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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 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2019-0688-JTL

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NATURE OF PROCEEDINGS

Lunar Representative, LLC ("Lunar") seeks to portray its misconduct below as merely an isolated, good-faith mistake in failing to comply with a single court order. Nothing could be further from the truth. Instead, Lunar displayed an extraordinary pattern of behavior: Lunar would blow a court discovery deadline, grant itself an extension, blow that extended deadline, and then ignore emails or calls from opposing counsel. AMAG Pharmaceuticals, Inc. ("AMAG") was thus repeatedly forced to seek judicial relief. Its first motion, filed in 2022, was, as the Court of Chancery put it, "so clear, [Lunar] conceded and agreed to pay attorneys' fees." (Ex. A at 52.) Even after sanctioning itself, Lunar continued to violate court orders. Lunar refused to engage regarding document production search protocols, despite a provision in the scheduling order requiring that it do so. At the court-ordered date for substantial completion of discovery, Lunar had not only failed to produce *a single document* but had hardly begun to even *identify* responsive documents. (*Id.* at 39-40.) When confronted by AMAG, Lunar at first promised that documents would be forthcoming—which they were not. Then, eventually, Lunar stopped responding to AMAG altogether. It was only after a month of this persistent silence that AMAG filed the sanctions motion at issue here.

Lunar's attempt to explain its conduct before the Court of Chancery was, to put it mildly, peculiar. Lunar offered no explanation for its failure to produce any

documents—or even meaningfully begin to collect documents—by the substantial completion deadline of January 31, 2023. Instead, Lunar argued that, based on a February 2 call with AMAG that occurred *after* the substantial completion deadline and that addressed the possibility of settlement discussions, Lunar had made "the strategic call" to "focus resources on reviewing AMAG's substantial document production" instead of complying with its own court-ordered discovery obligations.

After an extended hearing, the Court of Chancery concluded that, given the extreme nature of Lunar's misconduct, a terminating sanction was warranted. The court carefully explained the basis for its decision. It emphasized that it had denied terminating sanctions in multiple other cases but that Lunar's conduct was "beyond precedent." (*Id.* at 62-65.) The court highlighted the extreme and repeated nature of Lunar's misconduct; Lunar's own responsibility for the relevant misconduct as a "repeat-player client[]" that "know[s] all about litigation" generally and discovery in particular; the inadequacy of lesser sanctions; and the prejudice to AMAG and the judicial system as a whole from Lunar's misconduct. (*Id.* at 58-65.)

The Court of Chancery's decision is entitled to significant deference given the "broad discretion" trial courts enjoy to fashion sanctions for discovery violations. *Wahle v. Med. Ctr. of Del., Inc.*, 559 A.2d 1228, 1233-34 (Del. 1989) (deferring to trial court and affirming terminating sanction). Lunar's brief simply brushes aside

facts it does not like and comes nowhere close to establishing that the Court of Chancery exceeded its "broad discretion" by issuing a terminating sanction here.

Perhaps recognizing that it cannot defend Lunar's conduct below, Lunar's new appellate counsel have taken a new tack: pin all the blame on the lawyers they replaced. Their lead argument—one Lunar never made below—is that, however bad Lunar's misconduct may have been, that misconduct is "solely" attributable to Lunar's lawyers, not Lunar itself. (*E.g.*, Opening Br. at 22.) But Lunar told the Court of Chancery that each of its funds is "an expert in the litigation process" and that some of the funds even have in-house discovery teams. (Ex. A at 42.) Lunar was repeatedly in touch with counsel regarding discovery issues around the time that it flouted the substantial completion deadline. And Lunar has never suggested that it did not know about the court-ordered discovery deadlines (and Lunar obviously knew that it had not produced any documents). Indeed, had the fault truly lay "solely" with Lunar's lawyers, Lunar would have terminated those lawyers either after conceding that they had engaged in sanctionable conduct at the time of AMAG's motion to compel or, at the very least, when Lunar read AMAG's sanctions motion. Instead, Lunar did not replace its lawyers until the last possible second—months after the sanctions motion, when it appealed the Court of Chancery's order terminating its case. The record thus shows Lunar's complicity in, not objection to, its lawyers' conduct. Indeed, the notion that a sophisticated,

"repeat-player client[]" was merely an innocent bystander to its counsel's discovery misconduct defies credulity. (*Id.* at 65.)

In short, this Court has laid down a clear principle: "Litigants who continually miss discovery deadlines, both self-imposed and court-imposed, … may not claim surprise by imposition of the ultimate sanction of dismissal." *Wahle*, 559 A.2d at 1233. The Court of Chancery faithfully applied this Court's precedent and its thoughtful decision was well within its broad discretion. This Court should affirm.

SUMMARY OF ARGUMENT

1. Denied: The Court of Chancery did not abuse its discretion in finding that Lunar committed willful misconduct. Lunar conceded as much below. Lunar told the Court of Chancery that it chose not to comply with its court-ordered discovery obligations because Lunar made "the strategic call" to focus on reviewing AMAG's documents rather than produce its own despite knowing the deadline. As the Court of Chancery recognized, that "is the definition of willfulness." Moreover, the Court of Chancery correctly found that Lunar's misconduct began well before the substantial completion deadline, including Lunar's flagrant and conceded discovery violations that gave rise to AMAG's 2022 motion to compel.

2. Denied: Lunar's new argument that it bears no responsibility for its counsel's misconduct is unpreserved and meritless. The record contains significant evidence of Lunar's personal responsibility for the discovery violations and conscious disregard of the court's orders. Lunar's counsel represented to the court that the funds controlling Lunar are "expert[s] in the litigation process," and the Court of Chancery specifically found that the Lunar funds are "repeat-player clients" who "know what's going on." Lunar was repeatedly in touch with its counsel around the time of the substantial completion deadline. Lunar itself was undoubtedly aware of the discovery deadlines and, at a minimum, consciously disregarded them. And

despite copious evidence of counsel's misconduct, Lunar elected not to replace its lead counsel until after the Court of Chancery's order terminating its case.

3. Denied: The Court of Chancery correctly found that AMAG was prejudiced by Lunar's misconduct in several ways. (Ex. A at 58.) Moreover, Lunar ignores the harm its conduct causes to the judicial system as a whole, which this Court has recognized as an important factor in fashioning sanctions. *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 717 (Del. 2008).

4. Denied: The Court of Chancery carefully considered the possibility of lesser sanctions, but concluded that any lesser sanction equal to the gravity of Lunar's conduct—such as an evidentiary preclusion order—would be both unworkable and unfair to AMAG. That conclusion was well within the court's broad discretion.

