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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUNAR REPRESENTATIVE, LLC, Plaintiff-Below/Appellant, v. AMAG PHARMACEUTICALS, INC. Defendant-Below/Appellee.	)	No. 227, 2023 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2019-0688-JTL

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from a transcript ruling and accompanying order of the Court of Chancery entering a default judgment against Plaintiff-Below Appellant Lunar Representative, LLC ("Lunar") based on errors of judgment in the course of discovery by Lunar's counsel, an extreme sanction that Lunar respectfully submits was not justified by the facts or legal precedent.[1] In particular, the trial court concluded that sanctions were warranted because Lunar missed the deadline for substantial completion of document production and because Lunar purportedly failed to prosecute the action, a finding that Lunar strongly disputes. Despite the fact that only Defendant-Below/Appellee AMAG Pharmaceuticals, Inc.'s ("AMAG") documents are core to the dispute and that AMAG itself failed to produce any documents for a period of almost two years, it opportunistically moved for sanctions after Lunar failed to produce documents just four months after they were requested (and after AMAG had indicated that it wanted to engage in settlement discussions because of a potential impending bankruptcy filing by its parent corporation). Admittedly, Lunar's lead counsel below should have been more

[1] The transcript of the Oral Argument Re Defendant's Motion For Order To Show Cause And The Court's Ruling, dated May 26, 2023, and the Order Granting In Part Defendant's Motion For Order To Show Cause Why Plaintiff Should Not Be Sanctioned For Violating Case Scheduling Order, dated May 26, 2023, are attached hereto as Exhibits A and B, respectively.

proactive in late 2022 and early 2023 in communicating with AMAG and the trial court; however, that error in judgment, without any attendant bad faith, does not support the extreme sanction of a default judgment.[2]

The underlying claims in this action arise out of AMAG's acquisition of Lumara Health Inc. ("Lumara Health"), a privately-held pharmaceutical company specializing in women's health. Under the terms of the parties' Agreement and Plan of Merger dated September 28, 2014 (the "Merger Agreement"), the former equity holders of Lumara Health were entitled to earn-out payments if certain sales milestones were met related to Lumara Health's chief asset, Makena. Lunar, as the appointed representative of the former equity holders of Lumara Health, brought this action alleging AMAG breached its obligations in an effort to avoid the third milestone payment of $50 million.

Lunar initiated this action on August 29, 2019. (A1). AMAG responded by moving to dismiss. (A176). Following the filing of an amended complaint by Lunar and a second motion to dismiss by AMAG, the trial court entered an order dated August 21, 2020, denying AMAG's motion to dismiss. (A320, A476, A668). Thereafter, Lunar actively sought discovery in support of its claims. In February

[2] Non-Delaware lead counsel who represented Lunar in connection with the trial court proceedings has been replaced on this appeal and for purposes of any further proceedings below by Debevoise & Plimpton LLP. (A1160).

2021, Lunar served its initial set of document requests on AMAG and pursued and obtained third-party discovery from Grant Thornton LLP, Cantor Fitzgerald, L.P., and PricewaterhouseCoopers LLP. (A697, A712, A747, A782). Lunar also served a second and third set of document requests and a set of interrogatories on AMAG. (A873, A984).

In August 2022, AMAG, which had not yet produced a single document in response to Lunar's discovery requests, raised the possibility of discussing settlement on the premise that Lunar's claims did not have significant value. Lunar expressed skepticism, but in any event responded that it could not evaluate AMAG's invitation without first having an opportunity to review AMAG's discovery. AMAG did not make its initial production of documents until December 23, 2022, and thereafter made subsequent productions on January 20, 2023 and January 31, 2023. The parties dispute whether AMAG has produced all responsive documents.

The central issue in the underlying action—whether AMAG used commercially reasonable efforts to market and sell Makena—turns entirely on AMAG's conduct and thus on AMAG's discovery. As a former equity holder, Lunar had no involvement during the relevant period in AMAG's business or its efforts to market and sell Makena. It is therefore unsurprising that AMAG did not serve any affirmative discovery on Lunar until August 2022—three years after the commencement of this action. (A908).

On February 2, 2023, shortly after the January 31, 2023 deadline for substantial completion of document production, the parties had a follow up discussion by telephone regarding case scheduling and potential settlement negotiations. (A1049; A1063). Lunar had not produced any documents prior to the substantial completion deadline, and AMAG therefore raised the issue of a revised case schedule and timing for Lunar's discovery plan. The primary focus of the February 2, 2023 call, however, was on AMAG's renewed suggestion that the parties engage in settlement discussions. AMAG injected the added consideration that the financial condition of AMAG's parent corporation, Covis Pharmaceuticals Inc. ("Covis Pharmaceuticals"), was dire and could lead to a bankruptcy filing. A Covis Pharmaceuticals bankruptcy filing likely would have a significant impact on Lunar's ability to collect any judgment in this case. Counsel for Lunar left the call with the understanding that a review of AMAG's documents, which had only recently been produced on December 23, 2022, January 20, 2023, and January 31, 2023, was of paramount importance to evaluate AMAG's invitation to discuss settlement in light of the threat of a potential Covis Pharmaceuticals bankruptcy.

On March 23, 2023, while Lunar was continuing to evaluate its position in response to AMAG's invitation to discuss settlement, AMAG filed a Motion For Order To Show Cause Why Plaintiff Should Not Be Sanctioned For Violating Case Scheduling Order (the "Motion"). (A1010). Following briefing and oral argument,

the trial court granted, by transcript ruling, AMAG's Motion in part. Specifically, on May 26, 2023, the trial court entered the Show Cause Order (i) granting a default judgment, (ii) requiring Lunar to pay AMAG's attorneys' fees and costs associated with the Motion, and (iii) requiring Lunar to pay AMAG's costs incurred in the litigation.

Lunar's counsel should have been more diligent in meeting the January 31, 2023 substantial completion deadline and providing a discovery plan (or, at a minimum, should have engaged with opposing counsel and the trial court on a revised schedule). However, Lunar's counsel's conduct and the totality of the circumstances do not support the extreme sanction of a default judgment. This is especially true here, where Lunar acted appropriately and in good faith and did not fail, in any respect, to provide responsive discovery documents to counsel, at counsel's request, in a timely manner. Both before and after the substantial completion deadline the parties corresponded regarding an adjustment of the case schedule and potentially engaging in settlement discussions. In light of these discussions, counsel for Lunar focused on evaluating the value of its case, which turned on AMAG's discovery, rather than producing its own limited discovery. This was perhaps an error in judgment on the part of Lunar's counsel and admittedly a failure to suitably communicate with AMAG (and its own client), but it was not willful misconduct warranting the terminating sanction of a default judgment. To

the extent any sanctions were warranted, lesser sanctions were available to address the complained of conduct.

