Amur IV owned the Axis Dividends, it applied Section 5.07(f) to the $94K Distributions because they involved Amur IV's distribution of its own property to AFC. (Op. 41-44.) Because Amur has not appealed the Court of Chancery's determination that Amur IV owned the Axis Dividends and does not dispute that Section 5.07(f) applies to transactions in which Amur IV conveys its own property to an affiliate (OB 7, 30-

31), the Court of Chancery's decision that Section 5.07(f) was breached should be affirmed.

Amur relatedly contends that, due to the supposed oral side agreement, the $94K Distributions were merely the effectuation of a pre-existing agreement and not separate "transactions" to which Section 5.07(f) would apply. (OB 7.) This is wrong because, in the non-appealed ruling, the Court of Chancery held that any supposed oral side agreement was barred, with the result that each $94K Distribution was a separate "transaction" to which Section 5.07(f) applies.

Amur's superfluities argument is wrong because the doctrine against superfluities may not be used to vary contractual plain meaning, and the meaning of "transactions" plainly includes the $94K Distributions. But, even if this were not the case, the $94K Distributions are plainly "payments" and therefore would fall within the alternative portion of Section 5.07(f), prohibiting "payments" to affiliates, absent circumstances that did not exist.

3. Denied. According to Amur, the Court of Chancery erred by finding breaches, despite a supposedly contrary course of dealing, in which Pine River continued to make advances despite supposedly knowing of the $94K Distributions. (OB 8.) Amur is wrong because course of dealing evidence is barred by the anti-waiver provisions of the Credit and Security Agreements. In contrast to the cases cited by Amur, the anti-waiver provision in the Credit

Agreement expressly addresses the alleged course of dealing – making additional advances while supposedly knowing of the alleged misconduct. Moreover, as Amur agrees, course of dealing evidence may be used only to resolve a contractual ambiguity (OB 36), and there is no such ambiguity in the relevant agreements. Finally, there is no evidence that the course of dealing that Amur posits even occurred; Amur has not provided admissible evidence that Pine River knew of the $94K Distributions before this litigation commenced, and indeed the evidence shows the contrary.

4. Denied. According to Amur, the Court of Chancery erred in holding that the Axis Dividends were Collateral for the Pine River Loan. According to Amur, they were not Collateral because they were not owned by Amur IV. (OB 8-9.) Amur is wrong because the Court of Chancery ruled that the supposed side oral agreement was barred, such that the Axis Dividends *were* owned by Amur IV, and Amur has not appealed this ruling. Amur also argues that the Court of Chancery erred in treating as relevant the question whether the Axis Dividends were Collateral. Amur is wrong because the Court of Chancery's holding that they were Collateral confirmed that they were owned by Amur IV, an obviously relevant point.

5. Denied. According to Amur, the election of remedies doctrine bars Pine River's claims that the breaches arising from the $94K Distributions caused

Events of Default under the Credit Agreement. (OB 9.) This argument must fail for three reasons: *First*, the argument is waived because Amur did not make it before the Court of Chancery. *Second*, Pine River's time for making an election had not expired before it declared the Events of Default, and still has not expired. By Sections 7.01 and 7.02 of the Credit Agreement, the parties contractually extended Pine River's time to make any election indefinitely and unless and until Amur IV remedied the breach, which Amur IV has not done. *Finally*, contrary to Amur's position, Pine River did not know about the $94K Distributions. Amur is barred by its own representations from arguing to the contrary, and Amur has not submitted contrary admissible evidence.

COUNTERSTATEMENT OF FACTS

I. The Parties Enter Into the Credit Agreement.

On August 5, 2013, Pine River, Amur IV, AFC, and Deutsche Bank Trust Company Americas ("Deutsche Bank") entered into the Credit Agreement. (A570.) Under the Agreement, Pine River, as "Lender," agreed to loan up to $167 million to Amur IV, as "Borrower" (the Pine River Loan), to invest in certain companies (the Operating Companies). (A575; A585-86; Op. 4.) The Credit Agreement designated AFC, the parent and managing member of Amur IV, as the initial "Administrative Agent" for the Lender.[3] (A575; A580; A655; Op. 3.) It designated Deutsche Bank as Collateral Agent for the Lender. (A575; Op. 1.)

Section 9.06 of the Credit Agreement provides, "This Agreement constitutes the entire contract among the parties relating to the subject matter hereof and supersedes any and all previous agreements and understandings, oral or written, relating to the subject matter hereof." (A617.) Section 9.02(b) provides that neither the Credit Agreement nor any provision thereof "may be waived, amended or modified except pursuant to an agreement or agreements in writing entered into by the Borrower, Collateral Agent, the Lenders and the Administrative Agent." (A613.)

---

[3] The founder and controller of AFC, Mostafiz ShahMohammed, serves as president of both AFC and Amur IV. (*See* B324; B318; A659.)

The Credit Agreement has been amended twice by "Waiver and Amendment No. 1" dated November 18, 2013 and "Amendment No. 2" dated December 2014 (together, the "Amendments'). (B109-13; A648-52.) The integration, waiver and amendment provisions of the Credit Agreement "apply mutatis mutandis" to Amendments. (B110 (Section 5); A650 (Section 4).)

After entering into the Credit Agreement, Amur IV used funds from the Pine River Loan to make loans and preferred investments in five Operating Companies, including Axis Capital, Inc. (n/k/a Amur Equipment Finance, Inc.) ("Axis").[4] (A253; *see also* B477.) Amur IV's affiliates are the controllers and principal interest holders of each Operating Company, including Axis. (*See, e.g.*, B324-25; B204; A267; B088; B100; B107.)

