



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEMINI REAL ESTATE)
ADVISORS, LLC, and GEMINI)
EQUITY PARTNERS, LLC,)
Delaware Limited Liability) No. 320, 2018
Companies,)
) CASE BELOW:
Defendants Below, Appellants,)
) Court of Chancery of the State of
v.) Delaware, C.A. No. 2017-0510-VCL
)
WILLIAM T. OBEID,)
)
Plaintiff Below, Appellee.)

CORRECTED APPELLANTS' OPENING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS¹

Defendants Gemini Real Estate Advisors, LLC (“GRE”) and Gemini Equity Partners, LLC (“GEP” and together with GRE, “Defendants” or “Gemini”) appeal the trial court’s order requiring them to provide certain books and records to Plaintiff William Obeid (“Plaintiff” or “Obeid”) despite Obeid’s improper purposes for seeking them and despite such information exceeding the scope of Section 18-305 of the Delaware Limited Liability Company Act (“DLLCA”). Furthermore, the language of the trial court order requires production of undefined documents outside of Obeid’s demand and makes compliance impossible, which will lead to needless and ongoing litigation with Plaintiff in the future.

In July 2017, Obeid brought this books and records action, citing his need to value his membership interest in Defendants and to investigate alleged mismanagement. Defendants repeatedly objected on the grounds that Obeid’s stated purposes were not his actual purpose, *i.e.*, to interfere with Gemini’s business and undermine unfavorable decisions in a case pending in the Southern District of New York involving the same issues.

¹ The trial court’s June 5, 2018 Post-Trial Ruling (the “Post-Trial Ruling”), the June 13, 2018 Final Order and Judgment (“Final Order”), and the June 26, 2018 Order Denying Defendants’ Motion for Reargument Or to Alter or Amend Judgment (the “Reargument Denial”) all appealed herein, are attached as Exhibits A, B, and C, respectively.

Despite Obeid's improper purposes, Defendants continued to provide regular and voluminous updates to Obeid and produced over 2,000 pages of books and records in response to this litigation, leaving only one issue for trial: whether Defendants must provide Obeid with access to the Defendants' cloud-based accounting database, Yardi, which houses Defendants' general ledgers.

After trial, and despite Defendants' request for reargument, the trial court held that Defendants had not proven Obeid's improper purpose. That court then ordered Defendants to (i) maintain the Yardi database until Defendants cease operating, (ii) provide Obeid with scheduled access to Yardi, even though none of Defendants' managers have such access; (iii) provide updated versions of certain spreadsheets within 10 days of any update (even if Defendants are unaware of any such update), and (iv) produce spreadsheets that go beyond Obeid's requests for information in his Amended Complaint, identified as "comparable" to spreadsheets produced in this litigation (the "Disputed Information").

The trial court erred by finding Obeid had a proper purpose in pursuing his books and records demand and by requiring Defendants to provide Obeid with such broad, ongoing information access. This appeal follows the trial court's Final Order and its denial of Defendants' Motion for Reargument.

SUMMARY OF THE ARGUMENTS

1. The trial court erred by concluding that Defendants failed to show that Obeid's demand was motivated by an improper purpose. Accordingly, Obeid is not entitled to the Disputed Information in his capacity as a manager under DLLCA 18-305(b) or in his capacity as a member under DLLCA Section 18-305(a).

2. The trial court erred by concluding that Obeid is entitled to ongoing, read-only access to the Yardi database. Specifically, the trial court's grant of ongoing access to the database exceeds the scope of information contemplated by DLLCA Section 18-305 and Defendants' operating agreements and improperly requires that Defendants maintain a specific accounting database until Defendants are wound down.

3. The trial court erred by ordering Defendants to provide updated versions of certain books and records (designated as Exhibits 1-6 to JX 115), within 10 days of any update to the documents—no matter the form of the update, who makes the update, or if Defendants' members or managers have knowledge of the update.

4. The trial court erred by ordering Defendants to provide Obeid any Excel workbook prepared on behalf of GREA that summarizes the distributions to investors in certain funds, or fees earned by GREA as manager of those funds,

and/or which *forecasts* such distributions and fees, such as “any current workbook *comparable* to JX 116 or JX 117” (emphasis added). Such an order provides relief beyond the books and records requested in Obeid’s Amended Complaint and will also inevitably lead to further litigation over what documents might be considered “comparable.”

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Background

GREA is a Delaware limited liability company formed by Obeid, La Mack, and Massaro, who are the only three members of the company. (A1547 ¶ 1.) GREA is governed by an Amended Operating Agreement (the “GREA Operating Agreement”), dated as of February 19, 2009. (A1919-65.) GREA is in the process of winding down its affairs and selling its remaining assets. *See Obeid v. La Mack, et al.*, No. 14 CV 6498-LTS-HBP, 2018 WL 2059653, at *9 (S.D.N.Y. May 1, 2018); A2012-13; A2638 (discussing final assets that remain for GREA).