STATEMENT OF FACTS

A. AMAG acquires Lumara Health.

AMAG is a biopharmaceutical company focused on developing and delivering important products that support the health of patients in the areas of maternal and women's health and anemia management. (A186.) In 2014, AMAG purchased Lumara Health, Inc., a company whose major product, Makena, was intended to reduce the risk of preterm birth for at-risk women. (A187.) The merger agreement designates Lunar as representative of Lumara Health's stockholders. (A668.) Lunar's board is comprised of "four funds" who were "the largest holders of stock" in Lumara Health. (Ex. A at 41.)

As Lunar recognizes (Opening Br. at 10-11), AMAG provided Lumara Health's stockholders with significant compensation. AMAG paid $675 million in cash and equity at the time of closing and paid $150 million more through post-closing milestone payments that were triggered because certain post-closing net sales figures were achieved. (A668-70.) This case concerns an additional $50 million milestone payment that AMAG did not pay because the relevant sales figure was not met.

B. Lunar files this suit and the Court of Chancery concludes that Lunar's complaint "barely" survives a motion to dismiss.

Lunar filed this action on August 29, 2019. (A22.) Its amended complaint alleged that AMAG should have paid the $50 million milestone payment based on two alternative (and mutually contradicting) theories: (1) AMAG failed to meet the

net sales target because it did not use "commercially reasonable efforts" to market and sell Makena, as required by the agreement (*see* A669); and (2) AMAG actually did reach the relevant net sales target but "changed [its] financial accounting in an effort to avoid meeting the threshold required" (A330-34).

Lunar offered practically no factual allegations to support either theory. The primary support for its first theory was its unsupported allegation, made "[o]n information and belief," that "AMAG's Chief Executive Officer[] privately told an [unspecified] analyst that the Company would take steps so as not to make the Second Milestone Payment." (A330 ¶ 24.) The complaint contained no factual allegations to support its alternative theory that AMAG had fudged its accounting methods. Indeed, before the litigation, Lunar had exercised its contractual right to have an independent auditor examine AMAG's records and that auditor confirmed that AMAG had *not* hit the relevant sales target. (Ex. A at 14.)

AMAG moved to dismiss the amended complaint in January 2020. (A476.) The Court of Chancery denied the motion on August 21, 2020, relying largely on the "plaintiff-friendly standard for pleading stage analysis." (A674.) The court emphasized the complaint's weakness, writing that the allegations were "sufficient to state a claim, if barely so." (A675.)

C. Lunar fails to prosecute the case, prompting the trial court to ask whether the case should be dismissed.

AMAG filed its answer in September 2020. (A677.) Lunar then did nothing for almost five months—until February 2021, when it served three subpoenas on third parties and document requests on AMAG. (A697; A712; A747; A782.) AMAG timely responded to the document requests on March 12, 2021. (A817.) AMAG's response made clear that there were disagreements that the parties needed to resolve before AMAG could collect and produce documents—for instance, the parties disagreed about the relevant date ranges. (*E.g.*, A824 ¶ 6.) The parties entered into a stipulated confidentiality order on July 23, 2021. (A870.)

Already two years into the litigation, Lunar then stopped prosecuting the case for almost a year. It made no attempt to resolve AMAG's objections to its document requests, requested no additional discovery, and filed nothing on the docket. While Lunar suggests that AMAG was somehow at fault for not producing documents during this period, AMAG had made its objections to Lunar's document request clear, and the ball was in Lunar's court. Indeed, Lunar never suggested—either to AMAG at the time or in its briefing before the Court of Chancery—that it expected AMAG to produce documents in the July 2021 through July 2022 period. Given Lunar's apparent lack of interest in its case, the Court of Chancery issued an order on July 7, 2022 asking "[w]hether the case can be dismissed." (A871.) Eleven days after the Court of Chancery's order—and sixteen months after AMAG's response to

Lunar's first document request—Lunar served a second request for documents. (A873.)

On July 21, 2022, the parties filed a proposed Order Governing Case Schedule ("Scheduling Order") that required substantial completion of document production by January 31, 2023, and completion of fact discovery (including depositions) on April 28, 2023. (A886-88.) The Court of Chancery issued a Scheduling Order with those deadlines on August 8, 2022. (A901.) Paragraph 2 required the parties "to meet and confer regarding search terms, custodians," and other discovery matters. (A904.)

D. Lunar violates Court of Chancery Rules by refusing to respond to AMAG's discovery requests, forcing AMAG to file a motion to compel that the parties resolved only after Lunar agreed to pay AMAG's attorney's fees.

On August 17, 2022, AMAG served its first set of document requests and interrogatories. (A908.) Under Court of Chancery Rules 33(b)(3) and 34(b), Lunar's responses were due 30 days later, by September 16, 2022. Lunar ignored that deadline. Instead, three days *after* the deadline, Lunar's New York counsel sent AMAG an email blaming Lunar's Delaware counsel: New York counsel asserted that they "did not timely receive [AMAG's] discovery requests due to an office error with [Lunar's] local counsel," and requested "an extension to serve responses until two weeks from today – to Oct. 3." (A1107.) AMAG agreed to that extension. (A1105-06.)

Lunar then blew its own October 3 deadline. On November 14, 2022—nearly six weeks after Lunar had promised its belated discovery responses—AMAG asked Lunar to provide its "delinquent responses, along with [its] proposed discovery collection plan" (which Lunar was required to provide under Paragraph 2 of the Scheduling Order) by November 18, 2022. (A1104-05.) Otherwise, AMAG would seek judicial relief. (A1105.) Lunar's counsel responded on November 18 that it would provide its delinquent responses and discovery plan by the following Wednesday, November 23, 2022. (A1104.)

Lunar then ignored its own November 23 deadline without any explanation or outreach to AMAG. In the face of Lunar's repeated false commitments and blown deadlines, and with the substantial completion deadline coming up, AMAG moved on November 28, 2022 to compel Lunar to respond to AMAG's discovery requests. (A942.)

Undeterred by AMAG's motion, Lunar's dilatory conduct continued. On December 14—three months after the deadline—Lunar purported to serve interrogatory responses, but those responses stated merely that "Lunar will [provide the information requested]" at some unspecified future date. (B38-40.) As a courtesy, AMAG agreed that Lunar could have until December 30, 2022 to serve substantive interrogatory responses. (B44-45.) But Lunar again ignored the parties'

agreed-upon deadline and did not serve substantive responses until January 4, 2023. (B47; A982.)

The parties ultimately resolved the motion without the court's intervention, but only because Lunar agreed to everything that AMAG sought. Lunar had, finally, served substantive interrogatory responses and also agreed to pay AMAG's fees. (A982-83.) In other words, as the Court of Chancery put it, AMAG's motion "was so clear, the plaintiff conceded and agreed to pay attorneys' fees." (Ex. A at 52.) The Court of Chancery also concluded, in its ultimate sanctions order, that it would have sanctioned Lunar had Lunar not agreed to sanction itself. (*Id.* at 64.)

E. Lunar does not produce a single document by the substantial completion deadline, blows its self-granted extension of that deadline, and refuses to respond to AMAG.