II. The Credit Agreement Requires Amur IV to Maintain a 7.5% Equity Ratio.

The Credit Agreement requires Amur IV to maintain an "equity cushion." (Op. 9; A597.) It specifically provides that, in order to obtain "Advances" under

---

[4] In August 2016, Amur IV's investment in one of the Operating Companies, PMC Aviation 2012-1 LLC (a $12 million secured loan), came due but was not paid and remains in default. (*See* B009; B001; B477.) Amur IV's remaining investments in Operating Companies are set to mature before the end of 2019 (B477; *see also* B119; B166.) Amur IV cannot make any new investments because in February 2016, Pine River exercised its right under Section 2.04 of the Credit Agreement to terminate its obligation to advance new funds for new investments by Amur IV. (*See* A586; A878; A347.) Given that the last of Amur IV's investments will mature in 2019, the Credit Agreement's final maturity date of 2023 is no longer meaningful.

the Pine River Loan to make investments, Amur IV is required to establish that AFC's equity in Amur IV is not less than 7.5% of Amur IV's "Total Assets" (the Equity Ratio) at the time of each investment. (A578, A596-97 (Credit Agreement §§ 1.01, 4.02(e)).) The Equity Ratio acts as a shield for the value of the Pine River Loan and a source of additional capital for Amur IV. (Op. 9; *see e.g.*, A599 (Credit Agreement § 5.04).)

III. The Pine River Loan Is Secured by All Assets of Amur IV and All Proceeds Thereof.

By the Credit and Security Agreements,[5] Amur IV granted Pine River a perfected security interest in all "Collateral." (A585 (Credit Agreement § 2.02); A674 (Security Agreement § 2.01).) The definition of "Collateral" is all-encompassing, and includes the following property:

> whether now owned or hereafter from time to time acquired: . . . (c) all of the Assets and all rights to payment and other Proceeds from time to time received, receivable or otherwise distributed in respect of such Assets, (d) all income, payments and proceeds of any and all of the foregoing, and (e) all other Assets of the Grantor [i.e., Amur IV], wherever located and whether now owned or hereafter acquired or arising, and all proceeds thereof . . . .

---

[5] The Security Agreement was entered the same day as the Credit Agreement. (A667.)

(A674 (Security Agreement § 2.01(a).) As Amur does not dispute, Pine River's Collateral includes Amur IV's investments in the Operating Companies, assets held to satisfy its Equity Ratio requirement, and other assets.

IV. AFC Transfers the Axis Stock to Amur IV to Satisfy Amur IV's Equity Ratio Requirement, and Amur IV Pledges the Axis Stock as Collateral.

In August 2013, AFC transferred 7,546.22 shares of Series A Preferred Stock in Axis (the Axis Stock) to Amur IV to satisfy Amur IV's Equity Ratio requirement. (B002; A738.) As a result of this transfer, the Axis Stock and all proceeds thereof became property of Amur IV and Collateral for the Pine River Loan. (A585 (Credit Agreement § 2.02); A674 (Security Agreement § 2.01(a).) On August 12, 2013, Amur's counsel confirmed that the Axis Stock was Collateral, stating in a letter addressed to the Collateral Agent:

> [E]nclosed is an original of Stock Certificate No. 25, in the name of [Amur IV], representing 7,546.22 shares of the Series A Preferred Stock, par value $1,000 per share, of Axis Capital, Inc., which has been pledged, pursuant to the Security Agreement, to the Collateral Agent for the benefit of the Secured Parties (as defined in the Security Agreement).

(B002; *see also* A1017.) The transmittal letter did not contain any carve-out regarding the Axis Dividends.

In the Credit and Security Agreements, Amur IV represented that it "has good and marketable title to the Collateral it owns" and is "the legal and beneficial owner of the Collateral pledged by it, free and clear of any and all Liens (other

than Permitted Liens)." (A594 (Credit Agreement § 3.01(p); A675 (Security Agreement § 2.03(a).) The documentary trail is therefore clear and unambiguous: the Axis Stock, together with the Axis Dividends and any other proceeds, are Amur IV's property and Collateral for the Pine River Loan.

V. The Credit Agreement Restricts Distributions and Transactions by Amur IV.

A. Sections 6.02 and 6.04 Require Available Collections to Be Distributed in Accordance with the Section 6.04 Waterfall.

Section 6.02 of the Credit Agreement provides that all monies Amur IV receives from the investments in the Operating Companies that were funded by the Pine River Loan ("Available Collections") must be deposited in a "Collections Account."[6] (A601-02.) Section 6.04 of the Credit Agreement further provides that the Administrative Agent must distribute all Available Collections monthly in accordance with the order of priorities set forth in Section 6.04 (the "Section 6.04 Waterfall"). (A603-04.)

The Section 6.04 Waterfall sets forth a rigid order of priority for distributions of Available Collections. (A603-04.) Under the Waterfall, dividends

---

[6] The Axis Stock was used to satisfy the Equity Ratio, but it was not funded by the Pine River Loan. For this reason, it might be argued that Amur IV was not required to deposit the Axis Dividends in the Collections Account. But the argument would not matter. Amur *did* deposit the Axis Dividends in the Collections Account. Furthermore, as discussed below, Sections 5.07(d) and 5.07(f) apply to all of Amur IV's property regardless of the account in which it is deposited. (A600-01.)

and other distributions to AFC are permitted only after payment in full of interest not previously paid in cash, but capitalized to principal ("PIK Accrual"). (A603.) It is undisputed that those interest amounts had not been fully paid prior to the payment of the $94K Distributions to AFC, and therefore the Waterfall did not authorize the $94K Distributions. (Op. 36 n.103 (citing A912).)

B. Section 5.07(d) Prohibits Distributions to AFC Except in Specified Circumstances.

Section 5.07(d) of the original Credit Agreement prohibits Amur IV from "[m]ak[ing] any distributions in respect of its equity interests . . . other than any such payment permitted to be made to Parent in accordance with [the] Section 6.04 [Waterfall]." (A600.) As noted above, the Section 6.04 Waterfall provides no authority for the $94K Distributions. In December 2014, Section 5.07(d) was amended by Amendment No. 2 to the Credit Agreement. (A648-52.) As amended, Section 5.07(d) maintained its original prohibition, but allowed Amur IV to pay dividends if it satisfied four specified conditions. (A649-50; Op. 11.) There is no dispute that these conditions were never satisfied for the $94K Distributions. (Op. 35-37; A741.)