Moreover, contrary to the trial court's reasoning, Lunar did not fail to prosecute this case. Lunar served multiple rounds of discovery on AMAG and pursued and obtained third-party discovery. (A697, A712, A747, A782, A873, A984). At the time AMAG moved for sanctions, Lunar was actively evaluating this discovery so it could respond to AMAG's invitation to engage in settlement discussions, and was doing so with the reasonable understanding that the parties would amend the case schedule. In granting AMAG's Motion, the trial court failed to consider the totality of the record and wrongly found a persistent failure to prosecute and willful misconduct on the part of Lunar's counsel that could properly be remedied only by the extreme sanction of a default judgment. For the reasons fully set forth herein, the trial court's ruling and order was an abuse of discretion and should be reversed, with this Court remanding the action to the Court of Chancery for further proceedings.

SUMMARY OF ARGUMENT

1. The trial court abused its discretion in finding that the record demonstrated a persistent failure to prosecute and willful misconduct supporting entry of the extreme sanction of a default judgment. Although Lunar did not satisfy the January 31, 2023 substantial completion deadline, the trial court record as a whole demonstrates that Lunar actively litigated its claims. Lunar affirmatively sought discovery from AMAG and several third parties. As set forth in the parties' joint status report on July 21, 2022 (A886), throughout the litigation the parties worked cooperatively on discovery issues. Lunar's counsel should have been more proactive in late 2022 and early 2023 in meeting the substantial completion deadine or confirming in writing its understandings, which it believed were mutual, regarding scheduling adjustments and case priorities. However, this error in judgment without any attendant bad faith does not support entry of a default judgment in light of the overall trial record and facts and circumstances surrounding the actions of Lunar's counsel.

2. The trial court abused its discretion by entering a default judgment where there was no evidence that Lunar, the party litigant, had any involvement in the purported willful misconduct and failure to prosecute. Although as a general rule a party is burdened with its attorney's errors, the extreme remedy of a default

judgment is excessively punitive when counsel, not the party, bears the responsibility for failure to comply with a court order.

3. The trial court abused its discretion in finding that prejudice to AMAG supported the entry of a default judgment. There was little, if any, prejudice to AMAG as a result of Lunar's failure to meet the substantial completion deadline. As evidenced by AMAG's own actions in waiting three years to serve affirmative discovery, the clear focus of this action is on AMAG's conduct. AMAG is entitled to discovery from Lunar, but the failure of Lunar to produce the limited number of responsive documents in its possession by January 31, 2023, did not cause any meaningful prejudice to AMAG, let alone prejudice to a degree supporting entry of a default judgment. This is particularly true here, where the parties had exchanged correspondence recognizing the need to adjust the case schedule. Moreover, the trial court's reliance on systemic prejudice to the judicial system did not support the entry of a default judgment. When the totality of the trial record is examined and the explanation of Lunar's counsel considered, this case does not present facts and circumstances sufficiently egregious to warrant a terminating sanction to avoid harm to Court of Chancery practice.

4. The trial court abused its discretion in granting a default judgment when lesser sanctions were available to avoid unfairness to AMAG and sufficiently penalize Lunar. The trial court had available to it a menu of lesser monetary and

evidentiary sanctions that have been employed by the Court of Chancery and the Superior Court in similar instances. A lesser sanction would have been more appropriate under the totality of the circumstances of this case, particularly where, as here, there had been no prior acts of contempt by Lunar and no prior warnings from the trial court. Where Lunar was not put on prior notice of any failure of diligence by its counsel, the immediate resort to the most extreme sanction, where a lesser sanction was available, was an abuse of discretion by the trial court.

STATEMENT OF FACTS

A. The Parties.

Plaintiff-Below/Appellant Lunar Representative, LLC is a Delaware limited liability company. (A324). Under the terms of the Merger Agreement, Lunar is the appointed representative of the former holders of Lumara Health common stock, stock options, and restricted stock units. (A320).

Defendant-Below/Appellee AMAG Pharmaceuticals, Inc. is a Delaware corporation headquartered in Waltham, Massachusetts. (A324). AMAG acquired Lumara Health pursuant to the Merger Agreement dated September 28, 2014. (A320).

B. Lunar Initiates This Action To Enforce The Earn-Out Provision In AMAG's Merger Agreement With Lumara Health.

Lunar filed the original Complaint in this action on August 29, 2019 (A22), and thereafter amended its complaint on January 9, 2020 (A320). Lunar alleges that AMAG breached its obligations under the Merger Agreement, thereby depriving the former equity holders of Lumara Health of $50 million in earn-out payments. (A320-A321).

At the closing of the merger, AMAG paid $600 million in cash plus $75 million in stock to the former Lumara Health equity holders. (A321, A327). In addition to the $675 million paid at closing, AMAG agreed to provide contingent consideration of up to $350 million (the "Milestone Payments"). (*Id.*). The

Milestone Payments were based on the achievement of certain sales milestones for Lumara Health's principal asset, Makena, which was the only FDA approved product indicated to reduce the risk of preterm birth in women who were pregnant with one baby and had delivered one preterm baby in the past. (A321-A322). The Merger Agreement provided for up to three Milestone Payments, each triggered upon the achievement of "Net Sales" (as defined in the Merger Agreement) of $300 million, $400, million, and $500 million, during specified time periods. (A321, A327-328). AMAG agreed to use "commercially reasonable efforts" (as defined in the Merger Agreement) to market and sell Makena. (A322, A327-A328).

In October 2016, AMAG paid the first Milestone Payment of $100 million. (A323, A330). The third milestone was also achieved and paid by AMAG. (A669). Based on public guidance that Makena sales would be in the range of $410 million to $440 million on a last-twelve-month basis, AMAG appeared poised to make the second Milestone Payment of $50 million. (A323, A330).[3] However, AMAG ultimately reported actual sales of $393 million—slightly below the $400 million in net sales required to trigger the second Milestone Payment. (A323, A330). Lunar alleges that AMAG took active steps, including changing accounting methodologies,

[3] The Merger Agreement provided for a possible $50 million set off of the second Milestone Payment if the third Milestone Payment had been met or was required to be made. (A321-A322, A327). Because the third Milestone Payment was made, the amount due under the second Milestone Payment was $50 million. (A323).

to slow down Makena sales in order to miss the $400 million second Milestone Payment threshold, thereby failing to use commercially reasonable efforts to market and sell Makena according to its obligations under the Merger Agreement. (A330-A331).

