GT GreenbergTraurig

Hal S. Shaftel, Esq.
Tel 212.801.2164
Fax 212.805.9464
shaftelh@gtlaw.com

August 8, 2025

VIA ECF

Honorable John P. Mastando, U.S.B.J.
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, NY 10004

Re: *In re Eletson Holdings, Inc. et al.*, Case No. 23-10322 (JPM)

Dear Judge Mastando:

On behalf of Apargo Limited, Fentalon Limited and Desimusco Trading Limited (collectively, thee "Preferred Nominees"), we write to confirm their compliance following the Court's order dated August 1, 2025 (BK ECF 1759) (the "Subject Order") pertaining to Eletson Gas LLC ("Eletson Gas"). Although we were not counsel at the time of the underlying motion practice, we advise the Court that the three entities, in compliance with the Subject Order, today provided timely notice to Eletson Gas that they rescind the prior instructions covered by the Subject Order, subject to and without waiver of their rights on appeal (and they respectfully have filed a notice of appeal of the Subject Order).

As the Court may recall, the Preferred Nominees acted with respect to the share registry and board designations after the District Court, by Order dated February 9, 2024 (ECF 83) (the "February 2024 Order", annexed hereto for convenience as Exhibit A) confirmed in substantial part the Final Award (annexed hereto for convenience as Exhibit B) issued by Arbitrator Belen in the JAMS Arbitration, including, in particular, as related to the ownership of the preferred shares of Eletson Gas by the Preferred Nominees as of March 11, 2022. In doing so, the Preferred Nominees did not perceive any inhibition from the Lift Stay Order (BK ECF 48) based both on their own reading of its terms and on the District Court's explicit holding in the February 2024 Order that "the Award of the Preferred Interest to the Nominees … does not violate the Lift Stay Order or the automatic stay." ECF 83 at 90. Instead, the District Court found that "Levona is mistaken in its argument that the arbitrator improperly usurped the powers of the bankrupt court by determining that … the Nominees were entitled to the Preferred Interests. Nor will this Court have violated the Automatic Stay by confirming the Award." *Id* at 86.

2310322250808000000000004

Even though the Preferred Nominees accordingly understood that their actions regarding the share registry and board designations did not transgress the Lift Stay Order or automatic stay, they also understood that those acts at the time were ministerial by nature. Pending resolution of the ownership and board disputes, Arbitrator Belen previously had recognized by the Status Quo Injunction (BK ECF 7-3) (annexed hereto for convenience as Exhibit C) that the management handling the daily affairs of Eletson Gas since its inception in 2013 would continue in place in the best interests of the business. As Arbitrator Belen held in ordering the maintenance of the status quo: "the phrase 'status quo' refers to, *inter alia*, … its current management and operations…" The Status Quo Injunction continued: "preserving the 'status quo' is not about who is the preferred holder" (BK ECF 7-3); rather, it was correctly recognized that the issues regarding the assignment of shares and the composition of the board are separate and distinct from the conduct and handling of daily operations.

While our firm is not counsel to Eletson Gas, in the interests of transparency the Preferred Nominees understand that the current management of Eletson Gas remains in place consistent with the rationale of the Status Quo Injunction. In issuing the Status Quo Injunction, Arbitrator Belen recognized the point, which remains equally relevant today, that the continuation of the long-term management was necessary to avoid disruption of operations and relationships, including with respect to vessels, crews and other commercial matters. As Arbitrator Belen also found in the Final Award, Levona improperly engaged in "aggressive tactics" that "interfered with the Company's relationships with its banks", thereby resulting in the arrest of vessels and other economic hardships. ECF 41-1 at 56; s*ee also id*. at 68 (finding that "Murchinson/Levona's intentional interference with the Company's relationships with its lenders, caus[ed] the arrest of the Company vessels"); *id*. at 96-97 ("Levona . . . actively engag[ed] in unlawful behavior by wrongfully influencing Company financiers to turn against the Company … including . . . by causing the arrest of five of the Company's vessels"). Given that Murchinson/Levona has persisted through today with the exact same type of mischief involving "improper dealings with the Company's banks and financiers" (*id*. at 56), it is essential to continue the protections afforded Eletson Gas by keeping separate the disputes over ownership and board seats from its ongoing management.

No part of the Subject Order from last Friday addresses, let alone disturbs, the mechanics of the daily operations of Eletson Gas consistent with the Status Quo Injunction or the identity of the day-to-day management team, including Mr. Kertsikoff (President/Treasurer) and Ms. Karastamati (Secretary). Neither is a director of any of the Preferred Nominees. Until resolution of the ongoing disputes, the Final Award from the Arbitration constitutes the only determination, albeit subject to ongoing, unresolved challenge, relating to ownership of the preferred shares. In the current procedural posture, both the Status Quo Injunction and Final Award represent at the very least a binding contract on the parties to the proceeding. *See Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984) (being beneficiary of an arbitration award "is a contract right that may be used as the basis for a cause of action."). The binding nature of the arbitration clearly applies to Levona, as a counterparty to the contract providing for the arbitration. This is far from the inapposite situation where a third party is claiming it is not bound by an arbitration ruling, but rather a party who by contact is obliged to follow it unless and until overturned. Indeed, Levona is in violation of its contractual obligations to the extent it seeks to avoid the critical aspects of the Final Award that have not been disturbed.

Absent the Final Award being disturbed, which has not occurred in any relevant respects, deference is due its determinations, reasoning and findings, including in respect of the conduct of proper corporate governance. *See MGM Prods. Group v. Aeroflot Russian Airlines*, 91 Fed. Appx. 716, 717 (2d Cir. 2004) ("We accord great deference to the arbitrator's factual findings and contractual construction."); *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) ("courts must grant an arbitration panel's decision great deference.")

Because the Preferred Nominees are very mindful of the Subject Order and their obligations to abide by it, subject respectfully to the appropriate exercise of their appeal rights, we believe it is appropriate to apprise the Court through this letter as to their compliance.

Respectfully,

/s/ Hal S. Shaftel
Hal S. Shaftel

HSS:mk

EXHIBIT A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ELETSON HOLDINGS, INC. and ELETSON CORPORATION, Petitioners, -v- LEVONA HOLDINGS LTD., Respondent.	23-cv-7331 (LJL) OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

Petitioners Eletson Holdings Inc. ("Holdings") and Eletson Corporation ("Corp" and, together with Holdings, "Eletson" or "Petitioners"), apply for an Order confirming a final arbitration award (the "Award") issued by the Honorable Ariel Belen of the Judicial Arbitration and Mediation Services, Inc. ("JAMS") on September 29, 2023. Dkt. No. 62. Respondent and Cross-Petitioner Levona Holdings, Ltd. ("Levona" or "Respondent"), moves: (1) for an Order, pursuant to Federal Rule of Civil Procedure 12(b)(1), dismissing the petition to confirm the Award; (2) for an Order, pursuant to 9 U.S.C. § 10, vacating the corrected interim award dated August 15, 2023 (the "Corrected Interim Award") and the Award; and (3) for an Order, pursuant to 9 U.S.C. § 9, 9 U.S.C. § 207, and/or Article V of the New York Convention, denying the petition to confirm the Award. Dkt. No. 49.

BACKGROUND

The following facts are drawn from the Amended and Supplemental Petition to Recognize and Enforce the Arbitral Award ("Amended Petition"), Dkt. No. 62, the Award, Dkt.

No. 67-58, and the parties' statements of material fact pursuant to Federal Rule of Civil Procedure 56.1, Dkt. Nos. 65, 66. The facts are undisputed except as otherwise stated.

I. The Relevant Parties

This dispute relates to corporate control over non-party Eletson Gas LLC ("Eletson Gas" or the "Company"). Eletson Gas, formed in 2013 under the laws of the Republic of the Marshall Islands, is a limited liability company that specializes in liquified petroleum gas ("LPG") shipping. Dkt. No. 67-58 at 5; Dkt. No. 62 ¶ 2. The present dispute centers on whether Respondent Levona violated its agreements with and obligations to Petitioners Holdings and Corp, a question which turns in part on whether an option to purchase the preferred shares of Eletson Gas was effectively exercised by Holdings.

Eletson—both Petitioners Holdings and Corp—is an international shipping group owned by three principal families: the families of non-parties Laskarina Karastamati, Vassilis Kertsikoff, and Vasilis Hadjieleftheriadis. Dkt. No. 67-58 at 5. Both Holdings, the parent company, as well as its subsidiary, Corp, are corporations formed under the laws of Liberia. Dkt. No. 62 ¶ 2. Holdings owns the common shares of the Company. *Id.* Corp provides management services for vessels owned directly or indirectly by Eletson Gas in exchange for a management fee.

Respondent Levona is a special purpose entity formed under the laws of the British Virgin Islands on October 20, 2021. *Id.* ¶ 3. Levona is a subsidiary of two hedge funds, Nomis Bay and BPY, that have both engaged the same alternative management company Murchinson Ltd. ("Murchinson") to act as their investment sub-advisor. *Id.*; Dkt. No. 50 at 7 n.2.

II. The Joint Venture

As noted, this case arises from a dispute over the ownership of the preferred shares in the Company, and thereby the control over the Company's decision making and assets. The

Company has historically owned a large fleet of medium and long-range product tankers and has been a leader in the transportation of oil products and gas cargoes. Dkt. No. 67-58 at 6. At the time that the events giving rise to this case occurred, the Company owned and operated fourteen LPG vessels, making its fleet the second largest on the market, second only to Unigas, the Company's primary competitor. *Id.*

The Company was formed in 2013 as a joint venture by Holdings and funds managed by Blackstone Tactical Opportunities ("Blackstone"). *Id.* at 5. At the outset of the joint venture, Holdings, which contributed equity interests in five medium-sized LPG vessels to the enterprise,[1] held (and still retains at present) the common stock in the Company, while the Blackstone funds, which contributed capital, held the preferred shares. *Id.*; Dkt. No. 67-50 ¶¶ 91–92. Over the following few years, the Company was plagued by financial problems, defaulting on several loans. Eventually, in November 2021, Blackstone sold its interest in the Company to Levona, making Levona the owner of the preferred shares previously held by Blackstone. Dkt. No. 67-58 at 7.

Several agreements are relevant to this dispute. The first is the Third Amended and Restated LLC Agreement ("LLCA"), which became effective August 16, 2019, and governs the relationship among the holders of membership interests in the Company and contains the arbitration provision that Eletson invoked in the arbitration at issue here. *Id.* at 6. The original parties to the LLCA were the Company, Holdings (the common shareholder of the Company), Corp (the manager of the fleet of the Company's ships), and Blackstone (which held the preferred shares in the Company through a number of different funds it managed, all of which

[1] The vessels were the Anafi, the Nisyros, the Symi II ("Symi"), the Telendos II ("Telendos"), and the Tilos. Dkt. No. 31-1 at 84. Eletson later contributed capital to the venture as well.

were parties to the LLCA). Dkt. No. 67-2 at 1–2. When Blackstone sold its interest in the preferred shares (the "Preferred Interests") to Levona in November 2021, Levona replaced Blackstone as party to the LLCA, and signed a Joinder Agreement to that effect, agreeing to be fully bound by and subject to the provisions of the LLCA. *See* Dkt. No. 67-4.

The LLCA confers on the parties certain rights and obligations. As relevant to this dispute, the LLCA gave the holder of the Preferred Interests the power to designate three of five members of the Company's Board of Directors. Dkt. No. 67-2 § 3.3. Because the Board of Directors had "the sole right to manage and control the business, operations and affairs of the Company and to do any and all acts on behalf of the Company that are necessary, advisable or convenient to the discharge of its duties," *id.* § 3.1, the LLCA affords the holder of the Preferred Interests managerial control over the Company. Even so, ownership of the Preferred Interests did not guarantee total control over the Company; the LLCA requires the approval of four Directors—one more Director than the holder of the Preferred Interests has the power to select—to undertake any "Fundamental Action," including the acquisition or disposition of any vessels or any assets worth more than $1,000,000. *Id.* § 3.2; *id.* Schedule VI. The LLCA also gives the holder of the Preferred Interests the right to the vast majority of the profits of the Company. When Levona purchased the preferred stock from Blackstone in November 2021, it inherited these rights.

The LLCA also contained a mandatory arbitration provision. Section 12.14(a) provides as follows:

> Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof (including the determination of the scope or applicability of this agreement to arbitrate) shall be determined by arbitration in New York County in the State of New York or any other mutually agreeable location, before a single arbitrator. The arbitrator shall be selected by agreement of the parties. If the parties are unable to agree on an

> arbitrator within 15 days after the demand for arbitration is made, JAMS shall designated the arbitrator. The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. The Federal Arbitration Act shall govern the interpretation and enforcement of such arbitration proceeding. The arbitrator shall apply the Law of the State of Delaware and the Republic of the Marshall Islands, as the case may be, in accordance with Section 12.13.[2]

Dkt. No. 67-2 § 12.14(a). Arbitration was designated as the "exclusive and binding method" for resolving any such dispute. *Id.* § 12.14(b). But the Company's financial problems continued despite the LLCA and the Company's new management. By early 2022, five of the Company's ships—over a third of its fleet—had been arrested by various creditors for non-payment of the Company's liabilities. Dkt. No. 67-58 at 54. Multiple arrested ships were scheduled to be sold at auction to compensate creditors.

Three days before the auction was set to proceed, however, Holdings, Corp, the Company, and a wholly-owned subsidiary of the Company, entered into the second agreement with Levona that is relevant to this dispute—the Binding Offer Letter ("BOL")—on February 22, 2022, which, through a desperately-needed infusion of cash in the form of a loan from Levona, enabled the Company to avoid losing most of its fleet. Dkt. No. 67-10. Pursuant to the BOL, the Company agreed to transfer two of its ships to Levona, in exchange for Levona lending up to $10,000,000 to the Company, and granting the Company a limited option to buy Levona out of the Preferred Interests, which would have the effect of terminating Levona's ownership and control of the Company. *Id.* Because it has some relevance to the dispute, the Court describes the terms of the BOL in some detail. The BOL sets forth the terms and conditions pursuant to

[2] Section 12.13 provides that "[t]o the fullest extent permitted under the laws of the Republic of the Marshall Islands, [the LLCA] and the rights and obligations of the parties [t]hereunder shall be governed and construed and enforced in accordance with the laws of the state of Delaware for agreements made and to be performed wholly within that jurisdiction." Dkt. No. 67-2 § 12.13. To the extent that the laws of the Marshall Islands did not permit application of Delaware law, Section 12.13 provides that the law of the Marshall Islands governs. *Id.*

which Levona was "willing to (A) buy the shares and/or membership interests of" two of the Company's vessels, the Symi and Telendos, "from [the Company] in consideration of advancing a purchase option to [the Company] and Eletson Holdings . . . ; [and] (B) advance a US$10,000,000 senior loan to [the Company] . . . ." *Id.* With respect to the purchase of the Symi and the Telendos, the BOL states that "Levona shall buy all of the Shares in the Companies held by [the Company] . . . in consideration of the grant to [the Company] and [Corp] of the purchase option set out in Clause 2" of the BOL. *Id.* § 1.1.

The BOL then goes on to provide the terms and conditions of both the loan and the option to purchase the Preferred Interests from Levona (the "Purchase Option"). Clause Four, which addresses the loan and Assignment, provides that "[c]oncurrently with the Transfer [of the Company's interests in the Symi and the Telendos to Levona], Levona shall enter into a loan agreement . . . for the advance of a loan facility to [the Company] of an amount of US$10,000,000" to be "used as mutually agreed upon between Levona and [the Company] for various refinancing and sources and uses." *Id.* § 4.1. This loan, the BOL provided, was senior to all liabilities of the Company "save for such secured debts of [the Company] as Levona may agree in their sole discretion may remain senior to the loan." *Id.* And, concurrent with the transfer of the interests in the vessels and entry into the loan agreement, the parties agreed that Corp and the Company's subsidiary would assign any claims they had against the Company to Levona until the full amount of the loan was paid back. *Id.* §§ 4.3, 4.4. The BOL further states that the loan terms are to also include: (1) a maturity date of two years from the date of the first drawdown; (2) an interest rate of 10% per annum compounded monthly; and (3) priority on any excess cash flow. *Id.* § 4.2.

Clauses Two and Three of the BOL address the Purchase Option and the consideration for the Purchase Option ("Purchase Option Consideration"), respectively. Clause Two outlines the parameters under which the Company could buy out the Preferred Interests. It states that, "[s]ubject to and in consideration of the Transfer [of shares in the Symi and the Telendos] occurring and the conditions set out in Clause 2.2 and 2.3, Levona hereby grants to [the Company] . . . the option, exercisable by written notice to Levona . . . , for either [the Company] or its nominee to purchase all of the membership interests held by Levona in [the Company] . . . for a consideration equal to the Purchase Option Consideration" detailed in Clause Three. *Id.* § 2.1. However, the BOL sets conditions upon how and when this Purchase Option could be exercised. Clause 2.2 states that the Company "shall only be entitled to serve an Option Notice after either: (a) the Loan and any Interest accrued thereon is fully repaid; or (b) adequate security and/or collateral is provided for the Loan (the adequacy of such security being at the sole discretion of Levona)." *Id.* § 2.2. Clause 2.3 limits the amount of time the relevant parties had to exercise the purchase option. "[A]n Option Notice may only be served within 30 days from the date of [the BOL] ('the Purchase Option Period')." *Id.* § 2.3. The Purchase Option Period could be extended, but only if the loan was at least partially repaid. *Id.* §§ 2.4, 2.5. Under Clause 2.3, "[i]f no Option Notice is validly served by the expiry of such Purchase Option Period, . . . the purchase option shall lapse." *Id.* § 2.3.

Clause Three of the BOL sets forth the formula and methodology for calculating the Purchase Option Consideration. The Purchase Option Consideration is stated to be an amount equal to "$1 plus an amount equal to US$23,000,000 less the Net Value," where the "Net Value" is equivalent to the value of the Symi and the Telendos as determined by an independent valuation. *Id.* §§ 3.2, 3.3. In essence, if the value of the two vessels is less than $23,000,000, the

Company—to exercise the option to buy out Levona's Preferred Interests—must true up the difference to Levona so that the total value of consideration paid to Levona (including the value of the vessels) equals $23,000,000. If the "Net Value" exceeds $23,000,000 (*i.e.*, if the value of the vessels is greater than $23,000,000), then the excess benefits the Company and is applied to reduce the amount outstanding on Levona's loan to the Company.

The BOL also conditioned the loan on an agreement from the Company, Corp, and Holdings that from the last date of the period during which the Purchase Option could be exercised, they would cooperate and vote in favor of any Fundamental Action proposed by Levona. *Id.* § 4.2(d).

Importantly, the BOL links the loan and the Purchase Option. The Company could only exercise the Purchase Option if Levona was repaid the loan and interest in full, or if Levona received, in its sole discretion, "adequate security and/or collateral . . . for the Loan." *Id.* § 2.2(b). If the Company repaid the loan and interest or provided such adequate security and/or collateral, it was entitled to exercise the Purchase Option and buy the Preferred Interests from Levona, subject only to truing up the value of the ships (the Symi and the Telendos) to $23,000,000. But if the Company could not repay the loan and interest or provide such adequate security, then it did not have the option of buying the Preferred Interests from Levona. In that situation, Levona, as consideration for the unexercised option, would retain the Preferred Interests and the attendant control over the Company, as well as its interests in the Symi and the Telendos.

Like the LLCA, the BOL contained a provision stipulating to the applicable law that would be used to adjudicate disputes, as well as a mandatory arbitration provision. But the law to be applied, as well as the terms of where and how any arbitration would occur, were different

from those set forth in the LLCA. Arbitration to resolve disputes arising from the BOL was to proceed as follows:

> This Letter and the negotiations between the parties in connection with the contents hereof, including but not limited to the proposed purchase of the Shares, grant of the Purchase Option and advance of the Loan and any disputes and claims arising out of or in connection with them and their formation (including non-contractual claims and disputes), shall be governed by and construed in accordance with English law and shall finally be resolved by arbitration in accordance with the rules of arbitration of the London International Centre for Arbitration applicable at the time of conclusion of this letter (the "Rules") by one arbitrator to be appointed in accordance with the Rules. The seat of the arbitration shall be London, United Kingdom. The language to be used in the arbitral proceedings shall be the English language.

Id. § 10. The mandatory arbitration provision in the BOL did not supersede the mandatory arbitration provision in the LLCA.

In short, the BOL provided that Levona would be provided $23,000,000 (partially in the form of the two ships), in exchange for a loan of $10,000,000 and, if that loan and any interest accrued on it was repaid, or if adequate security or collateral was provided to Levona, the Company could exercise an option to buy out Levona's stake in the Company by acquiring the Preferred Interests.

On March 11, 2022, Levona and the Company executed a series of contracts to give effect to the terms outlined in the BOL (the "Transaction Documents"). Pursuant to the agreement contemplated in the BOL to transfer two Company vessels to Levona, the parties executed the Share Transfer Agreement ("STA"). Dkt. No. 67-12. The STA provided that the Company would sell its interests in the Symi and the Telendos vessels and that "[t]he consideration for the sale and purchase of the Shares [in the vessels] shall be as set out in the [BOL]." *Id.* § 3.1. It contained an integration clause providing that the STA "together with the [BOL] constitutes the entire agreement between the Parties regarding the sale and purchase of the Shares [in the vessels] and related matters." *Id.* § 7.1.

The same day, the parties also executed several other agreements to effectuate the terms contemplated by the BOL. The parties entered into an Intra-Group Loan Agreement, pursuant to which Levona provided to the Company a loan facility of up to $10,000,000 for a term of up to two years. Dkt. No. 67-58 at 8. The parties agreed, through a Fundamental Action Letter, that while the loan was outstanding, Eletson would "[c]o-operate with any Fundamental Action . . . proposed by Levona." Dkt. No. 55-4 at 15. Before the parties entered into the Fundamental Action Letter, "Fundamental Actions" as defined in the LLCA—including the Company's acquisition and disposition of vessels and other assets worth more than $1,000,000—were the only acts over which Levona could not already exercise complete control as the holder of the Preferred Interests. By providing that Eletson would cooperate with "Fundamental Actions" that Levona wanted to take, the Fundamental Action Letter transferred virtually unfettered control over the Company's affairs to Levona. The parties also entered into an Assignment of Claims agreement, as contemplated by the BOL, pursuant to which Corp assigned to Levona all of its claims against the Company and any of its vessels. Dkt. No. 67-58 at 9. Relatedly, the parties entered into a Deed of Waiver and Release, pursuant to which specified outstanding claims against the Symi and Telendos were released by certain Eletson entities.

On the same day that the parties executed the Transaction Documents, March 11, 2022, the Board of Directors of the Company unanimously approved the STA, the Loan Agreement, and the Fundamental Action Letter in a written memorandum ("Written Consent"). Dkt. No. 67-13. The Written Consent summarized the terms of the BOL with respect to the sale of two of the Company's vessels to Levona "in consideration of the grant of a purchase option to the Company over the shares held by Levona in the Company," and with respect to the "fixed term unsecured loan facility advanced by Levona to the Company of []$10,000,000." *Id.* The Written Consent

ratified the BOL and all of the ancillary contracts, and authorized the Eletson Directors on the board to sign, execute, and deliver the STA and the Loan Agreement on behalf of the Company. *Id.* at 2.

After signing the Transaction Documents, the Company and Levona continued to work in concert to navigate the Company's financial challenges. Dkt. No. 67-48 at 38. A March 9, 2022 cash forecast prepared by the CFO of Corp, Peter Kanelos, projected that the Company would be out of cash by April 7, 2022, and again by April 12, 2022. *Id*. In light of this projection, the parties amended the loan to increase the amount available to the Company to $14,000,000. Dkt. No. 67-58 at 9.

The parties dispute the effect of these agreements and specifically whether they constitute an exercise of the Purchase Option, and thus whether the Company bought out Levona's Preferred Interests in the Company. Holdings and Corp contended in the arbitral proceedings that these contracts satisfied the Purchase Option and effectuated the Company's purchase of the Preferred Interest from Levona, and thus nullified Levona's membership interest in the Company. Dkt. No. 67-24 at 13–14. Accordingly, Petitioners argued, Levona's later attempt to sell some of the Company's assets was improper, because Levona, having allegedly sold off the Preferred Interests, no longer had the authority to control the Company or its assets. *Id.* at 14. In response, Levona contended that the transfer of the ownership shares of the vessels was consideration for the Purchase Option, but did not itself constitute an exercise of the Purchase Option. Dkt. No. 67-17 at 8. If the conditions for exercise of the Purchase Option were not satisfied, Levona would retain the Preferred Interests *and* retain the ownership shares of the vessels. Pointing to the lack of a written notice to exercise the Purchase Option, and lack of repayment of any portion of the Loan, Levona contended that the Company never exercised the

Purchase Option and thus that Levona properly retained managerial control over the Company. *Id.*

About four months after the Transaction Documents were executed, on July 15, 2022, Levona—purporting to act on behalf of the Company—signed a non-binding Letter of Intent with Unigas (the "Unigas LOI")—the Company's primary competitor—to sell Unigas nine of the Company's twelve remaining vessels for $262,000,000. Dkt. No. 67-58 at 9. The two Eletson representatives on the Company's Board of Directors were not consulted before the Unigas LOI was signed, and were only informed of the agreement when a Levona representative sent the Unigas LOI to the Company's Board of Directors via email and directed them to accept its terms. Dkt. No. 67-24 at 16. Less than one week later, on July 21, 2022, one of the Levona representatives on the Board of Directors circulated notice for a Company Board Meeting to be held on July 26, 2022. *Id.* The Eletson representatives on the Board of Directors responded that the notice of the meeting was deficient for several reasons, such as the fact that the notice of the meeting did not specify the purpose of the meeting. *Id.* at 17. The Levona-appointed representative then circulated a new notice for a meeting of the Board of Directors of the Company to be held on July 28, 2022, and this time included a statement of the purpose of the meeting, which included certain actions to be taken in furtherance of the Unigas LOI. *Id.* After the Eletson Directors again responded that the notice was deficient and that they would not attend the meeting, the Levona directors stated that the meeting would nevertheless proceed, and ultimately held the meeting. *Id.*

III. The Commencement of the Arbitration and Jurisdictional Issues

On July 29, 2022, Holdings and Corp submitted a statement of claims and demand for arbitration against Levona in New York pursuant to the mandatory arbitration provision of the LLCA. Dkt. No. 67-16; Dkt. No. 65 ¶ 40; Dkt. No. 66 ¶ 40. Petitioners alleged that Respondent

breached the LLCA "and its express and implied duties thereunder" by, *inter alia*, purporting to act on behalf of the Company and in that capacity "actively trying to strip the Company of substantially all of its assets for less . . . than fair market value and for [Respondent's] selfish and personal gain." Dkt. No. 67-16 at 2. In particular, Petitioners alleged that Respondent granted the Company and Corp the Purchase Option, *id.* ¶ 13, that the Company had exercised the Purchase Option and effectuated the buy-out of the Preferred Interests, *id.*, that Respondent accordingly had no power or authority to act on behalf of the Company, *id.*, and that notwithstanding its absence of authority, and in violation of its duties under the LLCA, Respondent had attempted to effect a sale of nine of the Company's twelve vessels at fire-sale prices, *id.* ¶¶ 18–20. Eletson also included in its statement of claims its allegations that the Eletson-appointed Directors on the Company's Board had refused to sign off on the sale of nine of its twelve vessels, and that Respondent had improperly purported to call a meeting of the Company's Board of Directors to circumvent the Eletson-appointed Directors. *Id.* ¶¶ 21–29. Among other relief, Petitioners sought "[a] declaration that [Petitioners] have complied with all obligations necessary to complete the buyout purchase option and that the option has been executed," and injunctive relief against Respondent continuing to act on behalf of the Company. *Id.* at 8. Petitioners also sought an award of "[c]ompensatory damages for all the harm caused to the Company and/or Claimants by reason of Levona's misconduct," as well as punitive damages. *Id.* at 8–9. On August 16, 2022, pursuant to the LLCA, JAMS appointed Justice Belen to act as sole arbitrator of the dispute. Dkt. No. 62 ¶ 12.

On August 19, 2022, Levona filed its Response to the Statement of Claims and Statement of Counterclaims. *Id.* ¶ 13; Dkt. No. 67-17. Levona contested the jurisdiction of the arbitrator on the ground that the LLCA arbitration provision that Petitioners invoked—which provided for

arbitration in New York under the laws of the Marshall Islands and Delaware—could not control the parties' dispute, which, Levona contended, arose from the BOL. Dkt. No. 67-17 ¶ 1. It contended that the "crux" of the matter—the issue which underpinned all of Eletson's claims—was whether the Company had exercised the Purchase Option as provided for in the BOL, and thus that the dispute could only be resolved by an adjudication of the BOL in London under English law pursuant to the BOL's arbitration provision. *Id.* ¶¶ 1, 2. Levona also asserted counterclaims. It asserted that Eletson (both Holdings and Corp) had mismanaged the Company and failed to take care of its needs in violation of its obligations under the LLCA, the BOL, and the Loan Agreement. *Id.* ¶¶ 24–28. Specifically, Levona alleged that Eletson had breached the provision of the BOL requiring it to agree to Fundamental Actions directed by Levona as long as the loan remained outstanding. *Id.* ¶ 25. It alleged, as an example of Eletson's management failures, that Eletson had prevented the financier responsible for the March 2022 refinancing of selected LPG vessels from placing a mortgage on five of the vessels as desired, resulting in an increase in the interest margin rate and higher interest payments. *Id.* ¶ 28. It also alleged that Eletson had interfered with Levona's sale of the Symi and Telendos vessels, which Levona had acquired pursuant to the STA. *Id.* ¶¶ 29–34. And finally, Levona alleged that, as the sole holder of the Preferred Interests and pursuant to the LLCA and the Fundamental Action Letter, it had the right to sign the Unigas LOI and that Eletson had interfered with Levona's efforts to make the sale on behalf of the Company. *Id.* ¶¶ 35–41. Levona sought an order requiring Eletson agents to vacate the Symi and Telendos, declaratory judgment that the Purchase Option was not exercised, declaratory judgment that it retained the Preferred Interests, declaratory judgment that it was authorized to execute the Unigas LOI, and "[c]ompensatory damages for all the harm

caused and continuing to be caused to the Company and Levona by way of [Petitioners'] mismanagement, breach of contracts, and tortious behavior." Dkt. No. 67-17 ¶ 48.