GEP is a Delaware limited liability company formed by Obeid, La Mack, and Massaro, who are the only three members of the company. GEP is governed by an Amended Operating Agreement (the “GEP Operating Agreement”), dated as of July 19, 2012. (A1966.) GEP was wound down in 2017 and is no longer in good standing in Delaware as of June 1, 2018. (A2012-2013); Delaware Secretary of State Company Report, File No. 5186685.²

Obeid is not a member or manager of, nor does he hold an interest in any of the fund entities managed by Defendants (the “Funds”). *See Obeid v. La Mack, et*

² *See Morris v. Spectra Energy Partners (DE) GP, LP*, 2017 Del. Ch. LEXIS 114, at *20 (Del. Ch. June 27, 2017) (holding that a court may take judicial notice of relevant public filings).

al., No. 14 CV 6498-LTS-HBP, 2018 WL 2059653, at *17 n.19 (S.D.N.Y. May 1, 2018).

Obeid previously served as President and Operating Manager of GREA, but he was removed from the position in July 2014. (A1547 ¶ 4, A1550 ¶ 10.)

William Stelma (“Stelma”) is a third-party consultant who performs accounting functions for GREA. (*See* A2714 ¶ 2). Stelma has performed accounting functions for GREA since 2010. (*See id.*)

B. The 2014 Litigation

In July 2014, GREA sued Obeid in state court in North Carolina in response to Obeid’s numerous breaches of his fiduciary duties to Defendants, such as the diversion of partner distributions and corporate funds to pursue projects without the authority or knowledge of GREA’s majority in interest and the use of GREA employees to provide him with confidential asset and bid information regarding certain GREA properties Obeid sought to purchase through his competing entity, Arcade Capital, LLC (“Arcade”). *See La Mack v. Obeid*, Case No. 14-CVS-12010 (N.C. Super. Ct. 2014).³ The North Carolina litigation is currently stayed.

In August 2014, Obeid initiated a direct and derivative lawsuit against La Mack and Massaro in the United States District Court for the Southern District of

³ Plaintiffs in the North Carolina action subsequently sought leave to amend the complaint to assert claims on behalf of GEP and withdraw La Mack and Massaro’s individual claims in favor of their pending counterclaims in the Federal Action.

New York, captioned *Obeid v. LaMack, et al.*, Case No. 14-cv-6498-LTS-HBP (the “Federal Action”), relating to their alleged mismanagement of Defendants. The Federal Action also included claims that La Mack and Massaro had deprived Obeid of documents and information to which he was entitled as a member/manager. The court in the Federal Action dismissed all of Obeid’s information-based claims in its September 30, 2016 Motion to Dismiss Order (breach of contract claim) and its May 1, 2018 Summary Judgment Order (breach of fiduciary duty claim). *Obeid v. La Mack*, 2016 WL 5719779, at *6-8 (S.D.N.Y. Sept. 30, 2016); *Obeid v. La Mack*, 2018 WL 2059653, at *27 (S.D.N.Y. May 1, 2018). In the Federal Action, La Mack and Massaro brought counterclaims related to Obeid’s wiretapping of corporate computers, interference with Defendants’ business, and theft of partner distributions and corporate funds, among others. (Federal Action, ECF No. 336.) Those counterclaims have survived summary judgment and will proceed to trial. *Obeid v. La Mack*, 2018 WL 2059653, at *35.⁴

⁴ Obeid also filed a New York state court action captioned *Obeid, et al. v. Bridgeton Holdings, LLC, et al.*, No. 152596/2015 (Sup. Ct. N.Y. Cnty. Mar. 16, 2015) (the “New York State Action”) in an effort to block Defendants’ asset sales. Defendants were then forced to file bankruptcy actions to sell the assets without the lien created by Obeid’s notices of pendency filed in the New York State Action. *See In re: 33 Peck Slip Acquisition LLC et al.*, No. 15-bk-12479 (Bankr. S.D.N.Y. September 3, 2015); *In re: 36 West 38th Street LLC*, No. 15-bk-12480 (Bankr. S.D.N.Y. Sept. 3, 2015); *In re: Gemini 37 West 24th Street MT, LLC*, No. 15-bk-12481 (Bankr. S.D.N.Y. Sept. 3, 2015); *In re: 52 West 13th P, LLC*, No. 15-

Despite Obeid's misconduct and the imminent winding down of the companies, Defendants have endeavored to keep Obeid apprised of all company developments, and as a result he has received a wealth of information about the financial condition of the Gemini companies, allowing him to value his ownership interests. (A2001-02.) Obeid received a wealth of information in fact discovery in the Federal Action, including a copy of the shared folders hosted on GREA's data server. (A2001.) Furthermore, Massaro sends GREA's Member-Managers, including Plaintiff, monthly updates regarding Defendants' business with financial backup attached to the updates. (A2001-02; *see, e.g.*, A2687-2713 (providing detail of fund promotes, calculations regarding the value of the members' ownership interests, and detail regarding all of Defendants' expenditures).)⁵

Obeid also receives distribution information through the Bankruptcy Actions in connection with the sale of GREA's hotel properties through the bankruptcy process, including the Greenwich Village Hotel, the Best Western Seaport Hotel, and the Wyndham Flatiron Hotel. (A2002; *See* Third Post-Confirmation Status Report of Debtors, *In re: 33 Peck Slip Acquisition LLC et al.*, No. 15-bk-12479

bk-12482 (Bankr. S.D.N.Y. Sept. 3, 2015) (collectively, the "Bankruptcy Actions"). (A2000.)

