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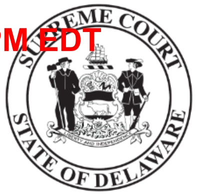

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DG BF, LLC, a Delaware limited liability company, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company; and JEFF A. MENASHE, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company,	No. 272,2022
Plaintiffs below, Appellants,	Court Below: Court of Chancery of the State of Delaware C.A. No. 2020-0459-MTZ
v.	
MICHAEL RAY, an individual, and VLADIMIR EFROS, an individual, and AMERICAN GENERAL RESOURCES, LLC, a Delaware limited liability company,	
Defendants below, Appellees	
and	
AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company,	
Nominal Defendant below, Appellee.	

APPELLANTS DG BF, LLC AND JEFF A. MENASHE'S
[CORRECTED] OPENING BRIEF
[PUBLIC VERSION DATED OCTOBER 27, 2022]

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NATURE OF THE PROCEEDINGS

"Delaware has a strong public policy that favors permitting a litigant a right to a day in court." *Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011).[1] This is a five-million-dollars fraud case where claimants never got their day in court. It took the trial court just a few months to go from endorsing Appellants' fraud claims as based on "reasonable" inferences from the alleged facts to dismissing their claims as a discovery sanction. Appellants were then hit with more than $2,200,000 in attorney fees to add insult to their $5,000,000 injury.

While Appellants' discovery conduct may not have been exemplary, it also did not justify such a draconian result—especially because they faced unnecessarily intrusive discovery measures, such as orders compelling forensic images of the entire third party server containing irrelevant third party confidential information, as well as compelled production of a personal cellphone without any regard to privacy or privilege. But "[c]ivil litigation should not be approached as if information systems were crime scenes that justify forensic investigation at every opportunity to identify and preserve every detail." *Par Pharm., Inc. v. QuVa Pharma, Inc.*, 2019 WL 959700, *6 (D.N.J. Feb. 27, 2019), citing *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008), and *The Sedona Conference, The Sedona*

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[1] All internal alterations, quotation marks, footnotes and citations herein are omitted, and all emphasis is added unless otherwise noted.

Principles, 19 Sedona Conf. J. 1, 112 (3d ed. 2018). Moreover, the record in this case lacks any required "clear" evidence of "subjective bad faith" amounting to the required "glaringly egregious" conduct to support the court's shifting of more than $2,200,000 in attorney's fees onto an individual investor who had already lost $5,000,000 by way of a fraudulently induced investment.

As the trial court itself confirmed, it initially adjudged Appellants to have stated a "colorable" claim and then blessed their claims to proceed beyond the pleadings by finding that the allegations supported a "reasonable" belief that they had been defrauded. Yet there were also missteps along the way—and not only those by Appellants once discovery started. Thus, the court reversed itself on a temporary restraining order it issued, directed briefing on injunction damages it had no jurisdiction to issue in the first place and eventually ruled that the claims it had approved to proceed to discovery only a few months earlier suddenly disappeared by the time it issued the dismissal sanction and had to justify to itself the draconian measure being applied. As shown below, the court also applied an incorrect standard when assessing Appellants' request to continue trial and improperly discounted the Pandemic effect on the proceedings, including staffing shortages and vendor issues. Appellants submit that the dismissal and the fee shift were similarly in error—especially given that for its "bad faith" findings in support of the fee shift, the court relied on the information Appellants ***disclosed in their***

complaint—the very same complaint it had adjudged earlier as demonstrating a "reasonable" belief that Appellants had been defrauded.

SUMMARY OF ARGUMENT

I. The court erred by dismissing all claims as the harshest discovery sanction where Appellants had achieved substantial compliance, and any prejudice to the Appellees could have been cured by a trial continuance.

II. The court erred by shifting all attorneys' fees for the entire proceeding based on its findings of bad faith that lacked the required evidentiary support.

STATEMENT OF FACTS

I. RELEVANT FACTUAL BACKGROUND

On June 25, 2019, Appellant and Plaintiff below, Jeff Menashe, through his investment vehicle, DG BF (also Appellant and Plaintiff below), contributed $5 million into the initial closing of "Series D" financing for Appellee American General Resources ("AGR"). (A-000826/002363-78.) Menashe is the founder and CEO of an investment banking firm. (A-000791.) Through a series of subsidiaries, AGR operated a business known as Bloom Farms, which was active in the cannabis industry. (A-000789.) AGR was a top ten cannabis brand in California. (*Id.*) Appellees and Defendants below, Michael Ray and Vladimir Efros, were both members and managers of AGR: Ray was the chief executive officer, and Efros was the chief strategy officer. (A-000805.)

AGR's Series D financing was marketed as a minimum of $15,000,000 for a $[redacted]-valued company. (A-000826.) In return for his personal investment, Menashe became the Series D representative on AGR's board of managers, securing certain corporate governance rights and preferences. (A-000812-18.) His affiliated investment banking firm, Demeter Advisory Group, LLC (hereinafter "Demeter" together with its affiliate, Demeter Group Holdings, LP), also secured a lucrative position as the company's investment banker. (*Id.*)

In advance of that investment, the parties engaged in extensive negotiations.

(A-000809-12.) During these negotiations, Efros presented glowing financials, including impressive historical revenue numbers, strong projections for future growth and a clear path to positive cashflow. (A-000811/000816.) He touted that he was in negotiations for an imminent lucrative merger with a successful cannabis distribution company. (A-000811.) As the trial court summarized the facts that ultimately led to this litigation,

> Soon after the plaintiff invested, the rosy picture the defendants had painted began to fade. The lucrative merger deal vanished without explanation. Less than four months after the plaintiff invested, the company's chief financial officer [Ronald Roach ("Roach")] ("CFO") pled guilty to creating fraudulent financial records and misleading investors in a $1 billion Ponzi scheme at another company. While the defendants allegedly knew the CFO was being investigated, they did not disclose that issue to the plaintiff before he invested. Moreover, the CFO was responsible for preparing the company's historical financial records and projections that the defendants presented to the plaintiff to secure his investment. Once the plaintiff invested, the company's historic financial performance was revised downward and, with it, the company's projected future growth. Within months, the company was insolvent and pursuing more money in a new "Series E" financing round.

(A-002363.) Indeed, the over $[REDACTED] in projected revenue shrunk to just over $[REDACTED] the following month, the supposedly "historical" numbers changed overnight, the Series D round's floor disappeared, and more secrets came to light, such as [REDACTED]. (A-000833-35/002371-78.) By December 4, 2019, the company claimed near-insolvency, and by March 2020, its valuation was in the red by more than $[REDACTED]. (A-000795-96/002377.)

After Appellants spent almost a year trying to fix the company from within—all to no avail, as the company refused to respond to Appellants' repeated requests for an independent forensic accounting of AGR's financial records, neglected to conduct regular board meetings and ignored continued calls for basic transparency (A-000835-51)—Appellants sued on June 11, 2020, two days after the board resolution approving "Series E" financing, seeking, *inter alia*, to enjoin the new financing round (based on the lack of approval from the Series D manager) and protect Appellants' distribution rights in the imminent liquidation. (A-000064.) Soon after, in retaliation for the suit and to remove an obstacle to the new financing round, Appellees rallied the Series D members to secretly remove Menashe from the board and eliminated the profitable investment banking relationship with the company that Appellants secured as one of the conditions of their investment. (A-000851-7.) They also changed AGR's operating agreement to impose attorneys' fees for suits against the company, including "continued" litigation in a retaliatory attempt to punish Appellants. (A-007673 n.4.)

As of July 2022, AGR's sole remaining asset offered for sale was the fee award in this case. (A007829.)

II. THE PROCEEDINGS BELOW

Expedition/TRO, Denial of Declaratory Relief, Core Claims Proceed. Given the impending Series E financing that threatened to eviscerate their distribution rights upon imminent liquidation, on June 15, 2020, Appellants sought and later obtained expedition of the matter. (A-000244/000304/000435.) On June 26, 2020, the court granted the temporary restraining order ("TRO") sought by Appellants; however, that order precluded only the closing but not the shopping of the new financing. (A-000541/000595.) Importantly, as the court later confirmed, the relief was granted "[a]pplying the standard for a temporary restraining order" (A-000600), which thus meant that the court had determined that Appellants had "a colorable claim."[2]

Less than two weeks after the TRO issued, it was dissolved on July 9, 2020 by the court's decision denying declaratory relief on the issue of Series E financing. (A-000598.) Notably, the court directed the parties to brief the issue of damages resulting from the TRO (A-000612)—which they did (A-001972/002254/002277), although the court eventually found that it had no jurisdiction to award such damages in the first place. (A-007792.)

In the same July 9, 2020 ruling, the court found that AGR's Operating

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2 *Cottle v. Carr*, 1988 WL 10415, *3 (Del. Ch. Feb. 9, 1988) (Allen, C.).

Agreement (A-000932) "does not require AGR to seek [Menashe's] approval" to amend it and issue new financing. Notably, the court agreed with Appellants that an amendment was required and Menashe's "consent rights" must be considered. (A-000606.) It was the reach of those "consent rights" that the court adjudged to fall short of providing Appellants with the right to block the transaction because it read into Appellants' priority standing a nonexistent condition. (A-000609-10 (finding that the right cannot be exercised in perpetuity).) There was nothing in the court's reasoning that indicated that Appellants' position was unreasonable or undertaken in bad faith—rather, based on the court's disposition of the arguments, there clearly was a bona fide disagreement over the contractual language.[3]

On October 20, 2020, having ascertained some confusion from defendants' pending motion to dismiss, Appellants clarified that their complaint did not include any claims arising from a separate contract, which was a purchase agreement dated June 20, 2019 (A-001048 ("Purchase Agreement")), governed by a mandatory forum clause that directed the parties to litigate any disputes arising from the agreement in New York. (A-002014.) It is under that agreement that Appellants subsequently initiated a separate action in New York on January 12, 2021, *DG BF, LLC v. Ray*, Index No. 150291/2021 (N.Y. Sup. Ct.), where they amended their complaint once

[3] Appellants sought interlocutory review of the decision, which the trial court denied, and this Court refused. (A-000669/000728/000772/000778/001183.) *See also DG BF, LLC v. Ray*, Case No. 258,2020.

on April 6, 2021 and opposed a motion to dismiss on May 25, 2021. (A-006063/006095.)

On March 1, 2021, the court approved "the crux" of Appellants' complaint to proceed by partially denying defendants' motion to dismiss as to, *inter alia*, twelve counts of AGR's contractual breaches and fraud claims against Efros. (A-002417.) The court thus endorsed Appellants' belief that they had been defrauded by holding that the projections inducing investment were "unsound from their inception," and it was "reasonable at this stage to infer that Efros presented these projections to Menashe with the intent to deceive him." (A-002420-21.) The decision undid a four-months discovery stay (A-001921), which froze Appellants' discovery started in July 2020 (A-001506/001300-42/001896) as of October 5, 2020 and prompted denial of their motion to compel (A-001925)—despite Appellants' staunch opposition to the stay, supported by conclusions from a forensic accountant that found AGR's financials to exhibit red flags (001768-81/001929-37/001959-64/002011).

Appellants' Initial Good Faith Discovery Efforts. By March 2021, the word was out that Appellees were on the brink of selling AGR for spare parts to avoid judgment (with the details revealed later through discovery), compelling Appellants to move fast to save their investment. (A-005313.) This is especially so, given that [redacted] (A-001104), yet no debt

forbearance agreement was disclosed. As a result, Appellants had all the reasons to consent to the expedited schedule, projecting, *inter alia*, for the parties to complete discovery by August 25, 2021 and proceed to trial on September 15, 2021, which the court approved on March 30, 2021. (A-002876.)

Yet, despite sitting on Appellants' discovery requests since July 2020, it took Appellees almost a year to start producing documents on June 11, 2021, which resulted in a 50,000-document dump on that date, making fact depositions impossible until July. (A-005471-72.) In turn, while Appellants' own discovery compliance was not always immediate or exemplary either—after all, they ended up responding to, *inter alia*, 124(!) interrogatories and 79 requests for production (A-004168-4241/004251-94/004459-63), they did exhibit every intention to comply in good faith by beginning their production on May 7, 2021 (A-003917-4136), providing hit reports and privilege logs (A-004350/004392) and engaging into months of meet and confer efforts to set up the relevant protocol and address their responses (A005004-17; *see also* A-004139-49/004158-66/004246-49/004299-4323/004336-90/004397-99/004403-08/004466-70/005059-70/005093). Notably, those responses, in addition to the verified complaint itself (A-001181): (1) pointed to the specific documents demonstrating due diligence before the investment, (2) specified all the misrepresentations and omissions at issue, and (3) pointed to the specific financials Appellants believed were fraudulent. (A-004215-28; *see also* A-

000811 ¶48, A-000899 ¶282 & A-000903 ¶301.) The issue thus became adequacy of compliance rather than lack thereof.

Discovery Motion Practice and Appellants' Efforts to Secure More Time for Compliance. Appellees moved to compel further discovery on July 2, 2021. (A-003900/004996/005044.) Having absorbed Appellees' earlier document dump, Appellants, in turn, sought more time to designate expert witnesses on July 19, 2021. (A-004770/004926.)[4] Menashe's deposition took place on July 27, 2021 and produced (largely unnecessary)[5] motion practice on the issue of separating Menashe as an individual from DG BF's PMK. (A-004992-95/005201/005434/006480-6565.) [6]

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4 While this motion was filed after the designation deadline, Appellees had only designated Ray and Efros as supposed experts (A-004800), which amounted to no designation at all. Indeed, no meaningful expert designation could take place before fact depositions, which only commenced on July 14 due to delays on both sides. (A-004771-2.)

5 The parties essentially reached an agreement on the issue (A-005439-44), with Menashe's second deposition proceeding on August 17, 2021.

6 This motion produced a decision publicly comparing Mr. Gerard Fox, Appellants' lead trial counsel, to a notoriously obnoxious Delaware practitioner. (A-005531.) While the court cited its own observations of Mr. Fox in support of this comparison, those were ostensibly based on only two remote appearances, at least one of which appeared to be plagued with connectivity issues that caused Mr. Fox to lose track. (A-005489(10:21-11:17).) Moreover, the court appears to have disregarded that Mr. Fox was interposing valid objections throughout the deposition in question, since Appellees' counsel insisted on posing questions outside of its scope. (A-006480.) The record does not support the court's scathing attack on Mr. Fox, who has practiced for almost 40 years with unreproachable record. Rather, this is but one example of Appellants ending up paying a disproportionate price for something that was beyond their control.

Certain important points emerged during Menashe's depositions. *First*, he testified that the "server" repository that Appellees had pursued did not actually exist because DG BF never had its own server but rather stored documents in a separate "Bloom Farms" folder on the nonparty Demeter's server. (A-006542(152:14-25).) *Second*, his testimony established that as a matter of a "company policy" that preexisted this dispute, all Appellants' laptops had been routinely wiped clean of information and recycled through donation every two years, while Menashe himself had always deleted all the text messages from his phone upon receipt. (A-006491(41:21-42:2)/006499(76:7-25)/006508(109:4-110:3)/006539(141:19-23).) As to laptops, Mr. Menashe had two employees working on the AGR investment, Kevin Raesly and Marc Levit, whose laptops were initially thought to have been wiped and donated upon their departure in 2020 but later discovered intact due to a combination of inability to ship and COVID stay-at-home orders. (A-006498-99(72:7-74:7)/006506(101:12-23)/006541-42(149:8-151:25).) While Menashe was confronted with texts deleted back in March 2020, he also testified he did not anticipate litigation "for months into 2020". (A-006559-61(220:7-8/223:6-224:2/228:18-229:18).) *Third*, on the evidence preservation front, Menashe testified about his belief that all the evidence was on auto-preserve based on the applicable industry regulations. (A-006488-95(29:6-14/32:23-33:20/38:7-39:7/44:16-50:4/54:14-18/60:3-5)/006539(140:7-142:4).)

Although as of July 28, 2021, Appellants were continuing with their good faith compliance efforts and, *inter alia*, had produced over 10,0000 pages of responsive documents (A-004996-7), they had run into the Pandemic effect, embodied by abrupt counsel departures and vendor difficulties, as they persistently signaled to the court. (A-005494/005337-40/005475(n.2)/005476-77.) Represented by a small firm outnumbered by Appellees' multiple counsel, Appellants' Pandemic effect was especially disproportionate. Accordingly, by August 2, 2021, it had become clear that they needed more time for compliance; moreover, new developments expanded the case, as AGR's attempts to avoid judgment emerged through discovery. (A-005299-100/005470-77.)[7] Additionally, the Pandemic slowed down subpoena service. (Ex. B at 26-27, 30-32, 34-39 & 47-49; A-005474-76.) Notably, while Appellees only had Menashe and his two assistants to depose, the pool for the relevant company witnesses was much more extensive. However, when Appellants moved for a six-week trial continuance, it was denied. (Ex. B at 49-51.)

Discovery Orders, Contempt, Dismissal and Fees. On August 3, 2021, the

[7] While the word of the sale was out as early as January 2021, the details were not available until Appellees' June 2021 production. (A-005299.) Based on this information, Appellants moved for to appoint a receiver based on the evidence of AGR's abysmal financial condition. (A-004476-4685.) The motion was eventually withdrawn due to the court's comments about Appellants' focus and its directions for Appellants to concentrate on discovery compliance. (A-005323; Ex. B at 33 & 37.)

court granted Appellees' motion to compel discovery and further ordered Appellants to complete all the outstanding searches and provide corresponding hit reports within 24 hours, as well as provide a privilege log certified by Delaware counsel within seven days. (A-05515-17.) By August 12, 2021, all the depositions Appellees demanded had been calendared, and Appellants detailed to the trial court the substantial compliance efforts they had undertaken to date. (Ex. B at 14-19; A-005337-41 (compliance as of August 9, 2021).) The report appeared satisfactory to the trial court, which directed the parties to set further deadlines between themselves. (Ex. B at 20-21.)

On August 18, 2021, Appellees renewed their motion to compel and moved for sanctions, both on "expedited basis." (A-005543.) Appellants were given a 53-minute ultimatum to agree to oppose it within 24 hours (A-006144-46). When they protested, Appellees proposed their schedule to the court anyway, and the court granted it, slightly modifying the deadline to run from its order instead (A-006125). In their opposition, Appellants detailed the escalating unreasonableness of Appellees' constant demands, including overnight vendor compliance, which was impossible to secure on a regular basis, let alone during the Pandemic's staffing shortages. (A-006128-46.) Still, in the two weeks since August 3, Appellants produced around 20,000 documents from six out of the eight repositories at issue and completed all the Appellees' searches, original and revised, along with hit lists

and privilege logs, for those six repositories. They were: (1) Menashe's email (with substantial compliance achieved within 24 hours of the August 3, 2021 order and additional demanded compliance achieved within 24 hours after any issues were raised), (2) Raesly's email (with the same compliance timeline as the previous category), (3) Levit's email, (4) Reasly's laptop (albeit after some technical difficulties, which notice and continuous updates provided to the Appellees), (5) Levit's laptop (albeit with the same difficulties as encountered for the previous category), and (6) the Bloom Farms folder on Demeter's server. (*Id.*) Moreover, the entire Demeter server had been imaged and was in transit for delivery the next day on August 19. (*Id.*)[8] Finally, although imaging of Menashe's laptop and cellphone had been attempted, it had failed due to technical difficulties, yet the necessary equipment was on its way to reach Menashe that very day (August 18).

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[8] Despite Menashe's sworn testimony that DG BF never had its own server, Appellees insisted on production therefrom throughout the discovery process. Once the issue was cleared up by requiring production from a ***third-party*** server, which was Demeter's server (A-006131), the third party in question moved for protection, as Appellees had never actually pursued third party discovery as to Demeter through proper channels mandated by the applicable rules, and Demeter's server stored unrelated confidential information of third parties protected by nondisclosure agreements that required Appellants to provide advance notice to those third parties to enable them to object. (A-006824-25.) Nevertheless, by August 25, 2021, as reported in the motion, 80% of the server had been uploaded for searching, with the vendor completing the imaging and uploading as soon as its capabilities allowed. (A-006827(n.2).) The court, however, dismissed the matter without even considering the motion. (A-007199-200 ("Pencils Down Order") (directing counsel, *inter alia*, to stop briefing the motion to quash).)

(*Id.*) In other words, Appellees had all the necessary information to proceed with the scheduled depositions of Raesly and Levit the following week, which were later continued anyway to provide Appellees with even more time. (*Id.*; *see also* A-006220-25.)