The deadline for substantial completion of document production was January 31, 2023—nearly three and a half years into the litigation. AMAG met this deadline, producing 26,594 responsive pages on December 23, 2022; 44,615 responsive pages on January 20, 2023; and 20,104 responsive pages on January 31, 2023. (A1063.)

Lunar, by contrast, did nothing. As Lunar's counsel told the trial court, the *only* effort that Lunar made to produce documents before the substantial completion deadline was to collect "several dozen" documents in December 2022—and it failed to produce even those few documents it had bothered to collect. (Ex. A at 39-40.)

These few documents were a microscopic fraction of the total universe of discoverable material. (*See id.* at 43-45.)

A week before the substantial completion deadline, AMAG sent an email to Lunar noting that Lunar had still not produced any documents or discussed its discovery plan, as required by the Scheduling Order. (A1103.) AMAG requested that Lunar provide, "no later than the end of this week, (1) the discovery collection plan that Lunar is using for its productions in this matter, including a list of document custodians, search terms, and date ranges, as applicable; and (2) a date certain by when we can expect Lunar's document production(s)." (*Id.*) Lunar did not respond.

The substantial completion deadline came and went, and Lunar had still not produced a single document or responded to AMAG's request for a discovery plan. On February 1, 2023, AMAG wrote again, asking: "where are your documents? Yesterday was the deadline for substantial completion and we have nothing from Lunar." (A1102.) Lunar replied the next day, February 2, and the parties scheduled a call for that morning. (*Id.*) Before the call, AMAG sent Lunar a recent article and press release containing financial analysis of AMAG's parent company group. (A1101; A1078-86.)

The parties' February 2 call began with a discussion of Lunar's delinquencies regarding its discovery obligations. (A1035-36.) Lunar committed to AMAG that its discovery plan would be forthcoming and that Lunar would begin producing

documents before February 21, 2023. (*Id.*; Ex. A at 11.) The parties then discussed possible settlement discussions. (A1115; Ex. A at 10.)

On February 8, counsel for AMAG followed up, reiterating that Lunar had represented that "Lunar would be producing some documents before 2/21" and asking "[w]hen are those coming?" (A1035-36.) Lunar did not respond.

On February 14, Lunar's counsel wrote to AMAG that he "talked to [his] client about the issues [the parties] discussed" on February 2, and that the client "asked whether any amount was escrowed for this litigation." (A1101.) AMAG promptly replied that there was no escrow. (*Id.*) Lunar did not address its document production or suggest it would not be able to meet its commitment to produce documents before February 21.

After February 14, Lunar simply vanished—it did not produce a single document by February 21 and refused to respond to *three* outreaches by AMAG. First, on February 24, AMAG's counsel left Lunar's counsel a voicemail asking for a return call. (A1034.) Second, on February 27, AMAG's counsel emailed Lunar's counsel, noting Lunar's "lack of meaningful discovery efforts to date" and asking to "get on the phone to discuss a more comprehensive plan for this case as soon as possible." (A1034.) Third, on March 6, AMAG's counsel again wrote to Lunar's counsel "following up here" and asking "what's the plan for this case? When can we speak?" (*Id.*) Lunar did not respond to *any* of this outreach despite being in flagrant

violation of both the court's Scheduling Order and Lunar's own commitment to produce documents by February 21.

F. AMAG moves to sanction Lunar.

On March 23, 2023—nearly two months after the court-ordered deadline for substantial completion of document productions and a month after Lunar had stopped responding to AMAG—AMAG filed the sanctions motion at issue in this appeal. (A1010.) As relevant here, AMAG asked the trial court to enter a default judgment against Lunar due to its extreme discovery misconduct. (A1022-23.)

In response, Lunar conceded that it violated the substantial completion deadline and that it had still failed to produce a single document or even share its discovery plan. (Ex. A at 34, 40.) Indeed, Lunar told the Court of Chancery that it only began its "most robust" efforts to collect responsive documents *after AMAG filed its sanctions motion*. (Ex. A at 37-38.) Lunar offered no explanation for those violations. Instead, its objection to the sanctions motion exclusively discussed Lunar's conduct after the parties' phone call on February 2, 2023—*i.e.*, after the court-ordered substantial completion date had passed without Lunar either producing a single document or even seriously beginning document collection. (A1046-58.) According to Lunar, its counsel made "the strategic call in early February 2023 to focus resources on reviewing AMAG's substantial document production" instead of complying with Lunar's court-ordered discovery obligations.

(A1046.) Lunar invoked a purported "mutual understanding" that settlement discussions would require an adjustment to the case schedule. (A1052.) But Lunar did not assert that there was any actual written or verbal agreement to adjust the schedule. Nor would such an assertion have been plausible given that, as AMAG pointed out below (A1115-16; Ex. A at 46), AMAG was repeatedly pressing Lunar to comply with its discovery obligations in February and March. (*See* pp. 13-14, *supra*.) Moreover, parties simultaneously evaluate settlement while complying with ongoing court deadlines in practically every case.

Lunar also represented to the Court of Chancery that, both before and after the substantial completion deadline, Lunar was "focus[ing] resources on reviewing AMAG's substantial document production"—an assertion Lunar presses again on appeal. (A1046; *see* Ex. A at 40 (Lunar's counsel explaining that it did not attempt to produce any documents by January 31 because "we were focused on AMAG's production"); Opening Br. at 17.) But, as AMAG explained below (A1116-17), and Lunar's new counsel concedes (Opening Br. at 34 n.12), Lunar did not even download most of the documents AMAG produced until late April, the day its opposition to the order to show cause was due. (A1117.)

Notably, one argument that Lunar did *not* make below is the primary argument that it presses in this appeal: That Lunar itself, as opposed to its lawyers, bore no responsibility for the conceded violations of the Court of Chancery's rules and

orders. Lunar's failure to make this argument is no surprise. Lunar is a highly sophisticated client: Its own counsel described "each of the funds" on Lunar's board as "an expert in the litigation process," noting that some even have in-house discovery personnel and the others have their own discovery vendors. (Ex. A at 42.) And Lunar has never suggested—below or in its brief to this Court—that Lunar's prior counsel did not send Lunar the case schedule, did not inform Lunar of the case deadlines, did not inform Lunar of the sanctions they agreed to pay for discovery misconduct in 2022, did not inform Lunar that they were required to produce documents by the end of January, or did not provide Lunar with a copy of AMAG's sanctions motion.

To the contrary, the record shows that counsel repeatedly sought Lunar's input. For instance, shortly after the February 2 call with AMAG, Lunar and its counsel conferred regarding "the issues … discussed" on the call—among which were Lunar's blown discovery deadlines and its self-imposed document-production deadline later that month. (A1101; *see* pp. 13-14, *supra*.) Moreover, Lunar's counsel told the Court of Chancery that AMAG's emails *after* February 14 went unanswered because Lunar and its counsel were still "conferring …. about [Lunar's] ultimate position on the issues that were discussed on the February 2nd call." (Ex. A at 32.) Given all of this, it would have been absurd to argue to the Court of

Chancery that a sophisticated client like Lunar had an epiphany about its lawyers' misconduct only after the Court of Chancery's termination order.