C. AMAG's Motions To Dismiss.

On September 25, 2019, AMAG filed a motion to dismiss Lunar's Verified Complaint (A176) and filed its opening brief in support thereof on November 7, 2019 (A179). In response to AMAG's motion to dismiss, Lunar filed a Verified Amended Complaint pursuant to Court of Chancery Rule 15(aaa). (A320). AMAG again moved to dismiss. (A476). Following the completion of briefing on AMAG's motion to dismiss (A480, A510, A627, A651), by Order dated August 21, 2020, the trial court denied AMAG's motion to dismiss. (A668).

On September 18, 2020, AMAG filed its Answer to the Verified Amended Complaint. (A677).

D. The Parties Engage In Discovery Between February 2021 And January 2023.

Lunar served its First Set of Requests for Production Directed to AMAG on February 10, 2021. (A697). Concurrently therewith, on February 11, 2021, Lunar served third-party subpoenas on Grant Thornton LLP (A712), Cantor Fitzgerald, L.P. (A747), and PricewaterhouseCoopers LLP (A782). AMAG served its Responses and Objections to Lunar's First Set of Requests for Production on March 12, 2021.

(A817). AMAG did not produce any documents in connection with its written responses and objections. On July 23, 2021, the trial court granted, with modifications, the parties' Stipulation and Order for the Production and Exchange of Confidential and Highly Confidential Information. (A846).

By Order dated July 7, 2022, the trial court requested the parties provide a joint status report (A871), which the parties submitted by letter dated July 21, 2022, along with a proposed scheduling order (A886). As represented to the trial court in the parties' joint status report:

> The current status of the case is that the Parties remain engaged in fact discovery. Since the Court granted the Stipulation for the Production and Exchange of Confidential and Highly Confidential Information on July 23, 2021, multiple non-parties have produced documents, and the Parties have worked cooperatively on the discovery that remains, including recently served additional document requests.

(A886).

The trial court initially denied the parties' proposed scheduling order because it permitted the filing of summary judgment motions as opposed to first requiring the parties to request permission from the trial court for the opportunity to move for summary judgment. (A894). Following the submission of a revised proposed scheduling order addressing the trial court's concern, the Order Governing Case Schedule was entered on August 8, 2022. (A901).

In the interim, on July 18, 2022, Lunar served its Second Set of Requests for Production Directed to AMAG. (A873). As of that date, AMAG had not produced

a single document, despite Lunar's First Request for Production having been pending for nearly a year and a half. In addition, though it was nearly two years after its motion to dismiss was denied and three years after the case was initiated, AMAG had not yet served any affirmative discovery on Lunar.

AMAG served its First Set of Requests for Production and First Set of Interrogatories on August 17, 2022, shortly after the trial court requested the joint status report. (A908). Also on August 17, 2022, AMAG served its Responses and Objections to Lunar's Second Set of Requests for Production. (*Id.*).

On November 28, 2022, AMAG filed a motion to compel discovery responses from Lunar. (A942). The parties amicably resolved AMAG's motion to compel without the need for court intervention. (A982).

On December 23, 2022, AMAG made its first document production, which consisted of 26,594 pages of documents. (A1063). On January 19, 2023, Lunar served its Third Set of Requests for Production and First Set of Interrogatories directed to AMAG. (A984). The next day, January 20, 2023, AMAG made a second production of documents consisting of 44,615 pages of documents. (A1063). Thereafter, on January 31, 2023, AMAG made a third production of documents consisting of 20,104 pages of documents. (*Id.*). The parties dispute whether or not AMAG properly withheld certain documents from production on the basis that they

are protected from disclosure as being trade secrets or under the business strategy immunity. (A1110).[4]

E. The Parties Correspond In Late 2022 And Early 2023 Regarding The Completion Of Discovery, An Amended Schedule, And Potential Settlement Discussions.

At or around the time the trial court entered the scheduling order in August 2022, counsel for AMAG broached the possibility of the parties engaging in settlement discussions. (A1062-A1063). Counsel for AMAG suggested discussing settlement because of the purported weakness of Lunar's claims. (*Id.*). Counsel for Lunar declined AMAG's invitation because any meaningful settlement discussions would require a review of AMAG's discovery—which it had yet to produce—in order to evaluate whether AMAG had failed to use commercially reasonable efforts in the marketing and sales of Makena. (*Id.*).

Between August 2022 and February 2, 2023, counsel for the parties exchanged several follow-up emails regarding document production and scheduling. (A1070). On February 2, 2023, two days after the deadline for substantial completion for production of documents, counsel for the parties convened a

[4] In addition, Lunar contends that AMAG has not produced all of the relevant monthly sales information regarding Makena. While Lunar contests the completeness and adequacy of AMAG's production, because of the trial court's ruling and order, Lunar has not had an opportunity to complete a meet-and-confer process and raise these issues with the trial court.

telephone call to discuss the case status. (A1061-A1064). Lunar did not meet the January 31, 2023 deadline for substantial completion of document production, as counsel for Lunar conceded in the trial court. (Exhibit A at 38-40). As the colloquy between the trial court and counsel suggested, and as more fully set forth in the Affidavit of Joshua D. Liston in Support of Plaintiff's Opposition to Defendant's Motion for Order to Show Cause Why Plaintiff Should Not Be Sanctioned for Violating Case Scheduling Order (A1060), the focus of the discovery effort had been seeking and obtaining discovery from AMAG because the merits of the case hinge entirely on AMAG's conduct. Moreover, the parties' correspondence during this period expressed a mutual understanding of a need to amend the operative case scheduling order so Lunar could focus on evaluating the strength of Lunar's claims to determine if settlement discussions would be constructive. This conduct, while an error in judgment by Lunar's counsel, does not support the trial court's finding of willful and egregious misconduct justifying the extraordinary sanction of a default judgment.

Although the parties briefly discussed adjusting the case schedule deadlines during the February 2, 2023 telephone call, the discussion quickly pivoted to AMAG again inviting Lunar to engage in settlement discussions. (A1060, A1062-A1064). In advance of the call, counsel for AMAG transmitted a recent article and press release, both of which presented an ominous financial outlook for AMAG's parent

company, Covis Pharmaceuticals. (A1061-A1062). The purpose of sending these materials in advance of the February 2, 2023 call was to support AMAG's pitch during the call that its financial outlook was dire and that it would be wasteful for the parties to continue expending resources on the case because of a potential Covis Pharmaceuticals bankruptcy filing. (A1064). In response, counsel for Lunar explained that before Lunar could evaluate whether settlement discussions would be fruitful, it needed an opportunity to review the substantial number of documents recently produced by AMAG (December 23, 2022, January 20, 2023, and January 31, 2023). (A1063-A1064). Counsel for AMAG invited such a review but encouraged Lunar to move quickly because Covis Pharmaceuticals could file for bankruptcy protection within the next two to three months. (A1064). As such, counsel for Lunar left the February 2, 2023 call believing the priority was for Lunar's counsel to review AMAG's recently produced documents to better evaluate the strength of Lunar's claims and the possibility of settlement discussions. (A1064-A1065). AMAG did not threaten or even raise the prospect of moving for sanctions during the February 2, 2023 telephone call.