Yet, when the parties reconvened before the court five days later on August 23, 2021 for what turned out to be their last hearing prior to dismissal, Appellants were held in contempt (and sanctioned with yet-to-be-defined adverse evidentiary inference (A-007242)), even though: (1) all the required document production and written discovery was substantially complete, with the only remaining issue focusing on claimed privilege, (2) all the depositions were either done or were on calendar to proceed as previously agreed, including yet another deposition of Menashe, (3) the relevant server was being uploaded by a third-party vendor that day and scheduled to be done by the end of it, and (4) Menashe's laptop had been delivered for imaging to the same third-party vendor. (A-007224-29/007232/007238/006815.) The only issue of real contention that remained was Menashe's inability to find a suitable vendor to image his phone on time, which was due to a combination of his remote location and Apple security features (A-007225-26/007232-33)—but Menashe did ship his phone the next day as ordered by the court. (A-006784-85/006790.) Moreover, while Appellees complained that they had not received any hard deadlines for compliance from Appellants as was

suggested by the court, this was only because Appellants had been unable to secure ***vendor*** commitment to any such hard deadlines, and Appellants had been already admonished that they cannot do any self-collection. (A-007230-31; Ex. B at 18-21; A-005515.) As such, Appellants were dependent on ***third party*** compliance that they simply could not control.

It is the following four days that the court later cited as tipping the scales toward its ultimate choice of the dismissal sanction. (A-007201.) Those four days saw a flurry of Appellees' submissions, including a spoliation motion (A-006226)[9] and two one-sided letters that Appellants never even got a chance to oppose—in one of which Appellees pushed the boundaries of an adverse inference sanction they had already secured. (A-006735/006886/007035.) On August 27, 2021, the Pencils Down Order issued, followed by the November 19, 2021 dismissal order. (A-007199-200; Ex. A.) Appellants' timely motion for reconsideration claiming insufficient evidence to support a bad faith finding was denied. (A-007631-41/007660.)

On October 28, 2021, Appellees moved the court to shift all the attorney's fees, including all the fees incurred outside of discovery, which Appellants opposed on January 6, 2022 based on, *inter alia*, insufficiency of the required clear

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[9] Appellants had to oppose this motion within 48 hours—again based on Appellees' one-sided scheduling proposal and despite Appellants' request for more time (A-006732-34/006722/006706-98).

evidence of subjective bad faith outside of discovery. [A-07245/007661-88/007746-59/006943.) The motion was granted on May 23, 2022, and Appellees were eventually awarded $2,247,326.56 in attorney's fees. (Ex. C; A-007808.)

ARGUMENT

I. THE COURT ERRED BY CHOOSING THE HARSHEST AVAILABLE SANCTION

A. QUESTION PRESENTED

Did the court erroneously select the most severe sanction available to punish the alleged misconduct, when less severe sanctions could have been equally effective in conjunction with providing more time to comply? (Ex. A; Ex. B.)

B. SCOPE OF REVIEW

Although "a trial judge has broad discretion to impose discovery sanctions," and this Court "will not disturb a trial [judge]'s decision regarding sanctions imposed for discovery violations absent an abuse of discretion," the trial judge's "decision to impose sanctions must be just and reasonable." *Lehman Cap. v. Lofland ex rel. Est. of Monroe*, 906 A.2d 122, 131 (Del. 2006) (original alteration), citing, *inter alia*, *Rittenhouse Assocs., Inc. v. Frederic A. Potts & Co.*, 382 A.2d 235, 236 (Del. 1977); *see also Roache v. Charney*, 38 A.3d 281, 286 (Del. 2012) ("Abuse of discretion review presents a high but not insurmountable standard …."). Moreover, "the application of the legal standard" for discovery sanctions is a question of law that this Court reviews *de novo*. *TransPerfect Glob., Inc. v. Pincus*, 278 A.3d 630, 645 (Del. 2022). In turn, spoliation is a mixed question of law and fact, thus legal principles are reviewed *de novo* and factual issues are reviewed for clear error. *See Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994).

Finally, this Court reviews a trial court's refusal to modify a scheduling order under the abuse of discretion standard. *See Christian v. Counseling Res. Assocs., Inc.*, 60 A.3d 1083, 1086-87 (Del. 2013). "[W]hen a trial judge exceeds the bounds of reason in light of the circumstances or has ignored recognized rules of law or practice to produce injustice, discretion has been abused." *Roache*, 38 A.3d at 287.

C. MERITS OF ARGUMENT

Although the applicable court rules permit the trial court "to dismiss an action when the complaining party fails to comply with court-ordered discovery," this is "an extreme remedy … [that] generally requires some element of *willfulness or conscious disregard* of a court order before the trial judge can impose such a severe sanction." *Lehman*, 906 A.2d at 131 (original italics); *accord Sundor Elec., Inc. v. E. J. T. Const. Co.*, 337 A.2d 651, 652 (Del. 1975) ("extreme remedy" requiring "willfulness or conscious disregard of the order"); *see also Rittenhouse*, 382 A.2d at 236-37. This is because "[t]he sanction of dismissal is severe and courts are and have been reluctant to apply it except as a last resort." *Drejka v. Hitchens Tire Serv. Inc.*, 15 A.3d 1221, 1224 (Del. 2010) (original alteration). "Therefore, where other less punitive sanctions [are] available ... [a] default judgment is the *ultimate sanction* for discovery violations and *should be used sparingly*." *Lehman*, 906 A.2d at 131 (original italics and alterations); *accord Sundor*, 337 A.2d at 652 ("It has been frequently held that a motion for such a judgment [of dismissal] will be granted if

no other sanction would be more appropriate under the circumstances.”). In other words, “sanctions … for failure to make discovery are not ordinarily applied where there has been an active, good faith effort to comply.” *Id.*

Here, as discussed below, “the extreme remedy of dismissal with prejudice [was] too punitive.” *Rittenhouse*, 382 A.2d at 236. Indeed, at the time of its decision to issue the ultimate sanction of denying Appellants their day in court, the trial court had no required “clear” evidence before it that Appellants’ discovery shortcomings were due to some purposeful masterplan rather than excusable shortcomings caused by circumstances beyond Appellants’ control, such as the Pandemic effect on both staffing and vendor availability. Moreover, the impact of any such shortcomings should have been negated by continuing the trial and allowing the parties more time for compliance.

1. Appellants’ Discovery Conduct Did Not Justify the Harshest Sanction

The trial court’s sanction of dismissal rested on its finding that Appellants “ignored their discovery obligations in bad faith” (Ex. A at 16). Yet Appellants attempted to substantially comply with all the orders in good faith, albeit imperfectly—and did achieve substantial compliance by the time the Pencils Down Order came out. Moreover, other than the parties’ initial overly optimistic scheduling stipulation, there was no fire compelling the trial court to hold Appellants to the September trial date, as it became increasingly difficult to meet.

However, when Appellants did seek additional time to comply with the outstanding discovery demands, the court still insisted on the September trial date and thus ultimately chose to sacrifice the merits of Appellants' claims in the name of keeping the original scheduling order intact.

There is no precedent supporting the default judgment in this case. Where a party cannot meet the scheduled deadline and moves for more time, as Appellants did here, the most appropriate remedy is the one that preserves their day in court, given the law's well-established and firmly rooted preference for resolution of claims on the merits. *See Beckett v. Beebe Med. Ctr., Inc*., 897 A.2d 753, 758 (Del. 2006) ("Courts should apply rules with a liberal construction because of the underlying public policy that favors a trial on the merits, as distinguished from a judgment based on a default."). Indeed, courts in similar situations usually opt for alternative and less draconian remedies. Thus, in *In re ExamWorks Grp., Inc. S'holder Appraisal Litig*., 2018 WL 1008439, *8-9 (Del. Ch. Feb. 21, 2018), a more sophisticated institutional litigant with much greater resources (that those of one individual investor here) was allowed to catch up after missing discovery deadlines—even though, unlike Appellants here, it did not seek more time for compliance when it was incumbent upon it to do so. Noting that this Court "has cautioned that a default judgment should be granted if no other sanction would be more appropriate under the circumstances," the *ExamWorks* court

reasoned that since the original trial date "would have limited my ability to craft an alternative sanction," the appropriate resolution was to "postpone[] the trial so that I would have greater flexibility in crafting a remedy …." *Id.* Indeed, the court went on to underscore that it is "[w]ith the time afforded by the continuance … [that] a lesser sanction than a default judgment becomes feasible and sufficient to remedy the … misconduct." *Id.* *9. Similarly, the appropriate remedy here was giving the parties more time rather than dismissing all the claims altogether—this would have negated any prejudice caused by any delay in Appellants' discovery compliance, while any evidentiary prejudice had been already addressed by the adverse reference ruling. Indeed, if it was not for the looming trial date that the court refused to continue, there would have been no point in the abrupt Pencils Down Order signaling dismissal of the case and expressly directing counsel to stop preparing for trial.

To be sure, none of the authorities cited by the trial court justify such a drastic result. Thus, in *Hoag v. Amex Assurance Co*., 953 A.2d 713, 718-19 (Del. 2008), the conduct involved "failures to comply with four court orders over the span of three years," while here less than a month passed from the court's first order finding fault in Appellants' compliance to the Pencils Down Order. In turn, defendant in *Connection, Inc. v. Synygy Ltd*., 2021 WL 1943350, *3 (Del. Ch. May 11, 2021), violated express order not to disconnect plaintiff's service, and the court first

deployed a lesser sanction of accruing monthly fine for five months before finding a default judgment to be appropriate.[10] By contrast, the record in this case reveals no indications of similar prolonged and purposeful noncompliance. As an initial matter, there was never any justification for ordering as intrusive of discovery as the court did here—let alone imposing "the extraordinary remedy of making an image of another party's server." *Bangkok Broad. & T.V. Co., LTD. v. IPTV Corp.*, 2009 WL 10670411, *3 (C.D. Cal. July 8, 2009), citing, *inter alia*, Fed. R. Civ. Proc. 34.[11] In fact, courts are "caution[ed] against such intrusiveness," especially

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[10] The trial court's other cited authorities are similarly distinguishable because they either involved persistent failures over prolonged periods of time, *see Holt v. Holt*, 472 A.2d 820, 824 (Del. 1984) (plaintiff "failed to answer interrogatories filed over six years"), or failure to even attempt to comply with any orders, coupled with repeated failures to appear, *see Gallagher v. Long*, 940 A.2d 945, 2007 WL 3262150, *1 (Del. 2007) (Table), or misconduct following a trial continuance designed to cure it, *see Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1213 (Del. 2009) (observing that following initial misconduct, the trial court "pushed the trial date back" and specifically warned that dismissal would follow if the offending party failed to get back on track). Moreover, *Minna* involved "things that are false" told to the court that precipitated discovery orders in the first place, *see id.* at 1251-16, while no such egregious conduct was found here. While Menashe did appear to forget that he had litigated before (Ex. C at 5), this deposition testimony was inconsequential for the merits of the case and did not cause anyone to change their positions, unlike the facts in *Minna*.

[11] This Court "regards federal decisions as persuasive authority on discovery matters." *In re Activision Blizzard, Inc.*, 86 A.3d 531, 542 (Del. Ch. 2014), citing *Appriva S'holder Litig. Co. v. EV3, Inc.,* 937 A.2d 1275, 1286 (Del. 2007). *Cf. Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 1979 WL 178473, *1 (Del. Ch. Apr. 23, 1979) (observing that "Rule 34 of this Court [was] … patterned after Federal Rule 34").

where, as here, "such an examination raises issues of confidentiality and can produce thousands of documents that have to be reviewed for relevance and privilege …." *Bangkok*, 2009 WL 10670411, *3. To be sure, "compelled forensic imaging is not appropriate in all cases, and courts must consider the significant interests implicated by forensic imaging before ordering such procedures." *Id.*, citing *John B.*, 531 F.3d at 460 (warning that courts should tread lightly before compelling mirror imaging in computers when the request is "extremely broad in nature" and the connection between the devices and the legal claims is unsubstantiated and observing that "mere skepticism that an opposing party has not produced all relevant information" does not justify "drastic electronic discovery measures," especially where there are ample privacy and confidentiality concerns). As the *Bangkok* court went on to conclude, this "highly intrusive discovery procedure" cannot be justified by "a vague statement alleging unrelated evidence destruction." 2009 WL 10670411, *3. Here, it was even further from "appropriate" because Appellees did obtain the relevant depository from the server (the "Bloom Farms" folder), and the server belonged to a third party that had never been subpoenaed, while it stored documents of unrelated parties protected by, *inter alia*, contractual confidentiality obligations—documents that admittedly had nothing to do with this matter and, as such, were never even relevant from the get go. *Cf. Fortis Advisors LLC v. Johnson & Johnson*, 2021 WL 4314115, *2 (Del. Ch. Sept.

21, 2021) (observing that "[t]he scope of permissible discovery is broad but not without limits" and noting that the relevant rules preclude discovery that is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive," as well as "discovery [that] is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation").

Most importantly, however, the conduct below simply fails to rise to the high standard of "subjective bad faith" that the trial court cited as justifying dismissal. Indeed, until its dismissal order, the trial court did not even make any evidentiary findings on this point.[12] This is because there was nothing in the record indicating "unusually deplorable behavior" required for a finding of any "bad faith." *Barrows v. Bowen*, 1994 WL 514868, *2 (Del. Ch. Sept. 7, 1994) (Allen, C.); *see also Macrophage Therapeutics, Inc. v. Goldberg*, 2021 WL 2582967, *20 (Del. Ch. June 23, 2021) (finding that "misguided and ultimately unlawful" conduct did not qualify for "bad faith" under this standard because it did not rise to the level of required "glaring[ly] egregious[ ]" misconduct) (alterations in original). Indeed,

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[12] Initially limited to Appellants' discovery conduct, this finding was later expanded when the trial court proceeded to retroactively shore up its conclusions by announcing that the whole litigation amounted to a bad faith proceeding (Ex. C)—a broader finding that erroneously rested on nothing but a handful of cryptic emails, as shown further below.

while the dismissal order proffered conclusions of "bad faith," it failed to identify any required "clear evidence" of "subjective" bad faith to support them. *In re TransPerfect Glob., Inc.*, 2017 WL 3499921, *5 (Del. Ch. Aug. 4, 2017); *Carlson v. Hallinan*, 925 A.2d 506, 545 (Del. Ch. 2006).

Nor could it, since at the time the court chose the harshest sanction available to it, Appellants had brought their discovery into the state of substantial compliance. Indeed, the dismissal order itself confirms as much, recounting that by the time the Pencils Down Order issued, Appellees had in their possession both Menashe's phone and all the laptop images, while Demeter's server remained subject to a pending unresolved motion. (Ex. A at 10-11.) As such, the real culprit for the dismissal order proved to be what the court classified as Appellants' "continued contumacious" conduct in the four days that separated the last court hearing and the Pencils Down Order. (A-007200.) Yet those findings rested on Appellees' one-sided *allegations* that Appellants never had a chance to oppose. (Ex. A at 10-11, citing A-006735/006886/007035.) In the end, those allegations amounted to nothing more than accusing Appellants of delaying shipments that were not even "late" under the court's order; indeed, as to the server and the laptop, the trial court only ordered turnover "as soon as [the image was] ***ready***." (A-007241.) While Appellees attempted to set their own (harsher) deadlines, the court never actually ordered third-party imaging vendor compliance within the set

number of hours, and the record shows that Appellants overnighted the laptop image the day after the order. (A-006784/006788.) Finally, there was also a letter attached to Menashe's cellphone that directed the vendor to withhold certain privileged and private information (A-007198/007205) but the record contains no evidence showing how that letter came about—whether it was an intentional violation of the court's order directing privilege claw-back procedures, a result of Menashe's misunderstanding of the order, counsel miscommunication of the order, or some combination thereof. Neither Menashe nor his counsel were given an opportunity to defend that letter, as the Pencils Down Order came just an hour after the letter was first mentioned in the record. In any event, as the trial court's own authority demonstrates, Appellants' efforts to "protect … confidentiality interests in … personal information" certainly cannot, as a matter of law, rise to the level justifying the harshest sanction. *TR Invs., LLC v. Genger*, 2009 WL 4696062, *18 (Del. Ch. Dec. 9, 2009). This is especially so, given that the letter was directed to *Appellees*' own vendor, which thus reduced any possibility that they could unknowingly lose information based on the letter's directions—indeed, the vendor immediately notified Appellees of the letter (A-007198).

As such, while the above-described discovery conduct certainly cannot qualify as beyond reproach, it still fails to exhibit the level of "glaring egregiousness" required to support the court's eventual pronouncement that

Appellants conducted discovery in "bad faith" (Ex. A at 16). It certainly cannot qualify as sufficiently willful or reckless to support the harshest sanction, especially because Appellants exhibited "an active, good faith effort to comply." *Sundor*, 337 A.2d at 652. Indeed, the trial court's own authorities exhibit courts' refusal of such sanctions even where the alleged misconduct at issue was far more serious. *See James v. Nat'l Fin. LLC*, 2014 WL 6845560, *11-13 (Del. Ch. Dec. 5, 2014) (despite finding that violations "appear to have been willful" because of defendant's ever-changing explanations for its failures, concluding that "[a]lthough I believe that entry of a default judgment would be warranted on these facts, I will not grant that remedy in light of the Delaware Supreme Court's guidance about invoking the ultimate sanction and the availability of less punitive consequences"); *TR Invs.,* 2009 WL 4696062, *16 & 19 (where the offending party was found guilty of purposefully destroying evidence in violation of the "clear terms" of the court order and even to have "conspired" to do so "secretly, in the dead of night," thus clearly evidencing purposeful malfeasance, still finding that "the extreme remedy of a default judgment is not appropriate" due to "the law's preference for an adjudication on the merits where possible" and choosing an alternative sanction of adverse inference that would cure "any evidentiary gaps that [the offending party]'s own misbehavior might have been caused"), *aff'd*, 26 A.3d 180 (Del. 2011). Rather, this is a classic David/Goliath situation where Appellants simply got

outspent and outnumbered by a better funded opponent. Most importantly, it would be a severe overstatement to suggest that Appellees were completely deprived of discovery here, given Appellants' substantial compliance efforts detailed above. In other words, what is at issue on this appeal is imperfect compliance during extraordinary difficult times, rather than some purposeful scheme to deprive anybody of anything.

Application of the relevant factors fails to support the harshest sanction. The analysis of the relevant factors further confirms that the harshest sanction was unwarranted. *See Minna*, 984 A.2d at 1215 (listing the six factors as (1) party's personal responsibility, (2) prejudice to opponent, (3) history of dilatoriness, (4) willfulness or bad faith, (5) effectiveness of alternative sanctions, and (6) meritoriousness of claims). While the trial court dutifully went through these factors (Ex. A at 15-18), its findings are reminiscent of those in *Lehman*, 906 A.2d at 133, which this Court found to be conclusory and speculative, given that the record contained no evidence of willful disobedience: "We conclude, for these reasons, that dismissal with prejudice was too severe and draconian a sanction given the less punitive and more appropriate sanctions that were available from the outset," especially considering that the trial court "had an entire spectrum of lesser sanctions available …." *Id.* Thus, the trial court's analysis on the first factor is largely based on the alleged spoliation, which, as shown below, did not even qualify as such, since

it failed to exhibit any intentional destruction of relevant evidence, as the texts were equally available to the Appellees (and were not "favorable" to them), while the laptops had been recycled long before the litigation as a matter of a preexisting policy. This also negates any prejudice to the Appellees from any such "spoliation" under the second factor, while the looming trial cited by the court could have been simply continued.

The third factor measures Appellants' "history of dilatoriness," which here was based on a few weeks of falling short of exhaustive compliance, while dealing with severe staff shortages and vendor issues in the middle of the global crisis—*i.e.*, issues that were beyond Appellants' control. *Cf. James v. Cartwright*, 659 F. App'x 888, 892 (7th Cir. 2016) (noting that a party "cannot be sanctioned for failure to comply with discovery orders if compliance is impossible"). Accordingly, the court's conclusion of "bad faith" under the fourth factor simply ignores the applicable standard discussed above, which requires "glaringly egregious" misconduct—indeed, even "misguided and ultimately unlawful" conduct would not do. Furthermore, under the fifth factor, the trial court's findings that its prior sanctions "had no effect" (Ex. A at 17) are clearly erroneous, since, as discussed above, Appellants had actually achieved substantial compliance by the time the Pencils Down Order issued. *See Sundor*, 337 A.2d at 652 (finding dismissal "too severe a penalty" based on "the absence of wilfulness in defendant's conduct, the

relatively short period of time involved and that defendant did file [discovery] answers within the time specified by the [c]ourt"); *see also Rittenhouse*, 382 A.2d at 237 (finding dismissal "too harsh a sanction" where "plaintiff had arguably valid legal objections …, and … plaintiff had filed answers to the … interrogatories before the dismissal order was entered"); *accord Drone Techs., Inc. v. Parrot S.A.*, 838 F.3d 1283, 1304-05 (Fed. Cir. 2016) (applying Third Circuit precedent and reversing dismissal sanction where, *inter alia*, trial court's conclusions on the prejudice factor ignored that some of the information sought was not properly discoverable, and "[t]he only real prejudice … was lost time, energy, and money," which could be cured by lesser sanctions).