⁵ Between April 2016 and July 2017, the updates were quarterly rather than monthly; however the monthly updates resumed in August 2017 and continue to date. ((A2001-02; A2601-14, December 2017, January 2018, and February 2018 Updates; A2627-54, A2687-2713, A1883, Trial Tr. at 56:3-10.)

(ECF No. 377); Fifth Post-Confirmation Status Report, *In re: 36 West 38th Street LLC*, No. 15-bk-12480 (ECF No. 125); Debtor’s Post-Confirmation Monthly Operating Report, *In re: Gemini 37 West 24th Street MT, LLC*, No. 15-bk-12481 (ECF No. 60); Ninth Post-Confirmation Status Report of Debtor, *In re: 52 West 13th P, LLC*, No. 15-bk-12482 (ECF No. 108.)

C. Obeid’s Demand

On July 13, 2017, nearly three years after his removal as GREA’s Operating Manager, Obeid filed this lawsuit demanding to inspect the books and records of GREA, GEP, and 35 other entities. (*See* A1547.) Obeid made this sweeping demand despite being a member of only three of the listed Entities: GREA, GEP, and Gemini 300 West 22nd Street, LLC. (*See* A1558.)⁶ Obeid purports to seek these documents to “value his membership interests in GREA and GEP” and to investigate whether any mismanagement of GREA and GEP has occurred. (A172 ¶ 26.)

On October 31, 2017, in a good faith attempt to resolve this lawsuit, Defendants provided Obeid with more than 2,000 pages of documents, including

⁶ This overreach is not surprising. In the Federal Action, the court dismissed claims that Obeid attempted to assert on behalf of over 90 entities in which he had no ownership interest (and therefore no standing), including the Funds for which he sought information in this action. *See Obeid*, 2018 WL 2059653, at *17 n.19 (S.D.N.Y. May 1, 2018).

tax records, general ledgers, investor reports, and other financial information relating to Defendants and entities they manage. (A1554-56.)⁷

On January 17, 2018, Plaintiff filed his Verified Amended Complaint Pursuant to 6 *Del C.* § 18-305 (DI 42). Because of Defendants' voluminous production, the Verified Amended Complaint only requested two categories of information:

- a. A copy of the Excel-based workbooks prepared by [Bill] Stelma on behalf of GREA that calculates the investor returns and Manager promote fees owed as a result of the sales of assets owned by the fund entities [(“Request A”)]; and,
- b. Read-only access to GREA's Yardi database with sufficient permission to view the accounting information that backs up

⁷ Specifically, Defendants produced 2016 federal tax returns for GREA, GEP, 300 West 22nd, and Gemini Rowlett Partners, LLC (“GRP”); 2016 state tax returns for GREA, GEP, 300 West 22nd, and GRP; 2016 local tax returns for GREA, GEP, 300 West 22nd, and GRP; general ledgers from January 2016 through September 2017 for GREA, GEP, 300 West 22nd, GRP, Gemini Property Management LLC, and Gemini Loan Servicing, LLC; investor reports from Quarters 1-4 of 2016 and Quarters 1 and 2 of 2017 for Gemini Opportunity Fund I, LLC, Gemini New York Hospitality Fund, LLC, Gemini Opportunity Fund III, LLC, and Gemini Fund 5, LLC; investor reports from Quarters 1-4 of 2016 and Quarter 1 of 2017 for Gemini Opportunity Fund IV, LLC; correspondence to investor Edward Schmidt dated November 30, 2016; an update to the investors in the Gem Hotel Union Square, LLC; investor lists for Gemini Opportunity Fund I, LLC, Gemini New York Hospitality Fund, LLC, Gemini Opportunity Fund III, LLC, Gemini Opportunity Fund IV, LLC, Gemini Fund 5, LLC, Gemini DuBois Mall, LLC, Gemini Edenton Village, LLC, Gemini Parkway Plaza, LLC, the Gem Hotel Union Square, LLC, and Gemini Indian Creek, LLC; 2017-18 Consolidated Budget for GREA; appraisals for various GREA managed assets; a December 31, 2016 debt valuation for the Houston County Galleria; monthly and quarterly updates to GREA's Member-Managers; and 2016 Schedule K-1s for GREA, GEP, 300 West 22nd, and GRP.

Stelma's calculations of the investor returns and Manager promote fees owed as a result of the sales of assets owned by the fund entities [(“Request B”)].

(A175.)