C. Section 5.07(f) Prohibits Transactions With and Payments To, or For the Benefit of, Affiliates Except in Specified Circumstances.

Section 5.07(f) of the Credit Agreement prohibits Amur IV from transferring value from itself to or for the benefit of its affiliates, unless certain stringent conditions are met. It specifically provides, in relevant part, that Amur IV may

> not make any payment to . . . transfer or otherwise dispose of any of its properties or assets to . . . or enter into or make or amend any transaction, contract, . . . loan, [or] advance . . . with, or for the benefit of, any Affiliate of Borrower . . . unless: (i) the Affiliate Transaction is on terms that are no less favorable to Borrower than those that would have been obtained by Borrower in a comparable transaction on an arm's-length basis . . . ; and (ii) Borrower delivers to the Lenders a board resolution determining that such action, permitted action or release does not adversely affect the interests of the Lenders and that such Affiliate Transaction complies with clause (i) . . . .

(A601.) It is undisputed that as to the $94K Distributions, the conditions set forth in Section 5.07(f) were not satisfied. (Op. 38; *see* A743.)

VI. Pine River Replaces AFC as Administrative Agent.

On November 22, 2016, Pine River exercised its unilateral right under Section 8.06 of the Credit Agreement to replace AFC as Administrative Agent, giving AFC 30 days' notice in accordance with Section 8.06.[7] Pine River designated Lighthouse Management Group, Inc. ("Lighthouse") as the successor

---

[7] Although Pine River required no reason for replacing AFC as Administrative Agent, it had a very good reason for doing so. Pine River exercised this right after learning that AFC had begun directing Amur IV to pay monies from the Collections Account for unspecified legal fees and expenses, which ultimately amounted to a total of $3 million and were later determined to be violations of the Credit Agreement. (B355; B359; B561; B571-72.)

Administrative Agent. (B448.) Following its appointment, Lighthouse sought information from AFC to assist in its transition to the role of Administrative Agent. Although AFC failed to provide the bulk of the information requested, in December 2016, it provided Lighthouse with the bank statements for the Collections Account ("Account Statements"). (B480-81.)

AFC requested time beyond the 30 day notice period to transition the role of Administrative Agent to Lighthouse. (*See* A272.) Pine River granted this request, extending the effective date of the replacement to January 20, 2017. (*See* A272-73.) Pine River did not grant any further extensions. Therefore, as of January 20, 2017, AFC ceased to be Administrative Agent and was no longer authorized to direct the distribution of funds from the Collections Account.[8]

VII. Pine River Files Suit to Protect Its Rights Under the Credit Agreement.

On February 23, 2017, Pine River filed the underlying action against Amur. (A1.) Pine River asserted, among other things, that Amur's distributions from the Collections Account to pay the legal expenses of Amur IV and its affiliates in

---

[8] In February 2017, despite its replacement and over Pine River's objection, AFC continued to direct the distribution of funds from the Collections Account. (B457-59; B463-65; B466.) Amur claimed it had to make February 2017 transfers from the Collections Account or risk Pine River declaring a breach by Amur for failure to pay cash interest then due. (OB 16.) Had Amur truly been so concerned, it would have sought an extension or waiver of this obligation from Pine River, but it did not. In reality, Amur made the payments to satisfy amounts then due on AFC's promissory note to a third party. (*See* B362.)

lawsuits involving the Operating Companies (the Improper Legal Fee Payments) breached the Credit Agreement and caused Events of Default. On March 31, 2017, Pine River filed a motion for summary judgment on this claim. (A70; A76.) On September 13, 2017, the Court of Chancery ruled that AFC breached the Credit Agreement by directing the distributions of the Improper Legal Fee Payments. (B564; B571-72.) The Court of Chancery did not find that the Improper Legal Fee Payments caused an Event of Default under the provisions of the Credit Agreement invoked in Pine River's motion. (B574-75.) The Court of Chancery is now determining whether the Improper Legal Fee Payments caused Events of Default under other provisions of the Credit Agreement.[9]

VIII. Lighthouse Discovers Amur IV Made $94K Distributions.

In connection with its appointment as Administrative Agent, Lighthouse received the Account Statements for the Collections Account and undertook a detailed review of the Account Statements. During this review, Lighthouse discovered that deposits and corresponding withdrawals of $94,327.75 had been

---

[9] In its Memorandum Opinion dated September 13, 2017, the Court of Chancery acknowledged that Pine River's operative complaint asserted additional bases for finding that the Improper Legal Fee Payments caused Events of Default. (B564 (footnote 48).) Those additional bases are now before the Court of Chancery, along with other claims, on cross motions for partial summary judgment and dismissal filed by Pine River and Amur on January 5, 2018 and February 6, 2018, respectively. At the Court of Chancery's direction, the parties have submitted these cross motions to facilitate the resolution of claims on the papers and narrow the scope of the action for which discovery will be needed. (A1023.)

made nearly every month since the inception of the Credit Agreement. On June 9, 2017, in response to Lighthouse's inquiry, Amur explained that the deposits reflected Amur IV's nearly monthly receipt of $94,327.75 in dividends on its Axis Stock (the Axis Dividends) and that the withdrawals reflected Amur IV's subsequent transfer of those amounts to AFC (the $94K Distributions). In total, the $94K Distributions amount to over $4 million.