Indeed, the court's conclusions that any lesser sanctions would not be effective appears largely derived from its negative perception of Appellants' trial counsel. (Ex. A at 17.) But this Court refused to endorse similar considerations as sufficient to negate effectiveness of lesser sanctions. In *Hill v. DuShuttle*, 58 A.3d 403, 406-07 (Del. 2013), this Court concluded that "the case should not have been dismissed," even though "[t]he trial court found that sanctions other than dismissal would not be effective" based on its conclusion that counsel was obtrusive and, as such, signaled that no compliance would be forthcoming. While noting that "[t]his Court readily understands the trial court's frustration over counsel's cavalier attitude," it still concluded that "the record does not support a conclusion that [lesser]

sanctions would have been ineffective." *Id.* (concluding that "dismissal was not warranted"). Moreover, by the time the Pencils Down Order issued here, the record reflects that Appellants' Delaware counsel took over and directed Appellants' compliance efforts. (Ex. B at 14-15; A- 007224.) As such, there was simply no reasonable basis for the court to order the harshest sanction based on its projections of future conduct.

Finally, on the merits factor, the court appeared to appease itself that there was not much left to dismiss, since Appellants had purportedly taken most of their claims to another court. Yet this is at odds with the court's reasoning on the motion to dismiss, which allowed the fraud claim as to the Operating Agreement to proceed and refused to import into its analysis any consideration of the disclaimers found in the Purchase Agreement—precisely because the claims as to the latter had gone to New York by way of a separate action. (A-002415-16.) In other words, as of March 1, 2021, the court knew about the separate fraud action based on the Purchase Agreement and still refused to dismiss Appellants' fraud claim as to the Operating Agreement—yet by August 27, 2021, the latter had somehow disappeared,[13] and all the trial court was supposedly dismissing were some contractual claims for nominal

[13] Moreover, the record reflects conclusions of a certified forensic accountant further supporting meritoriousness of Appellants' claims that AGR engaged in financial fraud. (A-001959-64/004513-17 (two expert declarations, with one submitted as part of a later withdrawn motion to appoint receiver, adjudging AGR's records as, *inter alia*, "inconsistent… inaccurate and unreliable").)

damages. (Ex. A at 17-18.) This entirely unexplained claim disappearance is another clear error that justifies reversal.

2. Spoliation Findings Overlook Applicable Precedent and Unfairly Saddle Appellants with One-Sided Burdens

As the trial court's own authority demonstrates, there is no spoliation of evidence as a matter of law unless the aggrieved party demonstrated "a reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the lost material would have produced evidence favorable to his cause." *TR Invs.*, 2009 WL 4696062, *18 n.73; *accord In re Happy Child World, Inc.*, 2020 WL 5793156, *9 (Del. Ch. Sept. 29, 2020) (finding movants failed to carry their "burden to prove intentional or reckless destruction of favorable evidence" to establish spoliation where*, inter alia*, the destroyed documents were available through other sources). Moreover, any "spoliation sanctions … must be tailored to the degree of culpability of the spoliator and the prejudice suffered by the complaining party." *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1189-90 (Del. Ch. 2009).

Here, the court partially grounded its sanction of dismissal on the alleged spoliation of evidence (and later recycled the same ground to award fees outside of discovery, as discussed in Part II below). (Ex. A at 5.) This is because the trial court concluded that Menashe: (1) used text messages to "conduct AGR business "but continued his practice of actively deleting his text messages through the pendency of this litigation" (*id.*), and (2) obtained a new laptop and donated the

one he used for prior AGR business in ***February 2020***—that is, ***months before*** he first anticipated litigation (A-006561(228:18-229:18)). As an initial matter, this finding acknowledges the record as demonstrating that all of these actions were undertaken as part of a ***preexisting*** established policy. In such cases, courts usually refuse to find sanctionable spoliation. *See Lesh v. ev3, Inc*., 2013 WL 3155761, *2 (Del. Super. Ct. Apr. 16, 2013) (observing that "the Third Circuit Court of Appeals has held that '[w]hen data is destroyed pursuant to [] normal recordkeeping practices …, no adverse inference is warranted'") (citing *Colgate-Palmolive Co. v. Tandem Indus*., 485 F. App'x 516, 520 (3d Cir. 2012)); *see also Genger v. TR Invs., LLC*, 26 A.3d 180, 193 & n.49 (Del. 2011) (collecting cases and observing that spoliation sanctions may not apply if the conduct "fell within … ordinary and routine data retention and deletion procedures"), citing, *inter alia*, *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 548 (Del. 2006) (recognizing that the rationale for spoliation finding would not necessarily apply where evidence was destroyed "accidentally or where records are purged under a routine document destruction policy"). Yet the court gave these preexisting policies no weight in imposing its dismissal sanctions.

This is especially so, given that "[a] party is not obligated to preserve every shred of paper, every e-mail or electronic document, but instead must preserve what it knows, or reasonably should know, is relevant to the action, is reasonably

calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *Seibold v. Camulos Partners LP*, 2012 WL 4076182, *23 (Del. Ch. Sept. 17, 2012). Menashe testified that he considered his preservation duties satisfied because all the computer data was on auto-preserve under the relevant banking regulations (*supra* 13) and may have exercised improper judgment by deleting texts based on his beliefs as to what was "relevant to the action" (A-006500(77:1-3) (Menashe stating his understanding that personal correspondence was not relevant to the case)). This simply does not rise to the level of intentional or reckless spoliation because this conduct is not "so unreasonable and so dangerous that … [nonmovant] knows, or should know, that harm will probably result." *Beard*, 981 A.2d at 1191-92 (finding default sanction unwarranted and reasoning that "[w]here the claim of recklessness is based on an error in judgment, a form of passive negligence, [movant]'s burden is substantial, because the *precise harm which eventuated must have been reasonably apparent but consciously ignored* in the formulation of the judgment") (original italics), citing, *inter alia*, *Jardel Co. v. Hughes*, 523 A.2d 518, 530 (Del. 1987); *Seibold*, 2012 WL 4076182, *23 (finding no intentional or reckless spoliation despite "imperfect" effort to preserve evidence). In other words, the record reflects no other "purpose" in Menashe's conduct than his usual mechanical practice of disposing of text chatter. *Cf. TR Invs.*, 2009 WL 4696062, *17 (warning

that "[d]ispositive sanctions … ***are only appropriate*** where a party acts to intentionally or recklessly destroy evidence," and "intentional destruction … means that the spoliator acted 'with purpose'").

Moreover, although the texts at issue were between the parties to this case (*i.e.*, between Menashe and *Defendants or their affiliated Board members*),[14] Appellants were improperly singled out as shouldering "the sole burden of preserving text messages that were equally available to both parties." *E.E.O.C. v. Fry's Elecs., Inc.*, 874 F.Supp.2d 1042, 1046 (W.D. Wash. 2012) (declining to impose such a one-sided burden); *see also OptimisCorp v. Waite*, 2015 WL 5147038, *22 (Del. Ch. Aug. 26, 2015) (finding "no spoliation" by defendants since "there is no evidence that the allegedly destroyed emails are not available to Plaintiffs"), *aff'd*, 137 A.3d 970 (Del. 2016). In fact, in addition to equal availability, Appellees never even tried any alternative sources—such as subpoenaing Menashe's cell service provider. As Appellees never even disclaimed equal availability, any spoliation finding based on these texts must be reversed. *See*

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[14] Menashe was not the only repository of these messages; indeed, Appellees had access to them even before they received Menashe's cellphone (A-006559-60). Menashe's phone yielded nothing "favorable" either (A-007096-7116), as all the recovered texts fell into two irrelevant categories: (1) outside of the "anticipating litigation" window, and/or (2) no substantive "business," since they only showed calendar coordination or small talk. As such, Menashe's continued deletion of texts, while unexcused, was still "a mere technical" rather than "a meaningful" transgression, *In re TransPerfect Glob., Inc.*, 2021 WL 1711797, *18 (Del. Ch. Apr. 30, 2021)—and thus insufficient to support a dismissal sanction.

Happy Child, 2020 WL 5793156, *9 (refusing spoliation findings where the shredded documents "were ultimately made available … through other sources. And there is no indication that what little is missing would have been favorable to [the moving parties].").

Finally, Appellees never actually showed that the deleted texts or any data on Menashe's donated laptop would have been so "favorable" to them as to warrant the resulting sanctions. In fact, one of the messages that Menashe supposedly spoliated (A-007102) dated back to March 2020 and included a brief discussion of the proposed terms for Menashe co-leading an additional round of financing—which only confirms that, as of that date, Menashe could not have actually contemplated litigation, as he was still working from within to save the company. As for the messages deleted after the litigation started, none of them were ***from*** Menashe and thus could not have qualified as any actionable evidence because he did not actually ***say*** anything—rather, he only read and deleted messages directed ***to*** him from various company representatives. (Ex. A at 5 n.18, citing A-006559-60.) As such, any supposed spoliation simply did not justify the deployed sanction. *See Beard*, 981 A.2d at 1190 (refusing default sanction based on alleged spoliation: "[A]lthough [nonmovants] acted recklessly in not preserving the original hard drive, I am not convinced they did so with any purpose of deceiving or misleading Plaintiffs or the Court[,] … [and] the relevance of the affected files … appears to

have been marginal, at best.”).

3. The Harshest Sanction Would Have Been Obviated by Trial Continuance

Deploying the harshest sanction was an especially extreme measure given that it could have been avoided by a simple trial continuance. While the court denied Appellants’ request for such a continuance, later explaining that Appellants failed “to establish excusable neglect” (Ex. A at 6), this was an incorrect standard to assess a request for continuance made before the expiration of the relevant deadlines, as both the discovery cutoff of August 25, 2021 and the trial itself remained weeks away at the time (Ex. B at 32-34, 35-36 & 49-50). Rather, the trial court should have applied a more forgiving “good cause” standard under Del. Ch. Ct. R. 6(b)(1). “[G]ood cause is likely to be found when the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party.” *In re Asbestos Litig*., 228 A.3d 676, 683 (Del. 2020) (observing that the standard is based on the federal “good cause” standard under Fed. R. Civ. Proc. 16).

Under this standard, Appellants’ discovery of the new issues expanding the case, including the impending sale of the company to avoid judgment, combined with the overall difficulties of conducting discovery during the Pandemic, including Appellants’ ongoing staffing shortages, should have resulted in a trial continuance. *See Nesby v. Heisner*, 2021 WL 1886296, *3 (W.D. Ky. May 11, 2021) (finding

"good cause" standard for scheduling modification satisfied where "the parties were engaging in discovery during the COVID-19 pandemic—which significantly affected one's ability to take a deposition and caused most discovery to be delayed"); *Sander v. KC Waldo Heights Apts., LLC*, 2021 WL 5541953, *1 (W.D. Mo. Mar. 15, 2021) (same "given the difficulties of obtaining discovery from the defendants [and] the inability to conduct normal third-party discovery and investigation due to the COVID 19 pandemic") (original alteration); *Faulkner v. Aero Fulfillment Sercvices*, 2020 WL 6261698, *1 (S.D. Ohio Oct. 23, 2020): (finding that "[a]lthough Plaintiffs are not wholly blameless, the impact of the global pandemic on civil litigation … cannot be understated" and observing that "the delays occasioned by the pandemic provided 'good cause'" for scheduling modification); *see also Fontes v. Time Warner Cable, Inc*., 2018 WL 3414162, *3 (C.D. Cal. July 6, 2018) (finding "good cause" based on, *inter alia*, "staff turnover" even prior to the Pandemic); *accord Bumgarner v. Verizon Delaware, LLC*, 2014 WL 595344, *2 (Del. Super. Ct. Jan. 14, 2014) (finding "good cause" for continuance although movants shared fault in delays). This is especially so considering the insurmountable prejudice of the eventual dismissal, as weighed against no comparable prejudice on the *Appellees*' side. *See Roache*, 38 A.3d at 288-89 (reversing denial of continuance where movant eventually suffered dismissal: "The trial judge abused his discretion by failing to consider the prejudice that would befall

[movant] in relation to the minimal inconvenience to [nonmovant] and the court.”).

Indeed, as an alternative to the harshest sanction, continuance remained on the table even when the trial court ordered pencils down. *See ExamWorks Grp.,* 2018 WL 1008439, *8-9; *cf. Christian v. Counseling Res. Assocs., Inc*., 60 A.3d 1083, 1087 (Del. 2013) (observing that dismissal could have been avoided if earlier in the case, the court granted trial continuance as requested). The court should have continued the trial rather than dismiss all the claims altogether, as the continuance would have negated any prejudice on the Appellees’ side while still providing Appellants with their day in court.

II. THE COURT ERRED BY FINDING BAD FAITH AND SHIFTING ATTORNEYS' FEES FOR THE ENTIRE CASE

A. QUESTION PRESENTED

Did the court err by finding that Appellants litigated in bad faith, warranting a fee shift for the entire proceeding? (Ex. C.)

B. SCOPE OF REVIEW

This Court reviews for abuse of discretion a lower court's finding that a party litigated in bad faith warranting a shift of attorneys' fees. *See Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 15 A.3d 1225, 1233 (Del. 2011).

C. MERITS OF ARGUMENT

"[T]ypically litigants must pay their own attorneys' fees and expenses under the American Rule." *Marra v. Brandywine Sch. Dist.*, 2012 WL 4847083, *4 (Del. Ch. Sept. 28, 2012); *see also K & G Concord, LLC v. Charcap, LLC*, 2018 WL 3199214, *1 (Del. Ch. June 28, 2018) (the American Rule applies "regardless of the outcome of litigation"). "Only rarely do Delaware courts deviate from this standard" and do so "cautious[ly]." *Marra*, 2012 WL 4847083, *4. This "rare[]" occasion can be justified only by a finding of bad faith, and "[t]he bad faith exception applies only in ***extraordinary*** cases." *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014); *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 877 (Del. 2015) (affirming denial of fee shifting because "[t]he bad faith exception applies only in ***extraordinary*** cases," despite the record below showing the party's intentional misstatements of fact to the court; although "aggressive" and "problematic," the

conduct still did not cross "the threshold of glaring egregiousness").

"[T]he party seeking to invoke th[e] [bad faith] exception must demonstrate by 'clear evidence' that the party from whom fees are sought ... acted in subjective bad faith." *Lawson*, 91 A.3d at 552. Accordingly, Appellees bore "the ***stringent*** evidentiary burden" because the "bad faith exception is not lightly invoked …." *K & G Concord*, 2018 WL 3199214, *1. In fact, "[t]he standard is ***arduous***: situations in which a party acted vexatiously, wantonly, or for oppressive reasons." *Branson v. Branson*, 2011 WL 1135024, *1 (Del. Ch. Mar. 21, 2011) (denying fees where the conduct was "more fairly viewed as an aggressive prosecution of deeply held beliefs and not as an example of vexatious or bad faith conduct"), citing *Merrill Lynch Tr. Co., FSB v. Campbell*, 2009 WL 2913893, *13 (Del. Ch. Sept. 2, 2009) (same where "a legitimate disagreement existed …[,] no basis to deviate from the ***presumption***" of the American Rule).

As an initial matter, although Appellants had been already sanctioned for their discovery conduct, the court partially grounded the fee shift for the entire matter on the same conduct. This is improper double punishment because fee shifting must be "calibrated to the damages caused by the bad-faith acts on which it is based." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186-90 (2017) (reversing a total shift of more than $2 million in fees where misconduct was limited to discovery; explaining that where sanction imposed is to punish rather

than reimburse, "a court would need to provide procedural guarantees applicable in criminal cases, such as a 'beyond a reasonable doubt' standard of proof;" otherwise, "[a] sanctioning court must determine which fees were incurred because of, and solely because of, the misconduct at issue"). This is especially so, given that the court never even considered that awarding the ***entirety*** of the discovery fees was unjustified by the conduct at hand, as discussed above. *Cf. Trascent Mgmt. Consulting, LLC v. Bouri*, 2018 WL 4293359, *25 (Del. Ch. Sept. 10, 2018) (reducing the claimed amount of fees to two-fifths of the claimed amount, even though the misconduct consisted of "false statements [that] go to the heart" of plaintiff's claims); *see also BTG Int'l, Inc. v. Wellstat Therapeutics Corp.*, 2017 WL 4151172, *22 (Del. Ch. Sept. 19, 2017) (refusing the requested "broad[]" shift of all fees despite "problematic" instances of discovery misconduct).

Since the court's award thus actually "calibrated" only $423,171.28 to discovery,[15] the remaining award of $1,824,155.28 must rest on Appellants' ***non***-discovery conduct. Yet the supporting record there is slim, since the entire fee shift appears to be based on two prelitigation emails altogether.[16] Indeed, it is based on

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[15] Appellees claimed the "already shifted" fees for discovery to stand at $608,666.88, yet that calculation included $183,495.60 in fees for the TRO process in June/July 2020 (A-007260), which had nothing to do with discovery that began in March 2021.

[16] The rest of the cited grounds were either recycled from the previous dismissal order that had dealt exclusively with Appellants' discovery conduct (Ex. C at 4 & 6 (first two grounds listed)) or cited Menashe's "false" testimony on text messages

those emails that the court concluded that Appellants never actually believed in their fraud claim. In the first email, Menashe, a non-lawyer, comments on the draft complaint and disagrees with its focus, since, in his opinion, the best proof of fraud was Appellees' secrecy about their revisions rather than the revisions themselves. (A-007268.) As a matter of law, however, both aspects were significant, and this is the very reason why Menashe retained counsel in the first place—so that, in the end, he received advice exhibited in the complaint setting forth both grounds as supporting his fraud claim.

Moreover, the complaint admits that there were prior revisions predating the investment—yet Appellees explained them away by projecting the same level of promised profitability by a date certain and touting the supposed impending $█ █ merger. (A-000811.) The issue was not that the "financials" were revised but that the ***underlying historical data*** started changing, and that happened only after Appellants' investment (A-000793). The court itself picked up on this distinction:

> Plaintiffs also point to AGR's ***historical financial data*** [in addition to the purported impending merger], which Efros presented to Menashe on June 1, in advance of the Investment. These historical numbers were

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and prior litigation experience (*id.* at 5)—none of which actually dealt with any merits of the claims but rather could only affect Menashe's credibility as a witness. While the court also pointed to the New York action (Ex. C at 6), it never explained why proceeding with another action on a separate contract (with a mandatory forum selection clause pointing to New York) was improper, especially given that the court itself had relied on it when denying Appellees' motion to dismiss (*supra* 35).

> representations of fact. Plaintiffs plead ***these numbers*** were inaccurate, as evidenced by the adjustment to them in July. Plaintiffs allege that Efros knew this data was false, especially given that they were prepared by Roach.

(A-002419.)

Similarly, in the second email, one of Menashe's *advisors* (and not even Menashe himself) makes a reference to a possible "shot over the bow" as one of the factors motivating Menashe to seek legal advice. (A-007265.) The email is an *introduction* email, in which Menashe is introduced to his counsel for the first time to discuss his "options," one being a possible "warning shot" to protect his investment. Neither Menashe nor his advisors had had the benefit of any legal analysis of the facts at that point and thus could not possibly start throwing around such labels as "fraud," yet the court concluded that this must mean that Appellants knew the shot was "blank." This cannot possibly qualify as the required "clear" evidence because there is an equally plausible alternative explanation that all it meant was that Appellants had become frustrated trying to fix things from within, thus necessitating the next step of resorting to litigation.

The court then proceeded to find that one of the supposedly newly "discovered" text messages offered further support for its "blank" conclusion. (Ex. C at 8.) In the text dated March 2020, Menashe discussed co-leading further financing round with Nichols and set the terms for the proposal. (A-007102.) The court's finding that this text message somehow tipped any scale is clearly erroneous

because Appellants ***disclosed this proposal from the start in their complaint***, which specifically alleged that "Menashe and … Nichols were asked to submit a term sheet to lead the new financing with the understanding Demeter Group would be running the fund" as of February 2020. (A-000845 ¶127 & A-001122.) Moreover, since the text at issue was between Menashe ***and Ray***, one of the defendants below, it was demonstrably wrong to find that this text was somehow newly "discovered"—Ray had it since he had received it back in March 2020. Finally, as of March 2020, Menashe still had no knowledge that AGR's books had been cooked by a convicted crook, which explains why he was still willing to give AGR a chance. (A-000829 ¶90 (explaining how Menashe came to find out the truth in May 2020) & A-006557-58 (Menashe testifying about the additional contemplated joint investment with Nichols in March 2020 designed as the last-ditch effort to save the company and provide it with a vote of confidence to attract further investment).)