In advance of trial, Defendants provided Obeid with the documents responsive to Request A. (*See* A2714-3555; A1883, Trial Tr. at 54:4-55:11.) Specifically, in his capacity as a consultant, Stelma prepared spreadsheets showing the historical distributions and waterfall calculations for the Funds: The Gemini New York Hospitality Funds, LLC; Gem Hotel Union Square, LLC; Gemini Opportunity Fund I, LLC; Gemini Opportunity Fund IV, LLC; Gemini Opportunity Fund III, LLC; and Gemini Fund 5, LLC (together the “Fund Spreadsheets”). (*See* A2714-15 at ¶¶ 3-8.) Stelma affirmed that all of the information needed to review the distributions to the investors in the Funds and to calculate whether a promote fee is owed to GREA was contained in either the Fund Spreadsheets or in the investor reports separately produced to Obeid. (*See* A2715 ¶¶ 9-10; Ex. 5) Defendants provided this information in an effort to resolve this litigation, even though Obeid has no membership or ownership interest in the Funds. *See Obeid*, 2018 WL 2059653 at *17 n.19.

Indeed, Plaintiff conceded that Request A was satisfied in advance of trial. The Joint Pre-trial Stipulation and Order (“Pre-trial Order”) entered by the trial court on March 8, 2018 states: “In response to Obeid’s Request A, at 6:56 p.m. on

March 2, 2018, Defendants produced an affidavit of Bill Stelma attaching Excel-based workbooks that provide the current and historical investor distributions and the waterfall calculations as calculated by Defendants for any promote fees owed to Defendants for the funds they manage.” (A1557 ¶ 29.)

This left only Request B for trial. Defendants’ general ledgers and backup documentation are currently maintained in the web-based Yardi database. (A2020 at 11:17-12:4.) While Obeid had access to Yardi from 2009 until approximately June 2014, he accessed Yardi on only a handful of occasions in 2009. (*See* A3557-76.) After the initiation of litigation between GREA’s member/managers in 2014, GREA made the business decision to cut off each of GREA’s three members from Yardi access given the litigation and Obeid’s acts of misappropriating Gemini information for his competing company, spying on Gemini’s officers and employees, and further interfering with Gemini’s operations. (A1901-02, A1901-02, Trial Tr. at 128:13-130:22.)⁸

D. Trial

On March 12, 2018, the trial court held a one-day bench trial. During trial, Obeid admitted that the Defendants provided his counsel with Excel-based

⁸ Obeid’s counsel was briefly provided direct access to Yardi in the Federal Action as part of litigation discovery, but such access terminated at the close of fact discovery in December 2016. (Federal Action, ECF No. 423.)

workbooks that showed investor distributions in response to Request A. (*See* A1882, Trial Tr. at 50:13-17.)

Obeid admitted that his specific allegations related to La Mack and Massaro's alleged mismanagement of Defendants were being litigated in the Federal Action. (A1887-88, Trial Tr. at 71:4-75:21.) He also conceded that the disbursements made by Defendants were provided to him in the form of monthly updates, (A1885, A1890, Trial Tr. at 61:22-62:20, 82:15-83:7), and the specific disbursements made by the assets in the Bankruptcy Actions were publicly available through reports in the bankruptcy court, (A1892, Trial Tr. at 92:5-21).

Despite receiving the extensive waterfall calculations, Obeid testified in his Verified Amended Complaint and at trial that he needs Yardi access merely to "back up[] Stelma's calculations of the investor returns and Manager promote fees owed as a result of the sales of assets owned by the fund entities." (A1887, Trial Tr. at 69:6-70:11 (quoting Verified Amended Complaint, A161).)

E. Post-Trial Ruling

On June 5, 2018, the trial court issued the Post-Trial Ruling finding that Obeid was entitled to three categories of information as a manager under Section 18-305 of the DLLCA and under Section 8.6.1 of the Company LLC Agreement and rejected Defendants' argument that Obeid had an improper purpose in this action. (*See* A1573-1579).

On June 13, 2018, the Court issued the Final Order, requiring Defendants to provide Plaintiff with the following information within five business days:

- a. Any updated versions of Exhibits 1-6 to JX 115 (the March 2, 2018 Affidavit of William Stelma), provided in Native Format, and to the extent such workbooks continue to be updated, any additional updated versions of such workbooks within 10 days of any such update;
- b. Any Excel workbook prepared on behalf of GREA that summarizes the distributions to investors in the Funds, or fees earned by GREA as manager of the Funds, and/or which forecasts such distributions and fees (*e.g.*, any current workbook comparable to JX 116 or JX 117); and,
- c. Read-only access to GREA's Yardi database with sufficient permission to view the individual accounts for GREA, Gem Hotel Union Square, LLC, Gemini 305 West 39th Street, LLC, Gemini Fund 5, LLC, Gemini New York Hospitality Fund, LLC, Gemini NYC Hotel, LLC, Gemini Opportunity Fund I, LLC, Gemini Opportunity Fund III, LLC, and Gemini Opportunity Fund IV, LLC from March 1, 2016 forward. Such access will be granted initially for 30 days, and subsequent access will be granted to Obeid thereafter for the last seven days of each month until GREA is completely wound down.

(A1642-43.)

F. Obeid's Conduct Following the Post-Trial Ruling

From the outset of Obeid's books and records action in Delaware, Defendants informed the trial court that Obeid's true purpose in bringing this

action was to undermine Judge Swain's rulings in the Federal Action and to interfere with Defendants' business. (*See e.g.*, A1851-52 at 12:23-13:8; A2005).