Following the February 2, 2023 telephone call, counsel for Lunar wrote to AMAG's counsel on February 14, 2023, stating: "I've talked to my client about the issues we discussed last time. They asked whether any amount was escrowed for this litigation at the time of the Covis/AMAG transaction or did Covis simply

assume any debt that could arise?" (A1065). In response, counsel for AMAG advised that, "[i]t was a take-private transaction, so Covis assumed the liability." (*Id.*). The clear import of this communication was that Lunar's potential for recovery could be significantly limited by a Covis Pharmaceuticals bankruptcy.

In the period following Lunar's February 14, 2023 outreach regarding the existence of an escrow, AMAG asked Lunar's counsel by email dated March 6, 2023, "[w]hat's the plan for this case? When can we speak?" (A1066). At the time, Lunar's counsel did not yet have an answer about whether settlement discussions would be productive, and therefore did not respond to AMAG's inquiry. (*Id.*). Admittedly, counsel for Lunar should have responded by explaining its decision to prioritize analyzing the value of the case in light of AMAG's representations regarding a potential Covis Pharmaceuticals bankruptcy. However, its failure to do so was not done in bad faith and caused no prejudice to AMAG.

F. AMAG Files A Motion For Order To Show Cause Why Lunar Should Not Be Sanctioned For Violating Case Scheduling Order.

On March 23, 2023, AMAG filed a Motion for Order to Show Cause Why Plaintiff Should Not Be Sanctioned for Violating Case Scheduling Order. (A1010). AMAG had not previously threatened or even suggested moving for sanctions. Nor had the trial court indicated at any time that Lunar was acting in bad faith or that its litigation conduct was dilatory—indeed, no prior sanction of Lunar had been cautioned, let alone imposed, on Lunar by the trial court and Lunar had not violated

any prior court order.[5] To the contrary, as noted by the parties in their joint July 2022 status report, Lunar had worked cooperatively with AMAG, affording it almost two years to respond to discovery in light of the Covid-19 pandemic.

On May 26, 2023, the trial court by transcript ruling granted in part AMAG's Motion for Order to Show Cause and issued an order (i) entering default judgment against Lunar, (ii) requiring Lunar to pay AMAG's attorneys' fees and costs associated with the Motion, and (iii) requiring Lunar to pay AMAG's costs incurred in the litigation. (Exhibits A and B). As set forth herein, the trial court abused its discretion in finding that the trial court record supported the terminating sanction of a default judgment.

[5] AMAG moved to compel responses to its First Set of Interrogatories on November 28, 2022. (A942). The parties conferred and ultimately were able to resolve the motion to compel without the need for court intervention. (A982). Rather than evidencing bad faith or dilatory conduct, this demonstrates Lunar's good faith efforts to comply with its discovery obligations and avoid burdening the court.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN FINDING THAT THE RECORD BELOW SUPPORTED THE ENTRY OF THE TERMINATING SANCTION OF A DEFAULT JUDGMENT.

A. Question Presented.

Did the Court of Chancery abuse its discretion in finding that Lunar's counsel engaged in willful misconduct justifying the extreme sanction of a default judgment against Lunar, and that no lesser sanctions were available to avoid harm to AMAG while at the same time appropriately penalizing Lunar? The issues were preserved for appeal in Plaintiff's Opposition to Order to Show Cause Why Plaintiff Should Not be Sanctioned for Violating Case Scheduling Order (A1053-A1057) and in the Transcript of Oral Argument Re Defendant's Motion For Order To Show Cause And The Court's Ruling (Exhibit A at 29-46).

B. Standard And Scope Of Review.

An appeal of the decision granting a motion for default judgment is reviewed by this Court for abuse of discretion. *Battaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977). "An abuse of discretion occurs when a court has … exceeded the bounds of reason in view of the circumstances, or … so ignored recognized rules of law or practice so as to produce injustice." *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 633-34 (Del. 2001) (internal quotations omitted).

C. Merits Of Argument.

A default judgment or dismissal with prejudice is an extreme sanction and should be applied only in compelling circumstances in keeping with the goal of deciding each case on its merits. *Holt v. Holt*, 472 A.2d 820, 823 (Del. 1984); *see also Ritchie v. Loring*, 797 A.2d 1207 (Del. 2002) (ORDER) (holding that a default judgment or dismissal with prejudice is the ultimate sanction and should be used sparingly) (citing *In re Rinehardt*, 575 A.2d 1079, 1083 (Del. 1990)). This Court has held that some element of willful or conscious disregard of a court order must be shown before the sanction of a default judgment or dismissal with prejudice is imposed, and that a court must consider to what extent, if any, the party seeking sanctions has been prejudiced before deciding the appropriate sanction. *See Rinehardt*, 575 A.2d at 1082; *Cebenka v. Upjohn Co.*, 559 A.2d 1219, 1226 (Del. 1989); *Sundor Elec., Inc. v. E.J.T. Constr. Co.*, 337 A.2d 651, 652 (Del. 1975). Sanctions other than dismissal or default judgment are "often more appropriate because the important goal of timely adjudications must be balanced against the strong policy in favor of decisions on the merits." *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 716 (Del. 2008) (internal quotations and citation omitted). As such, a default judgment should be granted only if no other sanction would be appropriate under the circumstances. *Id.* at 717.

In exercising its appellate function to determine whether the trial court has abused its discretion in entering a default judgment, this Court is guided by the manner in which the trial court balanced the following factors:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (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.

See Minna v. Energy Coal S.p.A., 984 A.2d 1210, 1215 (Del. 2009); *see also Hoag*, 853 A.2d at 718 (listing factors).

Here, upon a balancing of the foregoing "*Minna* factors," this Court should find that the trial court's entry of a default judgment against Lunar was an abuse of discretion. Indeed, none of the relevant factors support the entry of a default judgment.

1. Lunar, The Party Plaintiff, Was Not Responsible For, Nor Had Any Involvement In, The Actions Found By The Trial Court To Constitute Willful Misconduct.