On September 12, 2022, Levona moved to strike Eletson's claims, asserting that the claims were not within the jurisdiction of JAMS as it had in its initial response. Dkt. No. 67-18 at 3. On September 30, 2022, Justice Belen issued an order denying Levona's motion, holding that "the arbitration provision in the [LLCA] is broad, encompasses the claims asserted, and the parties agree that this arbitration provision was not replaced or superseded by the arbitration [provision] in the Transaction Documents." *Id.* at 12. Justice Belen also found that Levona had waived its jurisdictional challenges when it availed itself of the JAMS forum by filing counterclaims. *Id.*

On October 10, 2022, Justice Belen issued a temporary restraining order ("TRO") providing that, during its pendency, "the parties hereto shall maintain the status quo and shall not, among other things: (1) engage in the transfer or sale of any assets of [the Company] . . . absent the joint written consent of the parties"; or "(2) notice or conduct of any board meetings for the purposes of proposing or considering transfer or sale of any assets of the Company." Dkt. No. 67-58 at 13–14.[3] On November 7, 2022, Justice Belen issued an order rejecting Levona's argument that the TRO did not apply to "the sale of the Symi and Telendos" because those vessels were no longer assets of the Company, having been transferred to Levona pursuant to the STA. The arbitrator held that "[a]ny attempt to sell or otherwise transfer the Symi and Telendos vessels will be deemed to be in violation of the TRO." *Id.* at 14.

[3] The LLCA empowers the arbitrator to grant injunctive relief. It states, in relevant part, that "[t]he parties agree that the arbitrator shall have authority to grant injunctive or other forms of equitable relief (including, without limitation, a temporary restraining order or preliminary injunction) to any party . . . to preserve such party's rights pending a final resolution on the merits." Dkt. No. 67-2 § 12.14(c).

On October 25, 2022, Eletson moved for a preliminary injunction, extending the TRO through the conclusion of the arbitration proceedings. Dkt. No. 31-20. In its application, it complained that Levona was attempting to sell the Symi and Telendos and to continue its efforts to sell the nine vessels to Unigas. *Id.* Levona cross-moved for injunctive relief, seeking an order requiring Eletson to comply with any directive provided to Eletson by Levona related to the Symi and Telendos and to cooperate in due diligence with respect to the sale of the nine vessels to Unigas. On January 12, 2023, the arbitrator issued a decision on the parties' cross-motions for preliminary injunctions and entered a preliminary injunction ("Status Quo Injunction") extending the TRO's prohibition on actions altering the status quo until further notice. Dkt. No. 67-58 at 14. The preliminary injunction stated that:

> The parties hereto shall maintain the status quo and shall not, among other things: (a) engage in the transfer or sale of, or attempt to sell or otherwise transfer, any assets of [the Company] . . . or assets in dispute in this arbitration, absent the joint written consent of the parties, which shall be sent to the undersigned Arbitrator, or (2) notice or conduct of any board meeting for the purpose of proposing or considering the transfer or sale of any assets of the Company or other assets in dispute in this arbitration.

Id.

On December 31, 2022, Eletson filed a Third Amended Statement of Claims and Response to Counterclaims. Dkt. No. 67-24. In its claims, Eletson sought a determination that Levona *never* had any lawful interests in the Company, that the assignment of the two entities owning Company vessels to Levona was procured by coercion, fraud, illegal, and other wrongdoing and is null and void, and that Levona not be considered an interest holder of the Company, or, in the alternative, specific performance of the Company's buy-out of Levona's Preferred Interests. *Id.* at 4. Eletson also sought compensatory and punitive damages and attorneys' fees. *Id.*; *see also id.* at 22–24. In particular, Eletson sought "compensatory damages

for all the harm caused to the Company and/or Claimants by reason of Levona's misconduct." *Id.* at 22.[4]

IV. The Debt Holder Litigation, Holdings' Bankruptcy and Related Arbitration Developments

On or about January 4, 2023, an affiliate under common ownership with Levona—Pach Shemen—purchased $183,851,546 in bonds of Holdings for $2,000,000, with an agreement that it would pay an additional $500,000 if the arbitration ended to Levona's satisfaction such that it was able to exercise its rights as holder of the Preferred Interests to sell the Company or its vessels. Dkt. No. 67-58 at 60. Thereafter, on January 11, 2023, Pach Shemen instructed the bond trustee, Wilmington Savings Fund Society, to sue Holdings to collect the debt due on the bonds. *Id*. Accordingly, that same day, a complaint was filed in this District by Wilmington Savings Fund Society, FSB against Holdings and two related entities (the "Bondholder Litigation"), alleging that the defendants had failed to make required quarterly interest payments on April 15, 2019 and each quarter thereafter, and had failed to repay principal and accrued interest on the maturity date of the bonds in violation of the terms of the notes and the indenture. *Wilmington Sav. Fund Soc'y, FSB v. Eletson Holdings Inc.*, CM-ECF No. 23-cv-261, Dkt. No. 1. On February 2, 2023, and again on March 8, 2023, the court in that case granted letter motions for an extension of time to answer. *Id.* Dkt. Nos. 18, 23. The case has since been stayed. *Id.* Dkt. No. 23.

On March 7, 2023, while the arbitration was pending and after the Bondholder Litigation had been filed, Pach Shemen and two other creditors of Holdings filed involuntary petitions for relief under Section 303 of Title 11 of the Bankruptcy Code, commencing involuntary Chapter 7

[4] On January 27, 2023, Respondent filed a Second Amended Statement of Counterclaims. Dkt. No. 67-25.

proceedings against Holdings and two of its affiliates in the Bankruptcy Court for the Southern District of New York. Dkt. No. 67-30. Levona notified the arbitrator of the bankruptcy proceedings that same day. *Id.* On March 8, Eletson submitted its own letter to the arbitrator, asserting that the automatic stay generated as a result of the involuntary petition against Holdings did not stay any of Eletson's affirmative claims or any of Levona's counterclaims against Corp, and that Eletson intended to move the bankruptcy court to modify the automatic stay so as to permit Levona's counterclaims against Holdings and the arbitration as a whole to move forward. Dkt. No. 67-32. Eletson argued that the arbitration should move forward as scheduled for April 24, 2023. *Id.* It ended its letter to the arbitrator: "[w]e fully preserve all of Claimants' rights, claims, and defenses. Levona's bad-faith bankruptcy filing, like its other bad-faith tactics, is causing Claimants serious harm." *Id.* On March 10, 2023, Eletson sent a second letter to the arbitrator in response to a suggestion by Levona that the arbitration and certain of Levona's deadlines in connection with the arbitration be delayed. Dkt. No. 67-33. Eletson accused Levona's affiliate, Pach Shemen, of procuring the involuntary bankruptcy to disrupt the arbitration and of making false statements to the arbitrator. *Id.* It noted that Levona's affiliate was the largest petitioning creditor in the bankruptcy proceeding, that Levona's designees on the Company's Board had signed the involuntary petition, and that Pach Shemen had acknowledged in the bankruptcy petition that one of its affiliates owned the balance of the equity interests in the Company and was engaged in mandatory arbitration concerning the ownership of the equity interests in the Company. *Id.* Eletson also asserted that Pach Shemen's purchase of the Holdings bonds constituted a violation of the arbitrator's Status Quo Injunction. Referring to a dispute the parties had with respect to documents, it stated: "Your Honor should insist on timely production of documents and expert reports. If Levona does not honor Your Honor's orders,

Claimants reserve the right to seek the most severe sanctions." *Id.* at 1. The same day, the arbitrator stayed the arbitration pending further order of the Bankruptcy Court. Dkt. No. 67-34. In his order, the arbitrator stated: "[Petitioners] argue . . . [that] the filing of the involuntary petition is *arguably* a violation of the status quo injunctive order." *Id.* at 2 (emphasis added).

On April 11, 2023, the petitioning creditors and the debtors in the bankruptcy case submitted a stipulation, which was signed by the Bankruptcy Court on April 17, 2023, permitting the existing claims then pending in the Arbitration to proceed (the "Lift Stay Order"). Dkt. No. 67-35. The relevant provisions are in paragraphs 3 and 4 of the Lift Stay Order:

> 3. The automatic stay under section 362(a) of the Bankruptcy Code is hereby modified with respect to the Arbitration solely to the extent necessary and for the sole purpose of permitting a trial, any related pre-trial proceedings (including any remaining discovery), any related post-trial proceedings or briefing, and a final determination or award to be made by the Arbitrator, including any appeals, with respect to the claims currently pending in the Arbitration . . . . The Arbitration Parties are authorized to provide a copy of this Stipulation and Order to the Arbitrator.
>
> 4. Any Arbitration Award, whether in favor of any Arbitration Party, shall be stayed pending further order of the Bankruptcy Court on a motion noticed following the issuance of the Arbitration Award. For avoidance of doubt, no Arbitration Party shall transfer, dispose of, transact in, hypothecate, encumber, impair or otherwise use any such Arbitration Award or any asset or property related thereto absent a further order of this Court.

Id. at 3–4. The Lift Stay Order recited that the parties to the arbitration were Holdings, Corp, and Levona and defined them as the "Arbitration Parties." *Id.* at 2.

On April 25, 2023, Eletson submitted to the arbitrator what it styled a "Supplemental Notice of Additional Levona Status Quo Injunction Violations." Dkt. No. 67-36. Eletson challenged (1) the filing in this court of the Bondholder Litigation, a claim for breach of contract by the trustee of notes issued by Holdings and two non-party affiliates due to the nonpayment of interest and principal and certain indemnified losses as a bad-faith filing "directed" by the "Levona Parties"; (2) the service of a Notice by that trustee, Wilmington Savings Fund Society,

FSB, terminating a "Restructuring Support Agreement" among the consenting noteholders; and (3) the filing by Pach Shemen and the two other creditors of the involuntary bankruptcy petitions against Holdings and its two non-party affiliates. *Id.* Eletson claimed that the Bondholder Litigation and the related purported termination of the Restructuring Support Agreement, as well as the involuntary bankruptcy petition initiated by Pach Shemen, violated the Status Quo Injunction and caused damages to Eletson generally and the Company specifically. *Id.* at 8–10. Eletson further accused Levona of misleading the arbitrator when it filed a letter to the arbitrator asserting that the arbitration was automatically stayed due to the bankruptcy petition, and that Levona had misled the arbitrator by stating in the letter that "Levona is not responsible for the bankruptcy nor does it own or control any party who filed the involuntary petition." *Id.* at 10. Eletson submitted evidence that Pach Shemen's owners were identical to Levona's owners and that Pach Shemen held itself out as "Levona II," as well as other evidence suggesting a close relationship between the entities. *Id.* at 12. Eletson stated that it intended "to include these violations and seek appropriate relief concerning them in the upcoming pre-hearing submissions and to adduce proof concerning them at the upcoming hearing, seeking such other and further relief as the Arbitrator deems fitting." *Id.* at 2. In the last numbered paragraph of the submission, Eletson took issue with the claim in the bankruptcy proceeding that the Preferred Interests were part of the bankruptcy estate. *Id.* at 16–17 ¶ 47. Eletson stated that:

> [A]s Levona knows, the preferred interests at issue here were, under the BOL, to be transferred to Gas or to a nominee, and, as Levona knows, the preferred interest was transferred at the time of the BOL and the subsequent March 2022 transactions to such nominees. Part of the relief Claimants seek here is confirmation that Levona has no interest in that preferred and that the nominees from Gas do.

Id. This statement was the first time that Eletson asserted in the arbitration that the Preferred Interests were transferred to a nominee. Previously, in an October 25, 2022 affidavit submitted in the arbitration, Eletson claimed that Eletson had exercised the Purchase Option and was the

sole unit holder of the Company. Dkt. No. 67-20 ¶¶ 2, 9. Eletson made the same claim in memoranda of law submitted to the arbitrator on October 25, 2022, November 8, 2022, and November 18, 2022. Dkt. No. 67-21 at 10; Dkt. No. 67-22 at 6; Dkt. No. 67-23 at 11. But Eletson did not, until April 2023, state that the Company had transferred the Preferred Interests to a nominee.

Ultimately, Holdings and the other debtors agreed to convert the bankruptcy case to a voluntary Chapter 11 case, to withdraw a motion they had previously made in the bankruptcy case that the involuntary bankruptcy case had been filed in bad faith, and agreed not to object to the payment of attorneys' fees to the petitioning creditors from the bankruptcy estate in an amount up to $1,500,000. Dkt. No. 65 ¶¶ 132–134. On September 25, 2023, the bankruptcy court converted the involuntary bankruptcy proceeding to a Chapter 11 voluntary bankruptcy case. *Id.* ¶ 135. On November 13, 2023, the bankruptcy court approved an award of $1,500,000 in attorneys' fees that the petitioning creditors, including Pach Shemen, had incurred in filing and prosecuting the involuntary bankruptcy case. *Id.* ¶ 174.

V. The Arbitration Hearing

The arbitration hearing commenced on May 15, 2023. Dkt. No. 67-58 at 19. On May 3, 2023, in advance of the hearing and before the submission of the parties' Pre-Hearing Briefs, the parties stipulated that the schedule for the hearing was "fair and reasonable and waive[d] any objection to the schedule ordered or otherwise determined by the arbitrator." Dkt. No. 67-39 at 4. The parties further stipulated "that each has no challenge or objection to the arbitration on fairness grounds or on the basis that it has not been granted enough time to prepare for or present its case." *Id.* Procedural Order Number 6 identified the parties to the arbitration as those stated in the caption (*i.e.*, Holdings, Corp, and Levona), and the claims as those set forth in the Demand

for Arbitration and the Statement of Claims as well as those in Levona's Response to the Statement of Claims and Counterclaims. *Id.* at 1, 4.

In its Pre-Hearing Brief submitted on May 5, 2023, Eletson asserted that the Preferred Interests were not bought out by the Company but were transferred to nominees chosen by Eletson in March 2022. Dkt. No. 67-38. It stated: "[t]he preferred interests in this arbitration, from their issuance up until the execution of the BOL and even thereafter, were never owned or controlled, directly or indirectly" by Eletson, the Company or "any other entity directly or indirectly affiliated with any of those entities," *id.* ¶ 100, but that "[f]rom January 2022, at the latest," the owners of Eletson had determined to nominate three Cypriot entities (the "Nominees")—each related to the three families who own Eletson—to hold the Preferred Interests, *id.* ¶ 103. Eletson asked that the arbitrator confirm that the Nominees held the Preferred Interests in the Company. *Id.* ¶ 208(ii). Eletson also made a claim for "rescissory damages relating to the transfer of the Symi and Telendos to Levona, including that the proceeds of any sale of the Symi and Telendos and revenue related thereto paid to Claimants/the Company." *Id.* ¶ 50. Further, Eletson sought "punitive and other damages" for Levona's conduct that it alleged violated the Status Quo Injunction. *Id.* ¶ 51.

On May 10, 2023, Levona moved to strike Eletson's allegations that the Preferred Interests had been transferred to the Nominees, or in the alternative to dismiss Eletson's claims in chief. Dkt. No. 67-40. Levona argued that Eletson had improperly alleged that the Preferred Interests had been transferred to the Nominees for the first time on the eve of the hearing, with only specious evidence in support of the allegations, and in complete contradiction of Eletson's

prior assertions about the holders of the Preferred Interests.[5] *Id.* Levona suggested that Eletson had contrived the allegation that the Preferred Interests had been transferred to the Nominees to ensure that the Preferred Interests were not considered part of the bankruptcy estate in the bankruptcy litigation and thereby "avoid the consequences of a negative decision in the Bankruptcy Court." *Id.* at 4. Put differently, on Levona's account, Eletson only suggested that the Preferred Interests had been transferred to the Nominees at such a late stage because Eletson did not have an incentive to make such an assertion until after the bankruptcy proceeding against Holdings had been initiated. *Id.* Prior to the initiation of the bankruptcy proceeding, Holdings could retain the Preferred Interests by winning the arbitration; after the initiation of the bankruptcy proceedings, however, any arbitral award to Holdings would become an asset of the bankruptcy estate, such that if the Preferred Interests were included in the arbitral award, the Preferred Interests would be distributed to Holdings's creditors. *Id.* If the Preferred Interests had been transferred to the Nominees, however, they would remain remote to the creditors in the bankruptcy proceeding. Levona also argued that, if the Cypriot entities were the Nominees, they would be the real parties in interest and would be required to be made parties to the arbitration and that Eletson would not have standing. The arbitrator did not rule on Levona's motion until after the hearing. Dkt. No. 67-58 at 30.

During the eight-day hearing beginning on May 15, 2023, Eletson and Levona presented the testimony of their representatives, expert witnesses, and others. *Id.* ¶ 20. In his opening statement at the arbitration, counsel for Petitioners stated that he wished to address "how we might structure relief here so that it's effective so that we don't wind up going through all this

[5] Levona specifically argued that it would be prejudicial to allow Eletson to introduce documents regarding the transfer without allowing Levona any discovery. Dkt. No. 67-40 at 5.

and your Honor will come to toil and struggle to come to a decision and then Levona and its affiliates will render it nugatory" and sought to prevent Levona from arguing that "even if [Petitioners] win in this proceeding, [the recovery] goes back into Holdings" because "the bankruptcy allows them to take it." Dkt. No. 67-42 at 4–5, 6.

The arbitration hearing continued on May 16, 18, 19, 22, 23, and 24, and the arbitrator heard closing arguments on June 13, 2023, at which point he deemed the record closed. Dkt. No. 65 ¶ 118; Dkt. No. 66 ¶ 118. At the hearing, representatives of the Nominees submitted written testimony in which they stated that Eletson had told Levona that it intended the Preferred Interests to go to the Nominees of the Company and that "[a]ny conclusion by the Tribunal in this Arbitration" would "bind" them. Dkt. No. 67-41 at ¶¶ 101, 103; Dkt. No. 67-43 ¶¶ 194, 196; Dkt. No. 67-45 ¶ 104. At the conclusion of the hearing, the parties consented to a fifteen-day extension of the thirty-day deadline under the JAMS Rules for issuance of an award. Dkt. No. 62 ¶ 21.

In early June 2023, both sides submitted to the arbitrator their post-hearing briefs, Dkt. No. 67-48; Dkt. No. 67-50; and their proposed arbitral award orders, Dkt. No. 67-47; Dkt. No. 67-49. In their proposed order, Petitioners requested an award of damages solely and directly to the Nominees and to the Company—non-parties to the arbitration—with no damages paid directly to either Petitioner. Dkt. No. 67-47. On July 11, 2023, while awaiting the arbitrator's decision, Levona applied to the arbitrator to order Eletson to produce what Levona claimed was material new information that had been produced by Holdings in the bankruptcy proceedings. Construing the request as one to reopen the hearing, the arbitrator denied that request as both procedurally and substantively flawed on July 18, 2023. Dkt. No. 67-52.

VI. The Interim Ruling and Final Award

On July 28, 2022, Justice Belen issued an "interim" ruling and award ("Interim Award") in Eletson's favor, and on August 15, 2023, Justice Belen issued the Corrected Interim Award. Dkt. No. 67-55. On September 29, 2023, Justice Belen issued a Final Award. Dkt. No. 67-58. The Interim Award and Corrected Interim Award resolved all issues submitted for decision in the arbitration, except those relating to the parties' requests for attorneys' fees, costs, expenses and pre-judgment interest. Dkt. No. 62 ¶ 23.[6] The Final Award adopted, incorporated, and republished the Corrected Interim Award in its entirety and integrated the arbitrator's subsequent determinations regarding the parties' requests for attorneys' fees, costs, expenses and interest. *Id.* ¶ 28.

The arbitrator grouped Eletson's claims that Levona breached the LLCA and the implied covenant of good faith and fair dealing into four categories: (1) claims that Murchinson engaged in deceitful and wrongful conducted that voided *ab initio* Levona's acquisition of Blackstone's Preferred Interests by bribing Corp's Chief Financial Officer to induce him to disclose confidential Company information, and by communicating directly with Company financiers and lenders, thus engaging in "industrial sabotage" prior to Levona's acquisition of the Preferred Interests, in violation of the NDA that Levona had entered into with Blackstone; (2) claims that Levona breached the LLCA after its acquisition of the Preferred Interests and before entering into the BOL by attempting to fire Corp as the manager of the Company's vessels and by failing

[6] On August 14, 2023, Justice Belen issued a ruling rejecting Levona's argument that the Interim Award was not an award subject to JAMS Rule 24, which governs finality, but granted Levona an extension under the JAMS rules to identify "any computational, typographical or other similar error in the Interim Award." Dkt. No. 62 ¶¶ 24–25. Justice Belen found "absolutely no merit to Respondent's argument that the Interim Award was not a final determination with respect to all the issues and arguments raised in this arbitration relating to the merits of the claims and counterclaims." *Id.* ¶ 25.

to disclose its pre-acquisition misuse of confidential information; (3) claims that Levona and "Levona-related entities"—Pach Shemen and Murchinson—violated the Status Quo Injunction on numerous occasions, including by wrongfully declaring the Company in default of the loan made by Levona to the Company, trying to sell the Symi and Telendos, directing the purchase of a controlling position in debt securities of Holdings for the purpose of commencing litigation against Holdings and the involuntary bankruptcy of Holdings; and (4) claims that Levona breached the LLCA and the covenant of good faith and fair dealing by failing to transfer its Preferred Interests in the Company in accordance with the BOL and continuing to act on behalf of the Company in "complete bad faith" including by entering into a letter of intent with Unigas. Dkt. No. 67-58 at 9–11.

Levona, on the other hand, sought a declaration that it remained the holder of the Preferred Interests, and claimed that Eletson had breached the LLCA and Fundamental Action Letter by failing to attend board meetings (thereby preventing the Company from refinancing debt and engaging in due diligence in connection with the Unigas LOI), had tortiously interfered with the Company's LOI with Unigas, and had engaged in conversion for denying Levona the ability to sell the Symi and Telendos. *Id.* at 11.

The arbitrator recognized that resolution of the majority of the claims and counterclaims turned upon the interpretation of the Transaction Documents and whether the Company exercised the Purchase Option to buy Levona out of the Preferred Interests. *Id.* at 9. If the answer to that question was yes, then at some point Levona was no longer a member of the Company and did not have rights under the LLCA to enter into the Unigas LOI or otherwise act on behalf of the Company. If the answer was no, then Levona would have remained a member

of the joint venture and Eletson may have violated its obligations under the LLCA by refusing to, *inter alia*, engage in due diligence relating to the Unigas LOI. *Id.*

As a preliminary matter, Justice Belen found that Murchinson and Pach Shemen were alter egos of Levona. He found that the evidence demonstrated "conclusively that although technically two separate corporate entities, Murchinson and Levona are not distinct for any purposes relevant to these proceedings," and that while Levona, which was a shell entity, might "be the named party, Murchinson is the real party in interest." *Id.* at 21. He thus concluded that "any ruling . . . in this arbitration extends to Murchinson. Any award in favor of Levona is really in favor of Murchinson, and similarly, any award finding liability and damages against Levona, is owed by Murchinson." *Id.* He reached the same conclusion as to Pach Shemen, which he found had the identical ownership of Levona and was "seemingly created for the sole purpose of purchasing a controlling interest in the outstanding bond debt of Holdings so that three weeks later, it could direct the involuntary bankruptcy filing against Holdings." *Id.*

The arbitrator also denied Levona's motion to strike Eletson's claims that the Purchase Option had been exercised and that the Preferred Interests had been transferred to the Nominees, or alternatively to dismiss the claims. *Id.* at 30. He acknowledged that the lack of earlier written notice to Levona of the contingent transfer of the Preferred Interests to the Nominees had initially "raised concern," but concluded that there was no "bad faith or misconduct" in the failure to give notice as "the Eletson witnesses viewed the Company as a family company," "representatives from each of the Preferred Nominees . . . testified that they are bound by any award in th[e] arbitration," and that "Levona was not prejudiced by the later reference to the

Preferred Nominees." *Id.* at 30–31.[7] The arbitrator noted that "Eletson witnesses testified that from the outset of the time that the parties began discussing the buyout of Levona's interests, Eletson intended the preferred units to go to nominees of the Company, and that it told Levona of this intention." *Id.* at 27. The arbitrator stated that Eletson's explanation for why the transfer to the Nominees was not mentioned earlier in the proceedings was credible: "It was only after the Levona-related entities including . . . Pach Shemen made clear in the Holdings bankruptcy that they would attempt to use the bankruptcy proceedings as an end-run around against any adverse award in this arbitration by claiming that the preferred shares were part of the bankruptcy estate of Holdings, that Eletson felt compelled to set the record straight and make clear that . . . Holdings was never intended to directly or indirectly, as owner of the common shares of the Company, own the preferred shares." *Id.* at 31.

Justice Belen next concluded that the Company properly exercised the Purchase Option for the Preferred Interests because it had paid Levona the Purchase Option Consideration and had provided adequate security and/or collateral for the Loan.[8] *Id.* at 34–42. He concluded that the Company paid Levona the Purchase Option Consideration when, pursuant to the Share Transfer Agreement, on March 11, 2022, it transferred the ownership shares of the Symi and Telendos to Levona. *Id.* Levona had argued that the transfer of vessels was the consideration for the Purchase Option itself, rather than the Purchase Option Consideration payable upon the exercise of Purchase Option. Justice Belen rejected that argument. *Id.* He reasoned that because Section 2.1 of the BOL provided that "consideration equal to the Purchase Option Consideration" would

[7] The arbitrator noted that "Levona never sought additional discovery nor requested depositions on the issue of the nominees before or during the arbitration hearing" and "did not conduct any meaningful cross-examination of the three Eletson witnesses who testified about the contingent transfer to the Preferred Nominees or present any contradicting evidence." *Id.* at 31–32.

[8] It was not disputed that the loan remained outstanding and had not been fully repaid. *Id.* at 34.

be paid "on completion of the transfer of the Membership Interests," the BOL contemplated that the Purchase Option Consideration would be paid in exchange for the Preferred Interests and not in exchange for the *option* to purchase the Preferred Interests. *Id.* In his view, that conclusion was consistent with the terms of the LLCA, which prohibits Members (including Levona as the holder of the Preferred Interests) from acquiring or owning any vessels such as the Symi and Telendos. *Id.* at 35. It was only if the Purchase Option was exercised and Levona was no longer a member of the Company that Levona could, consistent with the LLCA, acquire the two vessels.[9] Justice Belen further concluded that the transfer of the Symi and Telendos was adequate consideration because the Net Value of those ships was in excess of $23,000,000, and thus more than the Purchase Option Consideration amount contemplated in the BOL of $23,000,000 less the value of the two ships. *Id.* at 37.

Justice Belen also found that Eletson satisfied the additional conditions for exercising the Purchase Option. Although it was undisputed that Eletson had not repaid the loan to Levona, the arbitrator found that the Company had met the alternative basis outlined in the BOL for exercising the Purchase Option by providing "adequate security and/or collateral." *Id.* at 38–42. He rejected Levona's argument that the Purchase Option could not be exercised without Levona's determination that it had been afforded adequate security or collateral for the Loan, reading the relevant section of the BOL to provide only that the adequacy of the security, not the adequacy of the collateral, would be at Levona's sole discretion. Dkt. No. 67-58 at 39. Justice Belen read the word "adequate" to modify only "security" and not collateral. *Id.* And he concluded that Eletson had provided adequate collateral by assigning Corp's claims against the

[9] The arbitrator also pointed to parol evidence that the parties contemplated that the consideration to be paid to Levona for its interests in the Company was $23,000,000. *Id.* at 36–37.

Company to Levona, despite the fact that the BOL, independent of any collateral, required Eletson to transfer Corp's claims against the Company until the loan was paid off in full and that, in any event, Levona's rights under the loan were senior to the claims by Corp. *Id.* at 38. Justice Belen rejected Levona's contention that it required the assignment of claims not as collateral for the Loan, but as a separate protective measure to prevent Corp from attempting to repay itself before the Company repaid the Loan. *Id.* at 39. He also concluded that the assigned claims constituted adequate collateral because at the time of the assignment their value exceeded $10,000,000. *Id.* at 40.

Justice Belen further found that notice of intent to exercise the Purchase Option was properly provided. Although he found that Eletson did not provide separate formal written notice of exercising the Purchase Option to Levona as required by the BOL, he also found that Levona was on actual notice of the Purchase Option's exercise based on the minutes of a March 10, 2022 Company Board of Directors meeting which contained a reference to an "[u]pdate on Eletson's intention to exercise the purchase option." *Id.* at 42. Based on that language, and the testimony of an Eletson witness that for Eletson, "intention means the actual fact," the Company had, in practice, provided sufficient notice. *Id.* The arbitrator additionally concluded that Eletson had engaged in conduct after March 11, 2022, the date that the Transaction Documents were signed, that was consistent with a buyout by assisting Levona in the sale of the two vessels to third parties, reflagging the vessels from Greece to Liberia, and novating the underlying bareboat charters to Levona's interests. *Id.* at 44. The arbitrator also noted that after that date, Eletson held itself out to be the sole shareholder of the Company and the sole beneficial owner of its remaining twelve vessels, even though the Directors that Levona had named to the Company Board, pursuant to its authority as the holder of the Preferred Interests, remained on the Board

well past March 11. *Id.* He concluded that "[a]t best, the absence of a written notice and a payment of $1 dollar [required by the BOL] are formalities that the parties failed to observe." *Id.* at 45.

Justice Belen concluded that since the conditions for the buyout were met, the Preferred Interests had been transferred to the Company or the Nominees and that, as of March 11, 2022, Levona no longer held the Preferred Interests and ceased to have any ownership interest in the Company. *Id.* at 46. The determination that the Purchase Option was properly exercised and that Levona ceased to have any ownership interest in the Company informed a number of the remainder of Justice Belen's conclusions. Specifically, he concluded that Levona did not have the authority, once it ceased holding the Preferred Interests, to enter into the Unigas LOI, direct the operations of the Company, or otherwise assert control over the assets of the Company. *Id.* at 47.

Having reached the determination that Eletson properly exercised the Purchase Option and that therefore Levona no longer held preferred interests in the Company, the arbitrator turned to the substantive claims. With respect to Eletson's pre-BOL claims, Justice Belen concluded that: (1) he had no jurisdiction over any claims related to conduct before November 2, 2021, when Levona and the Levona-related entities were not parties to the LLCA, and that such entities also could not have breached the terms of the LLCA or the covenant of good faith and fair dealing implied in it for pre-November 2, 2021 conduct, *id.* at 49; and (2) although there was "sufficient evidence" that Murchinson engaged in underhanded tactics and dishonest dealings to acquire Blackstone's interests in the Company, Eletson was not entitled to have Levona's acquisition of those interests voided *ab initio*, *id.* The arbitrator thus rejected Eletson's pre-BOL claims against Levona and the Levona-related entities.