G. The Court of Chancery's decision.

The Court of Chancery held a hearing on AMAG's sanctions motion on May 26, 2023. That morning, Lunar produced documents for the first time—nearly four months after the substantial completion deadline under the Scheduling Order, more than three months after Lunar had committed to providing documents, two months after AMAG moved for sanctions, and nearly a month after the close of all fact discovery. (*Id.* at 5.)

After a lengthy hearing at which the court gave Lunar ample opportunity to defend its conduct (*id.* at 38-45), the court entered a terminating sanction and explained, at length, its reasons why that sanction was warranted based on "the totality of the circumstances" (*id.* at 52). The court noted that, in multiple other cases, it had declined to enter a terminating sanction because the conduct at issue was not sufficiently egregious. (*Id.* at 62-64.) This case, however, was worse—in the court's words, "beyond precedent"—and warranted the type of terminating sanction the court had declined to order in the past. (*Id.* at 65.) The court carefully walked through the factors this Court has identified as relevant.

1. Lunar's willful misconduct leading up to the substantial completion deadline.

The court first recounted Lunar's "prolonged failure to prosecute this action," starting with the lull in the case after the court denied AMAG's motion to dismiss in August 2020. (*Id.* at 52.) The court explained that it asked whether the case should be dismissed in July 2022 "precisely because there had been no apparent action in the case for over a year." (*Id.* at 52-53.) The court emphasized that AMAG "had to file" a motion to compel "to get discovery responses," which the court characterized as "a motion that was so clear" that Lunar "conceded and agreed to pay attorneys' fees." (*Id.*) The court noted that it would have sanctioned Lunar had Lunar not conceded its misconduct and sanctioned itself. (*Id.* at 64.)

The court next discussed Lunar's violation of the substantial completion deadline. The court found not only that Lunar "produced nothing by that deadline," but also that "there had been minimal effort to do anything prior to the substantial completion date." (*Id.* at 53.) Lunar made "no effort to explain why nothing had been done to comply with the scheduling order or to make some production before the deadline or really do much of anything." (*Id.* at 54.) Moreover, Lunar's efforts to begin document production *after* AMAG filed its sanctions motion show "how easy it would have been for the plaintiff to do what it should have done." (*Id.* at 56.)

2. Lunar's willful misconduct after the substantial completion deadline.

Turning to Lunar's conduct after the substantial completion deadline, the court rejected Lunar's suggestion that its conduct was excusable because it had made "a strategic decision to focus on [AMAG's] document production in the belief that [Lunar's] document production wasn't that important." (*Id.* at 53.) Lunar did not even "claim that there was an agreement on postponing the schedule," merely a vague "signal that deadlines should be put off and that they should focus on settlement." (*Id.* at 56.) As the court explained, "[y]ou just can't do that": A party cannot unilaterally decide to disregard court orders based on its own view as to how it should best spend its time. (*Id.* at 53.) Thus, "the pattern" of Lunar's behavior "shows willful misconduct … in the sense of willful and intentional decisions not to fulfill one's obligations and not to comply with court orders." (*Id.* at 57.) Indeed, Lunar's own explanation that it decided to "strategically focus on [AMAG's] document production," rather than comply with court-ordered discovery deadlines, "is the definition of willfulness." (*Id.* at 57-58.)

3. Lunar's responsibility for the willful discovery violations.

Though Lunar never sought to distinguish its culpability from its attorneys' culpability, the Court of Chancery nevertheless made specific findings that Lunar itself was sufficiently culpable to warrant a terminating sanction. As discussed, Lunar's counsel had represented at the hearing that "each of the funds" on Lunar's

board is "an expert in the litigation process," and some of them have "in-house" personnel who work on litigation discovery while others "have their own vendors." (*Id.* at 42.) Relying in part on this representation, the trial court found that Lunar is comprised of "repeat-player clients … who know all about litigation"—they "are people who know what's going on" and "know how to play the game." (*Id.* at 65.)

The Court of Chancery also discussed Lunar's counsel's "conversations with [its] clients" prior to the substantial completion deadline, and counsel informed the court that counsel "was conferring with its client" for a protracted period after the blown deadline. (*Id.* at 32, 39.) The court thus found that, at a minimum, Lunar itself had "conscious[ly]" disregarded its discovery obligations. (*Id.* at 57.)

4. The possibility of lesser sanctions.

The Court of Chancery proceeded from the premise that, given the gravity of Lunar's conduct, it cannot be "that the only sanction for not following the rules is some form of monetary payment and a do-over." (*Id.* at 60.) The only remaining option other than a default judgment was "some type of cleanup effort involving a *melange* of remedies in an effort to get to something that would be suitably significant in light of the plaintiff's conduct." (*Id.* at 58.)

The court "carefully" considered this type of sanction, but concluded that it could not "be implemented in a manner that would be efficient or could avoid significant burden for the defendant and the Court." (*Id.* at 64.) For example, the

court explained that if the court precluded Lunar from relying on documents that it failed to timely produce, the court would "hav[e] to make particularized assessments about whether documents fell within the requests or not to determine what can be used," and it would also have to make "difficult judgment calls" as to whether AMAG had opened the door to any of those documents. (*Id.* at 59-60.)

5. The possibility of escalation.

The Court of Chancery also considered whether it was "too draconian" to "jump[] over the interim step of an order involving preclusion or an adverse inference or curative discovery and going straight to the default judgment." (*Id.* at 64.) But, after carefully considering this issue, the court concluded that "this is a situation that warrants the jump" because the severity of the willful misconduct at issue "is beyond precedent." (*Id.* at 65.) Moreover, there effectively was an "escalation" here given AMAG's prior sanctions motion, which had only been mooted because Lunar had conceded the motion and sanctioned itself. (*Id.* at 64-65; *see also id.* at 52 (explaining that the motion to compel "was so clear, the plaintiff conceded and agreed to pay attorneys' fees").)

6. Prejudice to AMAG and the judicial system.

The Court of Chancery found "prejudice both on the specific facts of this case and also prejudice to the broader system." (*Id.* at 58.) Cataloguing several examples of prejudice to AMAG arising from Lunar's willful misconduct, the Court of Chancery explained that AMAG "didn't get to litigate on the schedule that was

agreed to," "didn't get to pursue the types of discovery that they should have been able to pursue," and "didn't get to make the types of decisions that they should have been able to make in real-time." (*Id.*) The court added that, if it were possible to impose a "suitably significant" lesser sanction, AMAG would "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." (*Id.* at 58-59.) That, too, is prejudicial to both AMAG and the court: "[The court] shouldn't have to preside over this case and issue a post-trial decision based on some type of bespoke set of rules about what people can and cannot consider." (*Id.* at 59.)