It is on this "sparse record" that Appellants got saddled with the $2M+ tab for the entire proceeding[17]—including the TRO process, where they were initially successful based on the necessary finding that they had a "colorable claim," as well as the motion to dismiss briefing, where they also emerged victorious, having

[17] *In re SS & C Techs., Inc. S'holders Litig.*, 948 A.2d 1140, 1150 (Del. Ch. 2008) (discussing a similarly "sparse record" as insufficient to support a finding of "*subjective*" bad faith for the entire proceeding) (original italics).

proceeded beyond the pleadings with their core claims. Yet for the court, all of this was in "bad faith" based on certain pre-litigation chatter showing a non-lawyer "focus[ed] on corporate governance over fraudulent inducement" (Ex. C at 6-7)—or, in other words, thinking like a businessman and making comments to his legal team that betrayed his perception of certain claims as more important than others, which is the reason why businessmen hire lawyers in the first place. This is not "clear" evidence of "subjective" bad faith—this is not any kind of evidence at all. Indeed, it is demonstrably different from the trial court's authorities, such as *Beck v. Atl. Coast PLC*, 868 A.2d 840, 842-3 (Del. Ch. 2005), where plaintiffs prosecuted a class action without ever being part of the class, yet asserted in their pleadings that they had purchased the product just like other class members. By contrast, where defendant used wiping software and destroyed his hard drive, its conduct "although at times worthy of reprobation, d[id] not rise to the level … so as to warrant an award of attorneys' fees." *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, *8 & 27 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010).

On this sliding scale, Appellants' conduct here simply does not warrant the total shift of fees. This is especially so considering that the award here is simply inconsistent with the trial court's earlier findings, as only a few months earlier the trial court had adjudged the same facts to add up to a "reasonable" belief of fraud

(A-002421), as well as necessarily found that Appellants stated a "colorable" claim when granting the TRO. *See FGC Holdings Ltd. v. Teltronics, Inc.*, 2007 WL 241384, *7 (Del. Ch. Jan. 22, 2007) ("There appears to be at least a colorable basis for the claim …. Thus, I am not confident that Teltronic' claim was so lacking in merit as to constitute bad faith."); *accord P.J. Bale, Inc. v. Rapuano*, 888 A.2d 232, 2005 WL 3091885, *2 (Del. Nov. 17, 2005) (TABLE); *In re Sunbelt Beverage Corp. S'holder Litig.*, 2010 WL 26539, *15 (Del. Ch. Jan. 5, 2010) (no fees where facts presented "a legitimate legal question").

Finally, the award is simply excessive and thus unreasonable. *See Parfi Holding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 944 & n.126 (Del. Ch. 2008) (applying the relevant factors and refusing to shift all fees as discovery sanction, where, *inter alia*, the hours spent appeared excessive). This case was only ten months of active litigation without trial, with no expert discovery and only three depositions—yet it somehow produced over $2 million in fees. Case in point is the total amount billed for the TRO process (which only dealt with one claim concerning Series E): three briefs (A-00264/000422/000542) and two hearings in the space of three weeks produced a $183,495.60 price tag, which is hardly "reasonable"—especially when counsel bills around 50(!) hours (that is, ***more than six full days***) to ***prepare*** for just ***one*** TRO hearing. (A-007506.) Similarly, at one point, there were more than 135 combined hours billed for one reply brief in support

of defendants' motion to dismiss, and counsel spent around 65(!) combined hours (that is, ***more than eight full days***) to prepare for a hearing on the same motion. (A-007552-55/007500-01.) *Cf. Parfi*, 954 A.2d at 944 (finding 165 hours expended on two briefs "disproportionate to what it should have taken to write the two briefs in question"); *Richmont Cap. Partners I, L.P. v. J.R. Invs. Corp.*, 2004 WL 1152295, *3 (Del. Ch. May 20, 2004) (reducing the request for fees expended for two answers and two responses to motions to dismiss, as well as the attendant hearing, from 282 to 150 hours). While the trial court pointed to expedition as justifying the cost (Ex. C at 12), this briefing proceeded on a stipulated schedule with no unreasonable time limitations. (A-00049 No. 76.)

In any event, the award is excessive because it is ***about half*** of the benefit obtained (avoiding $5M in damages) and thus clearly disproportionate thereto. *See In re Nine Sys. Corporation Shareholders Litig.*, 2015 WL 2265669, *4 (Del. Ch. May 7, 2015) (reducing claimed $11 million in fees to $2 million based on the estimated $7-10 million benefit obtained). This is further confirmed by comparing awards in other cases, even where the conduct at issue was claimed to be far worse. *See In re Shawe & Elting LLC*, 2016 WL 3951339, *12, 17-18 & 20 (Del. Ch. July 20, 2016) (shifting only a third of fees where plaintiff deliberately "in secret and without the assistance of counsel" deleted actual relevant evidence and then lied about it), *aff'd*, 157 A.3d 142 (Del. 2017); *Beck*, 868 A.2d at 856-57 ($25,000 in

fees and a $2,500 fine where the plaintiff filed false pleadings); *compare Beard*, 981 A.2d at 1186-89 (finding that defendant deliberately deleted actual relevant evidence while in litigation), *with Beard Research, Inc v. Kates*, 2009 Del. Ch. LEXIS 170, *9 (Del. Ch. Oct. 1, 2009) (reducing claimed fees by thirty percent to award $76,906.80 in total). Accordingly, it cannot stand.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court reverse the judgment of the trial court.

Dated: October 4, 2022

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. Appellants' Opening Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word.

2. Appellants' Opening Brief complies with the type-volume limitation of Rule 14(d)(i), as enlarged by the Court's Order dated September 27, 2022, because it contains 12,000 words, which were counted by Microsoft Word.

Dated: October 4, 2022

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EXHIBIT – A –

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Case No. 2020-0459-MTZ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DG BF, LLC, a Delaware limited liability company, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company; and JEFF A. MENASHE, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2020-0459-MTZ
MICHAEL RAY, an individual, and VLADIMIR EFROS, an individual, and AMERICAN GENERAL RESOURCES, LLC, a Delaware limited liability company,	)	
Defendants,	)	
and	)	
AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company,	)	
Nominal Defendant.	)	

ORDER OF DISMISSAL

WHEREAS, having considered and granted Defendants' numerous discovery motions against Plaintiffs;[1] and having taken under advisement

[1] Those motions include Docket Item ("D.I.") 146, Defendants' Motion to Compel, granted at D.I. 183; D.I. 180, Defendants' Motion to Compel Proper Deposition, granted at D.I.

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Defendants' penultimate Expedited Renewed Motion to Compel and for Sanctions Against Plaintiffs,[2] their final Motion for Sanctions for Spoliation of Evidence as fully briefed,[3] and their letter advising the Court of Plaintiffs' failure to comply with this Court's August 23, 2021 ruling,[4] it appears:

A. Plaintiffs Jeff A. Menashe and his investment vehicle, DG BF, LLC ("DG BF") brought this action claiming that in the spring of 2019, Defendants Michael Ray and Vladimir Efros fraudulently induced Plaintiffs into investing in nominal defendant American General Resources LLC ("AGR" or the "Company"); that after Plaintiffs invested, Company executives ignored Plaintiffs' governance rights; and that after Plaintiffs sued, the Company retaliated against them, improperly removing Menashe as the manager of DG BF's investment series and eliminating a profitable investment banking relationship Menashe's affiliate had with the Company. Plaintiffs filed their initial complaint on June 11, 2020, and followed with an amended complaint on August 11.[5]

204; and D.I. 189, Defendants' letter advising of Plaintiffs' failure to comply with D.I. 183.

[2] D.I. 212.

[3] D.I. 225; D.I. 237; D.I. 242.

[4] D.I. 231. Plaintiff DG BF, LLC's affiliate, Demeter Group Holdings, LP, also filed a motion to quash. D.I. 234.

[5] D.I. 1; D.I. 49.

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B. Plaintiffs had some initial success at the pleading stage. The matter was expedited at Plaintiffs' request, and on July 6, the Court granted Plaintiffs' motion for a temporary restraining order regarding a subsequent financing round.[6] But on July 9, the Court found for Defendants on Plaintiffs' claim regarding that financing, and terminated the temporary restraining order.[7] Defendants moved to dismiss,[8] Plaintiffs withdrew some claims,[9] and the Court trimmed Plaintiffs' claims further on March 1, 2021.[10]

C. On March 30, the Court entered a stipulated scheduling order that specified Plaintiffs' document production would begin no later than thirty days after receipt of discovery requests; substantial completion of document production by June 11; expert identification by June 18; completion of fact, third party, and expert discovery by August 25; and trial on September 15–17.[11] Defendants served their discovery requests that same day, beginning a volley of discovery requests countered by responses and objections that lasted through May.[12]

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[6] D.I. 33.

[7] D.I. 35.

[8] D.I. 37.

[9] D.I. 105.

[10] *DG BF, LLC v. Ray*, 2021 WL 776742 (Del. Ch. Mar. 1, 2021).

[11] D.I. 120.

[12] D.I. 121.

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D. Plaintiffs produced some documents on May 7.[13] Plaintiffs did not collect or image Menashe's cell phone or laptop; any server on which DG BF stored electronic documents; or laptops and email accounts used by Menashe's colleagues at his investment firm, Demeter Group ("Demeter"), who were involved in DG BF's investment in AGR. Plaintiffs were unwilling or unable to provide a comprehensible hit report. Defendants began to ask about these issues in May, but the June 11 substantial completion deadline came and went without Plaintiffs producing any more documents.

E. Plaintiffs' repositories of electronic documents proved elusive. Menashe testified he did not know what a litigation hold was, and did not advise his Demeter colleagues to preserve documents or collect their data when they left Demeter.[14] The Demeter laptops used when negotiating DG BF's investment in AGR were particularly confounding. Plaintiffs' counsel repeatedly disclosed that those laptops had been wiped and donated, but eventually the laptops were found and given to Plaintiffs' counsel.[15]

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[13] *See* D.I. 146, Ex. 19 (describing how "Menashe's IT team" applied search terms to his email and conducted a search for "AGR" or "Bloom"); D.I. 212, Ex. 2 at 28–30 (explaining that Menashe is the only person at Demeter and that Menashe personally supervised the collection).

[14] D.I. 225, Ex. 1 at 32–33, 44–50. But Plaintiffs issued a detailed litigation hold to Defendants, and Defendants issued one to Plaintiffs. D.I. 225, Exs. 18, 19.

[15] D.I. 146, Ex. 18 (disclosing on May 25, 2021, that the Demeter laptops were donated when the custodians left Demeter in January 2020 and December 2020; also disclosing Menashe's laptop is "less than two years old" and updated every two years, and that his

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F. As for Menashe, he obtained a new laptop in or about February 2020, and donated the one he had used during due diligence on his Company investment.[16] Menashe used text messaging to conduct AGR business, but continued his practice of actively deleting his text messages through the pendency of this litigation.[17] Menashe testified that he did not text about business matters, but that testimony was undermined by texts Defendants produced; when confronted, Menashe then testified he deleted all such messages.[18]

G. In seeking to avoid reviewing laptops and Menashe's text messages, Plaintiffs insisted that "the relevant data is primarily stored on Demeter Group servers."[19] There was a folder on that server named after AGR's operating entity, "Bloom Farms."[20] But Plaintiffs did not search that folder or server.

H. Plaintiffs' written discovery responses fared no better. They refused to answer several core questions, including to identify the due diligence they performed

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personal devices have not been collected and that he "does not retain text message communications on his cell phone"); *id.* Ex. 19 (disclosing on June 9 that one Demeter laptop was donated in February 2020, and the other was donated in January or February 2021); D.I. 225, Ex. 1 at 42–43 (Menashe on July 27 testifying that he wiped and donated his own work laptop, but that one of his Demeter colleagues had both Demeter laptops).

[16] D.I. 146, Exs. 18, 19; D.I. 225, Ex. 1 at 42–43.

[17] D.I. 146, Exs. 18, 19; D.I. 225, Ex. 2 at 223.

[18] D.I. 225, Ex. 11; *id.* Ex. 2 at 222–24.

[19] D.I. 146, Ex. 18; *accord* Ex. 19 (noting "[a]ll of [Menashe's] files are stored on the Demeter Group servers and would be available there instead").

[20] D.I. 225, Ex. 2 at 155–57; D.I. 212, Exs. 4, 5.

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relating to DG BF's investment in AGR, and to identify the material omissions Plaintiffs contend were concealed and the financial statements or projections that Plaintiffs believed included misrepresentations.[21]

I. Plaintiffs also struggled to produce a complete and adequate privilege log. Their first privilege log, produced on June 11, was wholly deficient; after motion practice and at the Court's insistence, Delaware counsel oversaw the production of a compliant privilege log.[22] But the log would never be updated beyond Plaintiffs' initial production.

J. Rather than focusing on discovery, Plaintiffs engaged in motion practice, filing a motion to appoint a receiver over AGR (which Plaintiffs withdrew after Defendants moved to strike it)[23] and two motions to extend the scheduling order (which Defendants briefed and which were denied for failure to establish excusable neglect).[24] Plaintiffs also took time to amend their nearly identical complaint in a parallel action pending before the Supreme Court of the State of New York.[25]

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[21] *See* D.I. 183.

[22] *See* D.I. 206.

[23] D.I. 147; D.I. 152; D.I. 184.

[24] D.I. 158; D.I. 166; D.I. 182; D.I. 195; D.I. 202.

[25] D.I. 212, Ex. 9.

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K. On July 2, Defendants moved to compel.[26] Plaintiffs opposed the motion without offering any substantive grounds for their opposition.[27] Plaintiffs explained that staffing or supervisory issues at Plaintiffs' forwarding counsel had impeded compliance with the scheduling order and their discovery obligations.

L. On August 3, I ordered Plaintiffs to specify a deadline by which they would collect and image Menashe's cell phone and laptop; the electronic repositories for his Demeter colleagues; and any server on which DG BF stored electronic files (the "Key Repositories").[28] Plaintiffs were ordered to provide hit reports to aid in finalizing search terms, and to produce all hit documents to Defendants to review at Plaintiffs' cost. Plaintiffs were also ordered to respond to specific written discovery requests, and to provide a compliant privilege log. The Court specified that self-collection was strictly prohibited, and encouraged greater participation by Delaware counsel.

M. Plaintiffs did not comply. The Court was required to give Plaintiffs more guidance on August 12. At that hearing, Plaintiffs' counsel stated that Menashe's cellphone was being imaged "right now."[29] With Delaware counsel taking a more active role and promising improvements, the Court worked with

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[26] D.I. 146.

[27] D.I. 172.

[28] D.I. 183; D.I. 201 at 36–42.

[29] D.I. 239 at 15.

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Plaintiffs and ordered them to file a stipulation by the end of the day with concrete deadlines for getting the Key Repositories to Defendants' vendor so that discovery could be complete in advance of looming depositions.[30] Plaintiffs did not file any such stipulation, and related a series of delays and technical problems in imaging the Key Repositories. On August 16, Plaintiffs' counsel stated that hits in the Bloom Farms folder on the Demeter server would be produced, declining to image and search the entire server as ordered.[31] On August 17, Plaintiffs' counsel told Defendants' counsel that "the vendor was unable to successfully image Mr. Menashe's cell phone and laptop," and that new equipment was on its way to the vendor.[32]

N. On August 18, Defendants moved to compel Plaintiffs' deficient written and document discovery by a deadline, with dismissal on the line if the deadline was missed, and for sanctions for Plaintiffs' failure to comply with this Court's August 3 and August 12 directives.[33] The parties briefed that motion and the Court heard it on August 23.[34] At this point, the depositions of Menashe, his colleagues, and key players at AGR were noticed for the coming days, and trial was

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[30] *Id.* at 18–21.

[31] D.I. 212, Ex. 5.

[32] *Id.*

[33] D.I. 212; D.I. 214.

[34] D.I. 217; D.I. 221; D.I. 227.

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three weeks away. Plaintiffs had produced documents from the Demeter laptops, but had not completed imaging the Demeter server or Menashe's laptop, and—remarkably—had not yet even begun imaging Menashe's cell phone, as Menashe himself had been unable to identify a business in his locale of Helena, Montana that could perform the task.[35]

O. On August 23, the Court held Plaintiffs in contempt.[36] The Court ordered the images of the Demeter server and Menashe's laptop be produced to Defendants' vendor for Defendants' attorneys-eyes-only review until a deadline passed for Plaintiffs to claw back privileged documents by properly logging them, and for Menashe's cell phone to be provided for Defendants' remote imaging or overnighted to Defendants, at Defendants' election, subject to the same clawback procedure. The Court also ordered all documents withheld on the basis of privilege, but not yet logged, to be produced to Defendants on an attorneys-eyes-only basis until that same clawback-by-log period passed. Finally, as to written discovery, the Court deemed a request for admission admitted, and ordered that Plaintiffs were precluded from offering at trial any financial statement or projection that Plaintiffs believed misleading that was not explicitly identified in Plaintiffs' discovery

[35] D.I. 247 at 16–17.

[36] *Id.* at 29–34.

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responses. The Court indicated an adverse inference was warranted, and took the scope of that inference, and the potential for dismissal, under advisement.

P. Plaintiffs' discovery failures were not limited to written discovery and document production. Plaintiffs' forwarding counsel was extremely obstructive at the Court of Chancery Rule 30(b)(6) deposition of Menashe as DG BF's representative on document retention.[37] Defendants were again forced to resort to motion practice, and were awarded a second deposition on August 17.[38] Defendants were also awarded fees for their motion practice.

Q. On August 25, Defendants wrote the Court to relate that their vendor had yet to receive the server image, the laptop image, or Menashe's cell phone, and that they had not been shipped within the Court-ordered timeframe.[39] That same day, Demeter filed a motion to quash production of the server image.[40] And again,

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[37] D.I. 180, Ex. 1.

[38] D.I. 180; D.I. 196; D.I. 197; D.I. 204 (noting forwarding counsel, like the counsel at issue in *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 53 (Del. 1994) "(a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude [and] uncivil . . . ; and (c) obstructed the ability of the questioner to elicit testimony to assist the Court in this matter"; and noting Delaware counsel was expected to put an end to the misconduct, but did not). Forwarding counsel was ordered to submit a certification that he had reviewed, or re-reviewed, the Statement of Principles of Lawyer Conduct, and the Court's 2021 Guidelines To Help Lawyers Practice In The Court Of Chancery. *Id.* Forwarding counsel failed to submit that certification as requested; the Court only received a letter from Delaware counsel representing that forwarding counsel had completed that task. D.I. 211.

[39] D.I. 231.

[40] D.I. 234. Demeter's August 25 motion relates that imaging was still in process and would take another "day or two," *id.*, even though Plaintiffs' counsel told the Court on

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rather than attending to their own obligations, Plaintiffs took countermeasures, demanding on August 24 that *Plaintiffs* image *AGR*'s server "for all financial records going back to when Jeff invested in the company."[41]

R. Defendants ultimately sent Menashe's cell phone to Defendants' vendor, and provided them the image of his current laptop.[42] But when Menashe shipped his phone to Defendants' vendor, he included a letter instructing the vendor not to provide Defendants' counsel with any correspondence between Menashe and thirty-four individuals, or Menashe's photos or videos.[43]

S. On August 27, I informed the parties that the matter would be dismissed, that judgment would be entered in favor of Defendants, and that the trial scheduled for September 15 to 17 was cancelled.[44] I advised that a formal explanation of my decision would follow. This order provides that explanation.

T. "Trial courts should be diligent in the imposition of sanctions upon a party who refuses to comply with discovery orders, not just to penalize those whose

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August 23 that the imaging would be complete "before the close of business today or certainly by tomorrow." D.I. 247 at 16.

[41] D.I. 231, Ex. 9 ("Our IP company wants to image your client's server for all financial records going back to when Jeff invested in the company. Let us know before close of business tomorrow when our IP company can come in and image that server. Thank you.").

[42] D.I. 237.

[43] D.I. 244.

[44] D.I. 243.

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conduct warrants such sanctions, but to deter those who may be tempted to abuse the legal system by their irresponsible conduct."[45]

> Rule 37(b)(2) identifies potential sanctions that a trial court can impose for violating a discovery order, including but not limited to:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; [or]
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.][46]

U. Spoliation may also warrant dispositive sanctions, including dismissal of claims or imposition of an adverse inference,

> where a party acts to intentionally or recklessly destroy evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item. Delaware courts have defined recklessness in the spoliation context as a conscious awareness of the risk that one's action or inaction may cause evidence to be despoiled. Intentional destruction simply means that the spoliator acted with purpose.[47]

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[45] *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 717 (Del. 2008) (quoting *Holt v. Holt*, 472 A.2d 820, 824 (Del. 1984)).

[46] *James v. Nat'l Fin. LLC*, 2014 WL 6845560, at *8 (Del. Ch. Dec. 5, 2014) (quoting Ct. Ch. R. 37(b)(2)).