Moving to Eletson's claims regarding Levona's conduct after becoming a signatory to the LLCA, but before entering into the BOL, Justice Belen ruled for Eletson. He found that in the time period after Levona acquired the Preferred Interests and became a member of the Company pursuant to the LLCA in November 2021, and before the BOL was entered into in February 2022, Murchinson bribed Peter Kanelos, the CFO of Corp and a representative of the Company, breached the terms of its NDA with Blackstone, and disclosed confidential Company information in violation of the LLCA and the covenant of good faith and fair dealing. *Id.* at 51. Levona and Murchinson had executed what was called a "Services Agreement" with Kanelos in December 2021 pursuant to which Murchinson wired $100,000 to Kanelos. *Id.* The arbitrator concluded that Kanelos was an officer of the Company, and not just Corp, and that, as a result, Levona and Murchinson's conduct violated a provision of the LLCA that barred Levona from entering into any agreement with an officer or member of senior management of the Company. *Id.* The arbitrator found that Kanelos had clandestine communications with Murchinson before and after Levona's acquisition of the Preferred Interests, contrary to his duties as an officer of Eletson and of the Company, and that he and Murchinson actively concealed their communications. *Id.* at 23–24. Justice Belen also found that Murchinson breached its NDA with Blackstone by communicating directly with the Company's financiers and lenders. *Id.* at 51. Justice Belen further found "Murchinson/Levona continued to disclose confidential information in breach of the LLCA, without Eletson's and the Company's knowledge, and without NDAs, after Levona purported to join the Company." *Id.* at 53–54. Justice Belen found that "Levona breached the covenant of good faith and fair dealing by causing the Company's lenders to arrest five vessels and failing to disclose this conduct after it became a member of the Company." *Id.* at 54. He determined: "Murchinson's improper dealings with the Company's banks and

financiers pre-acquisition of Blackstone's interests caused the arrests of the vessels and that its failure to disclose these actions to Eletson once it became a member in the Company was a breach of the covenant of good faith and fair dealing." *Id.* at 56. And, the arbitrator found that Levona breached the LLCA by attempting to terminate the Company's management agreement with Corp and by attempting to replace the boards of directors of the Company's subsidiaries with Levona's preferred representatives. *Id.* at 58.

Next, Justice Belen found that "Levona-related entities," namely Pach Shemen, had violated the Status Quo Injunction by purchasing a controlling interest in outstanding bonds issued by Holdings, directing the trustee to commence litigation against Holdings, and then directing the commencement of an involuntary bankruptcy petition against Holdings. *Id.* at 59–62. Justice Belen found that, in those ways, Pach Shemen intended to disrupt the status quo and ensure that it would retain the Preferred Interests and be able to use them to control and profit from the sale of the vessels; either the involuntary bankruptcy would strip the arbitrator of jurisdiction or, if not, it would operate as a hedge against a potential loss in the arbitration. *Id.* at 61. On the assumption (which Justice Belen elsewhere found to be faulty) that the Preferred Interests would pass to Holdings in the event of an arbitral ruling in its favor, Pach Shemen as a creditor of Holdings would nonetheless be able to use the bankruptcy proceeding to obtain the Preferred Interests. *Id.* at 61. Finally, Justice Belen rejected Levona's counterclaims based on his finding that Eletson exercised the Purchase Option and bought out the Preferred Interests as of March 11, 2022. *Id.* at 62.

Justice Belen awarded compensatory damages against Levona, and against Murchinson and Pach Shemen as Levona's alter egos, jointly and severally, to the Nominees in the amount of $19,677,743.71 and to the Company in the amount of $23,777,378.50. *Id.* at 100. The damages

included $19,677,743.71 for the loss of the two vessels that Levona caused to be improperly transferred. *Id.* at 63–64. The arbitrator concluded that those damages should be paid directly to the Nominees "as they flow directly from Levona's refusal to relinquish the preferred interests, and the Preferred Nominees hold all title and interest in the preferred interests." *Id.* at 64. He also awarded $21,777,378.50 to the Company for losses arising from Levona's conduct that led to the vessel arrests. *Id.* at 64. He awarded another $2,000,000 to the Company for the (1) reduced bargaining position of the Company with business-sensitive information available to other parties, including those negotiating with the Company; (2) reputational harm to the Company and Eletson from the actions of Levona and its affiliates with financiers and banks but also with customers, employees, and vendors; (3) lost business opportunities, both with existing customers and with new customers, as a result of the reputational harm; (4) Eletson's loss of access to both existing and new sources of capital; and (5) permanent harm from the "indelible record created by Levona and its affiliates." *Id.* at 65–67.[10] The arbitrator further awarded Eletson reimbursement of the attorney's fees and costs incurred in connection with the trustee litigation in the Southern District of New York and the involuntary bankruptcy proceeding in the amount of $3,007,266.20 "to be paid to the entity or individuals who paid those costs and fees." *Id.* at 67, 75. Justice Belen also awarded $43,455,122.21 in punitive damages to be paid to the same entities awarded the underlying compensatory damages. *Id.* at 73.

In addition to the compensatory and punitive damages, Justice Belen awarded Eletson attorneys' fees, expenses and costs for the arbitration of $9,590,222.99. *Id.* at 86. The attorneys' fees and costs awarded included fees and costs incurred in connection with the arbitration, a

[10] Justice Belen awarded the Petitioners prejudgment interest at a contractual rate of ten percent per annum. *Id.* at 73.

success fee owed by Eletson to counsel for Eletson, and fees and costs in connection with the bankruptcy and bondholder litigation, but did not include costs incurred in connection with a state court action that Eletson commenced against Murchinson. *Id.* at 75–76, 84. The arbitrator rejected Levona's argument that Eletson was not the prevailing party because relief was payable only to the Company and to the Nominees, on the theory that it had been clear "throughout the[] proceedings that Eletson would turn over any damages" to the Company and that accordingly it was "Eletson that substantially prevailed on its claims in this arbitration." *Id.* at 88. The arbitrator also rejected Levona's argument that fees should not be awarded for the bankruptcy and bondholder litigation based on JAMS Rule 29, which provides that the "Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator." *Id.* at 91. "In other words, the award of attorneys' fees was as damages to compensate for the intentional violations by Levona, through its alter ego, Pach Shemen, of the Status Quo Injunction Order—not a finding of a prevailing party's entitlement to fees or a finding under a fee-shifting provision." *Id.*

PROCEDURAL HISTORY

On August 18, 2023, Petitioners filed the instant Petition, which was ordered unsealed on September 13, 2023. Dkt. Nos. 1, 11, 14. On September 22, 2023, Respondent moved to dismiss the Petition and cross-petitioned to vacate the Award. Dkt. Nos. 28–31.[11] About one

[11] On October 14, 2023, Respondent filed a statement of relatedness asking the Court to refer the Petition to the Bankruptcy Court handling the bankruptcy litigation of Holdings. Dkt. No. 32. Petitioners opposed that request. Dkt. No. 33. On October 6, 2023, Respondent filed a motion to refer the matter to the Bankruptcy Court, Dkt. No. 34, and, on October 10, 2023, Petitioners opposed that motion, Dkt. No. 35. The Court denied the motion to refer the Petition to the Bankruptcy Court on October 10, 2023. Dkt. No. 36. The Court reasoned that, as the tribunal with original jurisdiction of the Petition under the New York Convention and the Federal Arbitration Act, it was the proper entity to decide whether to confirm or vacate the Award. *Id.* Respondent asked the Court to reconsider that order, Dkt. No. 38, but the Court denied that

month later, on October 19, 2023, with leave from the Court, Petitioners filed their Supplemental Amended Petition. Dkt. Nos. 46–47. The Supplemental Amended Petition amended the Petition to reflect that the arbitrator had rendered a Final Award. *Id.* Respondent amended its response and moved to dismiss the Amended Petition on October 24. Dkt. Nos. 48–51. One week later, Petitioners filed their reply in support of the Amended Petition and further opposition to Respondent's cross-petition to vacate. Dkt. Nos. 54–55. Respondent filed its own reply in support of its motion to dismiss the Amended Petition on November 14, 2023. Dkt. Nos. 59–60.

On November 15, the Court held a conference, at which it instructed the parties to each submit statements of undisputed fact pursuant to Federal Rule of Civil Procedure 56.1. That same day, Petitioners filed a Corrected Amended and Supplemental Petition to Confirm the Arbitral Award, reflecting that Petitioners sought only confirmation and not enforcement of the Award. Dkt. No. 62. Petitioners and Respondent filed their respective statements and corresponding exhibits over the following forty-five days. Dkt. Nos. 65–68. On January 2, 2024, the Court held oral argument on the Petition.[12]

DISCUSSION

Petitioners petition for an order confirming the Award and to have judgment entered thereon pursuant to Section 207 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 207. Dkt. No. 62. Respondent moves to dismiss the petition and cross-petitions the Court to vacate the

request, noting that confirmation was intended to be conducted on a summary and speedy basis and that it was prepared to consider the pending motions on the timetable submitted by the parties, Dkt. No. 39.

[12] The Court received supplemental letter briefs on January 5, 2024. Dkt. Nos. 73, 74. By letter motion on January 11, 2024, Respondent moved to amend its motion to vacate the Award and for discovery. Dkt. No. 75. After hearing oral argument, the Court denied that motion by memorandum and order dated January 23, 2024. Dkt. No. 80.

Award.[13] Dkt. No. 49. Petitioners brought this action under the New York Convention, more formally known as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. "Recognition and enforcement seek to give effect to an arbitral award, while vacatur challenges the validity of the award and seeks to have it declared null and void." *Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A.*, 66 F.4th 876, 882 (11th Cir. 2023). "The party opposing enforcement of an arbitral award has the burden to prove that one of the . . . defenses under the New York Convention applies." *Encylopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005).

There is a "strong federal policy favoring arbitration, the enforcement of arbitration agreements and the confirmation of arbitration awards." *Pike v. Freeman*, 266 F.3d 78, 89 (2d Cir. 2001). "[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984). As a summary proceeding, the decision of whether to confirm an arbitral award "is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to

[13] The Court has jurisdiction over this matter. Although review of domestic awards requires an "independent jurisdictional basis" apart from the FAA, confirmation or vacatur of nondomestic or international awards under the New York Convention does not. *F. Hoffmann-La Roche Ltd. v. Qiagen Gaithersburg, Inc.*, 730 F. Supp. 2d 318, 324 (S.D.N.Y. 2010). The FAA expressly provides federal courts with subject matter jurisdiction over an "action or proceeding falling under the [New York] Convention." 9 U.S.C. § 203. The New York Convention applies to arbitral awards relating to commercial matters where either (1) at least one party is not a citizen of the United States; or (2) all parties are United States citizens but there is some reasonable relationship with one of more foreign states. 9 U.S.C. § 202; *see Dumitru v. Princess Cruise Lines, Ltd.*, 732 F. Supp. 2d 328, 335 (S.D.N.Y. 2010). It is not disputed here that no party is domiciled or has its principal place of business in the United States, and that the Award concerns a commercial matter.

confirm." *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007). The review of arbitration awards is "very limited . . . in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993). Thus, although the FAA empowers a court to "confirm and/or vacate the award, either in whole or in part . . . a petition brought under the FAA is not an occasion for *de novo* review of an arbitral award," *Scandnavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71 (2d Cir. 2012), nor an occasion for the court to conduct a "reassessment of the evidentiary record," *Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004).

The FAA provides several grounds upon which a court can refuse to confirm an arbitral award. At the outset, it states that a court must confirm an arbitral award falling under the New York Convention "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in said Convention."[14] 9 U.S.C. § 207. Article V of the New York Convention specifies seven grounds upon which courts may refuse to recognize an award. *Encyclopaedia Universalis*, 403 F.3d at 90. "[R]ecognition and enforcement of the award may be refused" only if the party against whom the award is invoked "furnishes . . . proof" that: (1) the parties to the arbitration agreement were "under some incapacity" or the agreement "is not valid" under the law designated by the parties, or, in the event they have not designated any, the law of the country where the award was made; (2) "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;" (3) "[t]he award deals with a difference not

[14] Some courts in this District have found that, by its express terms, the New York Convention does not permit *vacatur* of arbitral award; it only permits a court to refuse to confirm. *See, e.g.*, *Kondot S.A. v. Duron LLC*, 586 F. Supp. 3d 246, 255 (S.D.N.Y. 2022).

contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration," although any "part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;" (4) "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;" or (5) "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention, art. V. Additionally, "[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that" (6) "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country" or (7) "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." *Id.*

In addition to the bases for refusing to confirm an arbitral award provided in the New York Convention, and recognized by reference in the FAA, the FAA itself contains several further statutory bases upon which an arbitral award may be vacated. Such statutory bases are authorized by the New York Convention, which instructs "a court in the country under whose law the Arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award." *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 21 (2d Cir. 1997). Thus, where an "[a]rbitration was entered into in the United States . . . the domestic provisions of the FAA also apply, as permitted by Articles V(1)(e) and (V)(2) of the New York Convention." *Scandinavian Reinsurance Co.*, 668 F.3d at 71; *see also Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 589 (2d Cir. 2016) ("The

award in this case having been rendered in the United States, available grounds for vacatur include all the express grounds for vacating an award under the FAA."); *Temsa Ulasim Araclari Sanayi ve Ticaret A.S. v. CH Bus Sales, LLC,* 2022 WL 3974437 (S.D.N.Y. Sept. 1, 2022) (explaining that where "'the arbitration took place in the United States,' the award also is 'subject to the FAA provisions governing domestic arbitration awards.'" (quoting *Zeiler*, 500 F.3d at 164). Because the arbitration here was conducted in the United States, the Court also considers the grounds for vacatur outlined in the FAA. *See, e.g., Branco Bradesco S.A. v. Steadfast Ins. Co.*, 2018 WL 4284315, at *10 (S.D.N.Y. Sept. 7, 2018).

Section 10(a) of the FAA provides four statutory bases upon which an arbitral award may be vacated:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; and
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them so that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). Next, Section 11(b) of the FAA states that that the Court may *modify* the award under certain circumstances, including when "the arbitrators have awarded upon a matter not submitted to them." *Id.* § 11(b); *see also Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457, 474 (S.D.N.Y. 2016). Still, courts have cabined the applicability of the FAA's statutory bases for vacating, modifying, or correcting an award: "[t]he statutory provisions [of the FAA], 9 U.S.C. §§ 10, 11, in expressly stating certain grounds for either vacating an award or modifying or correcting it, do not authorize its setting aside on the grounds of erroneous finding

of fact or of misinterpretation of law." *Amaicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960); *see also Squarepoint Ops LLC v. Sesum*, 2020 WL 996760, at *3 (S.D.N.Y. Mar. 2, 2020) ("Even a 'serious error' in the law or facts is alone insufficient to warrant vacatur." (quoting *KT Corp. v. ABS Holdings, Ltd.*, 784 F. App'x 21, 24 (2d Cir. 2019) (summary order))).

Finally, and in addition to the bases specified in the New York Convention and the FAA, the Second Circuit "has 'held that the court may set aside an arbitration award if it was rendered in manifest disregard of the law.'"[15] *Zurich Am. Ins. Co.*, 811 F.3d at 589 (quoting *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451 (2d Cir. 2011)). Under these standards, "vacatur of arbitral awards is extremely rare." *Salus Cap. Partners, LLC v. Moser*, 289 F. Supp. 3d 468, 476 (S.D.N.Y. 2018) (quoting *Hamerslough v. Hipple*, 2012 WL 5290318, at *3 (S.D.N.Y. Oct. 25, 2012)).

Respondent argues that (1) the Petition should be dismissed at least in part because the Award was not in favor of Petitioners and Petitioners therefore lack standing, Dkt. No. 50 at 14–16; (2) the arbitrator exceeded his powers, *id.* at 16–31; and (3) the arbitrator manifestly disregarded the law, *id.* at 32–35. There is no argument that the award was procured by corruption, fraud, or undue means, that there was evident partiality or corruption in the arbitrator, or that the arbitrator was guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy.

The Court takes each argument in turn.

[15] The Second Circuit has expressly rejected the more permissive approach by other Circuits to vacatur of arbitral awards on other non-statutory bases, such as when the awards are "completely irrational," "arbitrary and capricious," or "contrary to an explicit public policy." *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 139 (2d Cir. 2007).

I. Petitioners Have Standing

"Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies.' For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019); *see also Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019). "To have standing, a plaintiff must 'present an injury that is concrete, particularized and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "If a plaintiff fails to satisfy any of those elements, a federal court lacks subject-matter jurisdiction to hear the case and it must be dismissed." *Fishon v. Peloton Interactive, Inc.*, 620 F. Supp. 3d 80, 89 (S.D.N.Y. 2022) (quoting *Ross v. AXA Equitable Life Ins. Co.*, 115 F. Supp. 3d 424, 432 (S.D.N.Y. 2015)). "Article III's case-or-controversy requirement applies to actions governed by the FAA." *Stafford v. Int'l Bus. Machines Corp.*, 78 F.4th 62, 68 (2d Cir. 2023); *Badgerow v. Walters*, 142 S. Ct. 1310, 1316 (2022).

Respondent argues that Petitioners lack Article III standing—specifically, injury in fact—to confirm the Award because the arbitrator did not award Petitioners any financial relief. Dkt. No. 50 at 14–16; Dkt. No. 59 at 2-6. Respondent notes that the compensatory damages awarded by the arbitrator are to be paid to persons other than Petitioners, including the Company, the Nominees, and those who advanced the fees and costs expended in the arbitration. Dkt. No. 59 at 4. Respondent also argues that the Award's declaratory relief was purely backward-looking. *Id.* Finally, Respondent argues that its vacatur petition cannot give Petitioners standing to confirm the award because standing addresses whether a party may bring suit in the first place. *Id.* at 5. Respondent bases its argument in large part on language from the Supreme Court's decision in *Town of Chester v. Laroe Estates*, 581 U.S. 433 (2017), that "a plaintiff must

demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* at 439 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). Relying on the second clause of that sentence, Respondent asserts that the Court must examine each item of relief awarded by the arbitrator to determine whether it provides a financial or other benefit to Respondents and, if it does not, then the Court must refuse to confirm the arbitral award or at least those portions of it that do not benefit Respondents.

Respondent's argument is built on a faulty foundation. Respondent reasons from *Town of Chester* that because portions of the award do not provide financial relief directly to Petitioners, Petitioners do not have a concrete interest in enforcement of those portions and the remedy awarded by the arbitrator will not redress their grievances. Respondent's premise is mistaken. A party to a contract need not have suffered direct financial loss to have a stake in its enforcement or to have suffered a concrete injury when it is breached. "Intangible harms," in addition to physical or monetary injuries, "can also be concrete." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021). "Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.* Rights arising from the law of contracts are no less legal rights than those arising from the laws of property and tort. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939). A contract right itself is a protectible interest, the breach of which gives rise to a concrete injury. *See Spokeo*, 578 U.S. at 344 (Thomas, J., concurring) (private rights that confer Article III standing include contract rights); *Tech-Sonic, Inc. v. Sonics & Materials, Inc.*, 2015 WL 4715329, at *6 (D. Conn. Aug. 7, 2015).

A division has emerged among sister circuits regarding whether a breach of contract itself constitutes a legally cognizable injury in fact, and thus satisfies the first element of the *Lujan* test

for standing. *See, e.g., Dinerstein v. Google, LLC*, 73 F.4th 502, 522 (7th Cir. 2023) ("A breach of contract alone—without any actual harm—is purely an injury in law, not an injury in fact. And it therefore falls short of the Article III requirements for a suit in federal court."); *Denning v. Bond Pharmacy, Inc.*, 50 F.4th 445, 451 (5th Cir. 2022) ("[A] breach of contract is a sufficient injury for standing purposes.").

In the Court's view, the Fifth Circuit has the better of the arguments. The Seventh Circuit based its view that an alleged breach of contract did not create a cognizable injury giving rise to standing in federal court on its reading of *Spokeo, Inc. v. Robins*, 578 U.S. 330, *TransUnion LLV v. Ramirez*, 594 U.S. 413, and on a law review article. *Dinerstein*, 73 F.4th at 519. In *Spokeo*, the Supreme Court held that a plaintiff asserting a "bare procedural violation" of the Fair Credit Reporting Act ("FCRA"), "divorced from any concrete harm," did not have standing to sue in federal court. 578 U.S. at 341. Congress did not have the power to "authorize that person to sue to vindicate that right." *Id.* In *TransUnion*, the Supreme Court held that the courts lacked the power under Article III of the Constitution to adjudicate claims that a credit reporting agency violated the FCRA by failing to use reasonable procedures to ensure the accuracy of credit files in the absence of evidence that the misleading credit files were provide to any potential creditors, concluding that the misleading information in the internal credit files did not itself constitute a concrete harm. 594 U.S. at 433, 435. The Seventh Circuit, citing *Spokeo* and *TransUnion*, reasoned that breach of a contract created a mere "legal infraction" and was insufficient to create standing in the absence of some additional "factual harm suffered" to the

plaintiff as a result of the breach. *Dinerstein*, 73 F.4th at 519 (quoting F. Andrew Hessick, *Standing and Contracts*, 89 Geo. Wash. L. Rev. 298, 313 (2021)).[16]

The holdings of *Spokeo* and *TransUnion* do not compel that result, and the decisions of the Second Circuit do not support it. Both *Spokeo* and *TransUnion* involved alleged statutory violations. At bottom, the question before the Court was whether Congress could expand the power of the federal courts under Article III by "elevat[ing] to the status of legally cognizable injuries, *de facto* injuries that were previously inadequate in law." *Spokeo*, 578 U.S. at 341 (quoting *Lujan*, 504 U.S. at 578); *see TransUnion*, 594 U.S. at 425. Those cases did not involve, as here, pre-existing common law rights historically enforceable in both federal and state court. *See, e.g.*, *Ogden v. Saunders*, 25 U.S. 213, 259 (1827). The *TransUnion* Court held that Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." 594 U.S. at 426 (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

The Court's methodology in *Spokeo* and *TransUnion* support the existence of Article III standing here. The Supreme Court instructed courts to look to "constitutional text, history, and precedent" to mark the limits of Congress's power to create an actionable legal injury sufficient to support Article III standing. *Id.* at 428; *see also id.* at 424 ("[H]istory and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." (quoting *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008))); *Spokeo*, 578

[16] Ironically, the Hessick article cited in *Dinerstein* recognizes that applying *Spokeo* to require a showing of some additional concrete harm to the plaintiff before a breach of contract claim could be brought in federal court "would significantly affect the enforceability of contracts in federal courts" and would have "undesirable consequences," but argues that "the inability to square *Spokeo* with contracts provides a compelling argument that *Spokeo* was wrongly decided." F. Andrew Hessick, *Standing and Contracts*, 89 Geo. Wash. L. Rev. 298, 300–02 (2021). The more logical and compelling inference is that *Spokeo* does not apply to contract claims.

U.S. at 340–41 (standing inquiry derives from case-or-controversy requirement which "is grounded in historical practice"). The Supreme Court did not hold that the plaintiff was required to show financial or physical injury to have Article III standing. Rather, it specifically embraced that "[v]arious intangible harms . . . can also be concrete." *TransUnion*, 594 U.S. at 425; *id.* at 427 (asking whether the plaintiff has alleged "any physical, monetary, or cognizable intangible harm,"); *Spokeo*, 578 U.S. at 340 ("[W]e have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete"). The Court also did not hold that the plaintiff personally need have suffered some additional factual harm in order to have standing. The *Spokeo* Court stated that in some circumstances, those similar to instances at common law, the violation of a legal right can give rise to standing without any showing of additional harm. 578 U.S. at 342; *see also* Erwin Chemerinsky, *Federal Jurisdiction* 74 (8th ed. 2020) ("Injury to rights recognized at common law—property, contracts, and torts, are sufficient for standing purposes."). The *TransUnion* Court then relied upon and cited favorably to *Sprint Communications*, in which (as discussed further *infra*) the Court recognized that a person did not have had to suffer harm individually in order to have standing to bring suit for harm caused to another. *Sprint Commc'ns Co.*, 554 U.S. at 287–88.

Eletson's standing here fits comfortably within constitutional text, history, and precedent. Eletson's injury is breach of a contractual right for Levona to honor the arbitral award. History and precedent support that a person whose contractual rights have been violated has standing to sue the breaching party, regardless of whether the non-breaching party has suffered additional harm. The right of a party to sue for breach of contract, regardless of harm done, has deep and roots in the law. *See* Restatement (First) of Contracts § 328 & cmt. a (1932) ("A breach of contract always creates a right of action; but a breach sometimes occurs without causing any

harm."); Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 1*, 46 Yale L.J. 52, 59 (1936) ("In a society in which credit has become a significant and pervasive institution, it is inevitable that the expectancy created by an enforceable promise should be regarded as a kind of property, and breach of the promise as an injury to that property . . . . That the promisee had not "used" the property which the promise represents (had not relied on the promise) is as immaterial as the question whether the plaintiff in trespass *quare clausum fregit* was using his property at the time it was encroached upon."). For two centuries, courts have recognized that a party who suffers only nominal damages from a material breach may still seek relief in court against the breaching party. *See Marzetti v. Williams*, 109 Eng. Rep. 842, 846 (K.B. 1830) ("[W]herever there is a breach of contract, or any injury to the right arising out of that contract, nominal damages are recoverable."); *Wilcox v. Executors of Plummer*, 4 Pet. 172, 181–182 (1830) (holding that breach of "a contract to act diligently and skil[l]fully" provides a "ground[] of action" in federal court); *see also Luitpold Pharm., Inc. v. Ed. Geistlich Söhne A.G. Für Chemische Industrie*, 784 F.3d 78, 87 (2d Cir. 2015) (reversing district court's grant of dismissal of breach of contract claim for failure to adequately plead damages because plaintiff "would have plausible claims for nominal damages"). Courts also have long recognized that a promisee has the same right to enforce a contractual provision benefitting a third-party beneficiary as a contractual provision benefitting the promissee itself. *See* Restatement (First) of Contracts § 345 & cmt. a (1932) ("This Section is an application of the general rules of damages to contracts for the breach of which a beneficiary as well as the promisee can maintain suit."); Restatement (Second) of Contracts § 305 (1981) ("The promisee of a promise for the benefit of a beneficiary has the same right to performance as any other promise, whether the promise is binding because part of a bargain, because of his reliance, or because of its formal

characteristics."); *see also* Restatement (Second) of Contracts § 305 ("A promise in a contract creates a duty in the promisor to the promise to perform the promise even though he also has a similar duty to an intended beneficiary."); 9 Corbin on Contracts § 46.2 (2023) ("Currently, there is no longer any doubt that a promisee has the same right to performance in a contract for the benefit of a third party as any other contract promise."). It is sufficient that a plaintiff be "'in privity of contract with the defendant *or* is a third party beneficiary of the contract.'" *Tang Cap. Partners, LP. v. BRC Inc.*, 2023 WL 2396635, at *16–17 (S.D.N.Y. Mar. 8, 2023) (quoting *Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, N.A.*, 747 F.3d 44, 49 (2d Cir. 2014))).

The Court in *Spokeo* recognized that a plaintiff would have standing to bring a claim for slander *per se*, notwithstanding that damages might be difficult to prove, 578 U.S. at 341–42, and the Court in *TransUnion* recognized that harms such as "reputational harms, disclosure of private information, and intrusion upon seclusion" could give rise to Article III standing, 594 U.S. at 425. The tort of invasion of privacy, however, was recognized only late in our constitutional history. *See* Restatement (Second) of Torts § 652A & cmt. a ("Prior to 1890 no English or American court had ever expressly recognized the existence of the right [to privacy] . . . ."). There is no reason to believe that the common law claim of breach of contract, which is of at least equal if not greater historical provenance, should be accorded lesser recognition.

The recognition of standing is also supported by constitutional text. While Respondent's challenge to Petitioners' standing arises in the immediate and specific context of a motion to confirm an arbitral award, Respondent's argument cannot be so limited. If accepted, it would deny any party to a contract the right to seek relief in federal court for a material breach in the absence of a showing of some additional harm to itself. But claims for breach of contract arise routinely in both state and federal court, and—not infrequently in those actions—the non-

breaching party has not suffered additional harm separate from the breach itself. It occasionally will bargain for and seek to enforce benefits that will accrue to a third party. The Constitution itself recognizes that when such suits arise between citizens of different States the federal courts are not deprived of power to hear them. Article III of the Constitution provides that the judicial power of the United States extends "to Controversies between two or more States." U.S. Const. Art. III sec. 2, cl. 1. Indeed, the provenance of diversity jurisdiction dates back to the very first Congress. Judiciary Act of 1789, 1 Stat. 73. If the non-breaching party has a claim against the party in breach, the non-breaching party has the right to have that case adjudicated in federal court (assuming that the statutory prerequisites for diversity jurisdiction are satisfied). And if the breaching party is sued in the courts of a foreign state by a citizen of that state, it has the right to remove the matter to federal court (again, assuming the statutory prerequisites are satisfied). In that manner, the Constitution itself guarantees all citizens a fair and impartial tribunal for the adjudication of disputes. *See, e.g.*, *Bank of United States v. Deveaux*, 5 Cranch 61, 87 (1809) (Marshall, C.J.) ("The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."), *overruled on other grounds by Louisville, C. & C.R. Co. v. Letson*, 43 U.S. 497 (1844); The Federalist No. 80 (Alexander Hamilton) (stating that suits between citizens of different states "should be committed to that tribunal which, having no local attachments, will be likely to be impartial

between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded"). But the Seventh Circuit's view would have the effect of stripping the federal courts of power to hear certain of those cases in which, at the founding, the Framers and the First Congress thought the exercise of federal court power would be most important—where the presumed parochialism and prejudices of state courts would not give a foreigner a fair and independent tribunal. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."). Under its view, an out-of-state plaintiff who contracted for a benefit to be provided to a third party and whose right to that performance was breached would be relegated in a suit for performance to the courts of the breaching party, except if the plaintiff could show some additional harm to itself. The court would have the general language of "case" or "controversy" negate the more specific language creating diversity jurisdiction in a vast swath of cases.