As for systemic prejudice, the trial court emphasized that the kind of misconduct exhibited by Lunar leads to a breakdown of the system—not only does the rule-violating party get an unfair advantage, but its adversaries who are complying with the rules "start feeling like chumps," thus instigating a "race to the bottom." (*Id.* at 60-61.)

* * * * *

Weighing all of these factors, the Court of Chancery concluded that Lunar's "prolonged and persistent failure to litigate the case and failure to comply with deadlines in this matter warrants the terminating sanction." (*Id.* at 64.) The court entered a default judgment and awarded AMAG attorneys' fees and costs incurred in connection with the motion for order to show cause, and the costs of litigation.

(Ex. B at 3; A1023-24.) The court declined to award AMAG fees and costs incurred while responding to Lunar's discovery requests and producing documents because "[t]he fact that [AMAG] complied with its obligations while [Lunar] did not was one factor that the court considered in awarding the ultimate sanction of a default judgment." (Ex. B at 3.)

ARGUMENT

I. THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION TO SANCTION LUNAR'S REPEATED AND WILLFUL DISCOVERY VIOLATIONS BY ENTERING A DEFAULT JUDGMENT.

A. Question Presented.

Whether the Court of Chancery abused its broad discretion by entering a default judgment to sanction Lunar's willful and repeated violations of the trial court's rules and Scheduling Order. This issue was preserved in the trial court at A1010-24, A1046-58, A1113-19, and Exhibit A.

B. Scope of Review.

This Court reviews the trial court's entry of a default judgment due to discovery violations and violations of court orders for abuse of discretion. *See Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215 (Del. 2009). "Trial courts must be afforded broad discretion to fashion orders to expedite cases consistent with the administration of justice and the efficient disposition of their case loads." *Wahle*, 559 A.2d at 1233. Therefore, this Court's inquiry is limited to considering "whether the trial judge's decision was an 'exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action.'" *Id.* at 1232 (citation omitted).

C. Merits of Argument.

The Court of Chancery did not abuse its broad discretion in weighing all of the relevant factors and concluding that, based on the totality of the circumstances,

Lunar's repeated and willful disregard of the court's rules and Scheduling Order was sufficiently extreme to warrant a terminating sanction.

Under Court of Chancery Rule 37(b), the trial court may sanction a party who has violated discovery orders by, among other available sanctions, "rendering a judgment by default against the disobedient party." Ct. Ch. R. 37(b)(2)(C). "[T]his Court has interpreted Rule 37(b)(2)(C) to require a showing of an element of wilfulness or conscious disregard of court-ordered discovery before [a default judgment] sanction is imposed." *Hoag*, 953 A.2d at 717 (quoting *Holt v. Holt*, 472 A.2d 820, 823 (Del. 1984)).

"Litigants who continually miss discovery deadlines, both self-imposed and court-imposed, … may not claim surprise by imposition of the ultimate sanction of dismissal." *Wahle*, 559 A.2d at 1233. Both this Court and the U.S. Supreme Court have underscored that, while termination may be "the most severe in the spectrum of sanctions provided by statute or rule," that sanction "must be available to the [trial] court in appropriate cases, not merely to penalize those whose conduct … warrant[s] such a sanction, but to deter those who might be tempted to such conduct." *Hoag*, 953 A.2d at 718 (quoting *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976)).

This Court has set forth "guidelines" to determine "whether a trial court abused its discretion when sanctioning a party." *Minna*, 984 A.2d at 1215. The Court evaluates:

> the manner in which the trial court balanced the following factors … and whether the record supports its findings: (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.

Hoag, 953 A.2d at 718 (quoting *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984)); *see Minna*, 984 A.2d at 1215-16 (applying "the *Hoag* factors" to sanction of default judgment). This Court has held that "all of [these factors] need not be met" in order to affirm the trial court's sanction, and that it is sufficient for the trial court to "implicitly" evaluate these factors. *Hoag*, 953 A.2d at 718.

Here, the Court of Chancery carefully and explicitly evaluated these factors. Its findings are amply supported by the record and its decision to sanction Lunar by entering a default judgment was well within its broad discretion. Lunar's brief seeks to relitigate issues it lost below, raises new arguments that prior counsel did not preserve, and ignores or mischaracterizes facts Lunar does not like. Lunar does not come close to showing an abuse of discretion and this Court should affirm.

1. The Court of Chancery did not abuse its discretion in finding that Lunar exhibited a history of dilatoriness.

Lunar's most remarkable argument is that the Court of Chancery erred in "finding that Lunar engaged in repeated failures to meet deadlines and failed to prosecute this action." (Opening Br. at 28.) Far from being an abuse of discretion, that finding follows inescapably from the record before this Court—much of which Lunar simply ignores. To take but a few examples:

- After the parties entered into a stipulated confidentiality order in July 2021, Lunar did nothing to resolve the parties' disputes or otherwise advance the case for nearly a year, forcing the Court of Chancery to enter an order asking whether the case could be dismissed. (*See* pp. 9, 19, *supra*.)

- Lunar's deadline to respond to AMAG's interrogatories and document requests was September 16, 2022. Lunar ignored that deadline. Three days after that deadline passed, Lunar sought and obtained an extension to October 3. Lunar ignored that deadline, too. Lunar then promised a response by November 23. Lunar again ignored that deadline. Lunar only responded after AMAG filed a motion to compel in late November. Even then, Lunar's initial response—on December 15—stated only that Lunar would answer the interrogatories on some unspecified future date. The parties' later agreed that date would be December 30, but Lunar also blew that deadline. (*See* pp. 10-12, *supra*.)

- Paragraph 2 of the court's Scheduling Order requires that parties share their discovery plan at some point before the substantial completion of document production on January 31, 2023. Lunar ignored that requirement. (*See* pp. 10-13, *supra*.)

- The Scheduling Order set January 31, 2023 as the deadline for the substantial completion of document production. Lunar ignored that deadline, as well as subsequent dates on which it agreed to produce its documents and discovery plan. (*See* pp. 12-13, 19, *supra*.)

- The Scheduling Order set April 28, 2023 as the deadline for the completion of *all* fact discovery, including depositions. As of that date, Lunar had not produced a single document or even meaningfully begun document collection. It did not begin its "most robust" document collection efforts until *after AMAG's sanctions motion*. And its first document production was on May 26, 2023, on the morning of the sanctions hearing. (*See* pp. 10, 15, 18, *supra*.)

It is bad enough that Lunar blew all of these deadlines. But Lunar also simply vanished for long periods of time, refusing to respond to AMAG's many attempts to communicate and move the case forward. (*See* pp. 11-14, *supra*.) Indeed, AMAG only brought its motion to compel in November 2022 and its motion for sanctions in March 2023 after long periods in which Lunar stopped responding to AMAG altogether. (*Id.* at 11, 14.) On this record, there can be no serious dispute that Lunar exhibited a history of inexcusably dilatory conduct.