[47] *TR Invs., LLC v. Genger*, 2009 WL 4696062, at *17 (Del. Ch. Dec. 9, 2009) (internal citations and quotation marks omitted), *aff'd*, 26 A.3d 180 (Del. 2011).

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. . .

> The remedial inquiries relevant to the contempt and spoliation claims are similar. A court has inherent power to fashion a remedy for contempt that is proportionate to the level of harm committed so long as the court exercises restraint. In determining what remedy to award for spoliation, the court should consider: (1) the culpability of the spoliating party; (2) the degree of prejudice suffered by the aggrieved party; and (3) the availability of lesser sanctions that could both avoid unfairness to the aggrieved party and serve as an adequate penalty to deter such future conduct.[48]

V. The ultimate sanction for contempt, which must be used sparingly, is the entry of a default judgment against the contumacious party.[49] "[A] default judgment should be granted if no other sanction would be more appropriate under the circumstances."[50] "[T]here must be an element of willfulness or conscious disregard of a court order before entry of judgment is warranted."[51]

W. When evaluating whether to enter or vacate a default judgment, this Court generally considers the following factors:

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[48] *Id*. at *18 (internal citations omitted).

[49] *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215–16 (Del. 2009); *Lehman Cap. v. Lofland*, 906 A.2d 122, 131 (Del. 2006).

[50] *Hoag*, 953 A.2d at 717.

[51] *Gallagher v. Long*, 940 A.2d 945, 2007 WL 3262150, at *2 (Del. 2007) (TABLE); *accord Sundor Elec., Inc. v. E.J.T. Constr. Co.,* 337 A.2d 651, 652 (Del. 1975).

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> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure [to comply]; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.[52]

IT IS HEREBY ORDERED, this 19th day of November, 2021:

1. Plaintiffs are in contempt of this Court's August 3, August 12, and August 23 discovery orders. They undisputedly were bound by the orders, had notice of them, and nevertheless violated them. They did not set a deadline to collect and image the Key Repositories or respond to written discovery as ordered on August 3. They did not stipulate to a deadline for submitting the Key Repositories to a vendor as ordered on August 12. They did not provide the image of the Demeter server to Defendants. And they were prejudicially late in providing the image of Menashe's laptop and Menashe's cell phone, in violation of the August 23 order. After this pattern of contumacious behavior, Menashe then attempted to thwart the Court's order to turn his cell phone over to Defendants' vendor, directing the vendor to restrict the material given to Defendants' counsel.

2. Plaintiffs, and specifically Menashe, spoliated evidence in Menashe's text messages and on the laptop he used during due diligence. Plaintiffs were under

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[52] *Connection, Inc. v. Synygy Ltd.*, 2021 WL 1943350, at *3 (Del. Ch. May 11, 2021) (quoting *Hoag*, 953 A.2d at 718, and citing *Minna*, 984 A.2d at 1215).

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a legal duty to preserve relevant evidence from at least the date they filed this suit, and received a litigation hold notice from Defendants. Their spoliation was not negligent; Menashe's destruction of his text messages, which persisted through two depositions about DG BF's recordkeeping, was intentional.

3. Plaintiffs' contempt and spoliation caused Defendants incredible prejudice. The only way Defendants would obtain Plaintiffs' discovery material in advance of trial was to review it themselves in the final days before trial, while preparing for depositions without the benefit of that discovery material.

4. Each *Minna* factor supports entering a default judgment as a sanction.

a. Party Responsibility for Failure to Comply. Plaintiffs have nobody to blame but themselves. Plaintiffs' failure to meet their discovery obligations began with their early partial collection and failure to preserve Demeter repositories, and ended with Menashe's spoliation of his text messages and attempt to thwart this Court's orders regarding his cell phone.

b. Prejudice to Defendants. As mentioned, Defendants have suffered significant prejudice as a result of Plaintiffs' contempt and spoliation, and would have suffered incredible prejudice had the matter not been halted days before trial.

c. History of Dilatoriness. While Plaintiffs bombarded Defendants with discovery requests and motion practice, they completely ignored their

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obligations to even image the Key Repositories until after the substantial completion deadline passed, and provided some of those images only after the Court thrice ordered them to do so. Even the simple order to overnight Menashe's cell phone to Defendants' vendor was not timely followed. Plaintiffs did nothing to tend to their affirmative obligations in this matter until after the deadlines passed, and could not demonstrate any excusable neglect; their delays were of their own making. After the Court got involved, Plaintiffs refused to comply with this Court's orders to set their *own* deadlines for their overdue discovery. Plaintiffs' dilatoriness has plagued this case.

d. Willfulness and Bad Faith. Plaintiffs have knowingly ignored the Court's clear and accommodating orders. Plaintiffs ignored their discovery obligations in bad faith, while heaping trouble and expense upon Defendants.

e. Effectiveness of Sanctions Short of Dismissal. The Court has been patient with Plaintiffs to a fault. The Court accommodated Plaintiffs when Defendants sought hard deadlines and Plaintiffs asked for flexibility. The Court gave Plaintiffs some grace and gave Delaware counsel the opportunity to lead Plaintiffs out of their morass of noncompliance. The Court entered nearly dispositive discovery sanctions, and noted it was considering an adverse inference and dismissal, but Plaintiffs continued to ignore their obligations and this Court's orders. Repeated fee-shifting for motion practice and DG BF's second 30(b)(6)

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deposition, and allowing Defendants' counsel to review Plaintiffs' repositories at Plaintiffs' expense, had no effect. While Defendants have generously characterized this state of affairs as "a Menashe problem,"[53] I believe his counsel's approach of prioritizing bluster over substance has compounded the problem. It is clear that no sanction short of dismissal has been or would be meaningful.

f. Meritoriousness of Plaintiffs' Claims. Plaintiffs' primary claim is for fraud. Plaintiffs' failure to answer written discovery substantially weakened that claim, as they declined to identify any omissions or misrepresentations in written discovery and so were precluded from offering any at trial. And even if Plaintiffs could still prevail on that claim here, Plaintiffs have filed a claim for fraudulent inducement in New York State based on these same facts, telling that court that New York state and federal courts "ha[ve] exclusive jurisdiction over any disputes 'arising out of, or relating to' the Purchase Agreement, ***including, without limitation, Plaintiff's claims that Defendants fraudulently induced it to enter into the Purchase Agreement***" by which it invested in AGR.[54] Plaintiffs withdrew all claims relating to that Purchase Agreement from this case.[55] Plaintiffs' remaining claims for breach of AGR's operating agreement due to AGR's corporate

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[53] D.I. 247 at 25.

[54] D.I. 212, Ex. 9 ¶ 7 (emphasis added).

[55] D.I. 105.

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governance practices offer only nominal damages, and do not support or seek any injunctive relief.

5. All fees associated with discovery motions, with Defendants' review of Plaintiffs' repositories, and Defendants' counsel's exemplary attempts to meet and confer about discovery, are shifted to Plaintiffs.[56] The parties shall submit a briefing schedule to address the rest of Defendants' fees, as requested in their October 28 motion.[57] That fee motion shall be heard together with Defendants' fully briefed Motion to Recover Damages Resulting from Plaintiffs' Unlawfully Issued Injunction.[58]

/s/ Morgan T. Zurn
Vice Chancellor Morgan T. Zurn

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[56] *Genger*, 2009 WL 4696062, at *19; Ct. Ch. R. 37(b)(2).

[57] D.I. 250.

[58] D.I. 93.

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EXHIBIT – B –

EFiled: Aug 26 2021 03:51PM EDT
Transaction ID 66883178
Case No. 2020-0459-MTZ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DG BF, LLC, a Delaware limited liability company, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company; and JEFF A. MENASHE, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company, Plaintiffs, v MICHAEL RAY, an individual, and VLADIMIR EFROS, an individual, and AMERICAN GENERAL RESOURCES, LLC, a Delaware limited liability company, Defendants, and AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company, Nominal Defendant.	C. A. No. 2020-0459-MTZ

\- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, August 12, 2021
10:58 a.m.

\- - -

BEFORE: HON. MORGAN T. ZURN, Vice Chancellor

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TELEPHONIC ORAL ARGUMENT AND RULINGS OF THE COURT ON DEFENDANTS' MOTION TO CONTINUE TRIAL AND ADJUST THE SCHEDULING ORDER

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

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1 APPEARANCES:

2 SEAN J. BELLEW, ESQ.
Bellew LLC
3 for Plaintiffs

4

5 SEAN A. MELUNEY, ESQ.
MATTHEW D. BEEBE, ESQ.
6 Benesch, Friedlander, Coplan & Aronoff LLP
for Defendants Michael Ray and Vladimir
7 Efros

8

9 DAVID B. ANTHONY, ESQ.
Berger Harris, LLC
10 -and-
JEDIDIAH DOOLEY, ESQ.
11 PERRY WOODWARD, ESQ.
of the California Bar
12 Hopkins & Carley
for Nominal Defendant
13

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1 THE COURT: Good morning, counsel.
2 This is Morgan Zurn. May I have appearances, please,
3 beginning with counsel for the plaintiff.
4 MR. BELLEW: Good morning, Your Honor.
5 May it please the Court. Sean Bellew on behalf of the
6 plaintiffs.
7 MR. MELUNEY: Good morning,
8 Your Honor. This is Sean Meluney on behalf of the
9 defendants Michael Ray and Vladimir Efros.
10 MR. ANTHONY: Good morning,
11 Your Honor. This is David Anthony on behalf of
12 American General Resources LLC. With us on the line
13 are Jedidiah Dooley and Perry Woodward, who have both
14 been admitted *pro hac vice*. And with the Court's
15 permission, Mr. Dooley will present today on behalf of
16 American General Resources.
17 THE COURT: Thank you.
18 MR. BEEBE: And, Your Honor, I'm
19 sorry, Matthew Beebe. My colleague at Benesch
20 Friedlander is also on the line. My apologies.
21 MR. WAGNER: And, Your Honor, I
22 apologize for speaking over. My name is Michael
23 Wagner. I'm a certified limited licensee at Smith,
24 Katzenstein & Jenkins, and I am here to observe and

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1 fulfill the requirements under Delaware Supreme Court
2 Rule 52.
3 THE COURT: Thank you. Welcome.
4 MR. BOUSTANI: And, Your Honor, this
5 is Eric Boustani, general counsel for American General
6 Resources. And my deputy general counsel, Harry
7 Berezin, is also on the line.
8 MR. EFROS: Your Honor, this is
9 Vladimir Efros.
10 THE COURT: Good morning. Is that
11 everyone on the line?
12 MR. MELUNEY: I believe so,
13 Your Honor.
14 THE COURT: Thank you very much.
15 Well, I'm hopeful that the way that things have shaken
16 out, our agenda this morning can just be mostly
17 hopefully a problem-solving scheduling conference. I
18 would appreciate an update on how plaintiffs' more
19 recent discovery efforts have been going and I would
20 like to discuss the feasibility of holding the trial
21 date, the propriety of holding the trial date. And I
22 also have from the defendants their motion for leave
23 to file summary judgment.
24 To the extent, Mr. Bellew, you're

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1 prepared to address that, I'm happy to talk about that
2 today as part of the scheduling efforts, but, of
3 course, if you want to wait until you file an
4 opposition, we can do that as well.
5 So with that, given that defendants
6 filed the first letter on the issue, Mr. Meluney,
7 could you update me on how the redoubled discovery
8 efforts are going.
9 MR. MELUNEY: Thank you, Your Honor.
10 May it please the Court. This is Sean Meluney. So
11 I'll just -- I'll skip through and I'll just go right
12 through kind of responding to Mr. Bellew's letter and
13 then just going through kind of what's happened and
14 what still needs to happen.
15 In terms of the collection of data,
16 I'll start there. Not much has happened,
17 unfortunately, since last week, in our view. And I'll
18 start with the order that was entered by the Court,
19 because I think the order very specifically identifies
20 seven repositories that needed to be imaged.
21 And so the repositories were
22 Mr. Menashe's cell phone, Mr. Menashe's laptop,
23 Mr. Raesly's laptop and email account, Mr. Levit's
24 laptop and email account, and then DG BF's server. So

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1 the server they used to save documents.
2 So for four of those repositories, it
3 doesn't appear that really anything has happened since
4 we were together last week, and those are
5 Mr. Menashe's laptop, Mr. Menashe's cell phone, the
6 DG BF server, and Mr. Levit's email account. So there
7 has been some progress with Mr. Raesly's and
8 Mr. Levit's laptops.
9 Last night, we received a hit report
10 on hits from those two repositories. We're still
11 unclear as to when the production would happen, and we
12 have a couple of additional tweaks to the search terms
13 that we're going to circulate today. But in terms of
14 what was ordered last week was, you know, within 24
15 hours, a list of exactly what repositories the
16 plaintiffs were going to image and then a concrete
17 date by which the imaging would happen along with the
18 hit report.
19 So in our view, those aren't tough
20 things to provide. It's really just communicating
21 with one another. And the fact that we don't have
22 really any idea what's happening with four of these
23 repositories -- and, you know, these are really
24 important repositories for us. We attached to our

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1 motion to compel what we think is a smoking-gun email
2 from -- or text message from Mr. Menashe.
3 And so we know that that is a critical
4 source of evidence, and it's one that, I mean, last
5 week when we were together, I talked about that a lot.
6 I mean, it was one of the ones I was real focused on.
7 So the fact that we're back with one another a little
8 over a week later and we have no progress whatsoever
9 on that repository, it raises red flags. It raises
10 concerns.
11 So that's one of the things that
12 jumped out and that's one of the reasons why I wanted
13 to have an opportunity to talk a little bit more about
14 the status.
15 Turning to some of the issues raised
16 in Mr. Bellew's letter, it seems to be they're taking
17 the positions -- the plaintiffs are taking the
18 position that there's confusion. They weren't sure
19 what they needed to image and they weren't sure
20 whether they were going to do the imaging or we were
21 going to do the imaging. And I just -- I want to
22 address those. I don't think that those arguments
23 have any merit. It wouldn't be possible for the
24 defendants to have handled the imaging of those

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1 repositories.
2 The things that we're talking about
3 are things that are directly in the custody of
4 Mr. Menashe. Quite frankly, a lot of the things that
5 we're talking about would have been the first things I
6 would have imaged, because they would have been in my
7 clients' possession, so I would have -- things that
8 they would have used every single day in the operation
9 of their business. So it would have been the first
10 things before I even sent an ESI letter, I would have
11 went to my client, I would have said, I have to get
12 myself -- yourself [sic] and I have to get your
13 laptop. I have to get those things imaged
14 immediately.
15 So the fact that we're one month out
16 from trial and there's been no steps taken on those --
17 as well as the server, that's another example. The
18 server from my record custodian deposition, I know
19 that's where they saved a lot of documents relating to
20 this investment opportunity with AGR. That's just
21 another, in our view, just like a very obvious place
22 to turn to first. So the fact that we're a month out
23 and we don't have it is surprising.
24 And the part about the confusion as to

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1 what repositories to image, I don't understand that
2 argument and I don't understand it because we filed a
3 motion to compel, and we really specifically
4 granularly identified the repositories that we wanted,
5 and we did the same thing in the order.
6 And even if you want to go back
7 further, we've been doing this in ESI letters dating
8 back to May, so it's not even as if they didn't really
9 have an idea until we filed our motion to compel what
10 we were looking for. We've clearly and transparently
11 identified those repositories dating back to the very
12 beginning of discovery.
13 So we're now a month out, and we did
14 get -- and I'll admit, they did get a -- the
15 hit report on the laptops late last night, but that's
16 really the only progress, along with they did produce
17 last week emails that appear to have been from
18 Mr. Menashe and Mr. Raesly. So how they did this
19 was -- my understanding is that they got, you know,
20 all emails to or from Mr. Raesly and Mr. Menashe, they
21 applied our search terms, and then they just did a
22 quick peek for privilege and then produced everything
23 else.
24 And so we did receive that last week.

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1 We were reviewing -- it's a lot of documents. I think
2 it's 13,000 documents, because there wasn't a
3 first-level review for duplication and responsiveness
4 and relevancy. So we're going through -- we're
5 reviewing that now. The production itself has some
6 issues that we're trying to understand more, which,
7 for example, Mr. Menashe is, again, the only listed
8 custodian of any of the data that was produced, but
9 their hit report indicates that Mr. Raesly's emails
10 were collected too.
11 Now, we don't have confirmation of
12 that outside of a hit report because it contradicts
13 the metadata that we have, but we're -- so we're
14 trying to work through that right now and understand
15 that. But we know for certain that we do not have hit
16 reports for the other repositories that I listed at
17 the beginning. So Mr. Menashe's cell phone,
18 Mr. Menashe's laptop, the server, Mr. Levit's emails.
19 So it's an incomplete hit report. We're still waiting
20 on that.
21 And I just want to go through -- we
22 got a privilege log, so we did receive a privilege log
23 from the plaintiffs. The privilege log itself is
24 incomplete, and the reason I say it's incomplete is

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1 that we obviously have these four remaining
2 repositories where no steps have been taken to collect
3 that data. So we know for certain that this privilege
4 log does not include that information. There's other
5 issues with the privilege log. It asserts privilege
6 over clearly nonprivileged communications. I don't
7 necessarily think I want to take the Court's time
8 today going through that just to say, you know, at the
9 very beginning of the case, their first production,
10 they redacted a lot of emails with -- you know, one of
11 Mr. -- between Mr. Menashe and one of his friends, his
12 name is Cary Fitchey, we said those emails are clearly
13 not privileged, you need to unredact them and send
14 them to us. They did that, and then we get the
15 privilege log last week and there's countless --
16 there's countless entries where they've now redacted
17 or withheld communications, again, between those two
18 folks. So we're struggling with that. They did give
19 us the privilege log, but obviously there were those
20 issues that I just raised.
21 The other part is written discovery.
22 So the last part of the order, or the only part that I
23 don't think I've talked about yet, is their supplement
24 to the written discovery. And, again, I'm not going

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1 to reiterate what I thought I presented last week, but
2 these are really critical questions. We haven't
3 received anything. We've asked for a deadline by
4 which we will get written responses. As far as I
5 know, we've never gotten a response to that. So we're
6 still waiting to understand, okay, when are we going
7 to get the supplemental information that we've asked
8 for.
9 So I think at this point one of the
10 things that I think has gotten clear is I think
11 there's something bigger happening here, and I think
12 one of the things that we've always said, we've always
13 taken the position that these fraud claims don't have
14 merit, and they don't have merit because we contend
15 that we provided Mr. Menashe all the information he
16 needed for his investment.
17 And now the critical repositories that
18 would have that exculpatory evidence are somehow
19 missing. Somehow, they're the ones that are being
20 held back. They're the ones for using Mr. Menashe's
21 cell phone, as an example, they're the ones where we
22 have real concerns as to the destruction of evidence.
23 And we're a month from trial. We just
24 had a ruling last week that I think gave the plaintiff

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1 the opportunity to get it together and get us the
2 documents that we needed to defend ourself in this
3 case. And the fact that we're back here a week later
4 and we don't have any of that is problematic.
5 And so I know when you started this,
6 Your Honor, you asked me to talk a little bit about
7 let's have this be a problem-solving exercise, and I
8 think that's a good idea. I think, from our
9 perspective, what we would suggest is by tomorrow, the
10 plaintiffs have to -- are required to turn over all
11 the repositories that we've identified that they have
12 not done anything to collect from. They turn those
13 over to an ESI vendor.
14 Within -- by Tuesday, that we have to
15 have the image -- the data process, search terms
16 applied, hit reports given, and a concrete deadline in
17 which -- within which we're going to get a production
18 and say, you know, that deadline's Tuesday, next
19 Tuesday, for example, and then if they don't meet that
20 deadline, then they have, you know, serious sanctions
21 up to what I think would be appropriate would be up to
22 terminating sanctions if they do not actually comply
23 with this kind of last opportunity to, you know, make
24 the production.