The actions giving rise to the trial court's entry of a default judgment did not involve Lunar. Rather, the record below demonstrates that it was solely the judgment of counsel that resulted in the actions causing the trial court to enter a

default judgment.[6] There is no evidence, or even the suggestion, that Lunar was the cause of the complained of actions (and it was not). To the contrary, at counsel's request Lunar facilitated discovery by providing relevant documents to counsel in December 2022, and again following the filing of the Motion. (Exhibit A at 39-41). The imposition by the trial court of the most severe sanction of a default judgment against Lunar, as a party litigant who was not responsible for the purported conduct (much less any willful misconduct), was an abuse of discretion. As has been articulated by this Court,

> Furthermore, although as a general rule a party is burdened with its attorney's errors, this rule is 'inappropriate in th[e] instance where there is nothing to show willfulness or conscious disregard of the [orders] by plaintiff … except the conduct of the lawyers.' Accordingly, 'the extreme remedy of dismissal with prejudice is too punitive … [when] counsel, not plaintiff, bears much if not all responsibility for failure to comply with the Superior Court orders.'

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[6] *See* Exhibit A at 40 ("ATTORNEY LISTON: Your Honor, the thought process was that there was more to do. And I fully confess that, unfortunately, [we] did minimize our obligations to produce those timely; that we were focused on AMAG's production."); A1065 ("I also believed, based on this important discussion with AMAG, that the parties understood that the priority in the case would be for Lunar's counsel to try to assess the strength of Lunar's case by reviewing the documents AMAG had only recently produced, so that Lunar could respond in an informed fashion to AMAG's invitation to discuss settlement while AMAG was still viable."); A1066 ("I recognize that I could have better communicated with AMAG's counsel following the February 2 and 14 communications regarding my belief that there was a mutual understanding that the case schedule would necessarily require adjustment to permit Lunar to assess AMAG's invitation to have meaningful settlement talks against the backdrop of Covis's deteriorating financial position, and that I should have taken steps to memorialize these adjustments in an amended scheduling order.").

Lehman Cap. v. Lofland ex rel. Estate of Monroe, 906 A.2d 122, 131 (Del. 2006) (quoting *Rittenhouse*, 382 A.2d at 236).

In *Lehman Capital*, there was nothing in the record to support a finding that Lehman willfully or consciously disregarded the trial court's rules or any court order. *Id.* at 131-32. Rather, the record demonstrated that noncompliance was attributed to Lehman's counsel. *Id.* As such, this Court concluded "that dismissal with prejudice was too severe and draconian a sanction given the less punitive and more appropriate sanctions that were available" to the trial court. *Id.* at 133. The same reasoning applies here—it was unduly prejudicial to impose the severe sanction of a default judgment on Lunar where there is no evidence that Lunar was responsible for, or had any involvement in, the actions the trial court found to constitute willful misconduct. *See Rittenhouse Assocs., Inc. v. Frederic A. Potts & Co., Inc.*, 382 A.2d 235, 236-37 (Del. 1977) (finding the Superior Court abused its discretion in ordering a dismissal for failure to comply with discovery orders where the record showed that counsel, not the plaintiff, bore much if not all responsibility for failure to comply with the court orders); *Sundor*, 337 A.2d at 652-53 (reversing Superior Court's entry of default judgment as too severe a sanction where counsel, and not the party, was responsible for the discovery misconduct).

The trial court erroneously disregarded the prejudice to Lunar and weighed this factor in favor of dismissal by reasoning that, "the clients have a remedy. It's a

remedy against their lawyer." (Exhibit A at 67). The trial court's reasoning is directly contrary to the well-established precedent of this Court. *See Lehman Cap.*, 906 A.2d at 131 (reversing Superior Court's dismissal with prejudice as too severe a sanction where there was no evidence that the plaintiff was responsible for noncompliance with court order); *Rittenhouse*, 382 A.2d at 236 (reversing Superior Court's order of dismissal as an abuse of discretion where counsel, and not the plaintiff, was responsible for the failure to reply with court orders); *Sundor*, 337 A.2d at 652-53 (reversing Superior Court's entry of default judgment where the party bore no responsibility for discovery misconduct). The trial court's failure to follow this precedent was error. As an initial matter, the trial court's reasoning encourages the filing of a new action, which would place an additional burden on the courts. And any such action would involve not only the actions of Lunar's counsel but also the merits of Lunar's claims that otherwise would be litigated in the action below. In addition to lacking in judicial economy, such a course runs counter to the strong preference for resolving disputes on their merits, particularly where, as here, lesser sanctions are available to address the conduct. Finally, it would be fundamentally unfair and prejudicial—and against this Court's precedent—to deny Lunar its day in court where the record shows that neither Lunar nor its counsel engaged in anything approaching willful misconduct. Accordingly, the trial court abused its discretion in entering the most extreme sanction of a default judgment.

2. AMAG Suffered De Minimis, If Any, Prejudice As A Result Of The Actions Found By The Trial Court To Constitute Willful Misconduct.

AMAG is entitled to the production of responsive documents in Lunar's possession. However, Lunar's failure to meet the substantial completion deadline on January 31, 2023 did not cause prejudice to AMAG warranting entry of a default judgment. The underlying merits of this action relate to whether AMAG failed to use commercially reasonable efforts to market and sell Makena. The relevant evidence answering this question is almost entirely, if not solely, within the possession of AMAG. Indeed, AMAG served affirmative discovery only after nearly three years into the litigation, following the trial court's request for a status report, and only several months before the substantial completion deadline. AMAG's own conduct reinforces the lack of prejudice to it as a result of Lunar's failure to meet the substantial completion deadline.

Moreover, the Scheduling Order governing the proceedings did not set a trial date. (A901). It was therefore likely that, irrespective of the timing of Lunar's document production, the deadlines in the Scheduling Order would need to be adjusted once a trial date was set based on the availability of the trial court, counsel, and the parties. Indeed, counsel for the parties had discussed an adjustment of the Scheduling Order's deadlines, including during their call on February 2, 2023.

(A1062).[7] Lunar committed to complete its production no later than June 9, 2023, which would have required only a slight adjustment to the schedule. (Exhibit A at 37). AMAG did not dispute in the proceedings below that the parties had discussed and understood that the Scheduling Order would be amended by mutual agreement of the parties.[8] Accordingly, the record below shows that AMAG expected and endorsed a revised schedule to permit a review of its documents and to facilitate settlement discussions, if appropriate: Lunar's failure to meet the substantial completion deadline thus caused little, if any, prejudice to AMAG.

In analyzing prejudice under the *Minna* factors, the trial court reasoned that absent entry of a default judgment to penalize Lunar, there would be systemic prejudice to the judicial system. (Exhibit A at 60-62). However, the circumstances of this case do not present the egregious set of facts required to support the terminating sanction of a default judgment to avoid prejudice to the judicial system.