Shortly thereafter, Lighthouse advised Pine River of the $94K Distributions, marking the first time Pine River learned of them.[10] On June 14, 2017, Pine River demanded that Amur IV halt the $94K Distributions, noting that they breached the Credit Agreement and a court order. (B469.) Amur refused, initially contending that the $94K Distributions had been permitted by an amendment to the Credit Agreement. (B474 (claiming "the parties agreed to specifically carve out these withdrawals from the Credit Agreement, and that these payments represent dividends on preferred equity payable to Amur IV from [Axis]").) But Amur could not produce such an amendment (because there was none).

---

[10] Amur does not assert that Pine River knew the $94K Distributions were being made from the Collections Account or assert that the AFC Board approved the $94K Distributions. (Op. 38 n.108.) It only asserts, through an affidavit by ShahMohammed, that ShahMohammed "understand[s] that Pine River ha[d] [] received quarterly financial disclosures that evidence the payment of these preferred share dividends since 2013." (A836 (Corr. ShahMohammed Aff. ¶ 18).) By the same affidavit, however, Amur concedes that Pine River did not have the Account Statements reflecting the $94K Distributions before December 2016. (*Id.*)

Amur then claimed that, concurrently with entering into the Credit and Security Agreements, the parties had also entered into an oral side agreement. (A834 (Corr. ShahMohammed Aff. ¶ 12).) According to Amur, under this supposed agreement, AFC would retain the rights to the Axis Dividends, which would then be routed to AFC through Amur IV's Collections Account. (*Id.*; OB 2.) Pine River promptly informed Amur, and later the Court of Chancery, that there had been no such oral side agreement and that any such oral agreement would have been barred by the Credit and Security Agreements.[11] (A956.)

IX. Pine River Moves for and the Court of Chancery Grants Summary Judgment for Pine River on the $94K Distributions.

On August 18, 2017, Pine River moved for summary judgment that, by making the $94K Distributions, Amur IV breached Sections 5.07(d) and 5.07(f) of the Credit Agreement and caused Events of Default under Section 7.01(f) of the Credit Agreement. In its October Opinion, the Court of Chancery granted Pine River's motion on the $94K Distributions. (Op. 46.) The Court noted that "it is undisputed that Amur IV owns the Axis Preferred Stock" and concluded that Amur IV therefore necessarily owned "all right, title and interest" in the Axis Stock,

---

[11] Although Pine River disputed the existence of the supposed oral side agreement in its summary judgment briefs (A889-90), it did not submit an affidavit to that effect because it was unnecessary to do so for purposes of the motion: due to the integration of the Credit and Security Agreements, the supposed oral agreement was inadmissible, unenforceable, and irrelevant.

including the right to the Axis Dividends. (Op. 41.) The $94K Distributions therefore were distributions of Amur IV's own property "in respect of [Amur IV's] equity interests." Because there was no dispute that the $94K Distributions did not comply with the Section 6.04 Waterfall and Amendment No. 2, the Court concluded that the $94K Distributions were "not authorized and, in fact, were prohibited by Section 5.07(d)." (Op. 37.) And, because there was no dispute that the prerequisites for transactions with affiliates were not satisfied, the Court concluded that the "$94k distributions violated Section 5.07(f) as well." (Op. 38.)

The Court of Chancery rejected Amur's contention that there had been an oral side agreement separating ownership of the Axis Stock and its Dividends. It did so for two reasons. *First*, it held that the Credit Agreement was fully integrated: According to the Court of Chancery, Amur's contention "fails to account for the parties' clear intent, as expressed in the Credit Agreement, that no such oral agreements will modify the parties' fully integrated written agreement." (Op. 43.) As the Court further explained,

> Considering the lengths to which the parties went in their written agreement to address these issues [referring to the Equity Ratio and the restrictions on distributions and affiliate transactions], it is not conceivable that the parties would have entered into a collateral oral agreement pertaining to the $94k distributions that was disconnected from the Credit Agreement.

(Op. 44.)

Second, the Court of Chancery held that the supposed oral side agreement was barred by the integration provision in Section 9.06 of the Credit Agreement. (Op. 44-45.) That Section provides that the Credit Agreement "supersedes any and all previous agreements and understandings, oral or written, relating to the subject matter" of the Agreement. (A617.) As the Court explained, Section 9.06 "forecloses Amur IV's argument that it reached a separate oral agreement with Pine River with respect to the $94k distributions." (Op. 45.)

The Court of Chancery also held that the Axis Dividends were Collateral for the Pine River Loan. (Op. 42.) It reasoned as follows: Because the Axis Stock was owned by Amur IV, it was an Asset under the Security Agreement (and therefore Collateral for the Pine River Loan). (Op. 41-43.) Collateral is defined under the Security Agreement to include both Assets and the proceeds of Assets. (Op. 42.) Finally, the Axis Dividends "are 'proceeds' of the Axis Preferred Stock and thus are Collateral for the Pine River Loan."[12] (Op. 42.) For this reason, the $94K Distributions constituted the distribution of Pine River's Collateral.

---

[12] The Axis Dividends were also a Security Agreement "Asset" in their own right. This was so because they were deposited in the Collections Account, and Asset is defined to include the contents of any of Amur IV's accounts. (A671 (Security Agreement § 1.01 (Assets includes "all right, title and interest of [Amur IV] in and to the following property with each term having the definition provided in Article 9 of the UCC: . . . deposit accounts, . . . whether now owned or hereafter acquired").) The Court may consider alternative reasons to affirm the Court of Chancery's holding. (*See infra* n.16.)

As for Amur's waiver argument, the Court of Chancery explained, "[G]iven Section 9.02's clear language to the effect that the parties cannot waive their rights under the Credit Agreement by failing to assert them, Amur IV cannot be heard to argue that Pine River's acquiescence to Amur IV's prior $94k distributions out of the Collections Account constitutes a waiver of its right to enforce Section 5.07." (Op. 45.)[13]

[13] The Court of Chancery further noted that Amur IV cannot "contend that its alleged side agreement with Pine River somehow amended or altered the written Amendments to the Credit Agreement" because the "integration, waiver and amendment clauses of the Credit Agreement 'apply *mutatis mutandis*' to the Amendments." (Op. 45 n.127 (citations omitted).)