Finally, the Fifth Circuit's approach is closer to the Second Circuit's reading of *TransUnion*. In the aftermath of *TransUnion*, the Second Circuit has held that a person who was neither a party to a contract nor its third-party beneficiary but was a mere non-party lacked standing to enforce an agreement. *Ryansko v. N.Y. Univ.*, 63 F.4th 186, 193–94 (2d Cir. 2023). Implicit in *Rynasko* was the notion that if the plaintiff—the parent—was a party to the contract, she would have had standing. The Second Circuit has also held a property-based injury, even one rooted in federal statute, is sufficient to give rise to standing in the absence of any other additional harm. *Saba Cap. Cef Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 114 (2d Cir. 2023). If one's right to dominion and control over chattels is seriously

interfered with, she has standing to sue. *Id.* The Second Circuit has held, post-*TransUnion*, that a plaintiff whose private information has been disclosed to third parties has standing to sue regardless of whether the third parties used that information to cause additional harm. *Bohnak v. Marsh & McLennan Cos., Inc.*, 79 F.4th 276, 285–86 (2d Cir. 2023). Indeed, the Second Circuit has never suggested that *TransUnion* or *Spokeo* denied a person who had standing to bring a common law contract, tort, or property claim in state court lacked the standing to bring the same claim in federal court.

The conclusion that Petitioners have standing to seek confirmation of the Award readily follows. Petitioners and Respondent are all parties to the LLCA. Dkt. No. 67-2 at 1–2; Dkt No. 67-4 at 2; *cf. Ryansko*, 63 F.4th at 193 (holding that a party lacked standing to bring breach of contract claim because she was "neither a party to the contract . . . nor an intended third-party beneficiary of that agreement, nor an assignee of [a party to the contract]'s claims"). The LLCA contains a mandatory arbitration provision, which states that "[a]ny dispute, claim, or controversy arising out of or relating to this Agreement . . . shall be determined by arbitration in New York County in the State of New York or any other mutually agreeable location, before a single arbitrator." Dkt. No. 67-2 at 69. It also designated arbitration as the "exclusive and *binding* method" of resolving such disputes. *Id.* (emphasis added). It was pursuant to that provision of the LLCA that Holdings and Corp commenced an arbitration proceeding against Respondent in July 2022. Dkt. No. 65 ¶ 40; Dkt. No. 66 ¶ 40. Holdings and Corp bargained and gave consideration for the contractual right for all disputes regarding LLCA to be resolved through arbitration. Respondent agreed to be bound to that method of resolution. Yet, Respondent has not satisfied the award. It has denied that the arbitrator has the power to resolve its dispute with Petitioners and has refused to honor the arbitrator's determination of that dispute.

"An unconfirmed award is a contract right that may be used as the basis for a cause of action[,]" *Florasynth, Inc.*, 750 F.2d at 176, and contract rights are a type of private right recognized as conferring Article III standing. *See Spokeo*, 578 U.S. at 344 (Thomas, J., concurring); *see also Culwick v. Wood*, 384 F. Supp. 3d 328, 339 (E.D.N.Y. 2019). Holdings and Corp have suffered a concrete injury in the breach of their right to have the dispute determined by the arbitrator and have standing to vindicate their contractual right, even if the benefit of the award were to flow entirely to a third-party. *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Cookson Am., Inc.*, 710 F.3d 470, 475 (2d Cir. 2013) (per curiam) (concluding that a union had Article III standing to enforce an agreement with an employer to provide benefits to retirees, because "[t]hat this benefit accrues to third parties . . . does not change the fact that the [plaintiff] has negotiated for the benefit and has incurred obligations in order to secure it"); *see also Frontier Commc'ns of N.Y., Inc. v. Int'l Bhd. of Elec. Workers*, 2008 WL 1991096, at *3 (S.D.N.Y. May 6, 2008) (Lynch, J.) ("It is 'axiomatic' that a party to an agreement has standing to sue a counter-party who breaches that agreement, even where some or all of the benefits of that contract accrue to a third party.").

It also is not fatal to the "redressability" element of the standing inquiry that the financial relief to be awarded by a court will be payable to a third-party and not to the plaintiff directly. "[F]ederal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their warder; receivers bring suit to benefit their receiverships' assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suits to benefit testator estates; and so forth." *Sprint Commc'ns Co.*, 554 U.S. at 287–88; *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (holding that plaintiff had Article III

standing to assert claim for civil penalty to be paid to the Government). "[C]onfirmation arms the winning party of an arbitration 'with a court order . . . [and] a variety of remedies available to enforce the judgment.'" *Teamsters Loc. 177 v. United Parcel Serv.*, 966 F.3d 245, 253 (3d Cir. 2020) (quoting *Florasynth*, 750 F.2d at 176). If the behavior of the defendant giving rise to a concrete injury is the failure to provide a benefit to a third-party as promised, then an order requiring the provision of that benefit will redress the injury no less than the penalty paid to the federal government redressed the injury of the private plaintiff in *Laidlaw*.

Thus, even though it is true that an arbitration award is divisible for purposes of confirmation, *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006) (court "can confirm . . . the award either in whole or in part" in FAA case), the Court need not parse through the arbitral award and determine whether Petitioners have standing to seek the Court's confirmation of each element of the award. Instead, as long as the award remains unsatisfied in any respect, Petitioners—as parties to the LLCA and parties to the arbitration—have standing to seek redress. "A party, successful in arbitration, seeks confirmation by a court generally because he fears the losing party will not abide by the award. Armed with a court order the winning party has a variety of remedies available to enforce the judgment." *Florasynth, Inc.*, 750 F.2d at 176. Petitioners bargained for, and gave consideration pursuant to, a contract—the LLCA—that bound Petitioners and Respondent to resolve disputes relating to the contract through arbitration. Respondent has failed to satisfy that award. Confirmation of the award would reduce the arbitrator's contractually-enforceable order into a judicially-enforceable judgment, thus providing redress for Petitioners' grievance that the award has not been satisfied. *Cf. Stafford*, 78 F.4th at 67 ("Confirmation is a 'mechanism[] for enforcing arbitration awards.'" (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008))); *D.H. Blair & Co.*, 462 F.3d at

104 ("The request [to confirm an arbitral award] simply [seeks] to give effect to the arbitration award."); *Footchrome, Inc. v. Copal Co., Ltd.*, 517 F.2d 512, 516 (2d Cir. 1975) ("The award itself is inchoate until enforced by judgment."). Respondent has not demonstrated that anything more is necessary.

The few cases upon which Respondent relies are not to the contrary. *Town of Chester* does not require a plaintiff—in order to have Article III standing—to show that the requested relief will benefit himself or herself financially. The plaintiff need only show for each claim asserted and for each form of relief claimed, a concrete and particularized injury traceable to the defendant that can be redressed through judicial relief requested. The plaintiff who has suffered damages in the past does not thereby have standing to assert a claim for injunctive relief, preventing the defendant from engaging in misconduct in the future; he also needs to allege a real and immediate risk of future injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *accord Soule v. Conn. Ass'n of Sch., Inc.*, 90 F.4th 34, 47 (2d Cir. 2023) (en banc) (separately analyzing whether plaintiffs' injury was redressable "by monetary damages and by the specific injunctive relief sought"). Likewise, a plaintiff who has standing to complain about a municipal property tax exemption does not thereby have standing to challenge a state franchise tax credit. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). It does not follow from *Town of Chester* that a person who has suffered a concrete non-speculative harm is denied a federal forum simply because the relief that will redress that harm will also accrue to the benefit of a third party.

In *Stafford v. IBM*, 78 F.4th 62, the Second Circuit held that a motion to seek confirmation of an arbitral award was moot and thus the courts did not have Article III standing

to hear it.[17] The court did not review the underlying relief awarded by the arbitrator or base its decision on any issue regarding the persons whom that relief benefitted. Rather, the court concluded that the case was moot because respondent had satisfied its obligations under an arbitration award "in full"; regardless of whom the award benefitted, there was nothing a judgment could remedy. The respondent did not owe the petitioner any further relief. *Id.* at 65, 68. There was "no longer any issue over payment or ongoing compliance with a prospective award." *Id.* at 68. The petitioner's alleged injury had been fully redressed, and its contractual right to resolution by arbitration had been fully vindicated. In this case, by contrast, Petitioners do not base standing solely on the "statutory right to seek confirmation under the FAA." *Id.* at 69. Respondent breached its contract with Petitioners and have yet to remedy that breach.[18] The Award provides relief intended to redress that breach. The dispute is not moot. A judgment is necessary for Petitioners to obtain the relief that the arbitrator determined would redress the contract rights of Petitioners that the arbitrator determined were violated.

Put differently, *Stafford* does not hold that a party to arbitration must have something financial to gain from enforcement of the award, in order to have Article III standing to seek its confirmation. Further support for this conclusion can be found in the *Stafford* court's favorable

[17] The Court notes that other Circuits would hold that, even if an arbitral award is fully satisfied, that a party could still have standing to apply for the award's confirmation. *See Teamsters Loc. 177*, 966 F.3d at 251–52 (holding that "[u]nder the FAA a party's injuries are only fully remedied by the entry of a confirmation order," and that "the dispute the parties went to arbitration to resolve is 'live' until the arbitration award is confirmed and the parties have an enforceable judgment in hand").

[18] Although the Court is dubious of the proposition that a pledge to comply with an arbitration award would defeat standing, it need not address that issue except to note that such a proposition, if accepted, could undermine the right conferred by the FAA and the New York Convention to confirmation of an award. *See Teamsters Loc. 177*, 966 F.3d at 253 & n.3. A respondent seeking to avoid payment under the award could simply pledge that it would satisfy the award, only to renege after the time period for confirmation had run.

mention of a Seventh Circuit case, *Unite Here Local 1 v. Hyatt Corp.*, in which that court found the petitioner had Article III standing to confirm an arbitral award. 862 F.3d 588 (7th Cir. 2017). In that case, the petitioner sought confirmation of two arbitral awards, one of which granted relief only in the form of an order for respondent to cease and desist certain conduct prohibited by the collective bargaining agreement between the parties, and the other of which granted monetary relief in the form of backpay, along with an order for respondent to cease and desist conduct prohibited by the collective bargaining agreement. *Id.* at 590–94. The court then found that there was "plainly a live dispute about whether [the respondent was] in fact acting in compliance with the awards," because "41 pending alleged violations of the award" created "an ongoing controversy." *Id.* at 598–99. Summarizing that and other cases, the *Stafford* court stated that a petitioner lacked standing to confirm an arbitral award "when there is no longer any issue over payment or ongoing compliance with a prospective award." 78 F.4th at 68. Finally, the court concluded its standing analysis by stating that "[t]he FAA's process for confirming an arbitration award still requires Article III injury, and § 9 of the FAA does not itself confer standing." *Id.* at 69.

Compagnie Noga d'Importation et d'Exportation S.A. v. Russian Fed'n, is also far afield. 2008 WL 3833257, at *6 (S.D.N.Y. Aug. 15, 2008), *aff'd*, 350 F. App'x 476 (2d Cir. 2009) (summary order). In that case, the court held that a party to an arbitration who had assigned its claim and the proceeds of an arbitration award to a syndicate of banks lacked standing to bring suit on that claim and to enforce the arbitral award. But Respondent's reliance on *Compagnie Noga* confuses an assignee with a third-party beneficiary. "An unequivocal and complete assignment extinguishes the assignor's rights against the obligor and leaves the assignor without standing to sue the obligor." *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank*, 731 F.2d 112,

125 (2d Cir. 1984); *see Valdin Invs. Corp. v. Oxbridge Cap. Mgmt., LLC*, 651 Fed. App'x 5, 7 (2d Cir. 2016) (summary order) ("Valdin's assignment of its rights extinguished its claims against Oxbridge and deprived it of any interest in this litigation. Valdin therefore lacks standing."); *Wistron Neweb Corp. v. Genesis Networks Telecom Servs., LLC*, 2023 WL 4493542, at *1 (S.D.N.Y. July 12, 2023) (same); *Sonterra Cap. Master Fund, Ltd. v. Barclays Bank PLC*, 403 F. Supp. 3d 257, 260 (S.D.N.Y. 2019) ("Where a valid assignment has been executed, the assignee is 'the real party in interest' and 'the right to sue is exclusively' the assignee's." (quoting *Dennis v. JPMorgan Chase & Co.*, 342 F. Supp. 3d 404, 409 n.6 (S.D.N.Y. 2018))). By contrast, both the parties to the contract and an intended third-party beneficiary have standing to enforce a contract. *Wistron Neweb Corp.*, 2023 WL 4493542, at *1. The petitioner in *Compagnie Noga* had assigned its interest in the claim in that case. 2008 WL 3833257, at *5. Accordingly, the holding in *Compagnie Noga* that the petitioner no longer had standing was and remains unexceptional. Acceptance of Respondent's argument here, on the other hand, would be unprecedented.

II. Respondent's Arguments that the Arbitrator Exceeded His Powers

Respondent next argues that the arbitrator exceeded his powers in violation of Section 10(a)(4) of the FAA by (1) adjudicating claims for conduct that falls outside the scope of the arbitration agreement in the LLCA and that is expressly subject to a London-seated arbitral tribunal; (2) adjudicating the rights and duties of non-parties to the arbitration proceedings and non-signatories to the LLCA; (3) adjudicating claims barred by the bankruptcy; (4) awarding fees incurred in the bankruptcy case and the bondholder litigation, in a manner that both violates the bankruptcy court's exclusive jurisdiction and is outside the scope of the LLCA's arbitration clause; and (5) awarding fees and costs to non-prevailing parties.

The FAA permits vacatur of an arbitral judgment "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). The Second Circuit has "consistently accorded the narrowest of readings to section 10(a)(4) permitting vacatur where the arbitrator has exceeded [his] powers." *Jock v. Sterling Jewelers Inc.*, 942 F.3d 617, 622 (2d Cir. 2019) (quoting *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.*,564 F.3d 81, 85 (2d Cir. 2009)). The focus of the inquiry is "whether the arbitrator had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrator correctly decided that issue." *Id.* (alterations omitted) (quoting *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 122 (2d Cir. 2011)); *see also Subway Int'l, B.V. v. Subway Russia Franchising Co., LLC*, 2021 WL 5830651, at *4 (S.D.N.Y. Dec. 8, 2021); *LTF Constr. Co., LLC v. Cento Sols. Inc.*, 2020 WL 7211236, at *3 (S.D.N.Y. Dec. 7, 2020). "[A]n arbitrator may exceed her authority by, first considering issues beyond those the parties have submitted for her consideration, or second, reaching issues clearly prohibited by law or by the terms of the parties' agreement." *Jock*, 942 F.3d at 622. "This is an extremely deferential standard of review." *Id.* "It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable." *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010).

A. Adjudication of Claims Subject to a Different Arbitration Agreement

Respondent argues that the arbitrator exceeded his powers under the arbitration clause of the LLCA by improperly adjudicating claims stemming from an alleged breach of the BOL. Dkt. No. 50 at 23–25. In particular, Respondent asserts that the dispute about whether the Company exercised the Purchase Option should have been arbitrated in London before the London Court of International Arbitration ("LCIA") under English law pursuant to the terms of

the BOL, and not in New York pursuant to the terms of the LLCA. *Id.* at 25. Respondent points to portions of the Award in which the arbitrator "concluded that because 'the conditions for the buyout were met . . . pursuant to the BOL, Levona's interests should have been transferred to Eletson Gas, or its nominee[,]" *id.* at 24 (quoting Dkt. No. 67-58 at 47), to posit that the arbitrator acted outside his scope of "authority to decide only those issues 'arising out of or relating to' the LLCA[,]" *id.* (quoting Dkt. No. 67-2 § 12.14). Respondent argues that the arbitrator therefore improperly awarded unjust enrichment damages for events "not governed by the arbitration agreement." *Id.* at 24 (internal citation omitted).

Respondent's arguments mirror those that it made to the arbitrator. *See* Dkt. No. 31-8. Before the arbitrator, Respondent argued that, in the words of the arbitrator, "whether the Option was exercised, or whether performance under the Option or Loan was completed, must be decided by the LCIA, not JAMS." *Id.* at 5. It further asserted, again in the words of the arbitrator, that "the issue of who controls the preferred units is outside of JAMS' jurisdiction because it requires the arbitrator to interpret and enforce the Transaction Documents, which, according to Respondent, provide for arbitration in the London Court of International Arbitration." *Id.*

The arbitrator twice rejected those arguments. In his ruling on the motion to strike, the arbitrator first concluded that, by filing counterclaims, Respondent had availed itself of the arbitral forum, submitted to JAMS, and waived any objection to the arbitrator's assertion of jurisdiction. *Id.* at 12. In the alternative, and independently, the arbitrator rejected Respondent's argument on the merits because the language of the arbitration provision in the LLCA was broad, and "[t]o the extent that the Transaction Documents or events or actions that occurred in connection with those transactions 'relat[e] to [the LLC Agreement] or the breach, termination,

enforcement, interpretation or validity thereof' the broad arbitration provision of the LLC Agreement governs." *Id.* at 13 (quoting Dkt. No. 67-2 § 12.14(a)) (alterations in original). The arbitrator rejected Respondent's proposed construction of the two arbitration provisions which would "require that the parties arbitrate their disputes in two steps: first, go to London to adjudicate performance under the Transaction Documents and then second, come to JAMS to determine breaches under the [LLCA]." *Id.* at 14. According to the arbitrator, such an interpretation "would render impossible the intent of the arbitration provision in the [LLCA], which contemplates that the parties use best efforts to arbitrate to completion disputes within 150 days from the selection of the arbitrator." *Id.* In the Award, the arbitrator reiterated that Levona itself had sought relief for counterclaims that the arbitrator could only award if he interpreted, enforced and provided relief pursuant to the Transaction Documents, and had thereby waived any jurisdictional objections concerning the claims and counterclaims. Dkt. No. 67-58 at 13.

At the outset, the parties dispute whether Respondent waived its objection to the arbitrator's jurisdiction to determine if the Purchase Option was exercised. It is for the Court to determine whether Respondent waived its objection. *Cf. Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 368 (2d Cir. 2003) ("[I]n this case, Bodylines objected repeatedly to arbitration, beginning with the statement by its counsel in June 1999 which inspired Opals to file the instant litigation. Correspondence between the parties throughout the period of the dispute further supports Bodylines' assertion that it continuously objected to arbitration. These objections prevent a finding of waiver."). Further, the question of whether a party has waived its right to object to the arbitrability of an issue is governed by federal law. *See, e.g., Woodcrest Nursing Home v. Loc. 144, Hotel, Hospital, Nursing Home and Allied Services Union*, 788 F.2d 894, 899 (2d Cir.1986) (per curiam). Even where a party participates in arbitral proceedings, it is

not deemed to have waived its objection to arbitrability of an issue if it "consistently and vigorously maintained its objection to the scope of arbitration." *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 9 n.10 (1st Cir. 2000). "[T]he fact that a party 'forcefully object[s]' to having an arbitrator decide a dispute . . . suggests an unwillingness to submit to arbitration." *Opals*, 320 F. 3d at 369 (quoting *First Options of Chi. v. Kaplan*, 514 U.S. 938, 946 (1995) (alteration added)). Here, Respondent did not waive its objection. The first argument presented by Respondent in its response to the Petitioners' statement of claims was that the arbitrator lacked jurisdiction to determine whether the Purchase Option was exercised, stating: "the question of this matter is simple: who holds the preferred shares of [the Company] . . . ? As will be shown, this can *only* be resolved by an adjudication on the [BOL] and various other documents signed at the nexus of the transaction in question, all of which demand arbitration in London and are governed by English Law." Dkt. No. 67-17 at 1. Respondent again reiterated its objection to the arbitrator's jurisdiction to resolve the Purchase Option issue in its amended statement of counterclaims, Dkt. No. 67-25 at 1, in its motion to strike Petitioners' allegations regarding the Preferred Interests, Dkt. No. 67-40 at 5, and its post-hearing brief, Dkt. No. 67-48 at 55. Petitioner thus did not waive its objection to the arbitrator's jurisdiction to determine the Purchase Option issue.

Even so, however, Respondent's argument underlying the objection—that the arbitrator exceeded his authority in awarding unjust enrichment damages and in addressing the question of Levona's ownership of the Preferred Interests—is without merit. The Supreme Court and the Second Circuit have repeatedly "held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019); *see also First Options of Chi.*, 514 U.S. at 944–45 ("In this manner the law treats silence or ambiguity about

the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'—for in respect to this latter question the law reverses the presumption.") (emphasis in original). Moreover, when "parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delete such issues to an arbitrator." *Contec Corp. v. Remote Sol., Co., Ltd.*, 398 F.3d 205, 209 (2d Cir. 2005); *see Lonstein L. Off., P.C. v. Evanston Ins. Co.*, 2022 WL 72302, at *8 (S.D.N.Y. Jan. 6, 2022); *Convergen Energy LLC v. Brooks*, 2020 WL 5549039, at *16 (S.D.N.Y. Sept. 16, 2020); *Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400 (E.D.N.Y. 2014).

The arbitration agreement in the LLCA is broad. It provides that "[a]ny dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof (including the scope or applicability of this agreement to arbitrate) shall be determined by arbitration in New York County in the State of New York or any other mutually agreeable location, before a single arbitrator." Dkt. No. 67-2 § 12.14(a). The mandatory arbitration provision does not just apply to disputes or controversies arising out of the LLCA but also to any disputes or controversies "relating to" the LLCA. *See Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 225 (2d Cir. 2001); *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995). The provision also is not limited to claims or controversies relating to breaches of the LLCA but to any dispute, claim or controversy relating to the "termination, enforcement, interpretation, or validity" of the LLCA. *See, e.g., Davitashvili v. Grubhub Inc.*, 2023 WL 2537777 (S.D.N.Y. Mar. 16, 2023); *see also Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 65 (2010).

Moreover, and importantly, the parties clearly and unmistakably delegated to the arbitrators the authority to decide the scope and application or the agreement to arbitrate. The breadth of the authority the parties delegated to the arbitrator is reinforced by their decision that the arbitration would be "administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures." LLCA at 69. Rule 11 of the JAMS Rules and Procedures which provides, in relevant part, that jurisdictional disputes, including disputes over the interpretation and scope of the agreement to arbitrate, will be submitted to the arbitrator:

> A. Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.
>
> B. Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are the proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.[19]

Dkt. No. 55-1 at 9.

"[I]f a valid [arbitration] agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." *Id.*; *see also Beijing Shougang Mining Inv. Co., Ltd. v. Mongolia*, 11 F.4th 144 (2d Cir. 2021); *Jock*, 942 F.3d at 624 ("[W]hen parties to an agreement explicitly incorporate rules that empower an arbitrator to decide an issue, 'the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator.'" (quoting *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 (2d Cir. 2018)); *Mumin v. Uber Techs., Inc.*, 239 F. Supp. 3d 507, 522–23 (S.D.N.Y. 2017) (finding clear and unmistakable intent based on contract language that

[19] The language "as a preliminary matter" conveys that the arbitrator is to decide the scope of the arbitration before addressing the merits and not to limit the scope of the arbitrator's authority. *Cf. Emilio v. Sprint Spectrum L.P.*, 508 F. App'x 3, 5 (2d Cir. 2013) (summary order); *Parrella v. Orange Rabbit, Inc.*, 2021 WL 4462809, at *8–9 (S.D.N.Y. Sept. 29, 2021).

stated "disputes arising out of or relating to interpretation or application of this Arbitration Provision shall be decided by an Arbitrator and not by a court or judge"); *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 371 F. Supp. 2d 571, 575–76 (S.D.N.Y. 2005) (finding clear and unmistakable intent based on contract language that delegated to an arbitrator disputes involving "meaning, construction, validity and/or enforceability"). "'[O]nce the parties have agreed that an arbitrator may decide questions regarding the scope of arbitrable issues in the first instance,' federal courts are indeed required to afford deference to the arbitral tribunal's decision as to that scope." *Beijing Shougang*, 11 F.4th at 156 (quoting *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 76 (2d Cir. 2012)). The Second Circuit has instructed that the Court may disturb the arbitrator's ruling as to jurisdiction only if the ruling did not fall "within his interpretative authority" and if the arbitrators reasoning did not draw "its essence from the agreement to arbitrate" but instead effectively "dispensed its own brand of justice." *Beijing Shougang*, 11 F.4th at 161 (internal quotation marks and citations omitted).

Respondent has not satisfied its burden to show that the arbitrator exceeded his interpretative authority in awarding unjust enrichment damages and in deciding issues regarding Levona's ownership of the Preferred Interests. *See Smarter Tools Inc. v. Chongqing SENCI Import & Export Trade Co., Ltd.*, 57 F.4th 372, 378 (2d Cir. 2023) (burden is on party seeking to vacate the award to show that arbitrator exceeded his authority). The Third Amended Statement of Claims and Response to Counterclaims submitted by Petitioners asserted that Levona had engaged in "egregious and ongoing breaches" of the LLCA. Dkt. No. 31-35 ¶ 1. In the Award, the arbitrator found that Levona breached its obligations arising out of the LLCA, including by bribing an employee of Corp and causing him to disclose confidential information, violating confidentiality obligations itself, influencing Gas's financiers to turn against Petitioners by

causing the arrest of Gas's vessels and doing so without notifying Petitioners, failing to acknowledge that Eletson had fully complied with the terms of the BOL Purchase Option, improperly purporting to act on behalf of the Company in its business dealings with third parties, improperly threatening Eletson and its affiliated officers and directors, improperly purporting to seize control of the Company's board of directors post-March 11, 2022, improperly purporting to assert control over the assets of the Company post March 11, 2022, improperly purporting to call and hold meetings of the Board of Directors post March 11, 2022, and breaching its obligations under the LLCA. Dkt. No. 67-58 at 96–98. The arbitrator did not purport to award damages for breach of the BOL. He awarded damages of $19,677,743,71 for the lost services of the Symi and Telendos without the reciprocal transfer of the Preferred Interests. The damages were based on an estimate of what the Company would have made from the two vessels had it not transferred them and was awarded to the Nominees because they flowed from Levona's refusal to relinquish the Preferred Interests and the Nominees hold all title and interest in the Preferred Interests. *Id.* at 64–65. The arbitrator also awarded $21,777,378.50 as directly calculable losses arising from Levona's conduct that led to the vessel arrests, including lost revenues and fixed costs incurred due to the arrests, payable to the Company as compensatory damages. *Id.* at 65. Finally, the arbitrator awarded $2,000,000 to be paid to the Company from a number of other wrongful acts of Levona including the loss of access to capital, management distraction, and reputational harm. *Id.* at 66.

The arbitrator based his conclusion that he had authority to make these determinations on the language of the arbitration provision in the LLCA, and did not dispense his own brand of industrial justice. The Court need not conclude that it would have reached the same decision as the arbitrator to conclude that he acted within the authority granted him by the parties to

determine his own jurisdiction. *See Beijing Shougang*, 11 F.4th at 158, 161. The dispute—and the arbitrator's ultimate determination of wrongful conduct—arose out of the LLCA and the relationship between the parties formed as a result of the LLCA, and related not just to breaches of the LLCA but also to its termination, enforcement and interpretation. Levona is in error when it asserts that the award of unjust enrichment damages related to events "not governed" by the LLCA.[20] It is precisely as a result of Levona's conduct that the arbitrator determined that the Company and the Nominees suffered the damages the arbitrator found that they had suffered. With respect to the unjust enrichment damages in particular, the arbitrator concluded that it was because Levona had taken unilateral acts—without authority to do so under the LLCA—that the Company had suffered foregone profits.

Levona is mistaken in its argument that the arbitrator was required as a matter of law to forego determination of Petitioners' claims because the arbitrator could not conclude whether Levona had engaged in wrongful conduct arising out of or relating to the LLCA without first making an antecedent determination as to whether Eletson had properly exercised the Purchase Option. Eletson's claim for damages turned upon conduct engaged in by Levona both before and after the exercise of the Purchase Option, and the arbitrator did not award damages for Levona's failure to honor the Purchase Option. Thus, to a large extent, the question of whether Eletson

[20] Thus, Levona's reliance on the dictum from *Smarter Tools* that "vacatur was necessary where, for example, the arbitrators exceeded their powers [by awarding damages] for events not governed by the arbitration agreement," 57 F.4th at 382, is not availing. *Smarter Tools* cited *In re Arbitration Between Melun Indus., Inc. & Strange*, 898 F. Supp. 990, 994–95 (S.D.N.Y. 1990), but the distance between the facts of this case and those of *Melun Industries* demonstrate the weakness of Respondent's argument. In *Melun Industries*, the arbitration provision at issue limited the arbitrator to resolving disputes over a post-closing adjustment and thus the arbitrator exceeded his authority by resolving issues regarding the accuracy of an opening balance sheet. The case bears no resemblance to this one in which the arbitration clause is broad and delegates issues regarding arbitrability to the arbitrator.

had properly exercised the Purchase Option was in the nature of an affirmative defense or an "anticipatory repudiation"—if Eletson had not exercised the option and if Levona had maintained its Preferred Interests, then arguably Levona would not have breached the LLCA and its conduct would not have violated any implied covenant of good faith and fair dealing.

The antecedent determination that the arbitrator was required to make here bears similarity to the antecedent determinations that courts are required to make when analyzing a claim for tortious interference, which only lies if the plaintiff had a business relationship with a third party that the defendant injured, and which may be overcome by a showing by the defendant that interference arose through the exercise of its equal or superior right in the breaching party's business. *See, e.g.*, *Lesnik v. Lincoln Financial Advisors Corp.*, 2020 WL 3057456, at *3 (S.D.N.Y. June 9, 2020) ("Under New York law, a claim for tortious interference with prospective economic advantage comprises four elements: (a) business relations with a third party; (b) that defendant knew of the relationship and interfered with it; (c) defendant acted with the sole purpose of harming the plaintiff or solely out of malice or used wrongful means; and (d) injury to that business relationship."); *Alvarado v. Mount Pleasant Cottage Sch. Dist.*, 404 F. Supp. 3d 763, 791 (S.D.N.Y. 2019) ("It is imperative that, in bringing a tortious interference claim, a plaintiff identify the relevant terms of the contract that existed that were breached by defendant.") (internal quotation marks omitted); *Lesesne v. Brimecome*, 918 F. Supp. 2d 221, 227 (S.D.N.Y. 2013) (noting the requirement that a plaintiff "identify the potential customers at issue when asserting a cause of action for interference with prospective economic advantage"); *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 835 N.Y.S.2d 530, 532 (2007) ("In response to such a claim, a defendant may raise the economic interest defense—that it acted to protect its own legal or financial stake in the breaching party's business."). In other words,

judicial bodies are called upon to make antecedent determinations about rights and obligations arising out of contracts even where the judicial body would not have jurisdiction to decide a dispute arising out of those contracts.