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1 You know, we're trying to be
2 reasonable. We think that there needs to be something
3 more, like a hook that really requires the plaintiff
4 to do what they're required to do. And I think that
5 that's justified in this case, although I admit that
6 it's significant.
7 But, Your Honor, I'll stop now. But
8 if you have any questions or anything like that, I'm
9 certainly -- I'm here and willing to answer any
10 questions that you may have.
11 THE COURT: Thank you. At this point
12 I'm happy to hear from Mr. Bellew.
13 MR. BELLEW: Thank you, Your Honor.
14 I want to start with where we are on
15 the depositions and work backwards. The defendants
16 have asked for four depositions, three of which are
17 all currently scheduled for not next week, but the
18 following week, Mr. Raesly, Mr. Levit, Mr. Menashe, in
19 his personal capacity, and the only outstanding
20 scheduling issue on the depositions that they are
21 seeking is the continuation of the Mr. Menashe dep,
22 which I hope to have resolved in short order.
23 Your Honor, I have become much more
24 personally engaged in this discovery process given the

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1 Court's admonition of last week. I understand
2 Mr. Meluney's position. I think I would come about
3 it, but from a different perspective. We have those
4 depositions locked and loaded. We are working to make
5 sure that they have all the documents that they're
6 entitled to and need that they can make those
7 depositions productive.
8 Candidly, Your Honor, coming into this
9 phone call and having personally overseen the efforts
10 to correct the deficiencies, the only outstanding item
11 that I saw was an imaging of Mr. Menashe's cell phone,
12 which I can represent to the Court is being conducted
13 right now. That would lead, I would say, of the seven
14 repositories, there are three that Mr. Meluney has
15 stated that the hit reports have been provided for. I
16 think that leaves -- a representation that
17 Mr. Menashe's cell phone is being imaged currently.
18 The other three things I heard him to say was
19 Mr. Menashe's laptop, Mr. Levit's email, and a DG BF
20 server.
21 Candidly, Your Honor, I believe that
22 they were not issues that were in the forefront of my
23 mind, but I do look like -- I look at this as a
24 problem-solving effort as well maybe this would have

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1 been asking too much given all the other efforts, but
2 had I seen an email to the effect that these are the
3 outstanding issues, I certainly would have followed up
4 on that.
5 I think we take to heart counsel's
6 suggestion that there needs to be some deadline by
7 which they get this information so it could be
8 productive for their depositions.
9 And without conceding to the dates or
10 any of the relief that would be entitled -- they would
11 be entitled to, I would commit to counsel for the
12 defendants that I'll have a full report to them before
13 the end of the day today on those remaining
14 outstanding discovery items such that they can readily
15 prepare for the depositions not next week, but the
16 following week.
17 The written responses, I will
18 certainly -- I'm hearing that now for the first time,
19 candidly. And as for the privilege log, certainly we
20 wouldn't have -- it's only incomplete because the
21 document production is incomplete. That was
22 produced -- we have -- we're working to provide some
23 clarification for the defendants on who the players
24 are on that privilege list, so -- and obviously will

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1 be updated as the production rolls out, but I would
2 not -- and I think it's unfair and maybe a bit of
3 piling on to characterize our efforts over the last
4 week as not having moved the ball.
5 I had my eye on the depositions. The
6 defendants are entitled to have productive depositions
7 and all the documents they need, and I can represent
8 to the Court that that will either happen or I won't
9 be involved in the case any longer.
10 So with that, I'm not sure what else I
11 could add other than we'll be on track. They will
12 know by this afternoon and they will have the
13 documents, and I will get answers to these remaining
14 repositories and they will be armed and ready to take
15 their depositions in a productive way.
16 THE COURT: Thank you. And I
17 appreciate your commitment and your constructive
18 planning in view of the depositions.
19 I wonder if in the report that you
20 give by the end of the day, rather than sort of
21 blindly committing to the deadline specifically that
22 Mr. Meluney has suggested of when the repositories
23 will be turned over and imaged and when the search
24 terms, hit report, and production will be made, I'm

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1 wondering if those are deadlines that you can yourself
2 suggest to Mr. Meluney by the end of the day.
3 MR. BELLEW: I would be happy to do
4 that, Your Honor. This is -- and for good reason.
5 We've invoked the Court's jurisdiction. We have
6 brought these defendants here. They're entitled to
7 take their depositions, and we will make sure that
8 they have the documents in a timely fashion. And I
9 will make that more concrete when I go back and
10 explore these issues with the vendor and with
11 co-counsel.
12 THE COURT: Thank you. What I would
13 hope for, then, is that you could offer those concrete
14 deadlines -- namely, when those repositories will be
15 turned over to a vendor. And I'll just note that they
16 were specifically enumerated in my order of
17 August 3rd, so they certainly weren't unidentified --
18 but identified to Mr. Meluney by the end of the day
19 when they will be turned over and imaged, when the
20 search terms will be applied, when a hit report will
21 be offered, and when their production will be made,
22 and that, as you've recognized, needs to be
23 sufficiently in advance of the depositions.
24 Is that workable?

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1 MR. BELLEW: It is, Your Honor. And I
2 want to add one other thing, and then I think we can
3 move past this. I was certainly on the line and with
4 my eyes and ears wide open during our last session.
5 All right. And I heard Your Honor give a 24-hour
6 deadline. I heard my colleague request 48 hours and I
7 heard the Court say it was 24 hours for the
8 hit report.
9 We attempted to get that hit report.
10 It didn't satisfy our friends on the other side, and I
11 immediately instructed our team to start from scratch.
12 And we did comply in good faith with that deadline,
13 and we'll certainly do everything that needs to be
14 done to get this case ready for the depositions a week
15 from Monday.
16 THE COURT: I appreciate that. Thank
17 you very much.
18 Mr. Meluney, that seems to, hopefully,
19 have addressed your concerns in the near-term. Is
20 there anything left unaddressed?
21 MR. MELUNEY: The main thing that I'm
22 concerned about -- and I'll -- is the kind of critical
23 deadline of, like, when are we getting the documents,
24 and the only reason I raise it -- and I raised it

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1 before, but I'm raising it again -- is if we go back
2 to what your order provides, this is -- we've modified
3 this into kind of like a quick production, which means
4 the production sizes are far greater than what they
5 would normally be, and that's with the understanding
6 that the plaintiffs are going to be paying our review
7 fee and costs.
8 But the problem is we need more time.
9 So if it was a normal production, I would say what
10 Mr. Bellew has suggested on the phone call is good to
11 hear. I'm glad to hear it. But without that deadline
12 on when are we getting the documents, I mean, these
13 aren't small depositions for us. These are critical
14 depositions for us, and we really want to be prepared
15 for it. So that's the only -- I appreciate everything
16 that's been said on the call. It's the one thing that
17 if I could ask, I just want a firm deadline by which
18 I'll get these documents, if possible.
19 Thank you, Your Honor.
20 THE COURT: Thank you. I understand
21 your perspective, but I really think, given counsel's
22 renewed dedication to this discovery process and the
23 fact that these images are -- I don't know where they
24 are. I don't know where the information is and I

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1 don't know what the status is with their vendor,
2 things like that. I am reluctant at this point to
3 judicially impose that deadline.
4 I think it's better, Mr. Meluney, for
5 you to work with Mr. Bellew and negotiate one. I'm
6 hopeful that that can be done. I take to heart -- and
7 he's acknowledging the exact concern that you've
8 raised, so I'm truly hopeful that between the two of
9 you, you can come to an agreement, and ideally in the
10 form of a filed stipulation.
11 And I think that given everything
12 that's going on, it's better for counsel to come up
13 with that -- solve that particular problem in the
14 first instance, and then if you need my help enforcing
15 it, I'll be here. But I think that deadline needs to
16 be negotiated between counsel for it to have the
17 greatest possibility of success.
18 MR. MELUNEY: Thank you, Your Honor.
19 THE COURT: Thank you.
20 Mr. Bellew, anything further?
21 MR. BELLEW: No, Your Honor. Thank
22 you.
23 THE COURT: Thank you. All right.
24 Then let's turn to the plaintiffs' motion to postpone

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1 trial.
2 Mr. Bellew, I don't know if that's a
3 motion that is still as ardently made as it was before
4 we redoubled our discovery efforts and are starting to
5 hopefully get back on track.
6 MR. BELLEW: Your Honor, it is as
7 ardent now as it was when it was originally filed.
8 And let me back up and put some context as to where we
9 are right now.
10 It's never a pleasant thing to be
11 referenced in an order with Joe Jamail, but the
12 Court's admonishments have been taken to heart. I
13 have had a very serious conversation with Mr. Fox.
14 Mr. Fox is still going to be lead trial counsel, along
15 with me in this case. We agree it would probably be
16 best that I take the lead in this call to give the
17 Court a little more of a different voice and somebody
18 that understands the way that we play the game here,
19 in a good way, meaning knows the ground rules and the
20 landscape.
21 Interestingly, Your Honor, I had the
22 chance to meet Joe Jamail about eight, ten years ago.
23 He represented the defendant in a case that I had. It
24 was a high-profile case. He represented a very

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1 prominent professional athlete who played quarterback
2 at the University of Texas, and I as a young lawyer --
3 and we have a clerkship-seeking candidate on the call,
4 so that's interesting, but we all heard about the Joe
5 Jamail story as we entered the Bar or right before
6 that. And I can tell you that I've taken it to heart
7 and have not forgotten that story over the last 20
8 years.
9 So when I went down to meet with him
10 in Texas, I was on guard. I had known his reputation.
11 I had no idea what he looked like. But when I went in
12 and I met him, he was a very, I would say, small --
13 I'm 5'8", so anybody who's smaller than me is small
14 and anybody who's taller than me is tall, at least in
15 my world. And he was a frail old man, walked with a
16 cane, wore a toupee, had very beautiful offices, and
17 he took me over to like a Gutenberg Bible of all of
18 his accomplishments in life.
19 Long story short, Your Honor, he was a
20 charming man in person, and we managed to settle that
21 case that day.
22 So sometimes an impression that you
23 get of somebody can be altered. And I believe what
24 you will see in this case going forward, that you will

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1 have a -- I think we will -- that everyone will have a
2 more favorable impression of who Mr. Fox is going
3 forward. Mr. Fox has been practicing for 30 years.
4 This is his vocation. He is an energetic lawyer.
5 That being said, things need to be done a certain way
6 in this state, and I will ensure that they are.
7 Again, they will be done that way or I will not be
8 involved any further.
9 So that is to address the Court's
10 concerns on where we are from a personality standpoint
11 going forward. And I would just ask that Mr. Fox
12 shouldn't be judged on one or two bad days, just like
13 my experience with Joe Jamail.
14 So with that, Your Honor, we do
15 believe that this case needs to pivot away from focus
16 on the lawyers and pivot away from all of the
17 unnecessary motion related to the procedure. This is
18 a case where Mr. Menashe invested $5 million, and it
19 appears that that $5 million may be seriously
20 prejudiced in terms of its value right now.
21 This is a case where this company is
22 attempting to engage in some substantial transactions
23 that will alter the existence of that company in a
24 major way.

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1 I will not seek to -- look, the blame,
2 if that's the right word, on why this matter needs to
3 be continued is certainly -- a portion of it needs to
4 be assigned in our direction. There's no doubt about
5 that. But this case isn't about me. It's not about
6 Mr. Fox. It's about Mr. Menashe and his $5 million
7 investment. I think the case seems to be boiling down
8 to an issue of the defendants taking a very aggressive
9 approach with discovery.
10 I heard Mr. Meluney's intimation that
11 the course of discovery led him to conclude that
12 there's something there. We certainly know that
13 there's no dispute that this gentleman, the plaintiff,
14 invested $5 million, and there's no doubt that there's
15 a serious question of whether that turn on investment
16 is where he intended it to be.
17 So with that background, Your Honor, a
18 couple points that I think talk to the issue of
19 excusable neglect and the fairness that would be
20 prejudiced by going to trial as scheduled.
21 Now, there's obviously -- that being
22 said, Your Honor, I do represent that we are engaging
23 in good faith to get this discovery done for the
24 defendants in a manner consistent with the current

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1 scheduling order. That's where I led off today. We
2 will continue to do that. We do need some relief from
3 the scheduling order, Your Honor, in order to fairly
4 try this case.
5 And we've talked about the outstanding
6 discovery that the defendants are entitled to. Well,
7 there is another side of the coin that hasn't been
8 really addressed in these last two weeks given the
9 fact that we were really up against it, as the
10 plaintiffs, no doubt, in terms of the discovery
11 obligations.
12 But, Your Honor, they -- we now have
13 at least a plan where they will have complete
14 discovery production. We now have a plan where they
15 will have a compliant hit reports. We now have a plan
16 where they will have a privilege log that is
17 ultimately robust and complete. And we have a plan
18 where their remaining depositions will be conducted.
19 But the other side of the coin is
20 there are multiple parties involved with the client in
21 terms of -- with the company, I should say, the
22 defendant company. We have been frustrated in our
23 attempts to take those depositions, three members of
24 the Nichols family who are investors of the company

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1 that we've attempted to take their depositions.
2 One of those efforts related to a
3 notice of service and an affidavit of service by a
4 process server that I've seen. They've moved to quash
5 that based on the fact that there was some technical
6 deficiency. They control that individual. That
7 person -- they could have that person at trial but
8 have not cooperated in getting a date to take that
9 deposition.
10 Mr. Roach, who is either -- I know
11 that he's indicted. I'm not sure where he is in that
12 criminal justice process, but we've sent a process
13 server in California to what we believed was his
14 house. The gentleman went out there eight times.
15 Maybe not eight, but certainly multiple times.
16 There's a litany of his efforts to get there. I have
17 pictures of him posting the subpoena on the
18 gentleman's door, what we believe to be the
19 gentleman's door.
20 Mr. Roach is a central figure in this
21 litigation -- almost, I would say, probably as much,
22 if not more than the actual principals to the
23 litigation. We've been unable to secure his
24 deposition.

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1 There's also depositions that -- there
2 was an incident recently -- and I'm not assigning
3 blame to anyone, but we were prepared to take the
4 deposition of a Mr. Archer. There was a court
5 reporter present. He did not appear. There were
6 emails after the fact between the lawyers as to
7 nonreceipt of Zoom information and some confusion
8 about that, but that's another deposition that needs
9 to be taken.
10 Your Honor, we haven't gotten the
11 opportunity to flip the coin, so to speak, and discuss
12 the deficiencies in the defendants' production. And
13 after we're able to assuage the Court's concerns and
14 rightful concerns about where we are on our
15 obligations, those are issues that are going to be
16 addressed.
17 Your Honor, it also has come to
18 light -- I guess this is not in dispute -- that there
19 is an effort to engage in a very substantial
20 transaction which may put a judgment outside of the
21 ability of execution, should that occur. I know
22 there's been some counterarguments on an effort to
23 segregate some of the proceeds of that transaction in
24 connection with this litigation, but that's something

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1 that's obviously worth -- important and worth
2 exploring on our end.
3 Let me finally address the expert
4 witness issues, Your Honor.
5 There was a deadline of June 13th.
6 The fact depositions did not start to occur until
7 July 14th. It's just unfeasible to think that
8 somebody would be in a position to name experts prior
9 to at least a modicum of discovery and deposition
10 discovery. That was just a -- that was just a misfit
11 in how this case proceeded and how it found itself in
12 court.
13 I will say that the idea that the
14 defendants complied with the deadline, that was a
15 perfunctory move. They did not actually name experts
16 other than their clients. So the argument that they
17 did it and they were able to do it and they followed
18 the rules and we didn't, I think is a little misguided
19 given the fact that all they simply did was name their
20 own experts.
21 Your Honor, with that, again, this is
22 a case about whether Mr. Menashe was defrauded of his
23 $5 million. All right. And that's not an
24 inconsequential amount of money for anyone. He should

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1 be getting -- he should get a fair trial. We
2 recognize that this is an imposition on the Court. We
3 would ask that the Court accommodate a trial in
4 November, which would allow proper exercise of justice
5 in this case and allow the plaintiff to be ready.
6 Your Honor, I don't -- I've resisted
7 the temptation of, you know, referencing the C word,
8 right. Everybody seems to have an issue with COVID,
9 and it has changed the way things occur.
10 This case could have been stayed on
11 track despite the pandemic. All right. We've all
12 learned to live with it, and it looks like we're going
13 to be living with it at least in the foreseeable
14 future. But there's no dispute that it has disrupted
15 people's lives. There's no dispute that it has made
16 certain things difficult.
17 Certainly, service of third-party
18 subpoenas is something that you could see would be
19 complicated by COVID. It is -- a supervising
20 attorney's ability to oversee in person the efforts of
21 their subordinates has obviously been impacted;
22 availability of witnesses; willingness to travel. And
23 there has been a great effort by this court and other
24 courts and by lawyers around the country to -- the

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1 show must go on. We get that, and we are asking for
2 an accommodation of a mere six weeks.
3 And with that, Your Honor, I would
4 just say that a six-week delay in this case is not in
5 any way going to prejudice. And if Mr. -- prejudice
6 defendants' case. As a matter of fact, if, in fact,
7 there is something going on, as Mr. Meluney indicates,
8 that's not going to change in six weeks. And you'll
9 have a much different road map in creating that
10 defense at trial.
11 So with that, Your Honor, we are
12 ardently seeking a continuance of this trial. I
13 recognize that Your Honor most likely doesn't have a
14 calendar that doesn't have anything scheduled on it in
15 November, but if we were able to get three days in
16 November, that would be the relief that we would seek,
17 Your Honor.
18 Thank you.
19 THE COURT: Thank you. I was looking
20 at the docket trying to identify when these notices of
21 deposition for the Nichols investors and Mr. Archer
22 were filed, and I wasn't able to see them.
23 Can you give me some more information
24 on when that effort began.

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1 MR. BELLEW: Yes, Your Honor. One
2 second here. I can pull up ...
3 Your Honor, I can represent, having
4 reviewed what are the affidavits of service for
5 Mr. Roach and Mr. Nichols, that there have been
6 efforts to serve them going back, I believe, at least
7 a month, if not more than that. I think some of these
8 depositions were originally scheduled in July.
9 And because of what appears to be
10 blatant efforts -- these are third parties, so they're
11 not -- apparently not controlled by my colleagues, but
12 it appears that there have been blatant efforts,
13 dating back to July, to avoid these depositions and
14 avoid service.
15 THE COURT: Just to be frank with you,
16 as you've been with me -- and I appreciate that --
17 when I think about the excusable neglect standard for
18 adjusting a deadline after it has been passed,
19 particularly here where no one from the plaintiffs'
20 side reached out to the Court for relief from the
21 scheduling deadlines as they were looming and then
22 passed, what I think about as excusable neglect is,
23 look, here is something that was happening in the past
24 that led to us blowing that deadline, and both from

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1 your comments today and at the hearing last week, the
2 only thing I've heard is that there were some staffing
3 or supervisory issues which I'm not sure fall within
4 excusable neglect.
5 I almost think that that's just sort
6 of a wound of one's own making, and it may be
7 frustrating for the clients, but I'm not sure that
8 that supports the excusable neglect standard. And I'm
9 wondering if you disagree or if there's something else
10 that was going on that would constitute excusable
11 neglect.
12 From my perspective, again, just to be
13 perfectly candid with you, it seems that California
14 counsel was having some staffing and supervisory
15 issues and nothing constructive was getting done on
16 discovery either to comply with their obligations to
17 the defendants or to make their own case. And then
18 for some reason the expert deadline is what caused
19 everyone to wake up. And even then, from my
20 perspective, what we got were motions to appoint a
21 receiver and other tangential pleadings-based motions
22 that weren't focused on the discovery task at hand.
23 As to the expert issues, one can
24 complain about having simultaneous expert and fact

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1 discovery tracks, but that's what was stipulated to.
2 And, again, if that wasn't working out, the most
3 prudent approach would be to come to the Court for
4 relief in advance of the deadline.
5 And now, after the deadline, you can
6 say, well, they just named their own experts as their
7 clients, but they aren't trying to name anyone else,
8 and they're content with that.
9 That was a lot of thoughts. But in
10 particular, is there anything that you can point to
11 that is excusable neglect other than how California
12 counsel staffed and administered its efforts?
13 MR. BELLEW: Your Honor, let me start
14 in a different posture and I will address the
15 excusable neglect issue.
16 I pulled up the affidavit of service
17 that relates to the Ronald Roach subpoena. And this
18 is an affidavit of service of a subpoena company, Full
19 Force Attorneys, and I can certainly put this of
20 record. And it indicates that in the mind of affiant,
21 all right, that he -- and this is a quote, "I served
22 the documents on Ronald [] Roach."
23 And then jumping ahead, "by posting
24 copies of documents listed [here] .... on [July 8th,

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1 2021], at 7:45 a.m."
2 It notes two, three, or four attempts
3 prior to that to serve that notice of that subpoena.
4 All right.
5 Your Honor, Mr. Roach's name is
6 replete in the complaint. He was the CFO at the time
7 and he's been indicted. I'm not sure where that is,
8 but I suspect that he's actually been convicted by
9 this point.
10 I have a second notice, affidavit of
11 service dated 14th of July, 2021, where the affiant,
12 another individual with Full Force Attorney,
13 delineates efforts to serve Steven Nichols, and he
14 says that it was -- the last attempt was posted on
15 July 8th, 2021.
16 Mr. Nichols and Mr. Roach are critical
17 witnesses in this matter. I don't -- I believe that
18 the defendants have at least a level of influence over
19 these two individuals, especially Nichols, given the
20 fact that I understand him to be a major investor in
21 the company, that these folks could be made available,
22 Judge. And, Your Honor, that's point number one.
23 Point number two --
24 THE COURT: I'm sorry, before you move

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1 on, just to be clear, so it sounds like formal efforts
2 to obtain these particular depositions began in July.
3 Could you refresh my memory on when
4 the fact discovery cutoff is.
5 MR. BELLEW: I believe the fact
6 discovery cutoff is the 25th of this month, if I'm
7 remembering that correctly.
8 THE COURT: And then one other thing.
9 My memory -- and I've gone back and checked -- is that
10 the plaintiffs' own complaint provided that Mr. Roach
11 had pled guilty in 2019.
12 MR. BELLEW: You might be correct,
13 Your Honor. So that is just a misunderstanding on my
14 part as I sit here, but, yes. So he has been
15 convicted.
16 But my point on that, Your Honor, just
17 is this goes beyond excusable neglect. This is a
18 change in the circumstance and the fact that we've
19 been unable to attain through, you know, formal
20 efforts to have these individuals deposed. And on top
21 of that, Your Honor, there has been an effort to sell
22 the company which is, you know, a change in
23 circumstance which has a material effect on the scope
24 of this dispute.