ARGUMENT

I. The Court of Chancery's Grant of Summary Judgment to Pine River on Count IX Should Be Affirmed.

A. Question Presented

Did the Court of Chancery correctly grant summary judgment to Pine River on its claims that Amur IV breached Sections 5.07(d) and 5.07(f) of the Credit Agreement by making the $94K Distributions?

B. Scope of Review

The parties agree that the scope of review is *de novo*. (OB 22.)

C. Merits of Argument

The Court of Chancery correctly held that there was no genuine dispute that Amur IV breached Sections 5.07(d) and 5.07(f) by making the $94K Distributions. The parties had not disputed that Amur IV owned the Axis Stock. (Op. 38-45.) And the Court rejected Amur's contention that a supposed oral side agreement separated ownership of the Axis Stock and its Dividends, allocating ownership of the Dividends to AFC. (*Id.* (rejecting argument that the "Dividends, from which the distributions originate, belong to AFC, not Amur IV.").) Because Amur does not appeal the Court of Chancery's rejection of the supposed oral side agreement (*see generally* OB 4-9), Amur is bound by this ruling. *See* Supr. Ct. R. 14(b)(vi)(A)(3) (argument not raised in opening brief is waived and will not be considered on appeal); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1264 (Del.

2012) ("This Court's rules specifically require an appellant to set forth the issues raised on appeal and to fairly present an argument in support of those issues in their opening brief. If an appellant fails to comply with these requirements on a particular issue, the appellant has abandoned that issue on appeal."). It was therefore Amur IV's own property that was distributed to AFC in the $94K Distributions.

As Amur does not dispute, Section 5.07(d) prohibited Amur IV's distribution of its own property to AFC except in compliance with the Section 6.04 Waterfall or as otherwise allowed under Section 5.07(d). Further, Amur does not dispute that there was no compliance with the Waterfall or the other terms of Section 5.07(d). Amur also does not dispute that Section 5.07(f) prohibited transactions between Amur IV and AFC concerning Amur IV's property absent satisfaction of certain conditions, which were not satisfied for the $94K Distributions. Because the Axis Dividends were Amur IV's own property, the $94K Distributions breached Sections 5.07(d) and 5.07(f). As detailed herein, Amur's argument primarily ignores the Court of Chancery's rejection of the supposed oral side agreement, and it is otherwise wrong.

If Amur had contested the Court of Chancery's determination concerning the supposed oral side agreement, it would have been wrong. As the Court of Chancery correctly explained, an oral side agreement may not be used to alter the

terms of fully integrated agreements, such as the Credit and Security Agreements. (Op. 43 (citing *Mitchill v. Lath*, 160 N.E. 646, 647 (N.Y. 1928); *Thompson Bros. Pile Corp. v. Rosenblum*, 993 N.Y.S.2d 353, 354 (App. Div. 2014)).) The Court of Chancery also correctly held that the supposed oral side agreement was barred by the Credit Agreement's integration provision (Section 9.06).[14] (Op. 44-45; A617.)

Moreover, the supposed oral side agreement would contradict the express terms of the Credit Agreement's Section 3.01(p) and the Security Agreement's Section 2.03(a), where Amur IV represented it had "good and marketable title" to and was the "legal and beneficial owner" of the Collateral. (A594; A675.) Amur does not dispute that the Axis Stock was Collateral for the Pine River Loan. (OB 39; *see also* Op. 41-42.) The Collateral includes the Axis Dividends as proceeds of the Axis Stock. (*Supra* pp. 14-15.) Accordingly, Amur IV has represented that it

---

[14] The supposed oral side agreement related to the subject matter of the Credit Agreement in multiple ways. The Axis Stock was part of Amur IV's equity to satisfy the Credit Agreement's Equity Ratio requirement. (OB 31, 34.) The supposed oral side agreement would have permitted the Axis Dividends to flow through the Collections Account, contrary to the terms of the Credit Agreement. (OB 35-36.) Furthermore, it concerned the Axis Stock and its proceeds, which were Collateral under the Credit Agreement. (Op. 42.) Finally, the supposed oral side agreement would have affected the distributions subject to Sections 5.07(d) and 5.07(f) of the Credit Agreement. As the Court of Chancery correctly explained, "[I]t is not conceivable that the parties would have entered into a collateral oral agreement pertaining to the $94k distribution that was disconnected from the Credit Agreement." (Op. 44.)

owned the Axis Dividends, and it cannot now be heard to contend otherwise due to a supposed oral side agreement.

1. The Court of Chancery Correctly Applied Section 5.07(d) to Amur IV's Distribution of Its Own Property.

Contrary to Amur's contention, the Court of Chancery did not err in holding that Section 5.07(d) applies to the $94K Distributions. Amur attempts to distort the Court of Chancery's opinion in this respect. Amur would have this Court believe that the Court of Chancery held that Section 5.07(d) applied to the $94K Distributions, even though AFC supposedly owned the Axis Dividends, simply because the Dividends were derived from stock owned by Amur IV. According to Amur, the Court of Chancery erroneously interpreted the words "its equity interests" in Section 5.07(d) to mean equity interests *held* by Amur IV (such as the Axis Stock), rather than the equity interests *in* Amur IV, which are held by its parent AFC.[15] The Court of Chancery made no such mistake. The Court of Chancery rather held that Section 5.07(d) applies to the $94K Distributions because *Amur IV owned the Axis Dividends* and the $94K Distributions therefore constituted the distribution of Amur IV's property to its equity holders. (Op. 35, and especially, footnote 101.)

---

[15] Amur similarly attempts to distort Pine River's arguments. (OB 23.) Pine River has never argued that "its equity interests" in Section 5.07(d) refers to equity interests held by Amur IV. (*See, e.g.*, A888.)