Further, once the arbitrator had properly seized jurisdiction of the dispute, it was not outside the scope of his remedial authority to determine that the Preferred Interests should be transferred to the Nominees. As the arbitrator reasoned, because Eletson asserted breaches of the LLCA, the parties were not required to "arbitrate their disputes in two steps: first, go to London to adjudicate performance under the Transaction Documents and then second, come to JAMS to determine breaches under the [LLCA]." *Id.* at 14.

B. Adjudication of the Rights and Duties of Non-Parties to the Arbitration and Non-Signatories to the Arbitration Agreement

Respondent argues that the arbitrator improperly adjudicated the rights and duties of non-parties to the arbitration proceedings and non-signatories to the LLCA. Dkt. No. 50 at 17–22. Specifically, Respondent complains that the arbitrator could not have awarded damages to the Company, as a non-party to the arbitration proceedings, or to the Nominees, as non-parties to the arbitration proceedings and non-signatories to the LLCA. *Id.* at 19. It also takes issue with the arbitrator's award of damages against Murchinson and Pach Shemen as Levona's alter egos because Murchison and Pach Shemen were not parties to the arbitration proceedings and are not signatories to the LLCA. *Id.* at 22–23.

1. The Award of Relief to Non-Signatories and Non-Parties

Respondent argues that the arbitrator erred and exceeded his powers under the arbitration agreement by adjudicating the rights and obligations of the Company and the Nominees. Dkt. No. 50 at 19–22; Dkt. No. 59 at 6. Respondent argues that the arbitrator was without power to award damages to the Nominees because they were neither signatories to the LLCA nor parties

to the arbitration proceedings, Dkt. No. 50 at 19, and that he lacked power to award damages to Gas because, although it was a signatory to the LLCA, it was not a party to the arbitration, *id.* at 19–20. The argument is without merit.

The arbitration agreement in the LLCA is broad. It commits to the arbitrator the resolution of "[a]ny dispute, claim or controversy arising out of or relating to th[e LLCA] or the breach, termination, enforcement, interpretation or validity thereof (including the determination of the scope or applicability of this agreement to arbitrate) . . . ." Dkt. No. 67-2 at 69; *see Alghanim v. Alghanim*, 828 F. Supp. 2d 636, 652 (S.D.N.Y. 2011) ("An arbitration clause covering '[a]ny claim or controversy arising out of or relating to th[e] agreement,' is 'the paradigm of a broad clause.'" (quoting *Collins & Aikman Prods. Co.*, 58 F.3d at 20)); *see also Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35–36 (2d Cir. 2002); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 845 (2d Cir. 1987). It also provides "[t]he arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures." Dkt. No. 67-2 at 69.

"Where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate." *ReliaStar Life Ins. Co. of N.Y.*, 564 F.3d at 86. "It is not the role of the courts to undermine the comprehensive grant of authority to arbitrators by prohibiting an arbitral security award that ensures a meaningful final award." *Banco de Seguros del Estado v. Mut. Marine Off., Inc.*, 344 F.3d 255, 262 (2d Cir. 2003); *see also Forschner Grp., Inc. v. Arrow Trading Co., Inc.*, 124 F.3d 402, 406 (2d Cir. 1997). Indeed, "arbitrators are generally afforded greater flexibility in fashioning remedies than are courts." *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 902 (2d Cir. 2015); *see Shasha v. Malkin*, 2021 WL 11960275, at *7 (S.D.N.Y. Mar. 24, 2021) ("Arbitrators 'may grant equitable relief that a Court

could not.'" (quoting *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 532 F. Supp. 901, 905 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982))); *see also* 1 M. Domke, Domke on Commercial Arbitration § 35:1 (3d ed. 2003) (hereinafter "Domke on Commercial Arbitration") ("Limited only by the broad concepts of equity and justice, an arbitrator has a plethora of remedies, both legal and equitable, to choose from in structuring a remedy."). "Additionally, the parties to the arbitration agreement can broaden the remedies available to them under the arbitration agreement by incorporating the rules of an arbitration administering agency." Domke on Commercial Arbitration § 35:2. Here, JAMS Rule 24 provides: "The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' Agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy." Dkt. No. 67-3.

The award to the Nominees and the Company here fell within the broad authority the parties delegated to the arbitrator. An arbitrator under a broad arbitration provision has even greater power than a court to award relief in favor of Gas and/or the Nominees as third-party beneficiaries of the LLCA. *Benihana, Inc.*, 784 F.3d at 902; *Sperry Int'l Trade*, 689 F.2d at 306 ("Under New York law arbitrators have power to fashion relief that a court might not properly grant."). The arbitrator concluded that Respondent wrongfully denied the Nominees the Preferred Interests to which they were entitled and that, by depriving them of the Preferred Interests while retaining the two vessels, Levona was unjustly enriched at the Nominees' expense. The arbitrator reasoned that the damages "flow[ed] directly from Levona's refusal to relinquish the preferred interests, and the Preferred Nominees hold all title and interest in the preferred interests." Dkt. No. 47-5 at 64. The arbitrator had the authority to hold that the Preferred Interests were transferred to the Nominees and award the Nominees damages. The

Court need not agree with that reasoning to conclude that it was within the arbitrator's power to determine that Levona's breach of its obligations to Petitioners could be most readily and effectively redressed by giving the party most directly injured the benefit the arbitrator found that Respondent unjustly enjoyed. As to the Company, the arbitrator determined that they too were directly injured by the conduct that the arbitrator found violated the LLCA—Levona caused the arrests of the Company's vessels and committed other breaches of contract. If it was within the power of the arbitrator to determine whether Levona breached the LLCA, it follows that it would be within the power of the arbitrator to grant the relief that the arbitrator believed was most effective to redress that breach.

Respondent's arguments to the contrary are without merit. Respondent contends that a non-party to the arbitration agreement that did not participate in the arbitration is not bound by the award rendered in the arbitration. *See, e.g.*, *Ali A. Tamini v. M/V Jewon*, 808 F.2d 978, 981 (2d Cir. 1987); *Dist. Council No. 9 v. APC Painting, Inc.*, 272 F. Supp. 2d 229, 240 (S.D.N.Y. 2003). Respondent's point that the Nominees and the Company were non-parties and that they did not participate in the arbitration has force. Neither the Nominees nor the Company were named as parties. Although representatives of each testified, they did so in their capacity as witnesses, and not in their capacity as parties. The Court has reviewed the arbitration filings and agrees with Respondent that it was not until the pre-hearing brief, months after the arbitration had commenced, that Petitioners asserted that the Preferred Interests should be transferred to the Nominees and not until after the hearing and in its proposed order that Petitioners asked that damages be awarded to Gas and to the Nominees and not to itself.

But that point gets Respondent only so far. Unlike the arbitrator's decision to award relief as against non-parties to the arbitration discussed below, the arbitrator's decision to award

damages to non-parties did *not* "bind nonparties to the arbitration." *Soleimani v. Andonian*, 2022 WL 748246, at *5 (S.D.N.Y. Mar. 10, 2022). It bound Levona, a party to both the arbitration and the underlying contract, to pay damages to non-parties. Accordingly, the award "do[es] not bind the[] non-parties in the sense proscribed by decisional law." *Matter of Arb. Between Cole Pub. Co., Inc. v. John Wiley & Sons, Inc.*, 1994 WL 532898, at *4 (S.D.N.Y. Sept. 29, 1994). Nor does the award "unnecessarily determine the rights of non-parties," as in cases where petitioners sought to confirm awards that benefitted nonparties *without resolving the parties' dispute*. *See, e.g.*, *Techcapital Corp. v. Amoco Corp.*, 2001 WL 267010, at *16 (S.D.N.Y. Mar. 19, 2001).

Respondent also relies upon the Sixth Circuit decisions in *NCR Corp. v. Sac-Co, Inc.*, 43 F.3d 1076 (6th Cir. 1995), *Nationwide Mutual Insurance Co. v. Home Insurance Co.*, 330 F.3d 843, 849 (6th Cir. 2003), and *Armco Employees Independent Federation, Inc. v. AK Steel Corp.*, 149 F. App'x 347 (6th Cir. 2005). None is apposite. In *NCR Corp.*, all parties agreed that the arbitrator exceeded his powers by awarding "class action type relief in a case that was not a class action." 43 F.3d at 1080. One of NCR's authorized dealers asserted a claim in arbitration of unfair competition; the arbitrator not only awarded that dealer punitive damages but also awarded "punitive damages to all of NCR's United States nonservicing dealers even though only one nonservicing dealer . . . was a party to the action before the arbitrator." *Id.* at 1078. In *Nationwide*, the reviewing court had previously determined that the third-party eventually awarded relief could not be a party to the arbitration given its contractual relationship with the parties to the arbitration, and that the only relief available in the arbitration was to the parties before the arbitrator. 330 F.3d at 847 ("In *Nationwide I*, we held that Nationwide could not bring suit directly against CIGNA, or compel CIGNA to submit to arbitration, because of a third-party

disclaimer provision in the assumption contract between Home and CIGNA. We construed this disclaimer provision as a limitation on the obligations CIGNA undertook in its assumption contract with Home. Therefore, Nationwide's only recourse was against Home, and CIGNA and its affiliates were not parties to the arbitration."). The court concluded that the award was in manifest disregard of the law and the Circuit's prior opinion because it purported to adjudicate and create rights that were not the subject of the arbitration. *Id.* Put differently, the court in *Nationwide* held that relief could not be awarded to a third-party because the relevant contracts did not provide for it. *Id.* at 848 ("Thus, the arbitration award unambiguously exceeds the terms of the Nationwide-Home contractual dispute."). Notably, the court did not contest the proposition proffered by the appellee that, if the award was construed, simply to direct relief by which the appellant could discharge its legal obligations, it could be confirmed. *Id.* Finally, in *Armco*, the Sixth Circuit held that the labor arbitrator exceeded his powers by awarding relief in an arbitration brought by the defendant's apprentices who complied with the collective bargaining agreement's grievance procedures also to those apprentices who did not comply with those grievance procedures. *Armco*, 149 F. App'x at 350–52. The court concluded, "[l]imiting relief to those apprentices who properly complied with the group grievance procedure is consistent with the terms of the CBA" and that the arbitrator's award to all apprentices, including those who did not comply with the grievance procedure demonstrated a "clear infidelity" to the collective bargaining agreement because it conflicted not only with the terms of the collective bargaining agreement, but also with "the parties' intent in entering into an agreement that sets forth such detailed provisions for filing grievances." *Id.* at 351–52.

The cases offered by Respondent thus do not stand for the universal proposition that an arbitrator determining a dispute under a broad arbitration agreement lacks authority to grant

monetary relief directly to third parties. In those cases, the arbitrator's award either depended on the determination of the rights of persons who were not parties to the arbitration, or granted relief to parties that a court had previously held could not be awarded relief in the arbitration. In this case, by contrast, the Award did not rest upon a determination that a wrong was committed as against the Company or the Nominees independent of the wrongs committed to Petitioners. It rested upon a determination the rights of Corp and Holdings—including the right to exercise the Purchase Option—were violated and that the payment of monies to the third parties was the most effective means of providing relief. The Award does direct a remedy by which Respondent will "discharge its legal obligations" to Petitioners. *Nationwide*, 330 F.3d at 847. The Award thus cannot be disturbed on the basis that because relief was directed to persons other than the Petitioners the arbitrator exceeded his authority under the arbitration agreement.

2. The Award of Relief Against Non-Parties

Respondent next argues that because Murchinson and Pach Shemen were not parties to the arbitration, the arbitrator could not award relief against them and in favor of Petitioners. Dkt. No. 50 at 22-23; Dkt. No. 59 at 8. For their part, Petitioners assert that they seek *confirmation* of the award only as against Levona, and not against Murchinson or Pach Shemen. Dkt. No. 54 at 13. Petitioners argue that—with respect to the liability of Murchinson and Pach Shemen—the Court should merely confirm the *factual findings* of the arbitrator regarding the roles and actions of Murchison and Pach Shemen, as the issues of the relationship among Levona, Murchinson, and Pach Shemen were before the arbitrator and the arbitrator's findings cannot be revisited by a court on a petition to confirm an award. Dkt. No. 54 at 13. Specifically, the arbitrator based his award of relief against Murchison and Pach Shemen on his conclusion that "Levona, Murchinson, and Pach Shemen, are each alter egos of the other concerning every fact proven in

this matter and every item of relief awarded herein." Dkt. No. 67-58 at 96. As a result, "and for the avoidance of any doubt, any judgments against Levona are also against each alter ego." *Id.*

Respondent's argument has merit. "[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *see Schneider v. Kingdom of Thailand*, 688 F.3d 68, 71 (2d Cir. 2012) ("The question whether the parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." (quoting *Howsam*, 537 U.S. at 83)). "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chi.*, 514 U.S. at 943. Thus, "a decision whether parties other than those formally signatories to an arbitration clause may have their rights and obligations determined by an arbitrator when that issue has not been submitted to him is not within the province of the arbitrator himself but only of the court." *Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Panama, S.A.*, 312 F.2d 299, 301 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963). "[W]here the petitioners contend that they are not 'bound to [the] arbitration agreement, the issue of arbitrability is for the Court in the first instance.'" *Kwatin v. Mason*, 356 F. Supp. 3d 343, 348 (S.D.N.Y. 2018) (quoting *Boroditskiy v. European Specialties LLC*, 314 F. Supp. 3d 487, 493 (S.D.N.Y. 2018)); *see also Nat'l Union Fire Ins. Co. of Pittsburgh v. Stucco Sys., LLC*, 289 F. Supp. 3d 457, 466 (S.D.N.Y. 2018) (stating that "whether [the non-signatory] is to be a party to the [arbitration agreement] is an issue for judicial determination first"); *Boroditskiy*, 314 F. Supp. 3d at 493 (noting that "in cases where a party disputes whether it is bound to an arbitration agreement, the issue of arbitrability is for the Court in the first instance" (quotation

marks omitted)); *Herman Miller, Inc. v. Worth Cap., Inc.*, 173 F.3d 844, (2d Cir. 1999) (summary order) ("The question of 'whether a person is a party to [an] arbitration agreement' is a threshold question to be determined by the court, and not by an arbitrator." (quoting *Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F.2d 4, 7 (2d Cir.1981) (per curiam))). Although parties may delegate questions of arbitrability to the arbitrator "so long as the parties' agreement does so by 'clear and unmistakeable' evidence," "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Henry Schein, Inc.*, 139 S. Ct. at 530 (quoting *First Options of Chi.*, 514 U.S. at 944); *see Pacelli v. Augustus Intel., Inc.*, 459 F. Supp. 3d 597, 605 (S.D.N.Y. 2020). These principles stem from the fact that arbitration is "a creature of contract." *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 288 (2d Cir. 2019); *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011). "[A]rbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 559 U.S. at 681 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Accordingly, "the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt*, 489 U.S. at 478 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)); *see also Stolt-Nielsen*, 559 U.S. at 683 (holding that "parties may specify *with whom* they choose to arbitrate their disputes").

There are limited circumstances in which a person who is not party to an arbitration agreement will be bound by an arbitral award. A court upon motion may *compel* a non-signatory to an arbitration agreement to participate in an arbitration. The Second Circuit has recognized five theories for requiring non-signatories to arbitrate: "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *see also Oriental Com. & Shipping Co. v. Rosseel,*

N.V., 609 F. Supp. 75, 78 (S.D.N.Y. 1985) ("It is within the province of this Court to determine whether Oriental S.A., although not formally a party to the arbitration agreement, should be made a party to the arbitration proceeding in addition to Rosseel and Oriental U.K."). District courts are instructed to "narrowly construe these five theories, each of which is governed by ordinary principles of contract and agency law." *Boroditskiy*, 314 F. Supp. 3d at 493. As such, an "agreement to arbitrate does not bind an agent acting on behalf of a disclosed principal 'unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal.'" *Veera v. Janssen*, 2005 WL 1606054, at *3 (S.D.N.Y. July 5, 2005) (quoting *Lerner v. Amalgamated Clothing & Textile Workers Union*, 938 F.2d 2, 5 (2d Cir. 1991)).

In addition, a person who is not a party to an arbitration agreement may nonetheless become bound by the arbitrator's award if that person initiates the arbitration or participates, without objection, in the arbitration proceedings. *Cf. Cole Publishing Co.*, 1994 WL 532898, *4 ("[I]t has long been recognized that an arbitration award cannot be enforced against a non-party to the arbitration clause who did not participate in arbitration proceedings."). Although "arbitrators do not have the power to bind a corporation which is not a party to the arbitration or a voluntary participant in the arbitration proceeding," *Am. Renaissance Lines, Inc. v. Saxis S.S. Co.*, 502 F.2d 674, 677 (2d Cir. 1974), they do have the authority to bind a voluntary participant in the arbitration proceeding, *see LGC Cap. Holdings, Inc. v. Julius Klein Diamonds, LLC*, 238 F. Supp. 3d 452, 473 (S.D.N.Y. 2017) (holding that individual non-signatories to an arbitration agreement "waived any right to object to the imposition of personal liability" by participating voluntarily in the proceeding, including by listing themselves in their personal capacity as respondents in the proceeding); *Halley Optical Corp. v. Jagar Int'l Mktg. Corp.*, 752 F. Supp.

638, 639–40 (S.D.N.Y. 1990) (finding waiver of objection to the imposition of personal liability where an individual participated in arbitration in order to ensure a party does not "participate in an arbitration, with the assurance that if it loses it may later challenge whether it had ever agreed to arbitration").

Finally, an alter ego to a participant in an arbitration or a party to an arbitration agreement can also be required to satisfy an arbitral award in the absence of an order compelling a party to arbitrate, or of actual participation in the arbitral proceedings. *See, e.g.*, *Blue Whale Corp. v. Grand China Shipping Dev. Co., Ltd.*, 722 F.3d 488 (2d Cir. 2013). However, in that circumstance, the proper vehicle is not an application under the FAA or the New York Convention to confirm the award issued in connection with a proceeding in which the third party did not participate and was not compelled to participate. An award against a person who is not a party to an arbitration agreement or who has not participated either voluntarily or by compulsion in an arbitration proceeding cannot be confirmed. The award may be confirmed only to the extent that it orders relief against a party or a participant. If the prevailing party seeks to hold the alter ego responsible for the relief awarded by the arbitrator, it must do so through a separate action in court to pierce the corporate veil. *See GE Transp. (Shenyang) Co. v. A-Power Energy Generation Sys., Ltd.*, 2016 WL 3525358, at *6 (S.D.N.Y. June 22, 2016); *APC Painting, Inc.*, 272 F. Supp. 2d at 240 ("[C]ase law is clear that in the commercial arbitration context the corporate veil cannot be pierced as part of a motion to confirm the arbitration award." (citing *Productos Mercantiles E Endustriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 46–47 (2d Cir. 1994))); *see also Orion Shipping & Trading Co.*, 312 F.2d at 301 ("It may well be . . . that Eastern Panama is thoroughly dominated by Signal, and that Signal is properly accountable on an 'alter ego' theory. But we hold that an action for confirmation is not the proper time for a

District Court to 'pierce the corporate veil.'"). "[T]he question of whether a third party not named in an arbitral award may have that award enforced against it under a theory of alter-ego liability . . . is one left to the law of the enforcing jurisdiction, here the Southern District of New York, under the terms of Article III of the New York Convention," *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 74 (2d Cir.), *cert. denied*, 583 U.S. 1039 (2017), in which the Court applies the federal common law of veil piercing, *see, e.g.*, *Global Gaming Philippines, LLC v. Razon*, 2023 WL 5935640 (S.D.N.Y. Sept. 12, 2023).[21]

The arbitrator thus exceeded his authority when he ruled that Pach Shemen and Murchinson were required to pay damages to Levona. *See Orion Shipping & Trading Co.*, 312 F.2d at 300 (concluding that the district court "held, properly we think, the arbitrator exceeded his powers in determining the obligations of a corporation which was clearly not a party to the arbitration proceeding, and that Signal's motion to vacate the award against it should be granted"); *Porzig*, 497 F.3d at 140–41 (vacating arbitral award of relief against a non-party to the arbitration after stating that "[t]he authority of the arbitral panel is established only through the contract between the parties who have subjected themselves to arbitration, and a panel may not exceed the power granted to it by the parties in the contract"). Here, only Levona—not Murchinson or Pach Shemen—was party to the LLCA, which contained the arbitration provision that Petitioners invoked. There is no dispute that Murchinson and Pach Shemen did not agree to the LLCA, were not signatories to the LLCA, were not parties to the LLCA, and were not bound

[21] "An alter ego relationship is not easy to establish," and exists "only where the instrumentality is so extensively controlled that a relationship of principal and agent is created or where affording the entity separate juridical status would work fraud or injustice." *Esso Expl. & Prod'n Nigeria Ltd. v. Nigerian Nat'l Petroleum Corp.*, 40 F.4th 56, 59 (2d Cir. 2022); *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 55 (2d Cir. 2021) (same). Common ownership and control is not enough. *See, e.g.*, *Thomson-CSF*, 64 F.3d at 788.

by the LLCA. Murchinson and Pach Shemen were thus also not bound by the arbitration provision in the LLCA. There also is no evidence or argument that Levona had the authority to bind Murchinson or Pach Shemen to the LLCA. The arbitrator had no authority to make Murchinson or Pach Shemen parties to the arbitration and, even if he did, he did not exercise that authority. Petitioners did not seek an order from a court compelling non-signatories Murchinson or Pach Shemen to participate in the arbitration under the LLCA. Petitioners never claimed that Murchinson or Pach Shemen were required to participate in the arbitration under a theory of incorporation by reference, assumption, agency, veil-piercing, or estoppel. The JAMS Comprehensive Arbitration Rules and Procedures, pursuant to which Eletson and Levona agreed to arbitrate in the LLCA, Dkt. No. 67-2 § 12.14(a), requires each party to serve on the other a Notice of Claims, "afford[ing] all other Parties reasonable and timely notice of its claims," Dkt. No. 67-3 § 9. None of Eletson's Notice of Claims name Murchinson or Pach Shemen or seek relief against Murchinson or Pach Shemen; Eletson does not claim here that it served Murchinson or Pach Shemen with its Notice of Claims. Indeed, the Third Amended Statement of Claims and Response to Counterclaims which was the basis of Eletson's claims in the arbitration names only Levona; it does not name Pach Shemen or Murchinson, seek to compel them to participate in the arbitration, or seek relief against them. Dkt. No. 31-35. Among other things, Petitioners sought as relief "the damages that they have suffered because of Levona's unlawful conduct together with punitive damages and attorneys' fees and costs." *Id.* ¶ 6(e). Indeed, it was not until after the hearing had concluded that Petitioners asked the arbitrator to award any relief against Pach Shemen and Murchinson and even then it did not do so by serving Murchinson or Pach Shemen with papers or seeking to bring them in to the arbitration. Snuck into the second page of Petitioners' post-hearing proposed order was the request that Murchinson

and Pach Shemen (along with hedge funds Nomis Bay and BPY) should be found to be alter egos of Levona and responsible for "every item of relief awarded herein." Dkt. No. 67-47 at 2. Tellingly, even then, the proposed order asked only that Levona pay damages.[22] *Id.* at 6–7. But, by that point the hearing was over. Pach Shemen and Murchinson had no notice prior to the hearing that they may ultimately be deemed liable in the proceedings, no opportunity to be heard, and no opportunity to defend themselves. Their rights were adjudicated without affording them any opportunity to be heard.

The Court therefore vacates the portions of the Award that purport to find Murchinson and Pach Shemen liable, or that require them to pay damages to Petitioners, the Company, or the Nominees. Section 11 of the FAA gives the court the power to modify or correct an award on the ground that "the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted." 9 U.S.C. § 11. The power is discretionary, and not mandatory. *See Sociedad Armadora Aristomenis Panama, S.A. v. Tri-Coast S.S. Co.*, 184 F. Supp. 738, 741 (S.D.N.Y. 1960); *see also Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 197–98 (2000). In the alternative, the FAA gives the Court the power to vacate an award on the grounds that the arbitrator exceeded his power. 9 U.S.C. § 10(a)(4); *see Smarter Tools*, 57 F.4th at 381–82. In this case, it is an appropriate exercise of discretion to modify the Award and not to vacate it in its entirety. The questions of whether Levona was liable to Eletson and whether Levona could be held responsible under the LLCA for the conduct of Murchinson and Pach Shemen were before the arbitrator. That the arbitrator exceeded his powers in ordering relief directly against Murchinson and Pach

[22] The Award, which recites that Levona, Murchinson, and Pach Shemen, pay compensatory and punitive damages and attorney's fees, costs, expenses, and interest, as alter egos, jointly and severally, Dkt. No. 67-58 at 99-100, exceed the relief requested by Eletson.

Shemen—because they were not signatories to the LLCA and were not parties to the arbitration—does not alone relieve Levona from liability for its role in the conduct of those entities.

Petitioners do not dispute that Pach Shemen and Murchinson cannot be bound as parties to the Award. They respond only that the Court should confirm "the factual findings involving the rules and actions of Murchinson and Pach Shemen, as these issues were arbitrated and submitted to Justice Belen for adjudication." Dkt. No. 54 at 13. That argument, however, is a non-sequitur. Under the New York Convention and the FAA, the Court does not confirm "factual findings." As Eletson itself emphasizes, the Court "cannot revisit or question the fact finding . . . that produced a challenged arbitration award." Dkt. No. 54 at 14 (citing *PDV Sweeny, Inc. v. Conocophillips Co.*, 670 F. App'x 23, 24 (2d Cir. 2016) (summary order)). It confirms an arbitral award. *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980). A portion of the Award here, if confirmed in its entirety, would direct Murchinson and Pach Shemen to pay damages. And whether Pach Shemen and Murchinson are liable to pay damages was not a question submitted to Justice Belen for decision. Thus, it is no answer to say that Pach Shemen and Murchinson can raise their arguments in an action by Petitioners for enforcement. Petitioners have not demonstrated that they are entitled to an Award confirmed against Murchinson and Pach Shemen and Respondent has shown that that portion of the Award must be vacated. It may be that Petitioners could have obtained an order compelling Murchison and Pach Shemen to participate in the arbitration even though they were not signatories to the LLCA. Eletson may yet have the opportunity to seek to hold Murchinson and Pach Shemen responsible for Levona's obligations under the Award. But, not having sought to make Murchinson or Pach Shemen a party to the arbitration, they must do so through a separate action

for veil-piercing. They may not do so through findings and an award as to which Murchinson and Pach Shemen had no opportunity to be heard.

C. Arbitration of Claims Barred by the Bankruptcy Stay

Respondent argues that the arbitrator violated the Lift Stay Order and the bankruptcy stay by determining that the Preferred Interests had been assigned to the Nominees and by awarding damages based on the alleged bad faith bankruptcy filing. Dkt. No. 50 at 25–27. Petitioners respond that the arbitrator acted within his authority under the Lift Stay Order and that Respondent has waived any claim based on the arbitrator's failure to operate within the confines of that order by not raising any issue until after the arbitration record closed and then only with respect to the fee award. Petitioners suggest that the claim for violation of the Status Quo Injunction was pending before April 17, 2023 because the issue of the bankruptcy filing having been made in bad faith was the subject of correspondence and motion practice before the arbitrator in March 2023, and because the arbitrator himself stated that the filing of the involuntary petition may have been a violation of the Status Quo Injunction. Thus, Petitioners argue that the violation of the Status Quo Injunction was not a new claim but an issue relating to a preexisting order of the Tribunal. Dkt. No. 54 at 19.

The arbitrator's exercise of authority did not violate the automatic stay or the Lift Stay Order. The automatic stay itself did not prohibit Eletson from litigating its claims against Levona or from asking the arbitrator to find that the Preferred Interests had been transferred to the Nominees. "Section 362 of the Bankruptcy Code provides that the filing of a bankruptcy petition creates an automatic stay against 'the commencement or continuation . . . of a judicial, administrative, or other action or proceeding *against the debtor* that was or could have been commenced before the commencement of the case.'" *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994) (quoting 11 U.S.C. § 362(a)(1)). "The general purpose" underlying

the provision "is to grant complete, immediate, albeit temporary relief to the debtor from creditors, and to prevent dissipation of the debtor's assets before orderly distribution to creditors can be effected." *S.E.C. v. Brennan*, 230 F.3d 65, 70 (2d Cir. 2000) (quoting *Penn Terra Ltd. v. Dep't of Envtl. Res.*, 733 F.3d 267, 271 (3d Cir. 1984)). For this reason, "any proceedings or actions described in section 362(a)(1) are void and without vitality if they occur after the automatic stay takes effect." *Rexnord Holdings*, 21 F.3d at 527. However, "the automatic stay is inapplicable to suits *by* the bankrupt 'debtor,' as he is now called." *Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989); *see also Koolik v. Markowitz*, 40 F.3d 567, 568 (2d Cir. 1994) (per curiam) ("[T]he automatic stay is applicable only to proceedings 'against' the debtor."); *In re Berry Ests., Inc.*, 812 F.2d 67, 71 (2d Cir. 1987) (holding that the automatic stay did not apply to state court actions brought by the debtor); *Assoc. of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir. 1982) ("Section 362 by its terms only stays proceedings against the debtor."). Even if it would have an adverse impact on the property of the bankruptcy estate, an action against a third party is not subject to the automatic stay unless it is "legally certain[] to impact estate property." *Picard v. Fairfield Greenwich Ltd.*, 762 F.3d 199, 208 (2d Cir. 2014). [23]

[23] The automatic stay does not "implicate mere ministerial acts performed by the clerk following the completion of the judicial function," but does prevent the court from making any "judicial decisions . . . after the filing of petitions in bankruptcy." *Rexnord Holdings*, 21 F.3d at 528; *see In re Fogarty*, 39 F.4th 62, 77 (2d Cir. 2022) ("The 'ministerial act' exception represents an exceedingly narrow category of actions that avoid the automatic stay."). Petitioner does not argue that the act of confirmation under the New York Convention and the FAA is merely ministerial.