Lunar ignores most of its relevant conduct. Instead, Lunar complains (Opening Br. at 29-30) that the trial court should not have treated the circumstances surrounding AMAG's 2022 motion to compel as evidence of Lunar's dilatory conduct because Lunar gave up and agreed to pay AMAG's attorneys' fees. That makes little sense. The fact that Lunar conceded that its dilatory conduct was sanctionable in no way excuses that conduct—to the contrary, as the Court of Chancery recognized, Lunar's inability to seriously dispute AMAG's 2022 motion shows just how extreme Lunar's conduct was. (Ex. A at 52.) Moreover, the Court of Chancery agreed with AMAG that Lunar's conduct preceding the motion to

compel was sanctionable. (*Id.* at 64.) Lunar's suggestion (Opening Br. at 19 n.5) that by conceding that its conduct was sanctionable Lunar somehow "demonstrate[d] [its] good faith efforts to comply with its discovery obligations" is nonsense.

Lunar also tries to deflect blame by suggesting that *AMAG* was somehow dilatory by not producing documents in response to Lunar's February 2021 document request until late 2022—although Lunar hastens to add, in a footnote, that AMAG did nothing improper. (*Id.* at 29 & n.9.) Lunar's suggestion is both irrelevant and wrong. It is irrelevant because AMAG's conduct *complied* with court rules and orders and, regardless, cannot excuse Lunar's egregious discovery violations. And it is wrong because the delay in AMAG's production is attributable to *Lunar*, not AMAG. AMAG timely responded to Lunar's document requests in March 2021, identifying disputes that needed to be resolved before AMAG could identify and produce responsive documents. (*See* p. 9, *supra*.) Lunar took no steps to resolve these disputes and has never suggested—either contemporaneously or in its brief to this Court—that Lunar expected AMAG to produce documents while those disputes were outstanding. Moreover, it was ultimately *AMAG*, not Lunar, that sought to advance AMAG's document production by seeking Lunar's approval of AMAG's discovery plan. When Lunar, in typical fashion, ignored AMAG's outreach, AMAG again sought to move the case forward by producing documents based on its discovery plan. (*E.g.*, A980 ("given … your silence on our Responses

and Objections to your Requests for Production since March of 2021," AMAG would proceed with document collection based on its discovery plan); A1040.)

Lunar also cites (Opening Br. at 30-31) other cases in which courts awarded terminating sanctions and argues that the facts in those cases were more extreme. That, too, is irrelevant. Even accepting Lunar's premise that its cases involve more extreme misconduct, those cases say nothing about whether the Court of Chancery abused its discretion here. Tellingly, Lunar does not cite a single case in which a court *refused* terminating sanctions—let alone concluded that such sanctions were an abuse of discretion—based on conduct akin to Lunar's.

2. The Court of Chancery did not abuse its discretion in finding that Lunar's misconduct was willful and in bad faith.

The Court of Chancery clearly explained its finding that "the pattern shows willful misconduct" by Lunar "in the sense of willful and intentional decisions not to fulfill one's obligations and not to comply with court orders." (Ex. A at 57.) Lunar never disputed that its failure to comply with the substantial completion deadline was willful. And, as the Court of Chancery recognized, Lunar's own explanation for its conduct after February 2 was that Lunar made "a conscious decision … not to comply with the substantial completion deadline and, instead, to strategically focus on [AMAG's] document production. That is the definition of willfulness." (*Id.* at 57-58.)

Lunar cannot seriously dispute this finding. After all, a "strategic" decision to ignore a court order—for whatever reason—unquestionably involves "an element of wilfulness or conscious disregard of court-ordered discovery." *Hoag*, 953 A.2d at 717 (quoting *Holt*, 472 A.2d at 823). Indeed, the definitions Lunar cites (Opening Br. at 32) confirm that the "conscious" and "intentional" decision to ignore a court order is willful. Unable to dispute that its conduct was willful, Lunar seeks to move the goal posts by characterizing its conduct as an "error in judgment" that "was not tainted by bad faith or evil purpose to gain advantage against AMAG or disrespect a court order." (Opening Br. at 34.) But that is not the standard. As the Court of Chancery recognized, Lunar's violations of the court's order were undoubtedly willful—*i.e.*, conscious and intentional—*even if* Lunar's reason for flouting the court's order was that it believed AMAG did not expect it to produce documents and/or that Lunar was focusing on reviewing AMAG's documents.

Making matters worse, there is every reason to doubt both that Lunar thought that AMAG did not expect documents and that Lunar was actively engaged in document review. The parties' email correspondence unambiguously shows that, during and after the February 2 call, AMAG continued to insist that Lunar promptly produce documents. (*E.g.*, A1034.) And, as Lunar now concedes, Lunar *did not even download* most of AMAG's documents until late April 2023. (Opening Br. at

34 n.12.) Whatever Lunar was doing in February and March, it was certainly not focused on AMAG's productions.

3. Lunar's new argument that only its counsel bears responsibility for the willful or conscious disregard of the Court of Chancery's orders is unpreserved and meritless.

Unable to seriously dispute the Court of Chancery's finding of dilatory and willful misconduct, Lunar's new counsel adopts a new approach. Its lead argument accepts the sanctionable nature of Lunar's misconduct, but argues that the misconduct involved "solely the judgment of [Lunar's] counsel," not Lunar itself. (*Id.* at 22.) This argument fails for multiple reasons. As an initial matter, while Lunar argued below that its conduct amounted merely to a mistake of judgment, it never sought to distinguish itself from its counsel or suggest that Lunar itself played no role in the relevant conduct. That argument is therefore waived. *See Protech Minerals, Inc. v. Dugout Team, LLC*, 284 A.3d 369, 377-78 (Del. 2022); Supr. Ct. R. 8. "[T]his Court may excuse [that] waiver" only "if it finds that the trial court committed plain error requiring review in the interests of justice." *Smith v. Del. State Univ.*, 47 A.3d 472, 479 (Del. 2012) (citation omitted).

Here, the interests of justice do *not* support considering this factual issue for the first time on appeal. Had Lunar argued below that it bore no responsibility for the relevant misconduct, AMAG could have focused its submissions on Lunar's involvement in the litigation—including, potentially, seeking testimony from Lunar's witnesses. This Court should not tolerate Lunar's attempt to sandbag

AMAG by raising this issue for the first time in an appeal in which AMAG cannot further develop the factual record.