The Court of Chancery clearly did not hold that Section 5.07(d) applies to Amur IV's distribution of property that Amur IV does not own. The Court of Chancery fully understood that the purpose of Section 5.07(d) was to preserve Amur IV's property – the "equity cushion" and "Collateral" for the Pine River Loan. (Op. 9-12, 34, 40.) And it held that the $94K Distributions were distributions in respect of Amur IV's equity, not a mere pass-through of dividends in respect of Axis's equity interests. (Op. 35 & n.101 ("While it is true that the payment of the Dividends from Axis to Amur IV were in respect of Axis's equity interests, the $94k distributions from Amur IV to AFC were payments 'in respect of' Amur IV's equity interests.").)

2. The Court of Chancery Correctly Applied Section 5.07(f) to the $94K Distributions Because They Were Transactions with, and Payments to, an Affiliate.

Contrary to Amur's contention, the Court of Chancery did not err in applying Section 5.07(f) to the $94K Distributions. Amur agrees that Section 5.07(f) prohibited "transactions" between Amur IV and AFC and "payments" by Amur IV to AFC, absent the satisfaction of conditions that were not satisfied. But, Amur contends that the $94K Distributions were not "transactions" *between* Amur IV and AFC because "the $94K Distributions were always AFC's." (OB 35.) The argument is wrong because the Axis Dividends were Amur IV's property, with the result that the $94K Distributions *were* "transactions" *between* Amur IV and AFC.

As previously explained, Amur has not appealed the Court of Chancery's determination that the Axis Dividends were owned by Amur IV and that the supposed oral side agreement did not change this result.

Amur contends that the $94K Distributions were not "transactions" between Amur IV and AFC also because, according to Amur, they merely effectuated the prior supposed oral side agreement, which was the only "transaction" between the two. (OB 31.) This argument is wrong because the Court of Chancery correctly rejected all arguments based upon the supposed oral side agreement. Amur did not appeal the rejection of the supposed oral side agreement, and therefore Amur may not raise the supposed oral side agreement to support any of its arguments on appeal. (*Supra* pp. 25-26.) Each of the $94K Distributions therefore was a separate "transaction" between Amur IV and AFC.

Amur relatedly contends that, if "transaction" includes "payments," such as the $94K Distributions, it would improperly render "surplusage" the portion of Section 5.07(f) applying the Section to "payments."[16] (OB 32.) This argument is wrong because the doctrine against superfluities may not be used to vary the plain meaning of a provision. In *U.S. West v. Time Warner, Inc.*, the Court of Chancery

---

[16] Amur contends that the interpretation would also render "surplusage" the provisions addressing purchases and sales. (OB 32.) Because the $94K Distributions were not purchases or sales, these provisions are not referenced above.

declined to apply the doctrine even though, "[u]nder a clear meaning interpretation, [two provisions] inescapably contain[ed] redundancy." 1996 WL 307445, at *15 (Del. Ch. June 6, 1996). The Court explained, "While redundancy is sought to be avoided in interpreting contracts, this principle of construction does not go so far as to counsel the creation of contract meaning for which there is little or no support in order to avoid redundancy." *Id.*; *see also UtiliSave, LLC v. Miele*, 2015 WL 5458960, at *3, *7 (Del. Ch. Sept. 17, 2015) (rejecting application of rule against superfluities, although one provision was wholly subsumed within another broader provision, because the subsumed provision may have been "a 'belt and suspenders' confirmation of an aspect" of the broader provision).

The New York law is the same. *See Shaw Gp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 124 (2d Cir. 2003) (stating that while contracts should be interpreted under New York law to avoid rendering a clause superfluous or meaningless, "in following these principles we are not free to alter the plain terms of an agreement"); *Deutsche Bank Sec. Inc. v. Lexington Drake L.P.*, 920 N.Y.S.2d 240 (Sup. Ct. 2010) (TABLE) (use of term for indemnity obligation in one paragraph added "belts and suspenders" to repayment obligation in previous paragraph). Here, the "payment" provision serves a "belt and suspenders" approach to make certain that Section 5.07(f) would apply to any "payment" to an affiliate, despite

the sort of argument that Amur is now making, that certain "payments" are not "transactions."

Apart from its improper reliance on the supposed oral side agreement, Amur does not dispute that the $94K Distributions fall squarely within the plain meaning of "transaction," and they do. (OB 30-34.) Accordingly, the word "transaction" must be given this plain meaning, and the Court of Chancery's decision must be affirmed.

In all events, even if the $94K Distributions were not "transactions," they were unquestionably "payments." Section 5.07(f) applies for this additional or alternative reason.[17]

3. Amur's Course of Dealing Argument Is Barred by the Credit and Security Agreements and Otherwise.

Amur wrongly argues that the Court of Chancery erred by interpreting Sections 5.07(d) and 5.07(f) as breached by the $94K Distributions, despite a supposedly contrary course of dealing by the parties. According to Amur, the supposedly contrary course of dealing was Pine River's continued performance of

---

[17] Pine River may present, and this Court may consider, alternative reasons to affirm the Court of Chancery's holding. *See Weinberg v. Baltimore Brick Co.*, 112 A.2d 517, 518 (Del. 1955); *United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435-36 (1924); *Landrum v. Anderson*, 813 F.3d 330, 335 (6th Cir. 2016); *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1273 n.11 (3d Cir. 1993), *overruled on other grounds by United States v. E.I. DuPont De Nemours & Co. Inc.*, 432 F.3d 161 (3d Cir. 2005).

the Credit Agreement, by making additional Advances, while supposedly knowing of the $94K Distributions. The argument is wrong for at least three reasons.