Neither Eletson's claims nor the Award violated the automatic stay.[24] Through the arbitration, Eletson sought a declaration and determination that it had complied with all of the obligations necessary to complete the option and that the option was exercised and completed on March 11, 2022, Dkt. No. 31-35 at 23, and that Levona be ordered to transfer any preferred shares it was found to have to Eletson, *id.* at 24. Eletson did not assert claims against Holdings. Moreover, although Eletson's claims included "factual allegations" regarding the election of the Nominees that might overlap in any fraudulent conveyance action that the Trustee in the Holdings' bankruptcy case or another party would choose to bring in the future to recover assets of the estate, the "legal bases" for Eletson's claim in the arbitration is "independent" of any such claim and do not "depend in substance" on the question whether Eletson or Holdings may have wrongfully transferred its interest in the option to the Nominees. *Picard*, 762 F.3d at 209. Thus, Levona cannot use the automatic stay—a statutory safeguard "intended to protect the debtor and to assure equal distribution among creditors"—as "a weapon against the estate." *Winters ex rel. McMahon v. George Mason Bank*, 94 F.3d 130, 135 (4th Cir. 1996) (quoting *In re Globe Inv. & Loan Co.*, 867 F.2d 556, 560 (9th Cir. 1989)); *see also Leeber Realty LLC v. Trustco Bank*, 2019 WL 498253, at *11 (S.D.N.Y. Feb. 8, 2019) ("Because the automatic stay's primary purpose is to preserve a bankrupt's estate for the benefit of all creditors, courts consistently hold that actions

[24] Eletson argues that Levona waived its rights to complain that the arbitrator exceeded his authority because it raised the issue about which it complains with the bankruptcy court in May 2023, but then did not file additional motions for relief. Dkt. No. 54 at 20. That argument is without merit. Levona moved to strike Eletson's allegations that the Preferred Interests had been transferred to the Nominees or, in the alternative, to dismiss Eletson's claims. Dkt. No. 31-37.

brought *by* a debtor are not subject to the automatic stay."), *aff'd*, 798 F. App'x 682 (2d Cir. 2019) (summary order).[25]

While Eletson sought an order compelling Levona to transfer to Eletson any preferred shares it was found to have, Dkt. No. 67-24 at 23, that request is more accurately understood as a demand that the arbitrator order Levona to turn over the Preferred Interests to the Company or whomever, under the BOL, the Company elected as its nominees. As Eletson has argued, the question regarding the identity of the recipient of the preferred shares would be a matter of indifference to Levona in its capacities as contractual counterpart under the LLCA and the BOL. If the Company did in fact exercise its option to buy Levona's preferred shares as the arbitrator found, the Company had the sole authority, without any input by Levona, to determine who should receive the preferred shares. Levona, which, pursuant to the arbitrator's findings, no longer had control over the Company, had no interest in the matter.

For all of those reasons, Levona is mistaken in its argument that the arbitrator improperly usurped the powers of the bankruptcy court by determining that Eletson had properly exercised the option and that, as a result, the Nominees were entitled to the Preferred Interests. Nor will this Court have violated the Automatic Stay by confirming the Award. The Award, by its terms, only declares that "Eletson effectively exercised the buyout option granted in the Binding Offer Letter," that "as of March 11, 2022, . . . Levona had no membership interest in" the Company, that the Company "exercised its rights under *the BOL* to nominate three entities—Fentalon, Apargo, and Desimusco, (the Preferred Nominees)—affiliated with the principals of Claimants,

[25] Levona's counterclaims against Eletson arguably did constitute an action against the debtor. *See Koolik*, 40 F.3d at 568 (holding that "a counterclaim against a plaintiff who becomes a bankruptcy debtor is an 'action or proceeding against the debtor' within the meaning of § 362(a)(1), notwithstanding the fact that the plaintiff initiated the lawsuit"). However, the bankruptcy court permitted those claims to go forward.

as the parties to receive the preferred interests in the Company," and that "[t]he preferred interests in the Company were transferred to the Preferred Nominees, effective as of March 11, 2022, and the Preferred Nominees are permitted transferees *under the LLCA*." Dkt. No. 47-5 at 96–97 (emphasis added). In short, the arbitrator adjudicated claims only as between Eletson and Levona and only under the BOL and LLCA. The arbitrator did not purport to address the questions—now raised by Levona—whether the Company or Holdings improperly elected the Nominees or whether the transfer to the Nominees of the Company's right to the Preferred Interests effected a fraud on the creditors of Holdings and the arbitrator's findings can have no collateral estoppel effect on those questions. *See* Restatement (Second) of Judgments § 84 cmt. c (1982) ("Giving claim preclusive effect to an arbitration award does not necessarily imply that such an award should also be given issue preclusive effects. It is coherent to treat an arbitration proceeding as wholly self-contained, conclusive as to the claims represented in the award but inoperative beyond them."). It therefore did not intrude on the authority of "the bankruptcy court to centralize all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." *In re U.S. Lines, Inc.*, 197 F.3d 631, 640 (2d Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000). The arbitrator's actions did not "dissipate estate assets or interfere with the trustee's orderly administration of the estate." *In re Fogarty*, 39 F.4th at 71 (quoting *Picard*, 762 F.3d at 207). The arbitrator did not "decide whether claims belonging to a debtor are property of the bankruptcy estate." Dkt. No. 38 at 2. The issues the bankruptcy court will have to decide were not before the arbitral proceedings nor was it necessary for the arbitrator to decide whether the election by Eletson that the Preferred Shares go to the Nominees rather than to the Company effected a fraud on the creditors of Holdings. Those issues therefore remain open for the bankruptcy court to decide.

See Global Gaming Phillipines, 2023 WL 5935640, at *3–4 (stating standards for application of issue preclusion to arbitral findings); *see also* Restatement (Second) of Judgments §§ 27, 84 (1982).

Thus, by confirming the arbitral award, the Court also will not intrude on the bankruptcy court's exclusive authority to decide what is property of the estate. *See Universal Well Servs., Inc. v. Avoco Nat. Gas Storage*, 222 B.R. 26, 30 (W.D.N.Y. 1998) ("[T]he decision as to what is and is not 'property of the estate' lies within the exclusive jurisdiction of the bankruptcy court."). As Eletson itself has emphasized, the Court's role on a petition to confirm an arbitral award is "very limited." Dkt. No. 54 at 5 (quoting *LiveWire Ergogenics, Inc. v. JS Barkats PLLC*, 645 F. Supp. 3d 290, 297 (S.D.N.Y. 2022)). The confirmation of an arbitration award "ordinarily is 'a summary proceedings that merely makes what is already a final arbitration award a judgment of the court.'" *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 132 (2d Cir. 2015) (quoting *D.H. Blair & Co.*, 462 F.3d at 110); Jay E. Grenig, Int'l Com. Arb. § 13:1 (Hilary Shroyer ed., 2023) ("Once a court has confirmed an award and reduced it to a judgment, a party may then seek a court in any Convention country with jurisdiction over the assets of the losing party that can be executed on to satisfy a money judgment. Finding such a court, the prevailing party may take the award that has been confirmed and reduced to a judgment, and petition the new court for recognition and enforcement."). The Court does not review the merits of the dispute and must "confirm an arbitration award unless it concludes that one of the enumerated grounds for refusing to enforce the award is present." *Citigroup*, 776 F.3d at 132 n.4 (internal citations and quotation marks omitted). Eletson has stated that it "intends to return to the Bankruptcy Court following this Court's ruling on confirmation and will prove then that the Arbitral Award does not even arguably involve property belonging to Holdings's estate." Dkt. No. 33 at 3; *see also*

Dkt. No. 35 at 3 ("Eletson intends to return to the Bankruptcy Court following this Court's confirmation ruling, to address enforcement issues."). It is in that forum, in the first instance, that the Court can address the timing of the election by Eletson that the Preferred Interests should go to the Nominees and whether the Preferred Interests should be considered to be property of the estate or should be clawed back or avoided.[26] *See Stone Container Corp. v. Tradeway Int'l Corp.*, 1994 WL 184661, at *3 (S.D.N.Y. May 12, 1994) ("[T]he issue of preferential transfers is properly an issue for the Bankruptcy Court to consider. Therefore, the Court [will not] rule on the alleged transfers.").

For similar reasons, the prosecution of the violation of the Status Quo Injunction also did not violate the automatic stay. That claim was leveled by Eletson against Levona. *See Koch v. Preuss*, 2020 WL 1304084, at *3 (S.D.N.Y. Mar. 18, 2020). It did not intrude upon the assets of the bankruptcy estate. *See Martin-Trigona*, 892 F.2d at 577. It could be argued that Eletson—by asking at the last minute that damages be paid to the Company and not to itself—transferred a claim that belonged to the estate or an entity owned by the estate to a non-debtor and that the damages awarded to the Company should instead be for the benefit of the creditors of Holdings, but the Court need not now address that issue (if it ever needs to be addressed). The arbitrator had before him no issue with respect to the rights as between Holdings and the Company, and no order this Court will issue confirming the award thus could affect the rights as between Holdings and the Company.

[26] *Marquis Yachets v. Allied Marine Grp., Inc. (North)*, 2010 WL 1380137 (D. Minn. Mar. 31, 2010), upon which Levona relies, is distinguishable. In that case, the court held that an arbitration panel exceeded its powers by deciding rather than staying claims in an arbitration brought against the debtor, not by the debtor, but nonetheless declined to modify the arbitration award because the panel was acting within its powers by continuing the arbitration award on claims to which the stay did not apply.

Finally, the Award of the Preferred Interests to the Nominees and damages to the Company for violation of the Status Quo Injunction does not violate the Lift Stay Order or the automatic stay. First, with respect to the Lift Stay Order, that order, by its terms, does not purport to "expand the scope" of the automatic stay. *Picard*, 762 F.3d at 207. Its language is permissive, not restrictive. The Bankruptcy Court stated:

> The automatic stay under section 362(a) of the Bankruptcy Code is hereby modified with respect to the Arbitration solely to the extent necessary and for the sole purpose of permitting a trial, any related pre-trial proceedings (including any remaining discovery), any related post-trial proceedings or briefing, and a final determination or award to be made by the arbitrator, including any appeals, with respect to the claims currently pending in the Arbitration.

Dkt. No. 67-35 at 4. The Lift Stay Order does not restrict Eletson from pursuing any action beyond the ambit of the automatic stay. In any event, the word "claims" is capacious. It refers to "[a] demand for money, property, or a legal remedy to which one asserts a right." *Claim*, Black's Law Dictionary (10th ed. 2014); *see In re Bridge Const. Servs. of Fla., Inc.*, 140 F. Supp. 3d 324, 334 n.5 (S.D.N.Y. 2015) (same); *Am. Ins. Ass'n v. Del. Dep't of Ins.*, 2008 WL 44322, at *4 (Del. Sup. Ct. Jan. 2, 2008) (same); *see also Goldstein v. N.J. Tr. Co.*, 39 F.R.D. 363, 366 (S.D.N.Y. 1966) (defining the word "claim" as it appears in Federal Rule of Civil Procedure 12(b)(6) to mean "the aggregate of operative facts which give rise to aa right enforceable in courts").

In sum, neither the arbitration nor the present proceeding infringed upon the automatic stay or Lift Stay Order.

D. Award of Fees Incurred in the Bankruptcy Case and the Bondholder Litigation

Next, Respondent challenges the arbitrator's award of damages for violations of the Status Quo Injunction. Dkt. No. 50 at 27–31. The arbitrator identified what he characterized as three intentional violations of the Status Quo Injunction that collectively caused quantifiable

harm: (1) Pach Shemen's purchase of a controlling interest of the outstanding bonds issued by Holdings—amounting to $183,851,546 in face value—for $2,000,000 on January 4, 2023; (2) Pach Shemen's directing of the trustee to commence litigation against Holdings on January 11, 2023, after Pach Shemen purchased the bonds; and (3) Pach Shemen's directing of the commencement of the involuntary bankruptcy petition against Holdings on March 7, 2023, again after purchasing the bonds. Dkt. No. 67-58 at 60; *see also id.* at 98–99 (finding that Levona violated the Status Quo Injunction by "[d]irecting and/or causing Levona's affiliates to purchase a controlling position in securities of . . . Holdings in January 2023 for the purpose of wrongfully commencing and then actually causing the commencement of litigation against . . . Holdings and the filing an involuntary bankruptcy petition against . . . Holdings"). The arbitrator did not find that the acquisition of the bonds by Pach Shemen alone would have violated the Status Quo Injunction, nor is the basis for any such finding apparent from the record. Rather, the arbitrator concluded that through these actions together, "the Levona-related entities were looking to either strip this arbitration of its jurisdiction or hedge against a potential loss in this arbitration." *Id.* at 61.[27] The arbitrator recognized that Pach Shemen's actions "technically" did not effect a transfer or attempted transfer or sale of the assets of the Company or of the assets in dispute in the arbitration, but he concluded that the "overall strategy was intended to disrupt the status quo and find another path to obtain the 'assets of [the Company] . . . or assets in dispute in this arbitration.'" *Id.* He also recognized that Pach Shemen was not bound by the Status Quo Injunction but he found that "Pach Shemen is the alter ego of Levona" and certain of the

[27] The arbitrator did not identify what would be wrongful about Levona hedging against a potential loss in the arbitration. Nor did the arbitrator award any compensatory damages arising out of the purchase of the bonds themselves—the compensatory award for breach of the Status Quo Injunction was based on fees and costs incurred during the bondholder litigation and the involuntary bankruptcy proceeding.

individuals who acted on behalf of Pach Shemen also were bound by the Status Quo Injunction. *Id.*

Consequently, the arbitrator awarded Petitioners $3,007,266.20 in fees and costs incurred by Petitioners in connection with the bondholder litigation against Holdings and the involuntary bankruptcy of Holdings that the arbitrator concluded Pach Shemen directed to be commenced in violation of the Status Quo Injunction, to be paid jointly and severally by Levona, Murchinson, and Pach Shemen to the entities or individuals who paid those costs and fees. Dkt. No. 67-58 at 91, 100. The arbitrator concluded that the attorneys' fees were damages "to compensate for the intentional violations by Levona, through its alter ego, Pach Shemen, of the Status Quo Injunction . . . ." *Id.* at 92. The arbitrator also based his award of punitive damages in the amount of $43,455,122.21, equal to the amount of compensatory damages, in part on what he concluded were violations of the Status Quo Injunction. *Id.* at 74.

The arbitrator lacked the power to enjoin Pach Shemen from filing the involuntary bankruptcy petition and the bondholder litigation or Levona from assisting in filing those actions and his award of damages for those actions thus exceeded his authority under the LLCA and under the law. *See Jock*, 942 F.3d at 622 (an arbitrator exceeds her authority by "considering issues beyond those the parties have submitted for her consideration [or] reaching issues clearly prohibited by law or by the terms of the parties' agreement"). The arbitration clause at issue, though broad, was not unlimited. It bound only the parties to the LLCA and applied only to disputes, claims or controversies "arising out of or relating to [the LLCA] or the breach, termination, enforcement, interpretation or validity thereof." Dkt. No. 67-2 § 12.14(b). It empowered the arbitrator to grant injunctive or other forms of equitable relief but only "(i) to preserve such party's rights pending a final resolution on the merits or (ii) that prevails in any

such arbitration." *Id.* § 12.14(c). Rule 24(e) of the JAMS Rules, to which the parties consented, gives the arbitrator the authority to grant "whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods." Dkt. No. 67-3 at 15. The JAMS Comprehensive Arbitration Rules and Procedures, in Rule 29, give the arbitrator the power to "order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator." *Id.* at 17.[28] As long as it is consistent with the arbitral agreement. an arbitrator has the authority to grant "interim relief in order to maintain the status quo." Domke on Commercial Arbitration § 35:4 (citing *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67 (1st Cir. 2010); *Charles Constr. Co. v. Derderian*, 586 N.E.2d 992 (Mass. 1992)). An arbitrator also "possesses the inherent authority to preserve the integrity of the arbitration process to which the parties have agreed." *On Time Staffing, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 784 F. Supp. 2d 450, 455 (S.D.N.Y. 2011).

The arbitrator's powers to issue injunctions, however, also are not unlimited. As a general matter, only under limited circumstances may even a court prevent a party from litigating a dispute in another court and thus intrude upon the second court's jurisdiction. "[T]he Supreme Court has recognized that '[t]he right of access to the courts is . . . one aspect of the right to petition' the government for a redress of grievances secured by the First Amendment to the Constitution." *Sherman v. Fivesky, LLC*, 2020 WL 5105164, at *5 (S.D.N.Y. Aug. 31, 2020) (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). Accordingly, federal courts themselves have circumscribed power to enjoin a party from availing

[28] Those sanctions may include assessment of any "costs occasioned by the actionable conduct, including reasonable attorneys' fees." Dkt. No. 67-3 at 17.

itself of its right to seek judicial relief. In particular, a federal court has the power to "protect its ability to carry out its constitutional functions against the threat of onerous, multiplicitious, and baseless litigation," by enjoining a litigant's right to file actions in federal court. *Abdullah v. Gatto*, 773 F.2d 487, 488 (2d Cir. 1985) (per curiam); *see In re Martin-Trigona*, 737 F.2d 1254, 1262–63 (2d Cir. 1984) (affirming injunction against filings in the District of Connecticut and requiring that Martin-Trigona inform other federal courts of the injunction and obtain leave of court but vacating injunction to the extent that it prevented Martin-Trigona from filing actions in state court). In addition, under the first-filed rule, "a district court 'may enjoin the suitor in [a] more recently commenced case from taking any further action in the prosecution of that case' if the claims presented in the second action should have been interposed as compulsory counterclaims to the claims in the suit pending before it." *Comput. Assocs. Int'l., Inc. v. Altai, Inc.*, 893 F.2d 26, 28–29 (2d Cir. 1990) (quoting *Nat'l Equip. Rental, Ltd. v. Fowler*, 287 F.2d 43, 45 (2d Cir. 1961)); *see Tropic Techs., Inc. v. Vendr, Inc.*, 2023 WL 2535215, at *5 (S.D.N.Y. Mar. 15, 2023).

But while courts do have the authority "to enjoin foreign suits by persons subject to their jurisdiction," that authority may only "be used sparingly and . . . only with care and great restraint." *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35–36 (2d Cir. 1987) (internal citations and quotation marks omitted). It may only be used when (1) the parties are the same in both matters, and (2) resolution of the case before the enjoining court is dispositive of the matter to be enjoined. *Id.*; *see LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 199 (2d Cir. 2004); *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004). Even then, a court may not enjoin a party from seeking relief from another court without also weighing "(1) the threat to the enjoining court's jurisdiction posed by

the foreign action; (2) the potential frustration of strong public policies in the enjoining forum; (3) the vexatiousness of the foreign litigation; (4) the possibility of delay, inconvenience, expense, inconsistency, or a race to judgment; and (5) other equitable considerations." *Eastman Kodak Co. v. Asia Optical Co., Inc.*, 118 F. Supp. 3d 581, 586 (S.D.N.Y. 2015); *see also China Trade*, 837 F.2d at 35. If the foreign proceeding poses no threat to the enjoining court's jurisdiction and will not frustrate the strong public policies of the enjoining forum or otherwise undermine the integrity of proceeding before the enjoining forum, no injunction is appropriate. "[O]ur legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation" involving different parties. *Smith v. Bayer Corp.*, 564 U.S. 299, 317 (2011).[29]

Of particular relevance here, a court has the authority to enjoin a party to an international arbitration agreement from initiating or maintaining litigation before another court only if the arbitration agreement is enforceable, the party being enjoined is bound by the arbitration agreement, the claims to be enjoined are within the scope of the arbitration agreement, and issuance of the injunction is appropriate upon consideration of a number of factors, including which court has the greater interest in ruling on the enforceability of the arbitration agreement. Restatement (Third) of the U.S. Law of Int'l Com. Arb. § 2.29 (Am. L. Inst., Tentative Draft No. 2, 2012); *cf. Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd*, 2010 WL 1050988 (S.D.N.Y. Mar. 23, 2010) (weighing *China Trade* factors to determine whether to award an anti-suit injunction against litigation in India in favor of arbitration); *Paramedics Electromedicina Comercial, Ltda.*, 369 F.3d at 680–81 (weighing *China Trade* factors in reviewing district court's anti-suit

[29] *Smith v. Bayer* itself involved suits by different plaintiffs, each members of a putative (non-certified) class. The proposition it relied upon, however, is generally applicable to suits involving different parties or different sets of issues, and not just different plaintiffs.

injunction against litigation in Brazil in aid of arbitration); *T-Jat Sys. 2006 Ltd. v. Amdocs Software Sys. Ltd.*, 2013 WL 6409476, at *4 (S.D.N.Y. 2013) (weighing *China Trade* factors and enjoining respondents and their officers and representatives from bringing action in Israel that would interfere with New York arbitral proceedings); *Stolt Tankers BV v. Allianz Seguros, S.A.*, 2011 WL 2436662, at *5 (S.D.N.Y. June 16, 2011) (weighing *China Trade* factors and enjoining respondents from pursuing action in Brazil in light of agreement to arbitrate in New York). *But see Telenor Mobile Commc'ns AS v. Storm LLC*, 524 F. Supp. 2d 332, 363–64 (S.D.N.Y. 2007) (Lynch, J.), *aff'd on other grounds*, 584 F.3d 396 (2d Cir. 2009) (holding that where an arbitral body itself enters an anti-suit injunction "the proper inquiry is whether the parties agreed to give the arbitrators the power to enter such an injunction" and that when the parties give broad authority to the arbitrator "the applicable test for arbitral jurisdiction is not whether the preconditions of *China Trade* are satisfied, but whether the arbitral award 'touch[es] matters' within the contract" (quoting *ACE Cap. Re Overseas Ltd. v. Cent. United Life Ins. Co.*, 307 F.3d 24, 26–28 (2d Cir. 2002))).

Petitioners request, however, that this Court hold that they could obtain relief from a private arbitrator—in aid of the arbitration—would far exceed the limited relief that a court would be authorized to grant Petitioners. On Petitioners' argument, the arbitrator had the authority to enjoin the filing of lawsuits by persons who were not parties to the arbitration, to vindicate rights that were not subject to the arbitration, in proceedings that would not adjudicate issues presented in the arbitration, and that would in no way interfere with the integrity of the arbitration or prevent the arbitrator from issuing his award. The Court concludes that the arbitrator had no such authority.

Starting with the involuntary bankruptcy petition, the arbitrator's powers did not extend to enjoining the filing of an involuntary petition even by Levona, much less by Pach Shemen, a party who was not before the arbitral panel. Under the Bankruptcy Code, both the debtor and a creditor have a near absolute right to file a petition for relief. *United States v. Royal Bus. Funds Corp.*, 724 F.2d 12, 15 (2d Cir. 1983) (citing the general rule "that a debtor may not agree to waive the right to file a bankruptcy petition"); *In re Project Restore, LLC*, 2022 WL 6233552, at *6 (Bankr. M.D. Tenn. Oct. 7, 2022) ("From the Court's standpoint, a creditor cannot contract away its right as a petitioner in an involuntary case any more than a debtor can contract away its right to file a voluntary bankruptcy."). The reasons why a debtor cannot be understood, in a bilateral agreement, to have contracted away its right to file a voluntary bankruptcy petition are self-evident and readily understood. The right to file a bankruptcy petition exists not purely to protect the personal interests of the debtor but also to protect the interests of the community of all of the creditors and the economy generally against the destructive race to the courthouse that would ensue if a single forum were not permitted to adjudicate, all at once, the interests of all with a claim against the debtor. *See Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1203–04 (9th Cir. 2005) ("This is a unique contribution of the Bankruptcy Code that makes bankruptcy different from a collection of actions by individual creditors. In a world of individual actions, each creditor knows that if he waits too long, the debtor's assets will have been exhausted by the demands of the quicker creditors and he will recover nothing. The creditors race to the courthouse, all demanding immediate payment of their entire debt. Like piranhas, they make short work of the debtor, who might have survived to pay off more of his debts with a little bit of reorganization—or at least might have more equitably fed the slower piranhas."); *Israel-British Bank (London) v. Fed. Deposit Ins. Corp.*, 536 F.2d 509, 513 (2d Cir.), *cert.*

denied, 429 U.S. 978 (1976) ("The theme of the Bankruptcy Act is equality of distribution of assets among creditors, and correlatively avoidance of preference to some. The road to equity is not a race course for the swiftest." (internal citations omitted)). For those reasons, the Second Circuit has held, as discussed further below, that the right to file a bankruptcy petition may be waived only in limited circumstances, generally in those circumstances where—as in the case of a receivership—an alternative forum exists that would "accomplish[] what a bankruptcy would[:]" the settlement of all of the claims against a putative debtor. *See S.E.C. v. Byers*, 609 F.3d 87, 92 (2d Cir. 2010); *see also Royal Bus. Funds Corp.*, 724 F.2d at 12 (applying the same rule in context of a consensual court-supervised federal receivership).

The same principles apply in the case of an involuntary petition. The Code gives every creditor the right to file an involuntary bankruptcy petition under Chapter 7 or 11 so long as it is the holder of a claim "that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount," and so long as it is either joined by two other creditors meeting the same criteria and all together holding at least $18,600 in claims or, if there are fewer than twelve creditors, so long as it holds more than $18,600 in claims. 11 U.S.C. § 303(b). The provision ensures that creditors—as well as the debtor—can prevent the destructive race to the courthouse and ensure the orderly disposition of the debtor's assets. "Involuntary bankruptcy petitions help ensure the orderly and fair distribution of an estate by giving creditors an alternative to watching nervously as assets are depleted, either by the debtor or by rival creditors who beat them to the courthouse." *In re Murray*, 900 F.3d 53, 59 (2d Cir. 2018); *see also In re Miles*, 294 B.R. 756, 760 (B.A.P. 9th Cir. 2003) ("A key justification for involuntary cases is as a creditors' remedy that enables creditors who lack the muscle or the luck to extract preferences or unequal transfers from distressed debtors to achieve equitable treatment by invoking the protections inherent in the

trustee's avoiding powers consistent with the principle of ratable recovery for creditors.").[30] Although the Code recognizes that a vexatious creditor or a creditor unknowledgeable about the debtor's financial condition could interfere with the debtor's operations, it balances that risk against the risk that the debtor will not place itself into bankruptcy, creating such balance by permitting the debtor to operate until the court orders otherwise, by allowing the court to require the petitioner to file a bond to indemnify the debtor for costs should the petition be dismissed, and by providing for costs and damages in the event that the petition is dismissed. As Judge Lifland once put it, "[w]hile no doubt an improvidently filed involuntary petition (i.e.: by one without a valid claim) can wreak havoc on an innocent debtor, this potential harm must be juxtaposed with the need to ensure that earnest creditors promptly receive all of the rights and protections afforded by the bankruptcy laws, lest the assets of the estate be squandered and secreted away by a financially troubled or dishonest debtor." *Matter of B.D. Int'l Disc. Corp.*, 15 B.R. 755, 759 (Bankr. S.D.N.Y. 1981). Section 303(i) authorizes the court—if an involuntary petition is dismissed—to grant the debtor judgment against the petitioners for costs or a reasonable attorneys' fees and, if the petition has been filed in bad faith, for compensatory or punitive damages. 11 U.S.C. § 303(i); *see also In re TPG Troy, LLC*, 793 F.3d 228, 235 (2d Cir. 2015) ("When an involuntary petition is dismissed, 'there is a presumption that costs and attorney's fees will be awarded to the alleged debtor.'" (quoting *In re Mountain Diaries*, 372

[30] Originally, under United States law, only creditors, and not the debtor, could file a bankruptcy petition. *See In re Marshall*, 721 F.3d 1032, 1058–59 (9th Cir. 2013) ("Historically, bankruptcy laws have not been conceived in the United States or England for the protection of debtors, whether honest or dishonest. Bankruptcy laws were enacted principally for the benefit of trade and for the protection of creditors, to give them more powers acting in concert to collect debts than they possessed individually. . . . The 1841 Act was the first United States law to authorize a debtor to file a voluntary bankruptcy petition. Neither the 1800 Act nor the English predecessors permitted a voluntary bankruptcy filing.").

B.R. 623, 637 (Bankr. S.D.N.Y. 2007))). "[B]ad faith is not a prerequisite to an award of costs and attorney's fees under § 303(i)(1)." *In re Bayshore Wire Prods. Corp.*, 209 F.3d 100, 105 (2d Cir.2000). The cost and damages provisions thus provide a potent deterrent against anyone who would file a possibly frivolous petition. *In re John Richards Homes Bldg. Co. L.L.C.*, 439 F.3d 248 (6th Cir. 2006) (affirming award of $4,100,000 in compensatory damages and $2,000,000 in punitive damages). But if a petition is not dismissed, the debtor has no right to relief under these provisions. The creditors are exercising a right given to them by Congress.

It follows that two parties cannot—by contract—agree to delegate to an arbitrator the power to decide whether either can file a bankruptcy petition, voluntary or involuntary. Although an arbitrator's powers are vast under the FAA and the New York Convention, they do have limits. "[T]he Arbitration Act's mandate may be overridden by a contrary congressional command." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *see also In re Belton v. GE Cap. Retail Bank*, 961 F.3d 612, 615 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1513 (2021) ("The Arbitration Act requires courts to strictly enforce arbitration agreements. But like any statutory directive, that mandate may be overridden by contrary congressional intent."). The Second Circuit has recently reiterated that congressional intent to override the FAA's mandate to strictly enforce arbitration agreements "may be deduced from 'the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes.'" *In re Belton*, 961 F.3d at 615 (quoting *McMahon*, 482 U.S. at 227). "Disputes that involve both the Bankruptcy Code and the [FAA] often present conflicts of 'near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach toward dispute resolution.'" *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006) (quoting *In re U.S. Lines, Inc.*, 197 F.3d at 640). The Second Circuit has

stated that "[t]he Arbitration Act as interpreted by the Supreme Court dictates that an arbitration clause should be enforced 'unless [doing so] would seriously jeopardize the objectives of the Code.'" *In re U.S. Lines, Inc.*, 197 F.3d at 640 (quoting *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1161 (3d Cir. 1989)). It follows that when enforcement of an arbitration clause would seriously jeopardize the objectives of the Code an arbitration clause should not be enforced. "In order to determine whether enforcement of an arbitration agreement would present an inherent conflict with the Bankruptcy Code, we must engage in a

> particularized inquiry into the nature of the claim and the facts of the specific bankruptcy. The objectives of the Bankruptcy Code relevant to this inquiry include the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders."

In re Anderson, 884 F.3d at 389 (quoting *MBNA Am. Bank, N.A.*, 436 F.3d at 108 (citation and internal quotation marks omitted)). "If a severe conflict is found, then the court can properly conclude that, with respect to the particular Code provision involved, Congress intended to override the [FAA's] general policy favoring the enforcement of arbitration agreements." *MBNA Am. Bank, N.A.*, 436 F.3d at 108; *see also In re Project Restore*, 2022 WL 6233552, at *4 (holding that arbitration clause is overridden when Congress intended the FAA to yield to a contrary congressional command, "which may be deduced from (i) the text of the statute, (ii) the statute's legislative history, or (iii) an inherent conflict between arbitration and the statute's underlying purposes"); *In re Patriot Solar Grp., LLC*, 569 B.R. 451 (Bankr. W.D. Mich. 2017) (denying motion for relief from the automatic stay so that a contractual counterparty could pursue arbitral proceeding against debtor pursuant to arbitration provision in the parties' contract).