[7] As mentioned, at the time of the filing of the Motion, Lunar was assessing AMAG's invitation to engage in settlement discussions. AMAG's pitch in support of settlement discussions was that its document production would not support Lunar's theory of the case, and that in any event because of AMAG's negative financial outlook it would be wasteful for both parties to continue to expend resources on the case. (A1063-A1064). The focus of the parties, as perceived by Lunar's counsel, therefore turned to Lunar's review and assessment of AMAG's recently produced document production. (*Id.*).

[8] AMAG suggested a six-month adjustment to the schedule in its moving papers below. (A1021).

Although the trial court suggested in its transcript ruling that Lunar engaged in a "prolonged and persistent failure to litigate the case and failure to comply with deadlines" (Exhibit A at 64), the record as set forth herein demonstrates otherwise. *See supra* 12-15; *infra* 28-32. Indeed, AMAG itself represented to the trial court in the parties' July 21, 2022 joint status report that, "the Parties have worked cooperatively on the discovery that remains, including recently served additional document requests." (A886). AMAG's representation is directly contrary to the trial court's rationale and does not suggest egregious misconduct by Lunar throughout the litigation threatening to cause irreparable harm to Court of Chancery practice absent the most severe sanction of a default judgment.

Lunar concedes that it failed to comply with the substantial completion deadline and that its counsel should have more proactively communicated regarding a discovery plan and formally amending the scheduling order in late 2022 and early 2023. However, counsel's conduct did not necessitate or justify entry of default judgment against Lunar. As soon as Lunar became aware of lead counsel's lack of diligence and error in judgment, such counsel was replaced. Monetary and evidentiary sanctions are real; they send a clear message to and effectively penalize parties and counsel. It is for this reason that the precedent of this Court requires a trial court to consider lesser available sanctions and issue a terminating sanction only as a last resort after prior warnings of the possibility of a default judgment. Here,

the trial court's reliance on systemic prejudice to the judicial system to justify the entry of a default judgment was an abuse of discretion.

3. The Trial Record Does Not Support A Finding Of A History Of Dilatory Conduct On The Part Of Lunar.

The trial court's finding that Lunar engaged in repeated failures to meet deadlines and failed to prosecute this action is not supported by the record.

Lunar initiated this action on August 29, 2019. (A22). For the next year, until August 21, 2020, the action was tied up in motion to dismiss practice. (A176, A179, A320, A476, A480, A627, A651, A668). AMAG filed its Answer on September 18, 2020. (A677). Thereafter, in February 2021, Lunar served its First Set of Requests for production on AMAG and sought and obtained third-party discovery from Grant Thornton LLP, Cantor Fitzgerald, L.P., and PricewaterhouseCoopers LLP. (A697, A712, A747, and A782). In July 2021, the trial court entered the parties' Stipulation and Order for the Production and Exchange of Confidential and Highly Confidential Information. (A846).

On July 7, 2022, the trial court requested a joint status report. (A871). As of that date, Lunar was not delinquent with regard to any prior or pending deadlines or obligations. For its part, AMAG had not yet produced any documents in response to Lunar's pending First Set of Requests for Production and AMAG had not yet

served any affirmative discovery.[9] In addition to its initial set of discovery served on AMAG, Lunar served a Second Set of Requests for Production on July 18, 2022, a Third Set of Requests for Production on January 19, 2023, and a First Set of Interrogatories on January 19, 2023. (A873, A984).

The trial court erroneously relied on the motion to compel filed by AMAG in November 2022 as showing dilatory conduct by Lunar. (Exhibit A at 52). Lunar, however, responded to that motion by acting in the manner urged by the Court of Chancery—it engaged in a meet-and-confer process with AMAG and resolved the motion amicably between the parties. With respect to the substantial completion deadline, Lunar's counsel made no excuse for missing it, but that one failure does not demonstrate a pattern of dilatory or bad faith conduct.

In the relatively few instances where a default judgment has been entered as a sanction, the conduct in those cases that warranted a default judgment sanction bore no resemblance to the facts here. In *DG BF, LLC v. Ray*, 2021 WL 5436868 (Del. Ch. Nov. 19, 2021), *aff'd*, 294 A.3d 63 (Del. 2023), for example, the plaintiffs were in contempt of three discovery orders. In addition to their violation of multiple court orders, the plaintiffs in *DG BF* (i) spoliated evidence, (ii) refused to answer

[9] Lunar does not intend to suggest that AMAG acted improperly with respect to the timing of its document productions. AMAG was engaged in the document collection and review process at a time when the Covid-19 pandemic was impacting many businesses.

several core questions and struggled to produce a complete and adequate privilege log, (iii) engaged in excessive motion practice to the exclusion of their own discovery obligations, (iv) focused on amending their identical complaint in a parallel action pending before another court, (v) opposed the defendant's motion to compel without offering any substantive grounds for their opposition, (vi) engaged in extremely obstructive conduct at a Rule 30(b)(6) deposition, causing the court to order a second Rule 30(b)(6) deposition on the same topics, and (vii) actively attempted to thwart the trial court's discovery order by directing their discovery vendor to restrict the material given to the defendant's discovery vendor. *Id.* at *6-7.[10] *See also Hoag*, 953 A.2d at 718-19 (party violated four orders of the Superior Court prior to the imposition of the sanction of dismissal); *Jacobson v. Ronsdorf*, 2005 WL 2149748, at *2-3 (Del. Ch. Aug. 23, 2005) (granting default judgment where party, among other things, (i) provided discovery responses that were "'woefully inadequate, to the point of being made in bad faith,'" (ii) generally refused to engage in discovery, (iii) made repeated insulting and disrespectful comments about the parties and the court in public filings, and (iv) filed frivolous motions with the court), *aff'd*, 906 A.2d 807 (Del. 2006); *Zhu v. Kane*, 2023 WL

[10] In analyzing the *Minna* factors before ultimately entering a default judgment, the Court of Chancery in *DG BF* noted that the plaintiffs themselves were principally responsible for the failure to comply with the court's orders. *Id.* at *6.

373283 (Del. Ch. Jan. 23, 2023) (ORDER) (plaintiff violated at least nine court orders, six of which were under threat of default, before Court of Chancery granted default judgment).

A similar litany of egregious litigation misconduct is missing from the present case.[11] Contrary to the finding of the trial court, a review of the totality of the trial record does not demonstrate persistent dilatory or bad faith litigation conduct on the part of Lunar's counsel (or any improper conduct by Lunar) to justify the sanction of a default judgment.