First, it is barred by the anti-waiver provisions of the Credit and Security Agreements. These provisions preclude the use of any course of dealing by Pine River to alter Pine River's rights under the Agreements. Section 9.02(a) of the Credit Agreement provides, in relevant part:

> No failure or delay by . . . a Lender in exercising any right or power hereunder . . . shall operate as a waiver thereof . . . . Without limiting the generality of the foregoing, the *making of an Advance* shall not be construed as a waiver of any Default, *regardless of whether the . . . Lenders may have had notice or knowledge* of such Default at the time.

(A613 (emphasis added).) Section 9.03 of the Security Agreement contains a similar provision. (A684.) Unlike the anti-waiver provision of the Credit Agreement, the anti-waiver provision in the cases cited by Amur did not address precisely the conduct alleged to have constituted the waiver. (*See, e.g.*, OB 36 n.20; *id.* 42 n.25.) The supposed oral agreement cannot be cited in support of the course of dealing argument, for the same reasons that it cannot be used in other contexts: the Court of Chancery properly rejected the supposed oral agreement.

Second, as Amur concedes (OB 36), evidence of course of dealing may be used only to resolve a contractual ambiguity. *See Wiggins v. Kopko*, 94 A.D. 3d 1268, 1269 (N.Y. App. Div. 2012) ("Where a written agreement is complete, clear and unambiguous on its face, parol evidence may not be considered to suggest an

unstated or misstated intention or to otherwise create an ambiguity[.]"); *see also Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991). There is no ambiguity in Sections 5.07(d) or 5.07(f), and Amur has not even suggested one.

Finally, as explained below (*infra* pp. 39-40), Pine River did not know that the $94K Distribution had taken place before Pine River made new Advances, and Amur has not submitted admissible evidence that it did, as required to defeat a motion for summary judgment.

4. The Determination That the Axis Dividends Were Collateral Was Both Relevant and Correct.

Contrary to Amur's argument, the Court of Chancery's determination that the Axis Dividends were Collateral for the Pine River Loan was not "irrelevant." (OB 38.) The determination that the Axis Dividends were Collateral for the Pine River Loan confirmed that the Dividends were property of Amur IV, an obviously relevant point. It also confirmed the inconsistency between the supposed oral agreement and the Credit and Security Agreements, confirming that the supposed oral side agreement could not stand. Amur quibbles, pointing out that whether Sections 5.07(d) and 5.07(f) apply does not depend upon whether the property distributed is Collateral. (OB 38.) Although this is true in a technical sense, it is irrelevant. As Amur does not dispute, all of Amur IV's property was Collateral and all of the Collateral was property of Amur IV. (A674-75; *see also* OB 14.)

Contrary to Amur's contention, the Court of Chancery also did not err in determining that the Axis Dividends were Collateral. According to Amur, they were not Collateral because they were *not* owned by Amur IV. This claim, however, depends entirely upon the existence and enforceability of a supposed oral side agreement, and Amur has not appealed the Court of Chancery's ruling rejecting the supposed agreement. Thus, Amur is wrong because the Axis Dividends *were* owned by Amur IV.

Finally, contrary to Amur's contention, the Court of Chancery did not hold that the Axis Dividends were Collateral "even if Amur IV did *not* own" them. (OB 39-40 (emphasis added).) The Court made no such determination. The Court rather stated that, "even if *not themselves a Security Agreement Asset*," the Axis Dividends were nonetheless Collateral because they are proceeds of such an Asset, the Axis Stock. (Op. 42 (emphasis added).)

5. Amur's Election of Remedies Argument Is Waived, Wrong, Barred, and Unsupported by Admissible Evidence.

According to Amur, based upon the elections of remedies doctrine, this Court should reverse the Court of Chancery's determination that the breaches arising from the $94K Distributions caused Events of Default. Amur contends this is so because, after supposedly learning of the breaches, Pine River did not declare Events of Default and accelerate the Pine River Loan, but rather made new Advances, thereby electing to continue the Agreement. According to Amur, due to

this supposed election, Pine River was precluded from declaring Events of Defaults later based upon the same breaches. (OB 41-43.) Amur is wrong for at least three reasons:

First, Amur never argued election of remedies before the Court of Chancery; it argued only waiver. And, as Amur agrees, election of remedies and waiver are different. (OB 42-43 ("[E]lection of remedies is an issue separate from whether Pine River waived its right to object to the $94K Distributions . . . .").) *See also Bigda v. Fischbach Corp.*, 898 F. Supp. 1004, 1014 (S.D.N.Y. 1995) ("[A]n election is not a waiver"), *aff'd*, 101 F.3d 108 (2d Cir. 1996); *ESPN Inc. v. Office of the Comm'r of Baseball*, 76 F. Supp.2d 383, 389 (S.D.N.Y. 1999) ("In essence, the election of remedies doctrine is implicated only in the absence of waiver.").

Amur's election of remedies argument is therefore waived. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review . . . ."); *Rocktenn CP, LLC v. BE & K Eng'g Co., LLC*, 103 A.3d 512, 512 (Del. 2014) ("In a commercial dispute like this that does not involve fundamental rights, like child custody or a criminal defendant's liberty, the interests of justice would be disserved, not furthered, by allowing the appellants to raise this issue for the first time on appeal."); *Cline v. Prowler Indus. of Md., Inc.*, 418 A.2d 968, 980 (Del. 1980).