Courts have considered the preemptive force of Section 303 of the Bankruptcy Code in two related contexts. Neither is controlling but both are instructive. In *Project Restore*, the

question was whether an agreement that the parties arbitrate a dispute as a prerequisite to an involuntary petition could thwart the rights of a creditor to file a petition under Section 303. *In re Project Restore*, 2022 WL 6233552, at *1–2. The petitioning creditor had signed an arbitration agreement that any dispute it had with the debtor would be resolved through arbitration. *Id*. The debtor argued that the involuntary petition should be dismissed because, in determining whether to allow an order for relief, the court would have to decide arbitrable issues. *Id.* at *1. As the court characterized it, the case involved the question whether the creditors' rights to file a bankruptcy petition trumped its obligation under the arbitration agreement, as made enforceable by the FAA, to present the dispute in the first instance to the arbitral tribunal. *Id.* at *4–5. The court held that there was "an inherent conflict between the underlying purposes of the Bankruptcy Code and arbitration, at least to the extent that arbitration would preclude a creditor's right to pursue an involuntary bankruptcy." *Id.* at *4. Thus, in the court's view, the issues presented by the petition were ones given exclusively to the bankruptcy courts by the Bankruptcy Code and over which the arbitrator had no authority. *Id.* at *5. The court highlighted first that bankruptcy courts had "exclusive jurisdiction over bankruptcy cases," second that "the bankruptcy court [was] the sole court with which a petition, whether voluntary or involuntary, [could] be filed to commence a bankruptcy proceeding" and "[a] bankruptcy case could not be commenced by filing a petition for bankruptcy with an arbitrator," and third that only the bankruptcy court and not the arbitrator could determine whether the petition satisfied the requirements of Section 303 and enter an order for relief. *Id.* at *4–5. The court also noted that under the debtor's approach, "a petitioning creditor with a disputed claim subject to an arbitration clause would have to have an arbitration award in order to qualify as a petitioning creditor, regarding of whether the dispute was bona fide." *Id.* at *5. The court concluded that "a

creditor cannot contract away its right as a petitioner in an involuntary case any more than a debtor can contract away its right to file a voluntary bankruptcy." *Id.* at *6. In sum, that court held that "creditors cannot prospectively delegate rights under the Bankruptcy Code to an arbitrator." *Id.*

The question in *In re Miles* was whether state law tort causes of action for damages predicated upon the filing of an involuntary bankruptcy petition were completely preempted by the Bankruptcy Code and whether a claim for damages arising from the filing of such a petition could be prosecuted other than through Section 303 of the Code. *In re Miles*, 430 F.3d 1083 (9th Cir. 2005). The plaintiffs in that case were relatives of the debtors who alleged that several involuntary bankruptcy petitions filed by the creditors-defendants, which were subsequently dismissed, gave rise to causes of action under the state law torts of negligence, defamation, false light, abuse of process, intentional and negligent infliction of emotional distress, and negligent misrepresentation. *Id.* at 1086. The creditors-defendants removed the case which had been filed in state court. *Id.* at 1087. The Bankruptcy Appellate Panel of the Ninth Circuit held that the case was properly removed on grounds that the causes of action asserted by the plaintiffs were completely preempted by the Bankruptcy Code, and that the plaintiffs' claims were without merit because they did not satisfy Section 303. *Id.* at 1087. The Ninth Circuit affirmed. As relevant here, the Ninth Circuit held that "Congress intended 11 U.S.C. § 303(i) to provide the exclusive basis for awarding damages predicated upon the filing of an involuntary bankruptcy petition," *id.* at 1089, and that "[p]ermitting state courts to decide whether the filing of an involuntary bankruptcy petition was appropriate would subvert the exclusive jurisdiction of the federal courts and undermine uniformity in bankruptcy law," *id.* at 1090. The court reasoned that "Congress created involuntary bankruptcy proceedings to enable creditors who are unable to extract

preferences or unequal transfers from distressed debtors to achieve equitable treatment." *Id.*; *see also In re Miles*, 294 B.R. at 760. The court also noted that Section 303(i)'s remedial scheme was "comprehensive" and "addresse[d] the full range of remedies, from costs and attorneys' fees for dismissed involuntary petitions to compensatory and punitive damages for involuntary petitions filed in bad faith," and that Congress's authorization of certain sanctions for petitions filed in bad faith "suggest[ed] that Congress rejected other penalties." *In re Miles*, 430 F.3d at 1090. The court further noted that the Constitution itself recognized the importance of uniformity in the administration of the bankruptcy laws, providing that Congress had the power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." *Id.* (quoting U.S. Const. Art. I, § 8, cl. 4). The court held, based on "[t]he 'highly complex' nature of the Bankruptcy Code and 'the unique, historical, and even constitutional need for uniformity in the administration of bankruptcy laws,'" that Section 303(i) provides the exclusive cause of action for damages predicated upon the filing of an involuntary bankruptcy petition and that state courts had no power to grant such relief. *Id.* at 1090–91 (quoting *MSR Expl., Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914–15 (9th Cir. 1996) (internal citations omitted)). "Allowing state court remedies for wrongful filings may well interfere with the filings of involuntary bankruptcy petitions by creditors and with other necessary actions that they, and others, must or might take within the confines of the bankruptcy process." *Id.* at 1090. The court concluded: "Permitting state courts to decide whether the filing of an involuntary bankruptcy petition was appropriate would subvert the exclusive jurisdiction of the federal courts and undermine uniformity in bankruptcy law by allowing state courts to create their own standards as to when a creditor may properly file an involuntary petition." *Id.*

Outside the arbitration context, the Second Circuit itself has limited the circumstances under which a court may issue an anti-litigation injunction barring bankruptcy filings as part of their broad equitable powers, cautioning that such power is "to be exercised cautiously." *Byers*, 609 F.3d at 91. In *Byers*, it approved such an injunction in the case of a Securities and Exchange Commission ("SEC") receivership only after concluding that the receivership would "accomplish[d] what a bankruptcy would."[31] *Id.* at 92. And, in *Royal Business Funds*, the Second Circuit affirmed an anti-suit injunction where the debtor was subject to a federal receivership (with the Small Business Administration ("SBA") serving as receiver pursuant to federal statute) to which it had consented and which had the authority to address the claims by all of the debtor's creditors. 724 F.2d at 16. No rights of creditors were impaired. In that instance, "[t]he bankruptcy petition, which was filed by the debtor rather than by third-party creditors, [would] disrupt the receiver's attempts to improve the company's fortunes." *Id.* The court concluded that "no public or private interest [wa]s served by allowing [the company] to repudiate the arrangements it made with the SBA." *Id.*

In re Miles, *Project Restore*, *Byers*, and *Royal Business Funds* strongly suggest that Eletson and Levona could not have—by private agreement to resolve disputes through arbitration—contracted away the rights of Levona, or an affiliate of Levona, to file an

[31] "A primary purpose of appointing a receiver is to conserve the existing estate." *Esbitt v. Dutch-Am. Mercantile Corp.*, 335 F.2d 141, 143 (2d Cir.1964). "Although neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 explicitly vests district courts with the power to appoint trustees or receivers, courts have consistently held that such power exists where necessary to prevent the dissipation of a defendant's assets pending further action by the court." *S.E.C. v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 436 (2d Cir. 1987), *cert. denied sub nom.*, 485 U.S. 938 (1988) (internal citation omitted). The Second Circuit has held that, where the SEC has alleged violations of the Securities Exchange Act, "the appointment of a trustee to help preserve the status quo while the various transactions were unraveled was necessary to obtain an accurate picture of what transpired." *Sec. & Exch. Comm'n v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1105 (2d Cir.1972), *abrogated on other grounds by Liu v. S.E.C.*, 140 S. Ct. 1936 (2020).

involuntary bankruptcy petition, and that the arbitral panel lacked the authority to enjoin Pach Shemen from filing such a petition. A "severe conflict" would be presented by any such provision. If, as the court held in *Project Restore*, a "petitioning creditor cannot contract away its right as a petitioner in an involuntary case" and cannot be forced to get an arbitrator's approval before filing an involuntary petition because "creditors cannot prospectively delegate rights under the Bankruptcy Code to an arbitrator," 2022 WL 6233552, at *16, it follows that an arbitrator in a case where the petitioning creditor has not contracted away its rights to file an involuntary petition cannot arrogate to himself the power to determine whether an involuntary petition may be filed or not. The assumption of such a power by the arbitrator would undermine a core proceeding committed to the exclusive jurisdiction of the bankruptcy court. And if, as the Ninth Circuit held in *Miles*, the exercise of jurisdiction by a state court to impose financial sanctions upon petitioning creditors based on "their own standards as to when a creditor may properly file an involuntary petition" would first, subvert the exclusive jurisdiction of the federal courts to determine whether a petition was properly filed or not, second, defeat the federal policy that "the potential costs of filing an involuntary bankruptcy petition should not be governed by state law," *In re Miles*, 430 F.3d at 1090, and third, undermine the uniformity of the Bankruptcy Code, so too here the exercise of jurisdiction by an arbitrator to determine *ex ante* whether a bankruptcy petition may be filed, and then to impose *ex post* financial sanctions when he has determined that the petition should not have been filed, would also conflict with the Bankruptcy Code, federal policy, and the uniformity intended to be achieved by the Constitution. In short, as the court stated in *Miles*, if Eletson felt aggrieved by the filing of the involuntary petition, it had "a comprehensive scheme of remedies available in the federal courts." *Id*. It had no right under the arbitration agreement and under the law to obtain relief from the arbitral tribunal.

The arrogation by the arbitrator of the power to determine whether a party could join in an involuntary petition clearly conflicts with the Code and its underlying purposes. Section 303 contains a carefully designed and balanced structure for the filing of an involuntary petition based on the number, type, and aggregate nominal significance of creditors joining in the petition. If there are fewer than twelve holders of claims that are not contingent as to liability or the subject of a bona fide dispute as to liability or amount (excluding certain specified insiders), an involuntary petition can be filed by a single holder of at least $18,600 (originally "$10,000," adjusted effective April 1, 2022) of such claims. 11 U.S.C. § 303. If there are twelve or more such holders (excluding certain specified insiders), the petition must be filed by three or more of such entities. *Id.* The Code does so in order to permit creditors, as a class, to preserve their interests from the debtor's dissipation of its assets and to ensure that they have a forum in which the interests of all of the creditors are protected, while at the same time protecting against the risk of a premature or vexatious filing that would injure both the debtor and its creditors. The arbitrator's exercise of authority, if recognized by this Court, would disrupt that balance and undermine the purposes of Section 303. If accepted, a canny debtor—intent on defeating an involuntary petition—could undermine the rights of all of the creditors by agreeing with some of them that they would not under any circumstances join in an involuntary petition without first going through the arbitral hoop. A potential involuntary creditor, in those circumstances, might find no one who could join the petition—not because there were no qualified creditors and not because the debtor was not in distress, but because the other creditors had years earlier signed an arbitration agreement. In a world where arbitration agreements are prolific, it is not difficult to imagine a circumstance in which a putative debtor could virtually immunize itself from the risk of any involuntary bankruptcy by the mere expedient of signing arbitration agreements with all

or almost all of its creditors. Indeed, on Eletson's theory, an arbitrator presumably could even prevent a creditor—in either a voluntary or involuntary proceeding—from filing a notice of claim in a bankruptcy proceeding until the arbitration was concluded. If the filing was part of an "overall strategy . . . intended to disrupt the status quo and find another path to obtain the 'assets of [the Company] . . . or assets in dispute in th[e] arbitration,'" Dkt. No. 67-58 at 61, such an injunction would be within the arbitrator's prerogative. Such an order might provide an immediate benefit to a party in the arbitration. However, it would forestall the bankruptcy, delay the debtor's liquidation or emergence from bankruptcy, and thereby would undermine the rights of all of the other creditors, undercut the functioning of the Bankruptcy Code, and intrude on the exclusive jurisdiction of the bankruptcy courts.

The risk is not merely hypothetical. In this case, Pach Shemen joined a petition filed by just two of Holdings' creditors who sought the assistance of the bankruptcy court in order to protect against the risk of Holdings' dissipation of assets. As it turns out, their petition was well-founded. The involuntary bankruptcy was not dismissed. Holdings ultimately agreed to file a motion converting the bankruptcy proceeding to a voluntary case under Chapter 11 and the interests of the creditors are being protected. Dkt. No. 65 ¶ 134; Dkt. No. 66 ¶ 134. In the bankruptcy, Holdings agreed to pay the fees of the involuntary creditors. There was no finding, nor apparently could there have been one, by the bankruptcy court that the involuntary petitions did not qualify or that the petition was filed in bad faith. Had Pach Shemen not joined in the relief requested by the other creditors, the bankruptcy court might never have been in the position to accord such relief. The congressional purpose underlying Section 303 would have been thwarted. It thus cannot be that the arbitrator had the power to prevent Pach Shemen from

joining the petition or, once Pach Shemen had joined the petition, to impose on it damages not authorized by Section 303 for having done so.

Of course, here, the Court need not go so far as to hold that two parties could never agree to delegate to an arbitrator the power to determine whether either could file an involuntary bankruptcy petition. It is clear from the arbitration provision here that the parties did not agree to give that power to this arbitrator, and thus that the arbitrator exceeded his powers either by issuing the injunction he did as applied to the filing of the bankruptcy petition or by ordering damages for the violation of the injunction. The arbitrator had the power to protect the property and disposable goods that were the subject of the arbitration and to preserve the integrity of the proceedings before him. Instead, the Status Quo Injunction as interpreted and applied by the arbitrator granted relief of a different nature. The arbitrator interpreted and applied the Status Quo Injunction to prevent an entity that was not before the arbitral tribunal from availing itself of its rights to relief in judicial fora, pursuant to instruments that were not the subject of the arbitration, and pursuant to rights over which the arbitral tribunal had no jurisdiction. And it did so by preventing that third party from seeking the relief available to any person—debtor or creditor—available from the bankruptcy courts pursuant to the Bankruptcy Code. Permitting an arbitrator to enjoin an involuntary bankruptcy petition would fundamentally change the nature of arbitration, effectively forcing into the arbitral tribunal issues that affect the rights of third parties and that are committed by the Bankruptcy Code to the bankruptcy courts. In *Stolt-Nielsen S.A.*, 559 U.S. at 685, the Supreme Court refused to read an arbitration agreement as authorizing class arbitration where the agreement was silent regarding class arbitration. The Court recognized that "parties are 'generally free to structure their arbitration agreements as they see fit,'" *id.* at 683 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995))), including by

selecting the "rules under which any arbitration will proceed," *id.* Still, the Court refused to infer from silence agreement to a procedure that would fundamentally change the nature of arbitration. *Id.* Here too, the LLCA's silence with respect to anti-bankruptcy cannot be read as a conferral of such authority of a fundamentally different nature.

The same conclusion follows with respect to the Bondholder Litigation. Although the arbitrator stated that the proceedings were launched to "find another path to obtain the 'assets of [the Company] . . . or assets in dispute in this arbitration,'" Dkt. No. 67-58 at 61, the matters to be addressed in the arbitration proceeding and in the Bondholder Litigation just like those in the bankruptcy proceeding, respectively, were entirely different. The former went to Eletson's rights under the LLCA and whether the Company or the Nominees were entitled to the Preferred Interests; the latter went to the rights of Pach Shemen under the bond indenture to the payment of interest and the repayment of principal for loans that had been extended to Holdings. The arbitrator did not find that the Bondholder Litigation or the bankruptcy proceedings would resolve any of the legal or factual issues in the arbitration. Because both sets of proceedings involved different issues, they could not have done so. He also did not base his finding of a violation on any notion that the Bondholder Litigation interfered with or undermined the integrity of the arbitration. Before it was stayed on March 8, 2023 following the filing of the bankruptcy petition, the only activity on the docket consisted of Holdings' agreement with the Trustee that Holdings would have additional time to respond to the complaint. *Wilmington Sav. Fund Soc'y, FSB*, CM-ECF No. 23-cv-261, Dkt Nos. 17, 22.

As Respondent notes, an arbitration award is divisible for purposes of confirmation. *See D.H. Blair & Co.*, 462 F.3d at 104 (holding that a court "can confirm . . . the award either in whole or in part" in FAA case); *Orion Shipping & Trading Co.*, 312 F.2d 299 (affirming district

court's partial confirmation in FAA case). The Court chooses to do so here in light of the "strong federal policy favoring arbitration, the enforcement of arbitration agreements and the confirmation of arbitration awards." *Pike*, 266 F.3d at 89; *cf. Smarter Tools Inc.*, 57 F.4th at 383 ("An award should be enforced, 'despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached.'" (quoting *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010))). The portions of the award that found Levona, Pach Shemen, and Murchinson liable for violating the Status Quo Injunction and the damages ordered for those violations thus cannot stand.[32]

E. Fee Award to Corp and Holdings

Finally, Respondent argues that the arbitrator exceeded his authority in awarding fees and costs to Holdings and Corp. Dkt. No. 50 at 31. The arbitrator awarded Petitioners $9,590,222 in attorneys' fees, expenses, and costs for the arbitration, including a success fee in the amount of $1,794,950.70. Dkt. No. 67-58 at 86–87. Respondent argues that the award of attorneys' fees and costs to Petitioners exceeded the arbitrator's authority because the LLCA empowers the arbitrator to "award reasonable attorneys' fees and reasonable travel expenses (excluding meals) to the prevailing party," Dkt. No. 67-2 § 12.14(d), and because Delaware law states that "'the defendant is the prevailing party' if a plaintiff receives 'zero dollars in damages,'" Dkt. No. 50 at 31 (quoting *Cooke v. Murphy*, 99 A.3d 226 (Del. 2014)). As Holdings and Corp were not awarded damages by the arbitrator, Respondent argues that the arbitrator could not permissibly

[32] The Court therefore need not consider Respondent's argument that this portion of the Award should be vacated on the theory that the arbitrator was without power to award fees and costs incurred in the bankruptcy case to parties other than the bankrupt debtor—Holdings, Dkt. No. 50 at 28, except to note that the arbitrator did not award fees and costs to third parties but rather to Eletson "*to be paid to the entity or individuals who paid those costs and fees*." Dkt. No. 67-58 at 67 (emphasis added). Whether Eletson would have had the power to further distribute the compensation to other parties is not before the Court.

interpret the LLCA in a manner that would deem Holdings and Corp prevailing parties eligible for fees. *Id.*

Petitioners respond that the arbitrator had the authority to determine that Holdings and Corp were prevailing parties and that he therefore also had the authority under the LLCA to award them attorneys' fees and costs. Dkt. No. 54 at 27–28. Petitioners dispute Respondents' assertion that Delaware law requires a party to be awarded nonzero dollar damages to be considered the prevailing party, and argue instead that "a prevailing party is one who 'predominated in the litigation.'" *Id.* at 28 (quoting *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 281 (Del. 2022)). Petitioners point to a case under Delaware law in which a court granted a party prevailing status and awarded it attorneys' fees and expenses even though its only relief in the underlying action was inspection of certain books and records. *Id.* (citing *Aloha Power Co., LLC v. Regenesis Power, LLC*, 2017 WL 6550429, at *5 (Del. Ch. Ct. Dec. 22, 2017)).

The arbitrator rejected Respondent's argument as "completely without merit." Dkt. No. 67-58 at 87. The arbitrator reasoned that, throughout the arbitration, it had been "clear that, in the event the option was exercised, the preferred interests would transfer to [the Company] or its nominee," *id.* at 88, and that "Eletson would turn over any damages" to the non-party Company, *id*. He thus ruled "it is Eletson that substantially prevailed on its claims in this arbitration." *Id.* at 88.

The fee award was well within the scope of the arbitrator's "contractually delegated authority." *Jock*, 942 F.3d at 622 (quoting *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013)). An arbitrator may award attorneys' fees and/or arbitration costs, to the extent they are permitted in the relevant arbitration provision or agreement. *See, e.g.*, *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996); *LiveWire Ergogenics*, 645 F. Supp. 3d at 299. The

LLCA delegated to the arbitrator the authority to interpret its terms and to determine any dispute, claim or controversy arising out of it. Dkt. No. 67-2 § 12.14(a). One of those terms is Section 12.14(d) which provides in pertinent part that "the arbitrator shall have discretion to award reasonable attorneys' fees and reasonable travel expenses (excluding meals) to the prevailing party, which fees may be set by the arbitrator of such action . . . and which fees shall be in addition to any other relief that may be awarded." *Id.* § 12.14(d). Thus, the arbitrator did not exceed his authority when he addressed the question of the prevailing party in the arbitration and determined that Petitioners were the prevailing party. *See, e.g.*, *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir.1997), *cert. denied*, 522 U.S. 1049 (1998); *MasTec N. Am., Inc. v. MSE Power Sys., Inc.*, 581 F. Supp. 2d 321, 330–31 (N.D.N.Y 2008); *Ferrand v. Mystique Brands LLC*, 2021 WL 119572, at *8 (S.D.N.Y. Jan. 13, 2021); *Ludgate Ins. Co., Ltd. v. Banco De Seguros Del Estado*, 2003 WL 443584, at *6–7 (S.D.N.Y. Jan. 6, 2003).

Respondent's argument is more properly understood as a challenge to the substance of the arbitrator's decision and whether he acted in manifest disregard of the law in determining that Petitioners were the prevailing party. So framed, however, the claim is no more successful. Respondent relies upon the Delaware Supreme Court's decision in *Cooke v. Murphy*, 99 A.3d 226, a motor vehicle accident case in which the court held that a plaintiff who proved the defendant's liability but failed to prove damages was not the prevailing party and was not entitled to an award of costs under Delaware Superior Court Civil Rule 54(d).[33] Following an earlier decision by a lower court, the Delaware Supreme Court reasoned "that where the

[33] Delaware Superior Court Civil Rule 54(d) states: "Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court directs otherwise." Del. Super. Ct. Civ. R. 54(d).

judgment reflects an award of zero dollars, 'it necessarily follows that Plaintiff has obtained no judgment from Defendant and Defendant is indeed the prevailing party for purposes of Rule 54(d).'" *Id.* at *3 (quoting *Streetie v. Progressive Classic Ins. Co.*, 2011 WL 1259809, at *15 (Del. Super. Ct.) *aff'd*, 35 A.3d 419 (Del. 2011)).

The arbitrator did not manifestly disregard any law in determining that Petitioners were the prevailing parties under the LLCA and entitled to an award of fees. *Cooke* neither addressed the question whether a party to a contract who succeeds in enforcing a provision specifically benefitting third parties is a prevailing party, nor did it involve a contractual fee-shifting provision. Here, where there was a contractual fee-shifting provision, the question whether Petitioners were prevailing parties here is purely one of contractual interpretation. *See Bako Pathology LP*, 288 A.3d at 280–81. The term "prevailing party" is a legal "term of art that the parties bargained for in the contract[]." *Id.* at 281. It refers to the party which has "predominated in the litigation" and "who has prevailed on most of [the] claims." *Id.* (internal citations omitted). The prevailing party need not have personally received an award of money damages. *See, e.g.*, *Aloha Power Co.*, 2017 WL 6550429, at *5 (concluding that party who succeeded in books-and-records dispute was the prevailing party); *Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) ("A plaintiff receiving . . . injunctive relief may be a prevailing party where she prevailed on the merits." (internal quotation marks omitted)); *Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989) ("Plaintiffs may be considered 'prevailing parties' for attorneys' fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.'"); *cf. Farrar v. Hobby*, 506 U.S. 103, 113 (1992) ("[T]he *degree* of the plaintiff's success does not affect eligibility for a fee award." (alteration in original)).

The arbitrator acted within his discretion in determining that Petitioners were the prevailing parties and in awarding them fees. In its Third Amended Statement of Claims and Response to Counterclaims, Eletson sought a determination that Levona *never* had any lawful interests in the Company, that the assignment of the two entities owning Company vessels to Levona was procured by coercion, fraud, illegal, and other wrongdoing and is null and void, that Levona not be considered an interest holder of the Company, or, in the alternative, specific performance of the buy-out of Levona's preferred stock, and compensatory and punitive damages and attorneys' fees. Dkt. No. 31-35. In its Counterclaims, Levona sought an order requiring any agent of Eletson to vacate the two Company vessels, declaratory judgment that the loan was not repaid and the Purchase Option was not executed, a declaration that Levona remains in control of the preferred shares, a declaration that Levona is authorized to execute a deal with Unigas, and compensatory and punitive damages and attorneys' fees. Dkt. No. 31-11.

The arbitrator ruled for Petitioners. He concluded: "Claimants have proven breaches of the LLCA and the covenant of good faith and fair dealing and established that Eletson exercised the purchase option pursuant to the BOL, and are therefore entitled to the declaratory relief, compensatory damages, punitive damages, prejudgment interest, and attorney's fees," and that "Respondent has not proven any of its counterclaims and they are dismissed. Respondent is entitled to recover nothing from the Claimants." Dkt. No. 67-58 at 95. The arbitrator issued declaratory relief finding that Eletson exercised the buyout option in the BOL; that as of March 11, 2022, Levona had no membership interest in the Company; that the Preferred Interests were transferred to the Nominees; that Levona had breached the LLCA and violated the Status Quo Injunction; and that Levona, Murchinson, and Pach Shemen were obligated to pay damages to the Company and to the Nominees. *Id.* at 95–100. As a result of the Award, Eletson and the

Nominees will be the sole owners of the Company. It is irrelevant that the Preferred Interests will be transferred to the Nominees and not to Eletson itself. Under the BOL, the Preferred Interests would never have been transferred to Eletson—Eletson contracted for a buyout option for the Company or the Nominees to receive the Preferred Interests. But the fact that, as a result of Eletson prevailing on its contract claim, the Company or the Nominees will receive the direct monetary benefit does not make Eletson any less the prevailing party than it would any other contract party who succeeds in enforcing a contract provision that inures to the benefit of a third-party beneficiary. It does not prevent Eletson from being a prevailing party. *See, e.g.*, *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98 (2d Cir. 2006); *Christopher P. by Norma P. v. Marcus*, 915 F.2d 794, 804–05 (2d Cir. 1990), *cert. denied*, 498 U.S. 1123 (1991). *Ferrand*, 2021 WL 119572, at *10 ("Even assuming *arguendo* that Ferrand's application here of the contractual term 'prevailing party' were the more persuasive, this case falls far short of being one of 'those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent but where none of the provisions of the FAA apply.'" (quoting *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003))).

III. Whether the Arbitrator Manifestly Disregarded the Law

Lastly, Respondent argues that the arbitrator grossly misinterpreted the BOL and manifestly disregarded the law. Dkt. No. 50 at 32. Specifically, Respondent contends that the arbitrator acted in manifest disregard of the law by relieving Eletson of the obligation under the BOL to have provided formal written notice of its intention to exercise the Purchase Option, *id.* at 33–34, and by failing to make any effort to interpret the BOL under English law, *id.* at 34–35. According to Respondent, these "deviation[s] from the plain contractual language and fundamental canons of contract interpretation [were] so far outside the range of permissible decisions as to warrant vacatur." *Id.* at 35.

Review of an arbitration award for manifest disregard of law is "severely limited." *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 208 (2d Cir. 2002) (Sotomayor, J.) (quoting *Gov't of India v. Cargill Inc.*, 867 F.2d 130, 133 (2d Cir. 1989)). To vacate an arbitral award on grounds of manifest disregard, the court "must find 'something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law.'" *Id.* (quoting *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967)). Vacatur under the manifest disregard standard is limited to "those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent." *Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 109 (2d Cir. 2019) (quoting *T.Co Metals, LLC*, 592 F.3d at 339). "A court may vacate an arbitral award based on manifest disregard only upon a finding that '(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'" *Precision Castparts Corp. v. Schultz Holding GmbH & Co. KG*, 2020 WL 4003578, at *2 (S.D.N.Y. July 15, 2020) (quoting *Zurich Am. Ins. Co.*, 811 F.3d at 589). "The test has sometimes been described in three parts, as requiring a demonstration that (1) 'the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators'; (2) 'the law was in fact improperly applied, leading to an erroneous outcome;' and (3) 'the arbitrator must have known of [the law's] existence, and its applicability to the problem before him.'" *Id.* (quoting *T.Co Metals*, 592 F.3d at 339); *see also LiveWire Ergogenics*, 645 F. Supp. 3d at 296. "A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law." *Wallace*, 378 F.3d at 190. Indeed, "[o]nly a barely colorable justification for the outcome reached by the arbitrators is necessary to confirm the award," *D.H. Blair & Co.*, 462 F.3d at 110, even if the "court[] disagree[s] with [the

arbitrator] on the merits," *Wallace*, 378 F.3d at 190. "A 'barely colorable justification' exists so long as the arbitrators had reasoning on which they 'could have justifiably rested their decision.'" *Smarter Tools*, 57 F.4th at 383 (quoting *Willemijn Houstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 13–14 (2d Cir. 1997).