After the March 12, 2018 trial in the Delaware proceedings, Judge Swain issued an opinion in the Federal Action dismissing Obeid's remaining claims that La Mack and Massaro failed to provide him with certain information and documents relating to Defendants. *Obeid*, No. 14 CV 6498-LTS-HBP, 2018 WL 2059653 (S.D.N.Y. May 1, 2018). Despite his representations to the Delaware trial court that the actions were distinct, (*see* Plaintiff's Pretrial Brief at A350-A353; A1888, Trial Tr. at 74:11-17; A2248 at 35:18-36:21), Obeid submitted a letter to Judge Swain on June 8, 2018 representing that the books and records action in Delaware and the information disputes in the Federal Action are "identical" and that the trial Court's opinion provided a basis to overrule Judge Swain's order. (*See* A1629-30.)

G. Motion for Reconsideration

On June 12, 2018 Defendants filed a Motion to Alter or Amend Judgment or for Reargument. (*See* A1580-1641.) The motion alerted the trial court to Obeid's post-trial conduct, reminded the court of Obeid's numerous instances of interference with Defendants' business which are proceeding to trial in the Federal Action, and alerted the trial court to certain of Defendants' concerns with the ruling. (*See id.*) The trial court denied Defendants' motion. (*See* A1649-51.)

H. Motion for Stay

On June 21, 2018, Defendants filed a Motion to Stay Pending Appeal. (*See* A1721-49, Motion to Stay Pending Appeal.) The trial court held that “defendants ...advanced arguments that raise fair ground for appeal[.]” and granted the requested stay. (*See* A1768.)

I. Appeal

On June 20, 2018, Defendants appealed the Post-Trial Ruling and Final Order. (A1717.) On July 17, 2018, the Defendants filed an Amended Notice of Appeal consolidating the appeal of the Post-Trial Ruling and Final Order and the appeal of the Reargument Denial. (A1770.) This is Defendants’ opening brief in this appeal.

ARGUMENT

I. THE EVIDENCE PRESENTED AT TRIAL DEMONSTRATES THAT OBEID'S DEMAND WAS MOTIVATED BY AN IMPROPER PURPOSE.

A. Question Presented

Did the trial court err by concluding that Defendants failed to show that Obeid's demand was motivated by an improper purpose? This issue has been preserved for appeal. (*See* A740-51; A1586-87.)

B. Scope of Review

Legal conclusions and statutory interpretations are reviewed *de novo*. *United Techs. Corp. v. Treppel*, 109 A.3d 553, 557 (Del. 2014) ("We review *de novo* a trial court's conclusions of law, including its interpretation of a statute.") Fact determinations are reviewed for abuse of discretion. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits of Argument

The trial court erred by concluding that Obeid is entitled to the Disputed Information in his capacity as a manager of the Company under Section 18-305(b) of the DLLCA, because it erroneously held that Defendants failed to establish that Obeid's purpose for seeking the information was improper. (*See* A1572-76; A1649-51). To the contrary, Defendants presented evidence rebutting Obeid's proffered purposes of valuing his interest in the companies and investigating alleged mismanagement. Moreover, Defendants established two improper

purposes that drove Obeid's pursuit of the Disputed Information, each independently sufficient to warrant denying access.

Under DLLCA Section 18-305(b) managers have the right to examine the categories of information listed in DLLCA Section 18-305(a). DLLCA § 18-305(b). When a person seeking to examine a company's books and records is a manager, he or she has made out a *prima facie* case for access. *Bizzari v. Suburban Waste Servs., Inc.*, No. CV 10709-JL, 2016 WL 4540292, at *8. That access can and should be denied, however, if a company shows that the manager is seeking the records for an improper purpose, rather than his stated purpose. *See id.* at *9 (denying a manager's demand for inspection where that demand was motivated by an improper purpose); *State ex rel. Farber v. Seiberling Rubber Co.*, 53 Del. 295, 298, 168 A.2d 310, 312 (Del. Super. Ct. 1961) (holding that a director's right to inspect corporate books ceases where it can be established that his motives are improper).⁹

At trial, Defendants demonstrated that Obeid interfered with Defendants' business in numerous regards. (A1901-02, Trial Tr. at 127:17-130:22.) Furthermore, as Judge Swain held in denying Obeid's Motion for Summary Judgment in the Federal Action, La Mack and Massaro presented sufficient

⁹ As explained further below, much of the Disputed Information falls outside the province of Section 18-305(a). However, even where information falls within 18-305(a), access should not be permitted where the demand is motivated by an improper purpose.

evidence that Obeid spied on them (taking confidential and personal information without their permission), entered into contracts with purported prospective purchasers of hotels without Defendants' majority consent, converted and pledged Defendants' funds in order to unilaterally pursue desired investments, and entered into broker agreements without majority consent. *Obeid v. La Mack*, 2018 WL 2059653, at *4, *8, *32-34 (S.D.N.Y. 2018).