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1 Now, that being said, Your Honor, I do
2 want to touch on the excusable neglect part of this.
3 I don't know that it's -- sometimes when there's --
4 when you make a misstep, it's difficult to reorient
5 the mind-set as to what was going on at a given time.
6 I mean, I do believe that given the circumstances,
7 given the world that we are now living in,
8 unfortunately, as it is, these missteps are excusable
9 given the challenges that we are facing.
10 There's been no lack of effort in this
11 case. Maybe there's been -- maybe too much effort.
12 Maybe a misdirected effort. Your Honor, my suggestion
13 to withdraw the motion to appoint a receiver, you
14 know, to clean -- clear the decks and let's get to
15 trial on the issues that are really here.
16 And, Your Honor, I will end with this,
17 the defendants believe that they have grounds for
18 summary judgment, and that's without the benefit of
19 the discovery that Mr. Meluney identified today and
20 with the depositions that they are going to conduct
21 about end dates.
22 I mean, if the Court is inclined to
23 entertain that motion, then that would certainly be --
24 it certainly would seem to be the right order to hold

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1 trial date, brief the complete discovery, brief the
2 summary judgment issues. And I would throw this out,
3 it would seem that that would take at least a 90-day
4 period, if the Court was so inclined, and that is
5 another imposition on the Court. I don't want to
6 simply look past the fact that we're putting another
7 significant to-do list -- item on your to-do list.
8 But it would seem to me that for the
9 proper order of justice, if there is going to be
10 motion practice, dispositive motion practice at this
11 stage, it would seem that it would only be practical
12 to move the trial date.
13 So with that, Your Honor, our request
14 is as ardent as it was originally. Mr. Menashe is
15 entitled to his day in court. On top of perhaps some
16 missteps along the way, there's also the fact that
17 despite rigorous efforts to get these folks into a
18 room for deposition -- and there are others -- that
19 hasn't occurred, notwithstanding the efforts to do
20 that.
21 But this dispute now has a new wrinkle
22 in it to the extent that this company is now on the
23 auction block, and that needs to be explored as well.
24 So with that, Your Honor, we submit

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1 that a modest accommodation to this scheduling order,
2 which is no small imposition on the Court and on
3 defense counsel, as I'm sure we'll hear, is warranted
4 under the circumstances.
5 THE COURT: Thank you.
6 Mr. Meluney.
7 MR. MELUNEY: Your Honor, this is Sean
8 Meluney on behalf of the individual defendants.
9 Mr. Dooley is actually going to handle
10 this argument. I would perhaps just reserve a minute
11 or two following his presentation, but I'm going to
12 let him take the lead on this one, with Your Honor's
13 permission.
14 THE COURT: Thank you.
15 Mr. Dooley.
16 MR. DOOLEY: Thank you, Your Honor.
17 Defendants vehemently oppose any
18 continuance. And, frankly, a continuance isn't
19 necessary. What's needed is just compliance with the
20 Court's orders.
21 Defendants have spent a considerable
22 amount of time and effort making sure that we prepared
23 this case properly for trial. We've complied with all
24 the deadlines in the scheduling order. We've complied

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1 with all of our discovery with the deadlines. And so
2 the issue now is plaintiffs have not. And, I mean,
3 any prejudice that's now befallen to them is of their
4 own making. They have not complied with any of the
5 deadlines, and now they also don't want to have the
6 September 15th trial date remain.
7 Any moving of that trial date as set
8 forth in our papers would be extremely prejudicial to
9 defendants, and in particular my client, AGR.
10 Kind of focusing on the Court's
11 comments regarding the excusable neglect standard,
12 there was no excusable neglect for not naming experts,
13 as the Court alluded to. This was a conscious
14 decision not to timely name experts. They were --
15 there's no claim they weren't aware of the deadline.
16 They just fully knew about them. They just didn't
17 comply with them. They received our disclosures and
18 expert reports and essentially didn't respond. They
19 laid in wait until after all the deadlines passed and
20 then sought on the deadline. That's not how a
21 reasonably prudent person would act. And to this day,
22 we still haven't heard an excuse as to why they could
23 not have timely disclosed their experts and provided
24 their reports.

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1 We did hear about depositions, about
2 third-party depositions. And I would just point out
3 that all those depositions were noticed for August,
4 and that's well after any expert issues were to be
5 decided in the scheduling order. Per the scheduling
6 order, opening experts were June 18th. Expert reports
7 were on July 8th. Expert -- rebuttal experts were 20
8 days thereafter. And so to say that somehow they were
9 prejudiced or that these third-party depositions had
10 impacted their ability to not comply with the Court's
11 scheduling order is just -- it's incorrect.
12 I'd also like to just address some of
13 these issues with the depositions.
14 First, I would just point out that
15 this notice was raised until reply [sic], so that's
16 why it wasn't in our opposition. Also, there's no
17 motion to compel, so this is a little bit of a
18 premature look at these discovery issues, but,
19 nonetheless, I would like to take a minute to address
20 them.
21 And so there's six depositions
22 outstanding. The first one is Mr. Boustani's
23 deposition, which was scheduled for today. And due to
24 some health concerns with plaintiffs' family,

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1 plaintiffs' counsel's family, that has been taken off
2 calendar and we're willing to reschedule that.
3 The second deposition is Mr. David
4 Nichols, and we have already reached out and asked for
5 dates to reschedule that deposition.
6 Next Friday was supposed to be Sally
7 Nichols, and we represent here and we're willing to
8 work with them to reschedule that deadline.
9 Regarding Mr. Roach, you know, the
10 meet-and-confer process on Mr. Roach just began
11 yesterday. We received a call from Mr. Bellew
12 regarding Mr. Roach yesterday. We informed him that
13 they had the wrong house and that, therefore, service
14 wasn't proper.
15 Nonetheless, we quickly endeavored to
16 try and reach out to Mr. Roach to try and resolve this
17 issue. And as of this morning, we have permission to
18 accept service of a subpoena on behalf of Mr. Roach.
19 We won't be representing him. He has his own personal
20 counsel, but we worked to facilitate and resolve any
21 issues with Mr. Roach's deposition.
22 With Mr. Archer, he was fully prepared
23 to attend the deposition yesterday. He was sitting in
24 a conference room with my colleague, Mr. Woodward, but

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1 my office wasn't provided the Zoom information and
2 neither was Mr. Meluney's office. So when we reached
3 out to try and get it about 15 or 20 minutes after the
4 scheduled time, we were told that the -- a depo had
5 already been taken and they couldn't get the court
6 reporter back. So we were fully willing to go
7 forward, and we asked them, we just continued, but for
8 whatever reason, it just didn't happen.
9 So regardless, we have now offered to
10 make Mr. Archer available tomorrow or any day next
11 week. Based on plaintiffs' counsel's unavailability,
12 I understand those dates aren't workable. And so
13 we'll get that scheduled, though. We're fully
14 committed to making that happen on whatever dates
15 plaintiffs can provide for us.
16 And lastly, regarding Mr. Steven
17 Nichols, he's a third-party investor. We do not
18 control him. He was not properly served. And based
19 on the affidavit that was filed with the court, one
20 attempt was made, and it wasn't proper.
21 So all that being said, we have been
22 working diligently to try and get these depositions
23 scheduled, but at the same time none of this relates
24 to any kind of delay on the expert issues. And all of

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1 these depositions can occur before trial, and so none
2 of this gives grounds for a trial continuance.
3 THE COURT: Thank you.
4 Could you address how you would
5 anticipate the Court fielding your request for summary
6 judgment in advance of a September trial.
7 MR. DOOLEY: Sure, Your Honor. I
8 would view that as we could get our opening brief on
9 file next week. The summary judgment issues are not
10 complicated issues. They're not complicated fact
11 issues. They're fairly straightforward legal issues.
12 They don't require a bunch of discovery.
13 So I would suggest that we would file
14 our opening papers next week, defendants could then
15 respond a week after that, and then we would respond
16 the following week, would be my proposed briefing
17 schedule on how we would go about that.
18 THE COURT: And how would you advise
19 me that I could cogently rule on that before trial?
20 MR. MELUNEY: Your Honor, this is Sean
21 Meluney. Can I jump in for just one second? I know
22 that you don't typically allow tag-teaming, but is
23 there any way I would just respond to that?
24 THE COURT: Sure.

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1 MR. MELUNEY: And my apologies. I
2 think, from our perspective, if it's a scheduling
3 problem, the trial date is more important than summary
4 judgment, so we're -- we are -- if there's a problem
5 with there just not being enough time, we are willing
6 to drop the request for summary judgment and then just
7 deal with those arguments after trial in post-trial
8 briefing.
9 So thank you, Your Honor. And I
10 apologize for jumping in.
11 THE COURT: All right. Thank you. I
12 appreciate the clarification.
13 MR. BELLEW: I concur with that,
14 Your Honor.
15 THE COURT: Thank you.
16 Mr. Dooley, is there anything else you
17 wanted to add?
18 MR. DOOLEY: I would just point out on
19 the COVID issues, I don't want to downplay the
20 seriousness of the pandemic, but at this point, you
21 know, we've all adjusted and are capable of handling
22 any issues. And while we would strongly like an
23 in-person trial in September, if that's not feasible
24 or if certain witnesses have to be accommodated via

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1 videoconferencing or Zoom or anything else, we're more
2 than happy.
3 For us, the critical piece to this is
4 that the September 15th trial date be firm and that we
5 proceed along those lines. You know, I think at this
6 point we've heard that there is a plan to get us the
7 discovery outstanding. There's a plan to get the
8 depositions scheduled. We're all working
9 cooperatively, and there's no reason that they both
10 can't occur.
11 You know, there was some allusions
12 made to documents that defendants need to produce, but
13 we've been asking for what documents have been missing
14 for over a month now and haven't received a response.
15 Our production was done two months ago. So I really
16 don't know what that issue is at this point, but it
17 certainly doesn't give rise to a continuance.
18 And I just would like to briefly
19 reiterate that what's set forth in our papers, that
20 this, to the defendants, is a critical, important
21 trial date. This has been going on now for over a
22 year, and defendants need to clear their name and look
23 forward to clearing their name at trial. And having
24 this lawsuit out there is just putting a black cloud

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1 over the company, it's putting a black cloud over the
2 individual defendants, and it's allowing the
3 plaintiffs to continue to disrupt our business
4 operations.
5 And I should just say one last thing
6 on the Flow-Kana transaction, well, the plaintiffs
7 complain that they haven't been able to do discovery.
8 The letter of intent was produced back in June, so
9 they've had that document for some time. And since
10 that time they've deposed Mr. Ray, who signed the
11 letter. And they didn't ask him any questions about
12 the transaction and they didn't ask him or Mr. Efros
13 any details about the proposed transaction.
14 So this notion that, you know, they
15 haven't been able to do any discovery, we don't agree
16 with. They just haven't availed themselves to the
17 proper discovery processes.
18 So with that, I don't have anything
19 further, Your Honor.
20 THE COURT: Thank you.
21 Mr. Bellew.
22 MR. BELLEW: Your Honor, briefly, this
23 really boils down to a matter of really fairness and
24 laying the prejudices and just some practical

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1 concerns.
2 The defendants will suffer no
3 prejudice by a six-week delay of the trial. To the
4 extent there's a black cloud hanging over them, the
5 fact that it will hang over them for six more weeks,
6 plus whatever efforts are directed at post-trial
7 briefing, that's not really a concrete measure of
8 prejudice, Your Honor.
9 On the flip side, the case isn't about
10 the discovery process. It's not about lawyers'
11 conduct. This case is about a $5 million investment
12 into a company based on what we purport to be
13 fraudulent financial information.
14 Mr. Menashe should be given his fair
15 opportunity to explore those issues. And to the
16 extent that our colleagues representing the defendants
17 have smoking guns, be able to prove that something was
18 going on, be able to, in a summary disposition, that
19 nothing is being prejudiced to those efforts if the
20 Court would accommodate scheduling trial. But by
21 contrast, it will work perhaps a severe prejudice to
22 the plaintiffs.
23 And with that, Your Honor, there is
24 also the practical issues. We have adjusted. You

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1 know, like I said, the show must go on. People have
2 found a way to make things work, but there have been
3 anomalies. There have been circumstances where we'll
4 need to be accommodating, including courts, to allow
5 this actually to be tried for what it is and not
6 adjudicated based on footfaults along the way by the
7 professionals.
8 So with that, Your Honor, I would
9 respectfully request that the trial be continued and
10 that the parties agree on a revised scheduling order
11 to allow the case to go to trial whenever the Court is
12 available in November or as early as possible
13 thereafter.
14 THE COURT: Thank you. The motion to
15 continue the trial and adjust the scheduling order is
16 denied. While the plaintiffs have told the Court
17 about suffering from staffing or supervisory issues
18 and that plaintiffs ended up disliking the stipulated
19 scheduling order that had simultaneous fact and expert
20 discovery, the plaintiffs did not seek relief under
21 that scheduling order as any deadlines approached,
22 and, instead, they waited until the eve of trial.
23 After the expiration of the deadline,
24 Rule 6(b) is very clear: the Court may grant the

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1 extension "where the failure to act was the result of
2 excusable neglect."
3 "'Excusable neglect' has been
4 interpreted ... to mean 'neglect which might have been
5 the act of a reasonably prudent person under the
6 circumstances.'" That's from *Encite v. Soni*.
7 Plaintiffs complain of the discovery
8 schedule they agreed upon, specifically simultaneous
9 fact and expert discovery, and the fact deposition
10 dates that they noticed. Plaintiffs have also blown
11 two compromise expert disclosure dates they offered
12 after blowing the one on the scheduling order.
13 Plaintiffs have not demonstrated any excusable
14 neglect. Nor does the possible Flow-Kana transaction
15 offer a basis to continue the trial. Plaintiffs
16 delayed to move on this issue as well, having known
17 about the acquirer's letter of intent since June 11th.
18 In my view, based on the limited
19 information I currently have, the best way to address
20 such looming events is to keep this case moving with
21 alacrity. This is without prejudice to plaintiffs'
22 ability to seek leave to amend their complaint, but at
23 this point, in my view, the transaction supports
24 continued expedition, not delay.

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1 As to the third-party depositions the
2 plaintiffs began to pursue in July and noticed for
3 August, those also do not support pushing the trial
4 date. That timing was, again, of plaintiffs' own
5 making without excusable neglect. It seems those
6 depositions will, in fact, occur, some with AGR
7 counsel's support, in August.
8 The effects of the COVID pandemic on
9 how trial is conducted will be assessed as trial gets
10 closer. I'm open to creative solutions and use of the
11 remote technology to which we've all, unfortunately,
12 become all too accustomed.
13 Finally, just to be abundantly clear,
14 in view of my comments about Mr. Fox's past behavior,
15 this decision to hold the trial date is not based on
16 any animus against him or plaintiffs' counsel. My
17 decision today is based on the concrete consequences
18 of how the plaintiffs have litigated their case. And
19 I do, of course, remain fully open-minded about the
20 merits of this action and do not translate my need to
21 reprimand counsel for their lack of professionalism to
22 the case that their clients have.
23 So with that, I look forward to
24 continuing to work with counsel under this new, more

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1 constructive tone to try to take this case to trial in
2 September. I will make myself available to make sure
3 that that happens and hope that we can continue in
4 this problem-solving mode. And I appreciate
5 everyone's attention and professionalism today.
6 Is there anything else that I can help
7 you with, Mr. Bellew?
8 MR. BELLEW: No, Your Honor. Thank
9 you for your time.
10 THE COURT: Thank you.
11 Mr. Meluney, anything further for
12 today?
13 MR. MELUNEY: No, Your Honor. Thank
14 you for your time.
15 THE COURT: Mr. Dooley?
16 MR. DOOLEY: No, Your Honor. Thank
17 you for your time.
18 THE COURT: All right. Thank you,
19 all. Take care. Bye.
20 (Proceedings concluded at 12:09 p.m.)
21 - - -
22
23
24

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1 CERTIFICATE
2
3 I, DOUGLAS J. ZWEIZIG, Official Court
4 Reporter for the Court of Chancery of the State of
5 Delaware, Registered Diplomate Reporter, Certified
6 Realtime Reporter, do hereby certify that the
7 foregoing pages numbered 3 through 52 contain a true
8 and correct transcription of the proceedings as
9 stenographically reported by me at the hearing in the
10 above cause before the Vice Chancellor of the State of
11 Delaware, on the date therein indicated, except for
12 the rulings, which were revised by the Vice
13 Chancellor.
14 IN WITNESS WHEREOF I have hereunto set
15 my hand at Wilmington, this 17th day of August, 2021.
16
17 /s/ Douglas J. Zweizig
----
18 Douglas J. Zweizig
Official Court Reporter
19 Registered Diplomate Reporter
Certified Realtime Reporter
20
21
22
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24

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EXHIBIT – C –

EFiled: May 23 2022 02:15PM EDT
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Case No. 2020-0459-MTZ

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OF THE
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1105 North Market Street, Suite 1100
Wilmington, Delaware 19801

RE: ***DG BF, LLC, et al. v. Michael Ray, et al.***,
Civil Action No. 2020-0459-MTZ

Dear Counsel,

I write to address the Defendants' pending Application for Attorneys' Fees and Costs (the "Application").[1] The Application seeks fees over and above those that were already shifted for discovery misconduct, citing the bad faith exception to the American Rule and a new fee-shifting provision in the governing operating

[1] Docket Item ("D.I.") 250. Citations in the form "App. —" refer to the Application. The Application attached several exhibits, which are cited in the form "App. Ex. —." The Application was also supported by two affidavits and a declaration submitted by Defendants' counsel; these are cited as "Meluney Aff. —," "Perry Aff. —," and "Anthony Decl. —," respectively. Citations in the form "AB —" refer to Plaintiffs' Answering Brief in Opposition to Defendants' Application for Attorneys' Fees and Costs, available at D.I. 265. And citations in the form "RB —" refer to Defendants' Reply Brief in Support of Its Application for Attorneys' Fees and Costs.

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agreement. Plaintiffs argue that the additional fees sought are unreasonable, and that they did not bring or litigate this matter in bad faith. Plaintiffs' litigation misconduct already resulted in dismissal of their claims, as I detailed in an order dated November 19, 2021 (the "Order").[2] This letter presumes familiarity with the Order's series of unfortunate events and its defined terms. For the additional reasons I will explain, Defendants' Application is granted.

I. Plaintiffs Litigated In Bad Faith.

My analysis begins where the Order left off. That Order explained that while other sanctions had been levied against Plaintiffs for their misconduct, they had failed to remedy and stop Plaintiffs' contempt, so no sanction other than dismissal would suffice.[3] It is difficult for me to discern any space between litigation so contumacious that only the ultimate sanction of dismissal will have any effect, and bad faith litigation. If there is any such space, this case does not fall within it. I conclude Plaintiffs litigated in bad faith.

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[2] *DG BF, LLC v. Ray* (*Order*), 2021 WL 5436868 (Del. Ch. Nov. 19, 2021); D.I. 253.

[3] *Id.* at *5–7.

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> Under the American Rule, litigants are expected to bear their own costs of litigation absent some special circumstances that warrant a shifting of attorneys' fees, which, in equity, may be awarded at the discretion of the court. The bad faith exception to the American Rule applies in cases where the court finds litigation to have been brought in bad faith or finds that a party conducted the litigation process itself in bad faith, thereby unjustifiably increasing the costs of litigation. There is no single standard of bad faith that warrants an award of attorneys' fees in such situations; rather, bad faith is assessed on the basis of the facts presented in the case. Courts have found bad faith conduct where parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims. Specific behavior that has been found to constitute bad faith in litigation includes misleading the court, altering testimony, or changing position on an issue. The bad faith exception is not lightly invoked. The party seeking a fee award bears the stringent evidentiary burden of producing "clear evidence" of bad-faith conduct.[4]

Defendants have produced such evidence. First, Plaintiffs "unnecessarily prolonged [and] delayed litigation."[5] By way of example:

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[4] *Beck v. Atl. Coast PLC*, 868 A.2d 840, 850–51 (Del. Ch. 2005) (footnotes omitted) (citing *Barrows v. Bowen*, 1994 WL 514868, at *1 (Del. Ch. Sept. 7, 1994), and *Arbitrium (Cayman Is.) Handels v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997), *aff'd* 720 A.2d 542 (Del. 1998), and *Jacobson v. Dryson Acceptance Corp.*, 2002 WL 31521109, at *16 (Del. Ch. Nov. 1, 2002), and *Shapiro v. Healthcare Acq., Inc.*, 2004 WL 878018, at *1 (Del. Ch. Apr. 20, 2004)).