Moreover, Lunar's attempt to offload responsibility on its prior counsel is irreconcilable with the record that does exist—and with the Court of Chancery's findings. Most importantly, Lunar itself had admitted that each of the entities that comprise Lunar's board and that oversaw this litigation is "an expert in the litigation process"; some entities even have their own in-house discovery teams and others have established discovery vendors. (Ex. A at 42.) The Court of Chancery relied on these representations, concluding that Lunar itself was responsible for the misconduct at issue because its funds are "repeat-player clients … who know all about litigation"—they "are people who know what's going on" and "know how to play the game." (*Id.* at 65.)

The idea that such sophisticated, repeat-player clients would have been totally unaware of the case schedule and discovery deadlines is, to put it mildly, implausible. Indeed, Lunar never suggested below, and does not argue to this Court, that its prior counsel never provided it with the case schedule generally or the substantial completion deadline in particular. And Lunar obviously knew that it had not produced any documents. That, alone, shows Lunar's conscious disregard of the Court of Chancery's scheduling order. Moreover, the record also shows that, in the period preceding and following the substantial completion deadline, Lunar and its

counsel were in direct communication—both verbally and by email—about Lunar's discovery obligations. (*Id.* at 39.) Given all of this, Lunar's bald assertion (Opening Br. at 24) that there is "no evidence" that it "had any involvement in" its lawyer's misconduct is specious.

Lunar also cannot minimize its culpability by asserting (*Id.* at 28) that "[a]s soon as Lunar became aware of lead counsel's lack of diligence and error in judgment, such counsel was replaced." That is demonstrably false. Lunar did not replace its lead counsel after the Court of Chancery entered an order asking whether it could dismiss this case given lead counsel's failure to prosecute the case for nearly a year—from July 2021 to July 2022. Lunar did not replace its lead counsel after AMAG filed its 2022 motion to compel, which detailed Lunar's lead counsel's lack of diligence and flagrant disregard of court rules and its own commitments. Lunar did not replace its lead counsel even after recognizing that AMAG's motion was so obviously meritorious that, as the Court of Chancery put it, Lunar "conceded and agreed to pay attorneys' fees." (Ex. A at 52.) Lunar did not replace its lead counsel despite its numerous conversations with counsel about discovery in the period after the substantial completion deadline—conversations that undoubtedly made clear that Lunar had missed court-ordered deadlines. (*See* pp. 17-18, *supra*.) And Lunar did not even replace its lead counsel after AMAG filed the sanctions motion at issue in this appeal, which laid out myriad examples of lead counsel's "lack of diligence

and error in judgment." (Opening Br. at 28.) It was only months after AMAG filed its sanctions motion—after the Court of Chancery had *terminated Lunar's case*—that Lunar replaced its lead counsel. Far from replacing its lead counsel "[a]s soon as Lunar became aware" of counsel's "lack of diligence and error in judgment," Lunar waited until the last possible moment. The timing of Lunar's decision to replace its lead counsel shows complicity in, not objection to, counsel's conduct.

Lunar also errs (*Id.* at 24-25) in faulting the Court of Chancery for its passing reference to a potential malpractice claim by Lunar against its former lead counsel. Contrary to Lunar's brief, the Court of Chancery did not conclude that Lunar, though blameless, could still be sanctioned because it could potentially sue its lawyers. The court simply noted, in a few passing sentences, that Lunar, despite its culpability, might still have some remedy against its lawyers. (*See* Ex. A at 67.)

Finally, this case is nothing like *Lehman Capital*, on which Lunar principally relies. (Opening Br. at 23-24.) There, virtually all of the misconduct was attributable to the "trial attorney's inept intraoffice communications": The plaintiff provided its attorney with responsive documents and "had no reason to believe" the attorney had not produced those documents; as it turned out, however, the attorney's secretary had lost track of the client's email. *Lehman Cap. v. Lofland ex rel. Estate of Monroe*, 906 A.2d 122, 131-33 (Del. 2006). Moreover, the defendant in that case *conceded* that it owed the vast majority of the damages sought—thus, terminating

the case would give the defendant an "astonishing windfall." *Id.* at 133. Here, by contrast, Lunar was a sophisticated client that was in active communication with its attorneys about discovery and knew full well that its attorneys had a history of dilatory conduct and discovery violations. Lunar also obviously knew that it had not produced a single document. And, as discussed below, pp. 42-43, *infra*, termination is not a windfall because Lunar is unlikely to recover a penny even if this case were to proceed on the merits.

4. The Court of Chancery did not abuse its discretion in concluding that Lunar's misconduct prejudiced AMAG and the Delaware judicial system.

The trial court noted several ways in which AMAG was prejudiced by Lunar's misconduct: AMAG "didn't get to litigate on the schedule that was agreed to," "didn't get to pursue the types of discovery that they should have been able to pursue," and "didn't get to make the types of decisions that they should have been able to make in real-time." (Ex. A at 58.) Lunar does not seriously dispute any of this, but instead primarily argues that the prejudice to AMAG was "[d]e [m]inimis" because "[t]he relevant evidence … is almost entirely, if not solely, within the possession of AMAG." (Opening Br. at 25-26.) That argument is mistaken for multiple reasons.

First, the premise of Lunar's argument—that the relevant evidence is solely in AMAG's possession—is wrong. For example, the complaint's second count alleges that AMAG altered its accounting methods to make it appear that AMAG

had not met the second year's sales milestone when it had. (A331 ¶ 29.) Lunar's independent auditor, Grant Thornton LLP, had "conduct[ed] a pre-litigation review of the sales periods at issue" (A1065) and "confirm[ed] that, in fact, the net sales were such that the milestone was not met." (Ex. A at 14.) Lunar's documents relating to Grant Thornton's audit are highly probative of the validity of Lunar's claim that, contrary to the independent auditor's finding, AMAG's accounting methods were somehow improper.

Similarly, the complaint's first count rests largely (if not entirely) on the allegation that AMAG's CEO told an unidentified "analyst" that AMAG would intentionally depress sales so as not to make the second milestone payment. (A330 ¶ 24.) This allegation is false, but to prove that it is false, AMAG needs discovery from Lunar to figure out the identity of this unidentified "analyst" and any other support Lunar might have for making this (false) allegation.

Second, Lunar's prolonged failure to prosecute and its refusal to engage with the discovery process prejudiced AMAG by making probative evidence harder to obtain. The litigation commenced four years ago and concerns events from 2016 and 2017. By now, witnesses may not recall important details or may be unavailable. *See, e.g.*, *Harris v. State*, 956 A.2d 1273, 1276 (Del. 2008) (noting that, as a case is delayed, witnesses may "become unavailable or their memories fade"). The longer Lunar delayed and refused to comply with deadlines (and then its own extensions),

the more prejudice AMAG suffered. If the case were permitted to go on, and fact discovery were to reopen, this prejudice would grow.

Third, for several years AMAG has been unfairly "burdened by the overhang and uncertainty of this litigation" (Ex. A at 15)—which included a false allegation of misconduct by AMAG's former CEO—without the opportunity to defend itself in court because of Lunar's willful misconduct.