Obeid has also competed with GREA through his company, Arcade, and sought to interfere with the sales process of GREA-managed assets for the benefit of Arcade. (*See* A1901-02, Trial Tr. at 127:17-130:22). Obeid encumbered four GREA properties in March 2015 with Notices of Pendency, preventing GREA from consummating sales of those properties. (A2003.) That action forced the entities owning the properties to file Chapter 11 bankruptcy. The trial court erroneously held that this evidence did not demonstrate an improper purpose sufficient to deny Obeid access. (*Compare* A1576-77 to *Bizzari*, 2016 WL 4540292, at *8–9 (holding that a showing a plaintiff is competing with the company and damaging it were sufficient to overcome the right to access)).

Defendants have also shown that Obeid pursued the Disputed Information for the improper purpose of circumventing the court's rulings in the Federal Action. As Defendants have demonstrated from the outset of the action, Obeid is using the books and records request as an improper end-around the close of

discovery in the Federal Action. *See Bizzari*, 2016 WL 4540292, at *6 (holding that plaintiff failed to show proper purpose for investigating records based on alleged wrongdoing where he had filed separate action based on same allegations that would entitle him to conduct discovery). Obeid confirmed his ulterior motives when he challenged the summary judgment order in the Federal Action by filing a notice of the Delaware trial court's order and asking the federal court to reverse itself since the information-based claims were "identical." (Federal Action, ECF No. 754.) Moreover, the filing in the Federal Action makes clear that Obeid's purpose in pursuing the Delaware action was to leverage the opinion to attempt to influence Judge Swain to overturn her already rendered decisions dismissing Obeid's deprivation of information claims. This, too, is unmistakable evidence of an improper purpose.

For these reasons, the trial court's decision should be reversed and access to the requested documents and information should be denied.¹⁰

¹⁰ This evidence of improper purpose similarly precludes Obeid's attempts to access the Disputed Information in his capacity as a member. Indeed, a member requesting records under Section 18-305 must establish a proper purpose by a preponderance of the evidence. *Somerville S Trust v. USV Partners, LLC*, 2002 WL 1832830 at *5 (Del. Ch. 2002).

II. OBEID IS NOT ENTITLED TO ACCESS THE YARDI DATABASE.

A. Question Presented

Did the trial court err by concluding that Obeid is entitled to ongoing, read-only access to the Yardi Database? This issue has been preserved for appeal. (*See* A740-751; A1588.)

B. Scope of Review

Legal conclusions and statutory interpretations are reviewed *de novo*. *United Techs. Corp. v. Treppel*, 109 A.3d 553, 557 (Del. 2014) (“We review *de novo* a trial court's conclusions of law, including its interpretation of a statute.”) Fact determinations are reviewed for abuse of discretion. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits Of Argument

The trial court erred by granting Obeid “[r]ead-only access to GREA’s Yardi database . . . initially for 30 days, and . . . thereafter for the last seven days of each month until GREA is completely wound down.” (A1646.) As a threshold matter, continuing access to a corporate database does not fall under any of the limited categories of documents to which a claimant is entitled under DLLCA 18-305(b). (*See* A1574-76; A1649-51). Furthermore, the Yardi database consists of general ledgers—the type of information that offers deep insight into the company and should not be afforded to a hostile party such as Obeid. The trial court also erred in granting access pursuant to the Defendants’ LLC Agreements, which do not

contemplate such broad access. Finally, the requirement that GREA provide ongoing access to Yardi acts as a mandate that GREA continue to use the database itself, notwithstanding the fact that its business is winding down. For each of these reasons, the trial court erred in granting Obeid access to Yardi.

First, Yardi access is outside the scope of the available records set forth in Section 18-305(a), which permits a member of a limited liability company to obtain only the following limited categories of documents:

- (1) True and full information regarding the status of the business and financial condition of the limited liability company;
- (2) Promptly after becoming available, a copy of the limited liability company's federal, state and local income tax returns for each year;
- (3) A current list of the name and last known business, residence or mailing address of each member and manager;
- (4) A copy of any written limited liability company agreement and certificate of formation and all amendments thereto, together with executed copies of any written powers of attorney pursuant to which the limited liability company agreement and any certificate and all amendments thereto have been executed;
- (5) True and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by each member and which each member has agreed to contribute in the future, and the date on which each became a member; and
- (6) Other information regarding the affairs of the limited liability company as is just and reasonable.

6 Del. C. § 18-305(a); *see also* A740-42. Although the trial court granted Obeid access to the database as a manager under Section 18-305(b), this provision grants managers access only to the same limited categories of information. 6 Del. C. § 18-305(b) (“Each manager shall have the right to examine all of the information described in subsection (a) of this section for a purpose reasonably related to the position of manager.”). None of the limited categories of information could be read to require ongoing access to a software database.

Allowing Obeid access to Yardi goes well beyond the six categories of information permitted under Section 18-305. In fact, Defendants provided Obeid with all of the records in the categories enumerated in the statute prior to trial in the form of a 2,000 plus page production including tax returns, investor reports, investor lists, appraisals, and monthly and quarterly updates about the business affairs of Defendants, as well as copies of spreadsheets showing distributions to the investors in the funds and promote fees calculations. (A2005-2010.) Where the requestor already has “sufficient information” from other sources or other books and records requests, “inspection . . . can be curtailed.” *Sanders v. Ohmite Holdings, LLC*, 17 A.3d 1186, 1194 (Del. Ch. 2011).