4. The Conduct Found To Be Willful By The Trial Court Was Not Taken In Bad Faith And Did Not Justify Entry Of A Terminating Sanction.

The fourth *Minna* factor examines whether the conduct was willful or in bad faith. *See Minna*, 984 A.2d at 1215; *Hoag*, 853 A.2d at 718. *Black's Law Dictionary* defines "willful" as "[v]oluntary and intentional, but not necessarily malicious. A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act

[11] The present case is more analogous to *Keith v. Lamontagne*, 2021 WL 4344158 (Del. Super. Ct. Sept. 20, 2021) (ORDER). There, Judge Wallace of the Superior Court found that the defendant was dilatory in timely responding to discovery and communicating with the plaintiff, but that such conduct was not egregious enough to warrant entry of a default judgment. *Id.* at *1-2. In so holding, the Superior Court reasoned that any sanction must be tailored to the specific violation and a consideration of the offending party's intent and whether and to what extent the opposing party has been prejudiced. *Id*. a *2.

is right or wrong." *Black's Law Dictionary* (11th ed. 2019). The Court of Chancery has articulated that willful misconduct involves a subjective standard that depends on the alleged wrongdoer's state of mind. *See Mennen v. Wilmington Tr. Co.*, 2015 WL 1914599, at *23 (Del. Ch. 2015) (citing *Venhill Ltd. P'ship v. Hillman*, 2008 WL 2270488, at *30 (Del. Ch. Jun. 3, 2008)). Delaware law provides that willful misconduct and bad faith are distinct concepts. *See id.* However, willful misconduct is arguably a subset of bad faith that involves some degree of intent as opposed to mere negligence. *Id.*

The trial court erred in finding the requisite willful misconduct or bad faith to justify the entry of the most extreme sanction of a default judgment. As an initial matter, Lunar—the party litigant—did not engage in the conduct found by the trial court to constitute willfulness. *See supra* at 15-18; 22-25. Rather, the actions were based solely on the judgment of Lunar's counsel. For this reason alone, this *Minna* factor weighs against the entry of a default judgment and requires reversal of the trial court's ruling and order. *See Lehman Cap.*, 906 A.2d at 131-32 (vacating dismissal with prejudice where nothing in the record suggested the party itself willfully or consciously disregarded a court order); *Rittenhouse*, 382 A.2d at 236-37 (finding the Superior Court abused its discretion in ordering a dismissal for failure to comply with discovery orders where the record showed that counsel, not the plaintiff, bore much if not all responsibility for failure to comply with the court

orders); *Sundor*, 337 A.2d at 652-53 (reversing Superior Court's entry of default judgment as too severe a sanction where counsel, and not the party, was responsible for the discovery misconduct); *DG BF*, 2021 WL 5436868, at *6 (noting that the plaintiffs were principally responsible for violation of trial court orders, which supported entry of default judgment).

Counsel for Lunar conceded that it had shifted its focus from the obligation to produce the documents collected from Lunar by the January 31, 2023 substantial completion deadline, instead focusing on AMAG's discovery. (Exhibit A at 40; *see also* A1064-A1065).[12] Lunar acknowledges Delaware precedent holding that scheduling orders are no different than any other court order. As such, Lunar

[12] In its reply papers below, AMAG characterized as "dubious" Lunar's claim that it had been prioritizing the review of AMAG's document productions since February 2023. (A1116). AMAG made this allegation based on the fact that on April 17, 2023, Lunar's counsel requested a new link to access AMAG's second and third productions. (*Id.*). It is not surprising that Lunar's counsel had not downloaded AMAG's second and third productions as of April 17, 2023. First, one-third of AMAG's documents were produced on December 23, 2022, a little over one month prior to the February 2, 2023 telephone call. Then, following the February 2, 2023 telephone call, Lunar had internal discussions about how best to efficiently evaluate the strength of its claims. (Exhibit A at 32-33). Finally, following the filing of the Motion, counsel for the parties had discussions about resolving the Motion, which would have included a request for a stay in the case to facilitate possible settlement discussions and an amended scheduling order. (A1066-1067). These discussions initially appeared positive, but ultimately AMAG would not agree to a resolution of the Motion. (*Id.*). Once these discussions broke down, it caused counsel for Lunar to request a new link to the second and third productions. (Exhibit A at 32-33). These facts in no way cast doubt on Lunar's claim regarding its focus on AMAG's discovery.

concedes that it violated a court order by failing to meet the substantial completion deadline and that counsel should have more proactively sought a formal extension of the deadlines in the Scheduling Order and been more responsive to AMAG's counsel in early 2023 regarding a plan for the case. However, this error in judgment and lack of communication was not tainted by bad faith or evil purpose to gain advantage against AMAG or disrespect a court order. This *Minna* factor does not support the entry of a default judgment.

5. To The Extent Sanctions Were Warranted To Remedy Lunar's Conduct, Lesser Sanctions Were Available And More Appropriate Under The Circumstances.

"[A] default judgment should be granted if no other sanction would be more appropriate under the circumstances." *DG BF*, 2021 WL 5436868, at *5 (quoting *Hoag*, 953 A.2d at 717). A court is therefore required to consider the availability of lesser sanctions to avoid unfairness to the innocent party, while serving as a sufficient penalty to deter the conduct in the future. *See Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009) (citation omitted). *See also Hoag*, 953 A.2d at 717 ("[A] default judgment should be granted if no other sanction would be more appropriate under the circumstances."); *Gallagher v. Long*, 940 A.2d 945 (Del. 2007) (TABLE) (reasoning that "the trial judge's decision to impose sanctions must be just and reasonable"); *TR Invs., LLC v. Genger*, 2009 WL 4696062, at *18 n.74 (Del. Ch. Dec. 9, 2009) (quoting Am.Jur.2d *Contempt* § 195) ("in selecting contempt

sanctions, a court is obligated to use the least possible power adequate to the end proposed"), *aff'd*, 26 A.3d 180 (Del. 2011); *Jacobson*, 2005 WL 2149748, at *3 (holding that default judgment "must be reserved for the most serious and disruptive examples of noncompliance," and granting default judgment only after party repeatedly engaged in bad faith discovery conduct and was given numerous warnings about the consequences of failing to comply with discovery obligations).

The trial court was presented with several lesser available sanctions. (*See* A1021; Exhibit A at 17-20). These included both monetary and evidentiary sanctions such as shifting fees in connection with the Motion, prohibiting Lunar from relying on any untimely produced discovery, or including an express provision in the Scheduling Order that any further violation would automatically result in a default. In declining to impose lesser available sanctions the trial court reasoned,

> And now, what we would need to have is some type of cleanup effort involving a *mélange* of remedies in an effort to get to something that would be suitably significant in light of the plaintiff's conduct.
>
> That's hard to figure out, and it's hard to live by. The defendant shouldn't have to litigate this case under some bizarre set of bespoke rules about what can be used and what can't be used at trial.