Second, Pine River's time for electing remedies had not expired before Pine River declared Events of Default and accelerated the Pine River Loan based upon the breaches; indeed, it still has not expired. Sections 7.01 and 7.02 of the Credit Agreement expressly extend Pine River's time for declaring Events of Defaults and accelerating the Pine River Loan. They extend the time indefinitely unless and until Amur IV remedies the Events of Default. Section 7.01 provides that each Event of Default "shall continue so long as, but only as long as, it shall not have been remedied." (A604.) Because Amur has not remedied the breaches, Events of Default continue to exist. And Section 7.02 provides that Pine River may accelerate the Pine River Loan and exercise other remedies "[u]pon the occurrence of any Event of Default . . . *and at any time thereafter during the continuance of such Event of Default.*" (A606 (emphasis added).) After the breaches, Pine River therefore has been permitted to notice an Event of Default at any time, including even today. Having agreed that Pine River could declare an Event of Default and accelerate the Pine River Loan "at any time," Amur cannot now contend that Pine

River was required to do so earlier.[18] The election of remedies doctrine does not apply.[19]

Furthermore, Amur does not appeal the Court of Chancery's determination that, due to the anti-waiver provision in Section 9.02 of the Credit Agreement, Pine River's rights under the Agreement were not waived. And Section 9.02 expressly addresses waiver by new Advances, stating that "the making of an Advance shall not be construed as a waiver of any Default, regardless of whether the . . . Lenders may have had notice or knowledge of such Default at the time." (A613.) For these reasons, even if Pine River had known of the $94K Distributions when they were occurring, it was still entitled to rely upon Sections 7.01 and 7.02 to declare Events of Default and accelerate the Pine River Loan "at any time."

Finally, Amur's election of remedies argument is barred by Amur IV's own representations and is wrong. As required by the Credit Agreement's Section 4.02(a), as a condition to each new Advance under the Credit Agreement, Amur IV provided an officer's certificate to Pine River stating that there had been no

---

[18] Under common law, the election of remedies doctrine permits the non-breaching party, after learning of the breach, a reasonable period of time in which to make its election. *Bigda*, 898 F. Supp. at 1013 . By Sections 7.01 and 7.02, Pine River and Amur contracted around the time period that would apply under common law.

[19] The cases cited by Amur are inapplicable because they do not address a contractual extension of the time for electing remedies.

"Defaults." (A596.) And under Section 5.01, Amur IV was required to provide Pine River with "prompt written notice" of any "Defaults" as they occurred, but did not do so, for the $94K Distributions. (A597.) Having certified that there were no breaches, Amur could only have viewed Pine River's subsequent Advances as made in the ordinary course. It could not have viewed them as a response to any breach, much less as an election to forego important remedies. Amur cannot reasonably argue that Pine River should not have believed Amur IV's representations.[20] *Bigda*, 898 F. Supp. at 1013 ("[T]he operative factor in the election doctrine is whether the non-breaching party has taken an action (or failed to take an action) that *indicated to the breaching party that he had made an election.*") (emphasis added).

In all events, there is no genuine dispute that Pine River did *not* know about the breaches arising from the $94K Distributions until Lighthouse recently discovered them. Amur has not adduced any admissible evidence that Pine River did know about them before then. It cites only ShahMohammed's affidavit statement that "I understand" that Pine River received unspecified quarterly

---

[20] Moreover, Pine River was entitled to rely upon Amur IV's silence and officer's certificates, and Amur would be estopped from claiming that Pine River could not. *See Wilson v. Am. Ins. Co.*, 209 A.2d 902, 903-04 (Del. 1965) (An equitable estoppel "may arise when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment.").

financial disclosures evidencing the payment of the $94K Distributions. (A836 (Corr. ShahMohammed Aff. ¶ 18).) And ShahMohammed does not claim to have been involved in any disclosures to Pine River. (*See* A830-39.) ShahMohammed's statement is therefore inadmissible hearsay. *Antioch Co. v. Pioneer Photo Albums, Inc.*, 2000 WL 988249, at *2 n.4 (S.D. Ohio Mar. 13, 2000) ("He states, albeit through inadmissible hearsay in ¶ 4 of his Affidavit, that he understands that . . . ."); *United States v. Ionia Mgmt., S.A.*, 2007 WL 2325199, at *8 (D. Conn. Aug. 9, 2007) ("[T]he allegation in Arriesgado's declaration that he 'understands' that . . . is hearsay."). Amur has not produced the supposed quarterly disclosures, although it undoubtedly would have done so, if they actually existed and supported Amur's position.[21] And inadmissible evidence may not be used to defeat a motion for summary judgment. *See* Ct. Ch. R. 56(e); *Humm v. Aetna Cas. & Sur. Co.*, 656 A.2d 712, 717 (Del. 1995) ("The party opposing the motion for summary judgment then has the duty to come forward with admissible evidence showing the existence of a genuine issue of fact."); *Bank of Del. v. Claymont Fire Co.*, 528 A.2d 1196, 1198 (Del. 1987).

---

[21] Before the Court of Chancery, ShahMohammed retracted a sworn statement that he understood that Pine River was to have received Collections Account statements disclosing the $94K Distributions. (*Compare* B546-47 (Original ShahMohammed Affidavit ¶¶ 18-19), *with* A836 (Corr. ShahMohammed Aff. ¶¶ 18-19).)

CONCLUSION

For the foregoing reasons, the Court of Chancery's grant of summary judgment to Pine River should be affirmed.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ C. Barr Flinn
C. Barr Flinn (No. 4092)
Emily V. Burton (No. 5142)
Lakshmi A. Muthu (No. 5786)
Rodney Square
1000 North King Street
Wilmington, DE 19801
Tel: (302) 571-6600

Attorneys for Plaintiffs/Counterclaim Defendants-Below, Appellees Pine River Master Fund Ltd. and Pine River Fixed Income Master Fund Ltd.

OF COUNSEL:

Jane E. Maschka
Michael F. Doty
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel: (612) 766-7559

Dated: March 21, 2018

CERTIFICATE OF SERVICE

I, Lakshmi A. Muthu, Esquire, do hereby certify that on April 5, 2018, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

By File & ServeXpress

Garrett B. Moritz, Esq.
Nicholas D. Mozal, Esq.
Ross Aronstam & Moritz
100 S. West Street, Suite 400
Wilmington, DE 19801

/s/ Lakshmi A. Muthu
Lakshmi A. Muthu (No. 5786)