That Obeid’s stated purpose for seeking this information—to investigate purported mismanagement and breaches of fiduciary duty by La Mack and Massaro—was already being actively litigated in the Federal Action also

demonstrates that granting such access was an error. For example, in *Bizzari*, the court determined that a manager failed to meet his burden of establishing a credible basis to investigate possible mismanagement or wrongdoing when that party had already initiated litigation alleging breaches of fiduciary duty. 2016 WL 4540292, at *6 (Del. Ch. Aug. 30, 2016). Indeed, that party and “his counsel presumably concluded they possessed sufficient information under Rule 11 to file the complaint without first inspecting books and records” and so the court noted that any “additional ‘investigation’ [could be conducted] under the much broader discovery that will be available to him under the Court’s rules.” *Id.* As with *Bizzari*, “[t]he availability of discovery . . . undercuts [Obeid’s] alleged need to investigate mismanagement through an inspection demand.” *Id.*

Additionally, ongoing access to the Yardi database will give Obeid, a hostile party, real time access to Defendants’ general ledgers and all backup documentation. As the trial court noted in the August 2017 court conference, general ledgers provide “deep insight into the company” and thus the court typically does not permit access to such information (*See* A1875 at 24:15-25:2.) Therefore, the trial court should have denied Obeid’s request for read-only access to the Yardi database when Obeid failed to articulate a specific reason for this unusually broad request.

The trial court also erred in granting Obeid access to the Yardi database under the Defendants' LLC Agreements. (A1577-78.) Section 8.6.1 of the GREA Operating Agreement generically provides that the books and records of the company "shall be open to the inspection and examination of the Members or their representatives during reasonable business hours." (See A1942.) Section 18 of the GEP Operating Agreement simply requires that members received 1) a balance sheet of the company, 2) an income statement of the company for the previous fiscal year, and 3) a statement of each member's capital account. (See A1966.) Obeid's theory that he was somehow deprived of information he is contractually entitled to under these agreements has already been rejected in the Federal Action, where the court dismissed Obeid's claim that La Mack and Massaro breached the operating agreement by withholding material company information from him. *Obeid*, 2016 WL 5719779, at *6-8.

Finally, the grant of access is particularly inappropriate here, where Defendants are required to maintain the web-based database while GREA is winding down. It is undisputed over the past several years, GREA has been selling off its hotel assets in anticipation of ceasing business operations. (A982); *see also Obeid*, 2018 WL 2059653, at *6-8. A requirement that Defendants provide Obeid ongoing access to Yardi—"for the last seven days of each month until GREA is completely wound down"—operates as a mandate that Defendants continue to use

Yardi, even if they would otherwise have discontinued use of the database in connection with winding down the business. Thus, the trial court is now controlling the business judgment of Defendants regarding how and in what manner they maintain their accounting records.

Delaware's books and records law does not require a company to create records solely for the purpose of providing them—nor does it require companies to maintain specific platforms so that records may be provided in that format—but that is the effect of the Final Order. See *Quantum Tech. Partners IV, L.P. v. Ploom, Inc.*, No. CIV.A. 9054-ML, 2014 WL 2156622, at *14 (Del. Ch. May 14, 2014) (holding that Plaintiff was only entitled to inspect financial records “to the extent they exist”); *Dobler v. Montgomery Cellular Holding Co., Inc.*, 2001 WL 1334182, at *9 (Del. Ch. Oct. 19, 2001) (“Naturally, if the records to which the Court has found the Plaintiffs are entitled do not exist, the Defendant has no duty to do the impossible.”); *Freund v. Lucent Techs., Inc.*, 2003 WL 139766, at *5 (Del. Ch. Jan. 9, 2003) (holding that only documents in existence need be produced). Furthermore, there is no authority for using DLLCA 18-305 to deprive a company of the discretion to make a business decision to discontinue use of certain software, but that, too, is the effect of the Final Order. Therefore, the trial court's decision should be reversed and access to should be denied.

III. THE TRIAL COURT’S ORDER REQUIRING DEFENDANTS TO PROVIDE OBEID WITH UPDATED VERSIONS OF EXHIBITS 1-6 to JX 115 AFTER ANY UPDATE MAKES COMPLIANCE IMPOSSIBLE.

A. Question Presented

Did the trial court err by concluding that Obeid is entitled to updated versions of Exhibits 1-6 to JX 115 within 10 days of any update? This issue was preserved for appeal. (*See* A1589).

B. Scope of Review

Legal conclusions and statutory interpretations are reviewed *de novo*. *United Techs. Corp. v. Treppel*, 109 A.3d 553, 557 (Del. 2014) (“We review *de novo* a trial court's conclusions of law, including its interpretation of a statute.”) Fact determinations are reviewed for abuse of discretion. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits of Argument

The trial court erred by holding that Defendants should provide Obeid with “any updated version of Exhibits 1-6 to JX 115 . . . and, to the extent such workbooks continue to be updated, any additional, updated version of such workbooks within 10 days of any such update” (*See* A1645-46).