(Exhibit A at 58-59). The trial court's determination that lesser sanctions would be unworkable—sanctions that have been previously ordered by Delaware state courts—and then vaulting to the most extreme sanction was reversible error. *See Lehman Cap.*, 906 A.2d at 131 (vacating the Superior Court's order of dismissal

with prejudice as too severe and draconian a sanction and that less punitive sanctions were appropriate); *In re ExamWorks Gp., Inc. S'holder Appraisal Litig.*, 2018 WL 1008439, *10-11 (Del. Ch. Feb. 21, 2018) (declining to grant a terminating sanction for late productions because it was too severe a penalty and instead sanctioning the party with monetary and evidentiary sanctions tailored to the specific misconduct); *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002*, 2018 WL 6331622, at *12-15 (Del. Ch. Dec. 4, 2018) (precluding a party from entering into evidence any belatedly produced documents); *Hardy v. Hardy*, 2014 WL 3736331, at *20 (Del. Ch. July 29, 2014) (awarding attorneys' fees and expenses incurred in bringing motion for contempt).

The trial court's entry of a default judgment to the exclusion of lesser available sanctions was particularly confounding when there had been no prior warnings or violations of a court order. As previously stated by this Court,

> The trial judge had an entire spectrum of lesser sanctions available that he could and should have considered before entering, ***without any warning***, the ultimate sanction of dismissal with prejudice.

Lehman Cap., 906 A.2d at 133 (emphasis in original). Indeed, this case is unique in entering a default judgment absent multiple prior warnings or violations of court orders. In *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210 (Del. 2009), for example, this Court affirmed the Court of Chancery's entry of a default judgment where the plaintiffs failed to obey several discovery orders and ignored the trial court's order

to pay the defendant's reasonable attorneys' fees incurred in compelling discovery. Rather than initially entering a default judgment for violations of the discovery orders, the Court of Chancery in the first instance warned that further violations could result in a default judgment. *Id.* at 1213. Ultimately, when the plaintiffs continued their non-compliance, the court determined a default judgment was an appropriate sanction, which this Court affirmed. *Id.* at 1213-16.

More recently, in *Zhu v. Kane*, C.A. No. 2021-0664-KSJM (Del. Ch. Jan. 23, 2023) (Letter Op.) (A1162),[13] the Chancellor entered a default judgment against the defendant only after warning that continued failures to comply with court orders and discovery obligations would result in a default judgment. There, the defendant had violated a "laundry list of court orders" and the Court of Chancery included a provision in the scheduling order expressly providing that failure to strictly follow the requirements of the order would serve as independent grounds for entry of a default judgment. (A1167). Ultimately, following the defendant's violation of at least nine court orders, six of which were under threat of default, the Court of Chancery finally entered a default judgment reasoning that lesser sanctions would only further waste litigant and judicial resources. (A1172). *See also Hoag*, 953

[13] The Court of Chancery's January 23, 2023 Letter Opinion in *Zhu v. Kane*, C.A. No. 2021-0664-KSJM is not available in an electronic database, and therefore a copy of this decision is included in the Appendix to Appellant's Opening Brief as a courtesy to the Court.

A.2d at 718 (finding no abuse of discretion and affirming the Superior Court's decision dismissing plaintiff's complaint where plaintiff violated four court orders); *Mainiero v. Tanter*, 2003 WL 21003260, at *3 (Del. Ch. Apr. 25, 2003) (granting default judgment where party disobeyed court order and continued to remain in default of her discovery obligations despite issuance of several letter opinions warning that continued noncompliance would result in sanctions, including, but not limited to, a default judgment); *Jacobson*, 2005 WL 2149748, at *3 (entry of default judgment appropriate where party was given numerous opportunities to engage in good faith discovery and numerous warnings about the consequences of failing to do so).[14]

Contrary to the trial court's reasoning, any number of potential sanctions would have been more appropriate under the circumstances to achieve the goal of avoiding unfairness to AMAG, while at the same time serving as a penalty and deterrent to Lunar. Lunar does not intend to suggest that its counsel's failure to meet the substantial completion deadline or timely provide a discovery plan should

[14] The fact that *Jacobson and Zhu* involved *pro se* litigants does not render their reasoning any less persuasive. Understandably, pro se litigants should be provided more leeway because of their lack of familiarity with the judicial process, but that does not mean that represented parties should be subject to the most severe sanction in the first instance. Particularly here, where the party litigant was not involved in sanctionable conduct, and the overall facts and circumstances do not demonstrate contumacious or bad faith conduct on the part of Lunar's counsel, the extreme sanction of termination was an abuse of discretion.

necessarily be excused without a sanction, but it does submit that immediately jumping to the most severe sanction was contrary to this Court's precedents, and should result in reversal.

6. Lunar's Claims Have Merit And It Should Have An Opportunity To Litigate Them The Merits.

The final factor to be considered by the Court—the merits of the claims—also weighs in favor of reversing the decision of the trial court. The allegations in Lunar's Amended Complaint were found by the trial court to state a claim for relief. (A668). In so holding, the trial court reasoned that if the allegations in the Amended Complaint proved true, they would constitute a breach of the Merger Agreement. (A674).

AMAG's conduct, as outlined in the Amended Complaint, was entirely suspect, falling far short of expectations and purportedly obtaining sales of Makena just shy of reaching the second Milestone Payment threshold of $50 million. Lunar has not yet had an opportunity to take depositions, but the evidence already obtained supports the allegations in its Amended Complaint. Lunar should be afforded its day in court to litigate the claims it asserted in the Amended Complaint. *See Hoag*, 953 A.2d at 716 ("The sanction of dismissal is severe and courts are and have been reluctant to apply it except as a last resort. Other sanctions are often more appropriate because 'the important goal of timely adjudications must be balanced against the *strong policy in favor of decisions on the merits*.'") (emphasis added)

(citing *Sundor*, 337 A.2d at 652) (quoting *Draper*, 767 A.2d at 798). Accordingly, this *Minna* factor weighs in favor of reversal of the trial court's ruling and order.

CONCLUSION

For the foregoing reasons, Lunar respectfully requests that this Court reverse the trial court's ruling and order granting a default judgment and remand this case to the Court of Chancery for further proceedings.

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2023, a copy of APPELLANT'S CORRECTED OPENING BRIEF was served via File & Serve*Xpress* upon the following attorneys of record:

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