In an attempt to minimize the prejudice to AMAG, Lunar mischaracterizes the record and falsely states that "AMAG expected and endorsed a revised schedule to permit a review of its documents and to facilitate settlement discussions." (Opening Br. at 27.) In reality, the discussions of a "revised schedule" only began after Lunar had violated multiple court rules and orders. Moreover, the parties never actually agreed on any revised schedule in writing as required by the Scheduling Order and prevailing practice (A906, ¶ 9; *Encite LLC v. Soni*, 2011 WL 1565181, at *2 (Del. Ch. Apr. 15, 2011) ("Informal agreements among counsel do not operate, *ex proprio vigore*, to modify a Court's order.")), and AMAG repeatedly made clear that it expected Lunar to comply with its existing discovery obligations, to no avail (*see* pp. 13-14, *supra*).

Finally, the Court of Chancery explained in detail the prejudice to the judicial system as a whole from allowing sophisticated counsel and sophisticated clients to intentionally and strategically disregard court rules, violate court orders, and ignore

correspondence from opposing counsel. (Ex. A at 60-62.) This Court has emphasized the importance of such prejudice given that sanctions serve "to deter those who may be tempted to abuse the legal system by their irresponsible conduct." *Hoag*, 953 A.2d at 717 (quoting *Holt*, 472 A.2d at 824). Lunar ignores this type of prejudice, presumably because it has no plausible response. The Court of Chancery's conclusion that, on these facts, anything short of a terminating sanction would encourage the "expectation [that courts will] turn[] a blind eye to problematic conduct" (Ex. A at 61) is exactly the sort of exercise of judgment that is entitled to significant deference.

5. The Court of Chancery did not abuse its discretion in concluding, after careful consideration, that lesser sanctions would not be appropriate or workable.

The hearing transcript shows the Court of Chancery's thoughtful and deliberate consideration of potential lesser sanctions, all of which the court ultimately found either too lenient given Lunar's conduct or practically unworkable and unfair to AMAG. (*See* pp. 21-22, *supra*.) While AMAG primarily sought a default judgment, it also proposed a "menu" of lesser sanctions for the Court of Chancery's consideration, including barring Lunar from obtaining any additional discovery and precluding it from relying on documents it belatedly produced. (Ex. A at 16-20.) Lunar, for its part, urged the court to simply push back the discovery deadlines for at least six months—which is no sanction at all. (A1057.) The Court of Chancery considered these options carefully and reasonably explained why lesser

sanctions were inadequate. (*See* pp. 21-22, *supra*.) Among other things, the court explained that it had denied terminating sanctions in other cases in favor of lesser sanctions. The court reached a different conclusion here because Lunar's misconduct was more extreme and lesser sanctions would be unworkable and prejudicial to AMAG. (Ex. A at 62-64.)

In this Court, Lunar appears to argue that the Court of Chancery did not have discretion to "vault[] to the most extreme sanction" without first imposing a lesser sanction or issuing a warning. (Opening Br. at 36-37.) But this Court has never held that a court must always impose lesser sanctions before entering default judgment—indeed, in *Wahle*, this Court affirmed a terminating sanction despite having issued no prior sanction. 559 A.2d at 1230. Lunar's proposed categorical rule would create a perverse incentive: It would penalize a party like AMAG for resolving a sanctions motion without court involvement even where the other side effectively concedes that its conduct was sanctionable. Moreover, the Court of Chancery made clear that it would have sanctioned Lunar in connection with AMAG's 2022 motion to compel if Lunar had not mooted the motion by "conced[ing] and agree[ing] to pay attorneys' fees." (Ex. A at 52, 64.) The Court of Chancery's determination that the prior conceded-to sanction effectively created a ramp-up was not an abuse of discretion.

Lunar also suggests (Opening Br. at 37) that "this case is unique in entering a default judgment absent multiple prior warnings or violations of court orders." But

Lunar *did* violate the Scheduling Order—as well as court rules and agreed-upon deadlines—multiple times. (*See* p. 28, *supra*.) As *Wahle* held in affirming a terminating sanction, "[l]itigants who continually miss discovery deadlines, both self-imposed and court-imposed, as in this case, may not claim surprise by imposition of the ultimate sanction of dismissal." 559 A.2d at 1233. Lunar has just as little cause for surprise.

6. Lunar's claims lack merit.

Lunar's reliance on the purported strength of its claims is unpreserved and meritless. Lunar never argued below that the merits weigh against termination, depriving AMAG of the opportunity to make a factual record.

Regardless, Lunar's case is exceptionally weak. The Court of Chancery concluded that Lunar's complaint only "barely" survived a motion to dismiss. (A674-75.) And while Lunar baldly asserts that "the evidence already obtained supports the allegations in its Amended Complaint," it tellingly cites nothing to support that assertion.

In reality, the discovery to date all but disproves Lunar's claims. Lunar's theory that AMAG engaged in impermissible accounting is refuted by Lunar's own independent auditor, who *agreed with AMAG* that AMAG's Net Sales did not trigger the second milestone payment. (*See* Ex. A at 14; A1051.) Lunar's other theory—that AMAG did not use commercially reasonable efforts—rests largely, if not

entirely, on Lunar's allegation that AMAG's former CEO told some unspecified "analyst" that AMAG intended to suppress sales to avoid the milestone payment. (*See* A330 ¶ 24; A673 ¶ 13.a.) Yet when AMAG asked Lunar to identify this "analyst," Lunar conceded that "Lunar does not know the name of the 'analyst'" but "understands the analyst worked at Cantor Fitzgerald." (B55-56.) Lunar requested third-party discovery from Cantor Fitzgerald, seeking (among other things) "communications with AMAG's management" about the milestone payments. (A761.) As far as AMAG is aware, Cantor Fitzgerald identified no responsive documents. Moreover, Lunar's repeated and willful violations of the Court of Chancery's discovery rules and Scheduling Order—including its failure to timely produce documents supporting this allegation—further "undermine[s] the merits of [its] claim." *Hoag*, 953 A.2d at 719. Thus, if Lunar's reliance on the merits of the parties' dispute is somehow preserved, the merits weigh in favor of the Court of Chancery's ruling.

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As this Court has emphasized, "[t]rial courts must be afforded broad discretion to fashion orders to expedite cases consistent with the administration of justice and the efficient disposition of their case loads." *Wahle*, 559 A.2d at 1233. Here, Lunar's conduct was both consistent and extreme—it was, as the Court of Chancery put it, "beyond precedent." (Ex. A at 65.) Lunar consistently flouted court

rules, the Scheduling Order, and the parties' agreements and, when confronted with its violations, buried its head in the sand and stopped responding to opposing counsel. The Court of Chancery's conclusion, after careful consideration of the relevant factors, that this conduct warrants a terminating sanction falls well within its "broad discretion" and this Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's entry of a default judgment.

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