The trial court’s ruling would require Defendants to do the impossible: constantly monitor the actions of a third-party consultant to ensure that whenever he (or any other individual) accesses the spreadsheets for any reason, Defendants

then send the spreadsheets to Obeid within 10 days. Taken to its logical extreme, the Final Order could be read to include any change to the metadata, such as entering the document and saving the document again without making any changes. As Obeid testified, the spreadsheets sought are managed by Stelma, an independent consultant of Defendants. (A1800, Trial Tr. at 37:15-20; A1804 at 53:5-11.) Consequently, Defendants run the risk of violating the Final Order if Stelma takes any minimal action relating to those spreadsheets—such as accessing the spreadsheets for a simple review—without Defendants’ knowledge.

Where a trial court enters an order than cannot be complied with, it is appropriate for this Court to remand for clarification. *See e.g., Mason v. State*, 901 A.2d 120 (Del. 2006) (remanding to the trial court where the superior court’s order was ambiguous). As a result, the trial court’s order that Defendants provide Obeid with any updates to Exhibit 1-6 to JX 115 within 10 days should be reversed, or, alternatively, remanded with instructions to clarify the order so as to only require that updates be provided on a quarterly basis.

IV. OBEID IS NOT ENTITLED TO WORKBOOKS “COMPARABLE TO JX116 OR JX 117.”

A. Question Presented

Did the trial court err by concluding that Obeid is entitled to any Excel workbook prepared on behalf of GREA that summarizes the distributions to investors in Funds, or fees earned by GREA as manager of the Funds, and/or which forecasts such distributions and fees, which the court described as “*any current workbook comparable to JX 116 or JX 117.*” This issue was preserved for appeal. (See A739-40.)

B. Scope of Review

Legal conclusions and statutory interpretations are reviewed *de novo*. *United Techs. Corp. v. Treppel*, 109 A.3d 553, 557 (Del. 2014) (“We review *de novo* a trial court's conclusions of law, including its interpretation of a statute.”) Fact determinations are reviewed for abuse of discretion. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits of Argument

The trial court erred by concluding that Obeid is entitled to any Excel workbook prepared on behalf of GREA that summarizes the distributions to investors in Funds, or fees earned by GREA as manager of the Funds, and/or which forecasts such distributions and fees, which the court described as “*any current workbook comparable to JX 116 or JX 117.*” This mandate in the Final

Order is not only too vague to carry out, but it also awards relief that was not demanded in the Amended Complaint.

Obeid's Verified Amended Complaint requests: "A copy of the Excel-based workbooks prepared by [Bill] Stelma on behalf of GREA that calculates the investor returns and Manager promote fees owed as a result of the sales of assets owned by the fund entities." (A175 ¶ 40(a).) Plaintiff conceded in advance of trial that Defendants had produced these workbooks: "In response to Obeid's Request A, at 6:56 p.m. on March 2, 2018, Defendants produced an affidavit of Bill Stelma attaching Excel-based workbooks that provide the current and historical investor distributions and the waterfall calculations as calculated by Defendants for any promote fees owed to Defendants for the funds they manage." (A1557 ¶ 29; *see* A2400-2401 ¶¶ 3-9; A1804, Trial Tr. at 54:4-55:11.)

The trial court ignored the fact that all Excel-based workbooks requested were already produced when it ordered Defendants to produce any documents that contain forecasts of any such fees or are *comparable* to JX 116 or JX 117.

Had Obeid requested the comparable documents in a timely fashion, Defendants could have used the discovery process and further inquired at trial to better understand the nature and parameters of Obeid's request. By allowing Obeid to wait until his post-trial submissions to seek this additional set of documents, (A1635 (citing to Plaintiff's April 20, 2018 post-trial submission)), the

trial court improperly denied Defendants the opportunity to consider Plaintiff's demand and defend against it. Where parties amend their demands in advance of trial, even those demands are improper where they deprive the defendant of the right to prepare a defense. *See Fuchs Family Tr. v. Parker Drilling Co., C.A.*, 2015 WL 1036106, at *4 (Del. Ch. Mar. 4, 2015) (striking attempt to expand inspection demand on eve of trial, on grounds that it denied corporation its right "to receive and consider a demand in proper form before litigation is initiated."); *Mack v. Mack*, 2013 WL 1339431, at *1 (Del. Ch. 2013) ("Defendant cannot reasonably be expected to be ready to address Plaintiff's claims in a formal and structured fashion in a matter of days."). Thus, Plaintiff's effort to amend his pleading after the trial should be rejected and the trial court's order reversed.

This portion of the trial court's order is also impossibly vague as Defendants have already produced all documents responsive to Obeid's request, and cannot determine what may constitute a "comparable" document absent any more specific direction. *See Chammas v. Navlink, Inc.*, 2016 WL 767714, at *8, n. 98 (Del. Ch. Feb. 1, 2016) (observing need to identify "specific books and records related to the plaintiff's proper purpose" so as not to "burden the corporation to search for the same"). Defendants must be able to discern what they are obligated to produce, and the Final Order, as drafted, leaves the matter subject to interpretation, which

will inevitably lead to additional litigation. Accordingly, the Final Order should be reversed.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed.

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