[5] *Id.* at 851.

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- "Rather than focusing on discovery, Plaintiffs engaged in motion practice, filing a motion to appoint a receiver over AGR (which Plaintiffs withdrew after Defendants moved to strike it) and two motions to extend the scheduling order (which Defendants briefed and which were denied for failure to establish excusable neglect). Plaintiffs also took time to amend their nearly identical complaint in a parallel action pending before the Supreme Court of the State of New York."[6]
- Plaintiffs opposed a motion to compel "without offering any substantive grounds for their opposition."[7]
- "Plaintiffs' forwarding counsel was extremely obstructive at the Court of Chancery Rule 30(b)(6) deposition of Menashe as DG BF's representative on document retention. Defendants were again forced to resort to motion practice, and were awarded a second deposition on August 17."[8]
- After the Court ordered Plaintiffs to image and search Demeter's server, Demeter (which Menashe controls) filed a motion to quash production of the server image.[9] "And again, rather than attending to their own obligations, Plaintiffs took countermeasures, demanding on August 24 that *Plaintiffs* image *AGR*'s server 'for all financial records going back to when [Menashe] invested in the company.'"[10]
- Plaintiffs' utter failure to properly collect, produce, and log discovery, in knowing and brash contempt of orders as detailed in the Order, also contributed substantially to the well-over thirty motions or letter applications filed in this case over eighteen months.[11]

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[6] *Order*, 2021 WL 5436868, at *2 (footnotes omitted) (citing D.I. 147, D.I. 152, D.I. 158, D.I. 166, D.I. 182, D.I. 184, D.I. 195, D.I. 202, and D.I. 212).

[7] *Id.* at *3 (citing D.I. 172).

[8] *Id.* at *4 (footnotes omitted) (citing D.I. 180, D.I. 196, D.I. 197, and D.I. 204).

[9] *Id.* (citing D.I. 234).

[10] *Id.* (citing D.I. 231, Ex. 9).

[11] *See, e.g.*, D.I. 146; D.I. 158; D.I. 180; D.I. 182; D.I. 212; D.I. 225; D.I. 231; D.I. 236; D.I. 238; D.I. 250; *see also* D.I. 272 at 6–7.

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Second, Menashe made false statements on the record.

- "Menashe used text messaging to conduct AGR business, but continued his practice of actively deleting his text messages through the pendency of this litigation. Menashe testified that he did not text about business matters, but that testimony was undermined by texts Defendants produced; when confronted, Menashe then testified he deleted all such messages."[12]
- Menashe also represented in briefing, attempting to defend his litigation misconduct, that he had never been involved in litigation before.[13] This was demonstrably false.[14]

Finally, Plaintiffs "knowingly asserted frivolous claims," most significantly a claim that Defendants fraudulently induced Plaintiffs into investing in AGR by presenting false financials that were later revised downward.[15] Plaintiffs' litigation conduct regarding their anchoring fraud claim betrays that they knew that claim was frivolous all along.[16]

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[12] *Order*, 2021 WL 5436868, at *2 (footnotes omitted) (citing D.I. 146, and D.I. 225).

[13] D.I. 237 at 2.

[14] *See* D.I. 242, Ex. 31; D.I. 242, Ex. 32.

[15] *See Beck*, 868 A.2d at 851.

[16] *See* Sam Reisman, *Chancery Preserves Investor's Fraud Claim Against Pot Co.*, LAW360 (March 2, 2021, 8:40 PM), https://www.law360.com/articles/1360493 (reporting that Plaintiffs' counsel described the fraud claim as "the crux of the dispute").

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- Plaintiffs "refused to answer several core questions, including to identify the due diligence they performed relating to DG BF's investment in AGR, and to identify the material omissions Plaintiffs contend were concealed and the financial statements or projections that Plaintiffs believed included misrepresentations."[17]
- "Plaintiffs' failure to answer written discovery substantially weakened that [fraud] claim, as they declined to identify any omissions or misrepresentations in written discovery and so were precluded from offering any at trial."[18]
- "Plaintiffs have filed a claim for fraudulent inducement in New York State based on these same facts, telling that court that New York state and federal courts have exclusive jurisdiction over any disputes arising out of, or relating to the Purchase Agreement, ***including, without limitation, Plaintiff's claims that Defendants fraudulently induced it to enter into the Purchase Agreement*** by which it invested in AGR. Plaintiffs withdrew all claims relating to that Purchase Agreement from this case."[19]

And after the Court ordered Plaintiffs' repositories to be turned over to Defendants for review by Defendants' counsel, Defendants' counsel discovered a June 2020 email that revealed Menashe was never concerned that the financials he saw fraudulently induced his investment.[20] Menashe forwarded an email he sent his

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[17] *Order*, 2021 WL 5436868, at *2 (citing D.I. 183).

[18] *Id.* at *7.

[19] *Id.* (alterations and internal quotation marks omitted) (quoting D.I. 212, Ex. 9 ¶ 7).

[20] App. Ex. 2. Plaintiffs should have produced this email in discovery.

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counsel to a friend; in the underlying email, Menashe gave his counsel his thoughts on a draft complaint:

> - The issue is NOT that financials were revised downward – so avoid mentioning $s and %s – the issue is they were not transparent, did not disclose Roach issue, and extended Series E to a closing date of Oct 31 when they knew company was insolvent (per BOD mtg 34 days later)
> - Need to focus on the key issues (mis-management, potential fraud, covering up actions, no governance etc,
> - Lastly, there is no mention of my demands I have presenting since mid February including now repricing Series D and getting Vlad completely out of company including Board, and Cary on Board, indemnification to me for financials, etc… my list. Instead it says I want my $5m back which is fine, but think we should list demands instead[21]

Menashe's focus on corporate governance over fraudulent inducement is consistent with Menashe's goal in May 2020, as related by his friend who introduced Menashe to his counsel:

> As I see it the Company has not done what it should have done to protect his investment and, if appropriate, could use the Fox review and potential "shot over the bow" to ensure his ownership and rights are protected………. and begin serious discussions.[22]

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[21] *Id.* (formatting in original).

[22] App. Ex. 1 (formatting in original).

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Defendants' counsel also discovered a text message, which Menashe had deleted, in which he proposed leading the next round of financing—after the projections were revised.[23] Menashe's "shot across the bow" comprised a fraud claim that he knew was a blank. I conclude Menashe knowingly and in bad faith pressed litigation based on a frivolous claim.

I conclude that fee-shifting is warranted under the bad faith exception.[24] I do not reach whether the fee-shifting provision in the Company's operating agreement, introduced after this litigation began, can compel fee-shifting in this case.

II. The Fees Defendants Seek Are Reasonable.

Defendants' Application, supported by the necessary Court of Chancery Rule 88 affidavits, requests over two million dollars in fees and expenses incurred by counsel for the individual defendants and separate counsel for the nominal defendant.[25] Of that amount, $608,666.88 is tied to previous fee awards and fees on fees for the Application;[26] the remainder is requested under today's bad faith award.

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[23] *See* D.I. 242, Ex. 24.

[24] This includes the attorneys' fees incurred in connection with the temporary restraining order and the Series E financing. *See* AB at 19–20.

[25] *See* Meluney Aff. ¶¶ 2–5; Woodward Aff. ¶¶ 3–6; Anthony Decl. ¶¶ 3–5.

[26] App. at 14–15.

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"Delaware law dictates that, in fee shifting cases, a judge determine[s] whether the fees requested are reasonable."[27] The Court "has broad discretion in determining the amount of fees and expenses to award."[28] The Court reviews a fee application pursuant to the factors set forth in Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.[29]

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[27] *Mahani v. Edix Media Gp., Inc.*, 935 A.2d 242, 245 (Del. 2007) (citing Del. Lawyers' R. Prof'l Conduct 1.5(a)(1)(a)); *see also Aveta v. Bengoa*, 2010 WL 3221823, at *4 (Del. Ch. Aug. 13, 2010) (noting that the Court assesses fee awards for reasonableness).

[28] *Black v. Staffieri*, 2014 WL 814122, at *4 (Del. Feb. 27, 2014) (TABLE) (citing *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005)).

[29] *Mahani*, 935 A.2d at 246 (citing Del. Lawyers' Rules of Prof'l Conduct R. 1.5(a)(1)).

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"Determining reasonableness does not require that this Court examine individually each time entry and disbursement."[30] Nor does it "require the Court to assess independently whether counsel appropriately pursued and charged for a particular motion, line of argument, area of discovery, or other litigation tactic."[31] "A party's expenses are reasonable if they were actually paid or incurred, were thought prudent and appropriate in the good faith professional judgment of competent counsel, and were charged at rates, or on a basis, charged to others for the same or comparable services under comparable circumstances."[32] "For a Court to second-guess, on a hindsight basis, an attorney's judgment" as to whether work was necessary or appropriate "is hazardous and should whenever possible be avoided."[33]

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[30] *Aveta*, 2010 WL 3221823, at *6 (citing, among other cases, *M & G Polymers USA, LLC v. Carestream Health, Inc.*, 2010 WL 1611042, at *76 (Del. Super. Apr. 21, 2010) (finding no authority that "requires this Court to engage in a line-by-line analysis of the components of an attorneys' fee application when an award of fees is based upon the bad faith exception to the American Rule")).

[31] *Weil v. VEREIT Operating P'ship, L.P.*, 2018 WL 834428, at *12 (Del. Ch. Feb. 13, 2018) (internal quotation marks omitted) (quoting *Danenberg v. Fitracks, Inc.*, 58 A.3d 991, 997 (Del. Ch. 2012)).

[32] *Id.* (alterations and internal quotation marks omitted) (quoting *Delphi Easter P'rs Ltd. P'ship v. Spectacular P'rs, Inc.*, 1993 WL 328079, at *9 (Del. Ch. Aug. 6, 1993)).

[33] *Arbitrium*, 1998 WL 155550, at *4; *accord Sparton Corp. v. O'Neil*, 2018 WL 3025470, at *6 (Del. Ch. June 18, 2018) (noting that "the hourly rates charged by Defendants' counsel are not excessive, and the staffing of attorneys appears appropriate" and should not be second-guessed); *Weil*, 2018 WL 834428, at *12 (stating that "whether counsel appropriately pursued and charged for a particular . . . litigation tactic" should not be second-guessed (internal quotation marks omitted) (quoting *Fitracks*, 58 A.3d at 997));

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In addition, "[w]hen awarding expenses as a contempt sanction or for bad faith litigation tactics, this Court takes into account the remedial nature of the award."[34] In those cases, the fee award "is designed to make whole the party who was injured by the other side's contumely. The remedial nature [of] the award commends putting primary emphasis on reimbursing the injured party. The results achieved are of secondary importance."[35] And when assessing the aggregate fees requested in situations involving contempt or bad faith, this Court considers whether they "are within the range of what a party reasonably could incur over the course of . . . pursuing an adversary engaged in a mix of open defiance, evasion and obstruction."[36]

Aveta, 2010 WL 3221823, at *8 (expanding the rationale and noting where "staffing appears appropriate" it "need not be second-guessed"). Still, the Court may consider "whether the number of hours devoted to litigation was excessive, redundant, duplicative or otherwise unnecessary," and may decrease an award where the applicant's "own litigation efforts have in some ways been less than ideal in terms of timeliness or prudent focus." *Fitracks*, 58 A.3d at 996 (internal quotation marks omitted) (quoting *Mahani*, 935 A.2d at 247–48); *Auriga Cap. Corp. v. Gatz Props.*, 40 A.3d 839, 882 (Del. Ch. 2012), *aff'd*, 59 A.3d 1206 (Del. 2012).

[34] *Aveta*, 2010 WL 3221823, at *6 (citing *In re SS &C Techs., Inc. S'holders Litig.*, 2008 WL 3271242, at *3 n.14 (Del. Ch. Aug. 8, 2008), and *Arbitrium*, 1998 WL 155550, at *3).

[35] *Id.* (citation omitted).

[36] *Id.* (internal quotation marks omitted).

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Against this standard, Plaintiffs dispute Defendants' requested fees, pointing to tepid "[i]ndicators [s]uggesting the [c]laimed [f]ees are [q]uestionable."[37] First, Plaintiffs object to the time Defendants' counsel spent on preparing their reply brief and for oral argument on their motion to dismiss. But Plaintiffs' amended complaint "span[ned] one hundred forty-three pages and offer[ed] twenty-four counts, taking readers on a comprehensive tour of the realms of fiduciary duty, contract, and tort."[38] In this regard, Plaintiffs' "shot across the bow" resembled buckshot: the work to clean the wounds was onerous, by design. Plaintiffs also sought and obtained an expedited schedule.[39] Plaintiffs' complaint that Defendants' counsel had to work many hours to quickly seek dismissal of those many counts fails to paint those hours as unreasonable. This is particularly so because the litigation was expedited,[40] the

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[37] AB at 18.

[38] *DG BF, LLC v. Ray*, 2021 WL 776742, at *1 (Del. Ch. Mar. 1, 2021).

[39] *See* D.I. 2; D.I. 6; D.I. 28; D.I. 36.

[40] *See, e.g.*, *Brandt v. CNS Response, Inc.*, 2009 WL 2425757, at *1 (Del. Ch. Aug. 3, 2009) (recognizing the risk of "unnecessary confusion and expenditure of time and attorneys' fees in an expedited matter"); *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 364 n.6 (Del. Ch. 1999) (considering, on a fee application, whether fees were incurred "in litigation conducted on a non-expedited schedule"), *aff'd sub nom. First Interstate Bancorp v. Williamson*, 755 A.2d 388 (Del. 2000).

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fees were incurred while Defendants were expecting to pay them,[41] and today's fee award is intended to be remedial.[42]

Second, Plaintiffs complain that Defendants' counsel billed for reviewing the nearly identical lawsuit Plaintiffs filed in New York. These fees, particularly as modified in Defendant's reply brief, are reasonable; it was necessary for Defendant's counsel to be informed about Plaintiffs' second "shot across the bow."[43] Third, Plaintiffs object to Defendants' work responding to Plaintiffs' bungling of the expert identification deadline.[44] Defendants explain that they interviewed potential rebuttal experts in the event Plaintiffs achieved an extension and disclosed experts. This was prudent. Fourth, Plaintiffs object that Defendants made travel arrangements to depose Menashe in his home state of Montana as he requested, and to attend the looming trial.[45] These costs were reasonably incurred; I do not see how Defendants

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[41] *See, e.g.*, *Aveta*, 2010 WL 3221823, at *6 (noting that one "indication" of reasonableness is the "reality" that when the fee-seeking party litigated the matter and "paid the expenses it now seeks to recover, [it] did not know that it would be able to shift those expenses to" the other party).

[42] *See supra* notes 34–36.

[43] RB at 9 n.7.

[44] AB at 21–22.

[45] *Id.* at 22.

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could have been prepared to take Menashe's deposition or attend the trial without them.

Fifth, Plaintiffs contend the documentation of the fees shifted under previous awards is "patchy."[46] In assessing the reasonableness of Defendants' requested fees, "[t]he Court of Chancery has discretion in determining the level of submission required."[47] I conclude Defendants' Affidavits are adequate to give Plaintiffs notice of the fees.

Finally, Plaintiffs lodge a conclusory objection to the time spent pursuing fees on fees.[48] But the path of this case has been extraordinarily contentious and time-consuming, with zigs and zags that take time to document. Plaintiffs themselves sought an enlarged word count and extensive briefing schedule to respond to the Application.[49] I conclude Defendants' fees on fees are reasonable.

Defendants shall submit a proposed order reflecting the modification to the amount sought set forth in their reply brief. With that, I believe the only issue remaining before me is Defendants' motion for damages from the temporary

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[46] *Id.*

[47] *Aveta*, 2010 WL 3221823, at *3 (citing *Cohen v. Cohen*, 269 A.2d 205, 207 (Del. 1970)).

[48] AB at 22.

[49] *See* D.I. 263.

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restraining order. I ask Defendants to advise if any further submissions are requested, or to advise that the motion is ready to be considered on the papers. Those submissions are due within twenty days.

Sincerely,

/s/ Morgan T. Zurn

Vice Chancellor

MTZ/ms

cc: All Counsel of Record, via *File & ServeXpress*

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EXHIBIT – D –

GRANTED

EFiled: Jul 07 2022 03:55PM EDT
Transaction ID 67800077
Case No. 2020-0459-MTZ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DG BF, LLC, a Delaware limited liability company, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company; and JEFF A. MENASHE, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company; Plaintiffs, v. MICHAEL RAY, an individual, and VLADIMIR EFROS, an individual, and AMERICAN GENERAL RESOURCES, LLC, a Delaware limited liability company Defendants. and AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company, Nominal Defendant.	)	C.A. No. 2020-0459-MTZ

[PROPOSED] FINAL JUDGMENT AND ORDER OF DISMISSAL

WHEREAS, on June 11, 2020, Plaintiffs DG BF, LLC and Jeff A. Menashe (collectively "Plaintiffs") filed a Verified Complaint and Motion to Expedite Proceedings and for Status Quo Order [D.I. 1] against Defendants American General Resources, LLC, Vladimir Efros, and Michael Ray (collectively, "Defendants").

WHEREAS, on August 11, 2020, Plaintiffs filed a First Amended Verified Complaint [D.I. 49] ("Amended Complaint").

WHEREAS, on October 20, 2020, Plaintiffs filed a Notice of Voluntary Dismissal Without Prejudice Pursuant to Rule 41(a)(1) [D.I. 105], dismissing all claims "based on or arising from any other written agreement but the Sixth Amended and Restated Limited Liability Agreement."

WHEREAS, on March 1, 2021, after full briefing on Defendants' Motion to Dismiss, the Court dismissed 17 of Plaintiffs' 24 claims in the Amended Complaint in a Memorandum Opinion [D.I. 116].

WHEREAS, on August 27, 2021, the Court issued a letter to counsel regarding several outstanding discovery motions [D.I. 243]. In that letter, the Court advised the parties that it would be dismissing the case and entering judgment in favor of Defendants.

WHEREAS, on November 19, 2021, the Courted entered an Order of Dismissal [D.I. 253], which dismissed Plaintiffs' case with prejudice and entering judgment in Defendants' favor.

WHEREAS, on May 23, 2022, the Court issued a decision granting Defendants' Application for Attorneys' Fees and Costs [D.I. 273].

WHEREAS, on June 21, 2022, the Court entered the Order Granting Defendants' Application for Attorneys' Fees and Costs [D.I. 277] ("Fee Order"),

seeking recovery of $2,247,326.56 ("Fee Award"). The Fee Order also required that counsel for the parties submit a proposed form of final order and judgment within 10 days after the Court had ruled on *Defendants' Motion to Recover Damages Resulting from Plaintiffs' Improperly Issued Injunction* [D.I. 93] (the "TRO Damages Motion").

WHEREAS, on June 27, 2022, the Court rendered a decision denying the TRO Damages Motion [D.I. 278].

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. Final judgment is entered in favor of Defendants.
2. As stated in the Fee Order, Plaintiffs are jointly and severally liable for and required to pay $2,247,326.56 within thirty (30) days of the Court's entry of the Fee Order.
3. Judgment is hereby entered in Defendants' favor in the amount of the Fee Award.
4. The Fee Award will begin to accrue post judgment interest at 6.75%, which is the legal rate of interest as of the date of the entry of this Order.

____

Vice Chancellor Morgan T. Zurn

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	Morgan Zurn
File & Serve Transaction ID:	67798580
Current Date:	Jul 07, 2022
Case Number:	2020-0459-MTZ
Case Name:	STAY DISC/ CONF ORD/ DG BF, LLC vs Michael Ray
Court Authorizer:	Morgan Zurn

/s/ Judge Morgan Zurn

CERTIFICATE OF SERVICE

I, Sean J. Bellew, certify that on October 27, 2022, I caused a copy of the foregoing APPELLANTS DG BF, LLC AND JEFF A. MENASHE'S [CORRECTED] OPENING BRIEF [PUBLIC VERSION DATED OCTOBER 27, 2022] to be served on the following counsel of record, via File & ServeXpress:

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Dated: October 27, 2022

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