A. The Notice Requirement

Levona first contends that the arbitrator manifestly disregarded the law by holding that Petitioners had satisfied the notice requirement of the BOL. Dkt. No. 50 at 34. The BOL provides that the Purchase Option is "exercisable by written notice to Levona" by the Company "for either [the Company] or its nominee to purchase all of the membership interests held by Levona in [the Company]." Dkt. No. 67-10 § 2.3. It further provides that if an Option Notice is not "validly served by the expiry of the Purchase Option Period," the Purchase Option will lapse. *Id.* § 2.5. The arbitrator found that "there does not seem to be a separate formal written notice provided to Levona by Eletson exercising the option," but concluded that Levona received actual notice and that the evidence established that "the parties acknowledged that Eletson was exercising the option." Dkt. No. 67-58 at 42. The arbitrator supported that conclusion by the content of the agenda for the March 10, 2022 Company Board of Directors meeting which contained the language "[u]pdate on Eletson's intention to exercise the purchase option." *Id.* As "additional support," he looked to the Unanimous Written Consent which was signed by all directors including Levona directors, but gave only the Eletson directors authority to sign or deliver on behalf of the company notices in connection with the BOL. *Id.* at 43–44. Finally, the arbitrator concluded that "both parties acted in a manner consistent with the fact that Levona had been bought out of the Company." *Id.* at 44. Thus, the arbitrator concluded "[a]t best, the absence of a written notice and payment of $1 dollar are formalities that the parties failed to

observe." *Id.* The arbitrator did not cite English law or Delaware law in those portions of his findings.[34]

Respondent supports its argument that the arbitrator's conclusion on notice satisfied the first two prongs of the manifest disregard test—that the law allegedly ignored was clear and explicitly applicable to the matter before the arbitrator, and that the arbitrator misapplied the law—by citing the general axiom that a contract is to be interpreted to give meaning to its every word, and the Delaware Supreme Court's 1986 decision in *Stoppi v. Wilmington Tr. Co.*, 518 A.2d 82, 86 (Del. 1986), regarding the notice required to be given by a secured party to a debtor prior to the sale or disposition of collateral under the Uniform Commercial Code. Dkt. No. 50 at 34; *see also* Dkt. No. 59 at 13.[35] Respondent argues that the third prong of the test was satisfied—that the arbitrator knew of the law's existence and its applicability to the problem before him—because they directed the arbitrator's attention to the proposition that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Dkt. No. 55-4 at 9 (quoting *Motors Liquidation Co. DIP Lenders Tr. v. Allianz Ins. Co.*, 2017 Del. Super. LEXIS 279, at *16 (Del. Super. Ct. June 8, 2017)). The argument that the arbitrator manifestly disregarded the law in excusing Petitioners from the requirement of providing written notice is without merit. First, the general proposition of

[34] "[I]t is axiomatic that arbitrators need not disclose the rationale for their award." *Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 516 (2d Cir. 1991). So long as the Court can infer a ground for the arbitrator's decision from the facts of the case, the Court must confirm the award. *Standard Microsystems Corp.*, 103 F.3d at 9.

[35] *Stoppi* interpreted the former Section 9-504(3) of the U.C.C. *Stoppi*, 518 A.2d at 84–86. Article 9 of the U.C.C. was recodified in 2001 and the former Section 9-504(3) is now Section 9-611. It requires a second party that disposes of collateral under Section 9-610 of the U.C.C. to "send" to the debtor and any secondary obligor a "reasonable authenticated notification of disposition." U.C.C. §§ 9-611(b), (c). The *Stoppi* court relied upon a definition of "send" to mean deposition in the mail or delivery for transmission to mean that the notification must be in writing.

contract law that a contract is interpreted according to its plain meaning and so as to give every word meaning provides only limited support to Levona, in the face of the other general proposition that, at least in some circumstances and in some states including Delaware, whether viewed as a covenant or a condition precedent, "[n]otice provisions have generally been interpreted to require substantial compliance," not literal compliance. Richard A. Lord, 6 Williston on Contracts § 49:88 (4th ed. 2003); *Gower v. Trux, Inc.*, 2022 WL 534204, at *11 (Del. Ch. Ct. Feb. 23, 2022) ("When confronted with less than literal compliance with a notice provision, courts have required that a party substantially comply with the notice provision." (quoting *Gildor v. Optical Sols., Inc.*, 2006 WL 4782348, at *7 (Del. Ch. Ct. June 5, 2006))); *Kelly v. Blum*, 2010 WL 629850, at *8 n.52 (Del. Ch. Ct. Feb. 24, 2010) (same); *cf. James Constr. Grp., LLC v. Westlake Chem. Corp.*, 650 S.W.3d 392, 405 (Tex. 2022), *reh'g denied* (Sept. 2, 2022); *Bantz v. Bongard*, 864 P.2d 618, 624 (Idaho 1993) ("This Court has long held that only substantial compliance with a contractual notice provision is required."); *Putney Sch., Inc. v. Schaaf*, 599 A.2d 322, 327 (Vt. 1991) ("The rule in Vermont is that substantial compliance with notice requirements will suffice."). Nor do Respondent's citations to Delaware case law. The Delaware Superior Court's decision in *Motors Liquidation Co.* involved the question whether insurance policies that were the assets of General Motors's predecessor had been validly assigned to its successor trust, and in the quotations cited by Levona, the court relied upon New York law. 2017 Del. Super. LEXIS 279, at *16 n. 61 (citing *Greenfield v. Philles Recs., Inc.*, 780 N.E.2d 166 (N.Y. 2002)). It has no apparent bearing on the notice issues raised here. *Stoppi v. Wilmington Trust Co.*, 518 A.2d at 86, the case Levona cites before this Court, holds that written notification to the debtor prior to any sale or other disposition on collateral is "the better rule" under the U.C.C, but also recognizes that "other jurisdictions have

split on the issue." It does not demonstrate that the law that was allegedly ignored was "clear, and in fact explicitly applicable to the matter before the arbitrators." *Precision Castparts Corp.*, 2020 WL 4003578, at *2.

Generally, Respondent misstates the law when it argues that it is sufficient that the arbitrator "knew the Delaware legal principles governing contract interpretation" and that those general principles should be interpreted to defeat Eletson's right to exercise the option in the absence of written notice. Dkt. No. 59 at 18. A party who agrees for an arbitrator to determine its disputes does not contract for those disputes to be determined in accordance with law, but only not in manifest disregard of the law. The Second Circuit has stated that "[a] party seeking vacatur bears the burden of proving that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it." *Duferco Int'l Steel Trading*, 333 F.3d at 389.[36] Moreover, in the absence of "an error that is so obvious that it would be instantly perceived as such by the average person qualified to serve as an arbitrator," the only duty of the arbitrator is to be aware of the "governing law identified by the parties to the arbitration." *Id.* Thus, the parties must have made the arbitrator aware not only of the law's existence, but also of "its applicability to the problem before him." *Precision Castparts Corp.*, 2020 WL 4003578, at *2 (quoting *T.Co Metals*, 592 F.3d at 339); *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002); *Aksman v. Greenwich Quantitative Rsch. LP*, 563 F. Supp. 3d 139, 150 (S.D.N.Y. 2021), *aff'd*, 2023 WL 6799770 (2d Cir. Oct. 16, 2023) (summary order). More specifically, although the Delaware Superior Court in 2018 required literal compliance with a notice provision preventing the release of funds from escrow

[36] The Third Circuit and the Delaware Supreme Court have both adopted this rule verbatim. *See, e.g., Black Box Corp. v. Markham*, 127 F. App'x 22, 24 (3d Cir. 2005); *SPX Corp. v. Garda USA, Inc.*, 94 A.3d 745, 750 (Del. 2014).

where the contract at issue defined what constituted reasonable notice and required the release of funds if such notice was not provided, *see, e.g.*, *PR Acquisitions, LLC v. Midland Funding LLC*, 2018 WL 2041521, at *6–7 (Del. Ch. Ct. Apr. 30, 2018) (granting summary judgment for plaintiff where defendant contracting party "never directly gave notice to [the plaintiff] in any form before the [contractually specified] date," and did not, in course of litigation, offer any "reason other than its own error for its failure to comply with the notice provision it negotiated"), and more recently stated "as a matter of law, where the contract specifies what constitutes notice thereunder and dictates how to communicate that notice, strict compliance with the notice provision is necessary," *Aluminum Source, LLC v. LLFlex, LLC*, 2023 WL 2547996, at *19 (Del. Sup. Ct. Mar. 16, 2023), that rule appears not to be as uniformly applicable or oblivious to context as Levona suggests. Following *PR Acquisitions*, the Delaware Chancery Court has explained that Delaware courts have "at times, accepted substantial compliance with notice provisions in lieu of actual compliance, when the circumstances so justified." *Vintage Rodeo Parent, LLC v. Rent-A-Center, Inc.*, 2019 WL 1223026, at *15 (Del. Ch. Ct. Mar. 14, 2019). As Chancellor Strine explained: "The requirement of substantial compliance is an attempt to avoid 'harsh results . . . where the purpose of these [notice] requirements has been met.' . . . Substantial performance is 'that which, despite deviations from contract requirements, provides the important and essential benefits of the contract.'" *Gildor*, 2006 WL 4782348, at *7 (internal citations omitted).

Critically, Levona did not cite any of these cases or any other cases that could possibly be relied on to support its position to the arbitrator, and thus did not put him on notice of the applicable law. Levona's argument to the arbitrator regarding notice was limited to a single sentence: "[n]o 'written option notice' was given—this is undisputed." Dkt. No. 55-4 at 19. It

cited no law to the effect that the failure to provide written notice would defeat the exercise of the option when both parties actually knew of Eletson's exercise of the option within the Purchase Option Period. It therefore cannot be said that the arbitrator "knew of a governing legal principle yet refused to apply it or ignored it altogether." *DiRussa*, 121 F.3d at 824 (quoting *Folkways*, 989 F.2d at 112). Accordingly, its argument that the arbitrator manifestly disregarded the law in finding that the notice requirement had been satisfied is unavailing.

B. Interpretation Under Delaware Law

Levona's argument that the arbitrator manifestly disregarded the law by looking only to Delaware law and not to English law is no more successful. The BOL has a choice-of-law clause providing that it would be "governed by and construed in accordance with English law." Dkt. No. 67-10 § 10. Levona did not cite to the arbitrator any English law but only to Delaware law and to New York law. Dkt. No. 31-38 at 48–49, 52–55, 66–67. It can hardly complain that the arbitrator manifestly disregarded a body of law to which it did not direct the arbitrator's attention. *See, e.g.*, *Wallace*, 378 F.3d at 195; *Westerbeke*, 304 F.3d at 209; *DiRussa*, 121 F.3d at 823; *see also GMS Grp., LLC v. Benderson*, 326 F.3d 75, 77–78 (2d Cir. 2003); *Halligan v. Pipe Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999).

CONCLUSION

The application to confirm is GRANTED IN PART and DENIED IN PART and the motion to vacate is GRANTED IN PART and DENIED IN PART.

The Court confirms the Award as stated in Dkt. No. 67-58, beginning on page 95, including the award of compensatory and punitive damages and the grant of attorneys' fees, costs, expenses, and pre-judgment interest, with the following exceptions:

- Paragraphs A.7, A.8, A.10(i), and A.10(iii) are vacated.
- All awards of relief against Murchinson and Pach Shemen are vacated.

- All awards of relief, including compensatory and punitive damages, based upon violations of the Status Quo Injunction are vacated.

- All awards of attorneys' fees, costs, and expenses relating to the involuntary bankruptcy petition and Bondholder Litigation are vacated.

Parties are directed to each submit a proposed judgment in accordance with this Opinion and Order by February 23, 2024. The Clerk of Court is respectfully directed to close Dkt. Nos. 28, 49.

SO ORDERED.

Dated: February 9, 2024
New York, New York

LEWIS J. LIMAN
United States District Judge

EXHIBIT B

Exhibit 1

JAMS ARBITRATION
NEW YORK, NEW YORK

Eletson Holdings, Inc., et al.,

Claimants,

and **JAMS Ref. No. 5425000511**

Levona Holdings Ltd.,

Respondent.

FINAL AWARD

I. INTRODUCTION

1. Parties and Counsel: The parties to this arbitration are identified in the caption and are represented as follows:

Counsel for Claimants:

Louis Solomon, Esq.
Reed Smith LLP
599 Lexington Avenue
22nd Floor
New York, New York 10022
Tel: 212 521-5400
Email: lsolomon@reedsmith.com

Colin Underwood, Esq.
Reed Smith LLP
599 Lexington Avenue
22nd Floor
New York, New York 10022
Tel: 212 521-5400
Email: cunderwood@reedsmith.com

Nancy Savitt, Esq.
Reed Smith LLP
599 Lexington Avenue
22nd Floor
New York, New York 10022
Tel: 212 521-5400
Email: nsavitt@reedsmith.com

Counsel for Respondents:

Mayer Klein, Esq.
Frankel, Rubin, Klein, et al.
231 South Bemiston Avenue
Suite 1111
Clayton, Missouri 63105
Tel: 314 725-8000
Fax: 314 726-5837
Email: mklein@frankelrubin.com

Reid Simpson, Esq.
Frankel, Rubin, Klein, et al.
231 South Bemiston Avenue
Suite 1111
Clayton, Missouri 63105
Tel: 314 725-8000
Fax: 314 726-5837
Email: rsimpson@frankelrubin.com

Mark McNeill
Quinn Emanuel Urquhart & Sullivan LLP
51 Madison Avenue
22nd Floor
New York, New York, 10010
Tel: 212 849 7351
markmcneill@quinnemanuel.com

Odysseas Repousis
Quinn Emanuel Urquhart & Sullivan LLP
51 Madison Avenue
22nd Floor
New York, New York, 10010
Tel: 212 849 7626
odysseasrepousis@quinnemanuel.com

Isaac Nesser
Quinn Emanuel Urquhart & Sullivan LLP
51 Madison Avenue
22nd Floor
New York, New York, 10010
Tel: 212 849 7000
isaacnesser@quinnemanuel.com

William Adams
Quinn Emanuel Urquhart & Sullivan LLP
51 Madison Avenue
22nd Floor
New York, New York, 10010
Tel: 212 849 7000
williamadams@quinnemanuel.com

2. JAMS Arbitrator:

Hon. Ariel E. Belen (Ret.)
JAMS
620 Eighth Avenue
34th Floor
New York, New York 10018
Tel.: 212 751-2700
Fax: 212 751-4099
Email: abelen@jamsadr.com

3. JAMS Law Clerk:

Rachel Gupta, Esq.
JAMS
620 Eighth Avenue
34th Floor
New York, New York 10018
Email: rgupta@guptaresolutions.com

4. JAMS ADR Consultant:

Burton King, Esq.
JAMS
620 Eighth Avenue
34th Floor
New York, New York 10018
Tel.: 212 607-2758
Email: BKing@jamsadr.com

5. The claims are set forth in a certain "Demand for Arbitration Form," dated July 29, 2022, and in a certain "Statement of Claims," dated July 29, 2022, with exhibits attached thereto. Respondent submitted "Levona Holdings LTD's Response to Statement of Claims and Statement of Counterclaims," with exhibits, dated August 19, 2022. Respondent also submitted a Letter, dated September 5, 2022. Claimant then submitted a Letter, dated September 5, 2022.

6. This arbitration is brought pursuant to a certain "Eletson Gas, LLC, Third Amended and Restated Limited Liability Company Agreement," dated July 29, 2022 ("LLCA"). The arbitration provision is contained in subsection 12.14(a), page 69 of the LLCA. The parties

disagree as to the scope of this arbitration provision and the arbitrability before JAMS of some of the claims.

This Final Award is based upon a review of all the pleadings in this arbitration proceeding, as well as the submissions that follow that were considered by the undersigned arbitrator. The submissions and the exhibits attached thereto that were reviewed and considered are as follows: "Claimants' Pre-Hearing Statement of Position Pursuant to JAMS Rule 20(b) and Procedural Order No. 5 ¶ 8," dated May 5, 2023 ("Claimants' Rule 20(b) Statement"); "Respondent Levona's Rule 20(b) Statement of Counterclaims and Defenses to Eletson's Statement of Claims," dated May 5, 2023; "Claimants' Post-Hearing Submission," dated June 9, 2023 ("Claimants' Post Hearing Brief"); "Claimants' Proposed Order," dated June 9, 2023; "Respondent's Post Trial Brief and Statement of the Record," dated June 9, 2023 ("Respondent Post Trial Brief"); and "Respondent's Proposed Order," dated June 9, 2023. In addition, I heard and considered the testimony at an arbitration hearing that was held on May15, 16, 18, 19, 22, 23, and 24.

I also heard closing arguments on June 13, 2023. I reviewed and considered the transcripts of the arbitration hearing and closing arguments which contain the testimony of the witnesses and the colloquy and arguments of counsel on various substantive and procedural issues. I reviewed and considered the exhibits admitted with the post-hearing submissions and the exhibits admitted at the arbitration hearing. In addition, I reviewed Eletson's Affirmation Supporting Fees, Costs, Expenses and Interest, with supporting exhibits and client affidavit, filed on August 11, 2023 ("Opening Affirmation); Levona's Affirmation in Response to Claimants' Affirmation in Support of Its Motion for Fees, filed on August 25, 2023 ("Respondent's Affirmation"); and Eletson's Reply Affirmation in Further Support of Fees, Costs, Expenses and Interest, with supporting client affidavit, filed on September 1, 2023 ("Reply Affirmation").

On July 28, 2023, I issued an Interim Award in this arbitration. Subsequently, counsel for Levona requested corrections to the Interim Award pursuant to Rule 24(j) of the JAMS Comprehensive Rules and Procedures ("JAMS Rules") and on August 15, 2023, I issued a Corrected Interim Award ("Corrected Interim Award") clarifying that in Section VII.B.4 of the award: "The entities referred to in B.1 and B.2 respectively shall also be awarded pre-judgment interest on the principal amount of the compensatory damages in paragraph B.1."

This Final Award adopts, incorporates, and republishes the Corrected Interim Award in its entirety amending the Corrected Interim Award only as necessary to make certain ministerial and stylistic edits, and to integrate the undersigned arbitrator's subsequent determinations regarding the Claimants' request for attorneys' fees, costs, expenses and interest. Section VII of the Corrected Interim Award entitled Conclusion and Corrected Interim Award is not reproduced here for the sake of brevity and clarity, although the findings and legal conclusions contained in that section are adopted here in their entirety in Section VIII of this Final Award entitled Conclusion and Final Award.

The Corrected Interim Award resolved all issues submitted for decision in this arbitration, except as expressly reserved therein, relating to the amount of Claimants' attorneys' fees, costs, expenses, and pre-judgment interest. The undersigned arbitrator in

this Final Award has considered and resolved all the issues and arguments raised relating to the merits of the claims, counterclaims, requests for attorneys' fees, costs, expenses, and pre-judgment interest. Any argument not addressed in this Final Award was found to be unavailing, without merit, academic, or unnecessary to reach.

The undersigned arbitrator recognizes and appreciates the high quality of the presentations by counsel for each party. The result of this decision is not a reflection on any difference in the quality of those presentations, but of the arbitrator's review of the record.

II. BACKGROUND OF THE DISPUTE AND SUMMARY OF CLAIMS AND COUNTERCLAIMS

A. Parties and Relevant Facts

Claimant Eletson Holdings, Inc. ("Holdings") is a corporation formed under the laws of Liberia, which holds the common shares in Eletson Gas LLC (the "Company") (J-1.0005 and J-01.0084.) Claimant Eletson Corporation ("Eletson Corp") (together with Holdings, "Eletson") is formed under the laws of Liberia, and among other things, is a special member of the Company responsible for the provision of management services for the vessels owned directly or indirectly by the Company. Holdings is the parent company of Eletson Corp. (*See* C-1963, J-1.0085.) Eletson is owned by three principal families, which are the families of Laskarina Karastamati ("Karastamati"), Vassilis Kertsikoff ("Kertsikoff"), and Vasilis Hadjieleftheriadis ("Hadjieleftheriadis"), each of whom hold various officer positions in the Eletson entities.

On October 22, 2013, Holdings announced the creation of the Company, a $700 million liquefied petroleum gas shipping joint venture of Holdings and funds managed by Blackstone Tactical Opportunities ("Blackstone"). (C-1774, C-1964 ¶ 9; C-1963 ¶ 17.) Blackstone was the preferred shareholder of the Company. (J-1.0084.) Eletson contributed five medium-size gas carriers to the creation of the Company. (C-1774.) Additionally, in 2020, Eletson contributed approximately $5.5 million in liquidity support to the Company. (May 16, 2023 Transcript p.336:4-17.)

From 2013 to 2021, Blackstone was the preferred shareholder of the Company (May 16, 2023 Transcript pp. 23:20-24; 77:18-25.) From 2013 to the present, Holdings was the common unit holder of the Company. (C-1964 ¶ 11; C-1963 ¶19.)

On August 16, 2019, Eletson and Blackstone entered into the Third Amended and Restated Limited Liability Company Agreement, dated August 16, 2019. On April 16, 2020, Eletson and Blackstone entered into Amendment No. 1 to the Third Amended and Restated Limited Liability Company Agreement. (J-2.) Collectively, the August 16, 2019 agreement and the April 16, 2020 Amendment are referred to as the "LLC Agreement" or "LLCA". The LLCA regulates the relationship among the holders of membership interests in the Company. (*See* J-1.)

At the beginning of 2022, the Company owned, directly or indirectly, 14 liquefied petroleum gas carriers. (C-1963 ¶ 21; C-1964 ¶ 13.) The Eletson fleet is the second largest in the market—second only to Unigas, Eletson's primary competitor (C-1963 ¶ 21; C-1964 ¶ 13) ("Unigas is one of Eletson's key direct competitors").) The Company's revenues are primarily derived from the operation of the vessels (C-1963 ¶ 20; C-1964 ¶ 14.) Eletson Corp is responsible for the provision of management services for the vessels owned by the Company through subsidiaries. (C-1963 ¶ 9; May 18, 2023 Transcript pp. 52:14-17.) For its management services, Eletson Corp is paid management fees from the vessel subsidiaries. (May 16, 2023 Transcript pp. 243:3-18; 334:3-16.) The management fees are an asset of Eletson Corp and a liability for the Company or the relevant subsidiaries incurring the expense. (May 16, 2023 Transcript pp. 334:19-25.) All throughout Eletson's partnership with Blackstone, Eletson managed the vessels (C-1963 ¶ 9.)

In early 2021, Blackstone sought to sell its interest in the Company. Blackstone and Murchinson, an alternative management firm that manages funds on behalf of

institutional investors, signed a Confidentiality and Non-Disclosure Agreement on or around January 25, 2021 ("NDA".) (J-36.) The NDA states that the parties "desire to exchange certain proprietary or confidential information for the purpose of exploring a possible negotiated direct investment opportunity . . . in connection with certain LPB Shipping assets owned or operated by Eletson Gas LLC." (*Id.*) The NDA provides further that the "Confidential Information will be used solely for the purpose of evaluating, financing and executing the Opportunity . . . and will not be disclosed by the Receiving Party or its Representatives except (i) as may be consented to by the Disclosing Party." (J-36.001.) Under the NDA, Murchinson agreed not to "directly or indirectly contact or communicate with any of Eletson's employees, lenders, lessors, customers, suppliers, or any other person with whom Eletson has a business relationship, or to seek any information in connection therewith from such person, without the express written consent of Blackstone." (J-36.0002.)

At some point in time, Murchsinson and Blackstone reached a deal, whereby Murchsinson would purchase 100% of Blackstone's interests in Eletson Gas for an initial investment of $3 million. (C-1782 p. 32:13-25.) Murchinson created a special purpose vehicle to hold these interests, Levona Holdings Ltd ("Levona")—the Respondent in this arbitration. Levona is 60 percent owned by Nomis Bay and 40 percent owned by BPY—two hedge funds. (C-802, C-1053.) Murchinson controls and manages Nomis Bay and BPY. On November 2, 2021, Blackstone assigned its interest in the Company to Levona and appointed the four representatives designated by Levona to the board of the Company. (J-12; C-033; C-051.) These directors were: Eliyahu Hasset ("Hasset"), Joshua Fenttiman ("Fenttiman"), Mark Lichtenstein (Lichtenstein"), and Adam Spears ("Spears").

For all meaningful purposes relevant to this Corrected Interim Award and the facts and circumstances giving rise to the claims at issue in these proceedings, Murchinson and Levona are one and the same. This will be discussed in more detail later in this Corrected Interim Award. "Levona-related entities" refers to Levona, Murchinson and Pach Shemen—also a special purpose vehicle with identical ownership as Levona, managed and controlled by Murchinson.

Shortly after acquiring the Blackstone interests, Eletson officers and Levona's representative, Adam Spears, began discussing a deal that would enable Eletson to buyout Levona's interests.

The parties entered into a Binding Offer Letter ("BOL") on February 22, 2022.

Section 2.1 of the BOL provided that:

> Subject to and in consideration of the Transfer occurring and the conditions set out in Clause 2.2 and 2.3, Levona hereby grants to Eletson Gas the option exercisable by written notice to Levona by both of them (an "Option Notice"), for either Eletson Gas or its nominee to purchase all the membership interests held by Levona in Eletson Gas (the "Option Membership Interests") for a consideration equal to the Purchase Option Consideration payable in cash on completion of the transfer of the Membership Interests to such account as Levona may nominate in writing. (J-06 § 2.1.)

The Purchase Option Consideration "shall be an amount equal to US$1 plus an amount equal to US$23,000,000 less the Net Value." (J-06 ¶ 3.2.) The Net Value "shall be based on a third party independent valuation of the [Symi and Teledos]." (J-06 ¶ 3.3(b).)

Following the execution of the BOL, on March 11, 2022, the parties entered into a series of agreements including the following: (i) the Intra-Group Loan Agreement, pursuant to which Levona provided the company a loan facility of up to $10 million for a term of up to two years (J-07); (ii) the Share Transfer Agreement, pursuant to which the Company transferred to Levona 100% of the shares of the Symi and Telendos (J-8); (iii) the

Assignment of Claims, pursuant to which Eletson Corporation assigned to Levona all of its claims relating to the management fees and liquidity support owed to it by the Company, or its subsidiaries (J-09); (iv) the Deed of Waiver and Release (C-0027); and (v) the Fundamental Action Letter (J-10) (collectively, the "Transaction Documents").

In April, the loan was amended to provide the Company with the ability to draw an additional $4 million. (C-24.)

On July 15, 2022, Levona entered into a Letter of Intent with Unigas, the main competitor of the Company, to sell the Company's fleet of vessels for $262 million ("Unigas LOI"). (J-019.)

B. Summary of Claims and Counterclaims

The resolution of the majority of the claims and counterclaims asserted in this arbitration rests upon the interpretation of the Transaction Documents. Did Eletson exercise the purchase option pursuant to the Transaction Documents? If the answer is "yes," then at some point in time, Levona was no longer a member of the Company and did not have any rights under the LLCA to enter into the Unigas LOI, or otherwise act on behalf of the Company. Conversely, if Eletson did not fulfill the requirements under the Transaction Documents to exercise the purchase option, Levona's interests were not bought out and Eletson may have violated its obligations under the LLCA by refusing to, *inter alia*, engage in due diligence relating to the Unigas LOI.

Eletson has asserted claims against Levona for breach of the LLCA and breach of the covenant of good faith and fair dealing. These claims can be grouped into four categories. First, Eletson asserts claims that Murchinson engaged in deceitful and wrongful conduct that voids *ab initio* its acquisition of Blackstone's preferred interests. Eletson claims that Murchinson bribed Eletson Corporation's CFO, Peter Kanelos, and caused him

to disclose confidential Company information before Murchinson's purchase of the preferred interests in the Company. Eletson also claims that Murchinson, in breach of the NDA with Blackstone, communicated directly with Company financiers and lenders, and engaged in industrial sabotage that led to the arrest of Company's vessels prior to Levona's acquisition of preferred interests. These claims will be referred to as the "Pre-Acquisition Claims." Eletson seeks damages, under a theory of rescissory damages, in connection with the harm it alleges it suffered as a result of these claims.[1]

Second, after acquiring Blackstone's interests, Eletson claims that Levona breached the LLCA in a number of ways. Immediately upon joining the Company, Eletson asserts that Levona breached the LLCA and the Company's management agreements by among other things, attempting to fire Eletson Corporation as the manager of the Company's or the Company's subsidiaries' vessels. In addition, Eletson claims that Levona failed to disclose its pre-acquisition misuse and breaches of confidential information, continued to conspire with Mr. Kanelos to liquidate and harm the Company, and conspired with the Company's counsel, Watson Farley Williams ("WFW") against the Company's interests. I will refer to these claims as the "Post-Acquisition/Pre-BOL Claims."

Eletson also alleges that the Levona-related entities violated the Status Quo Injunction (defined, *infra,*) on numerous occasions, including by wrongfully declaring the Company in default of the Loan made by Levona to the Company, trying to sell the Symi and Telendos, directing the purchase of a controlling position in debt securities of Holdings for the purpose of commencing litigation against Holdings and the involuntary bankrtupcy against Holdings ("Status Quo Injunction Claims").

[1] Eletson attempts to merge the Pre-Acquisition Claims into material breaches of the LLCA, but prior to November 2, 2021 when Blackstone sold its interests in the Company, neither Murchinson nor Levona were parties to the LLCA.

And finally, Eletson asserts claims for breach of the LLCA and breach of covenant of good faith and fair dealing against Levona for failing to acknowledge Eletson's compliance with the terms of the Transaction Documents, failing to transfer the preferred interests in the Company, and continuing to act on behalf of the Company in complete bad faith including by entering into the Unigas LOI.

In addition to declaratory relief, Eletson seeks compensatory damages of at least $71 million, punitive damages in the range of 3 to 9.63 times the compensatory damages, pre-judgment interest at ten percent per annum, costs, and attorney's fees.

Conversely, Levona asserts that through today, it remains the preferred interest holder. Accordingly, it seeks various declarations with respect to the rights it is afforded by virtue of the LLCA and/or the Fundamental Action Letter. It also seeks monetary damages allegedly arising from Eletson's failure to attend board meetings, which prevented the Company from refinancing certain debt and engage in due diligence in connection with the Unigas LOI. Levona also asserts a claim for tortious interference in connection with the Unigas LOI and conversion for denying Levona the ability to sell the Symi and Telendos. For all of its claims, Levona seeks compensatory damages of more than $3 million, plus an undefined amount that includes any profit it is due from the Company as preferred holder, and any decrease in net profit from the sale of the vessels as compared to the Unigas LOI. Levona also seeks $2 million in punitive damages, post-judgment interest, costs, and attorney's fees.

III. HISTORY OF THE PROCEEDINGS

The following events and rulings are relevant to this Final Award.

Eletson filed the initial Statement of Claims on or about July 29, 2022. Levona filed its Response to Statement of Claims and Statement of Counterclaims on August 19,

2022. In that Response, and in a subsequently filed Motion to Strike Certain of Claimants' Pleadings, Arguments, and Requests for Relief, dated, September 12, 2022 ("First Motion to Strike"), Levona challenged the jurisdiction of JAMS. Levona conceded that JAMS had jurisdiction to decide issues raised under the LLCA, including for example, issues related to Levona's calling of board meetings and Eletson's failure to attend them, Eletson's refusal to cooperate in due diligence for the Unigas sale, or Eletson's refusal to cooperate with other rights Levona may have. Levona, however, insisted that JAMS did not have jurisdiction concerning the majority of Eletson's claims because determining those claims required the arbitrator to enforce the parties' rights under the Transaction Documents, which Levona claimed needed to be arbitrated in London. (*See, generally* First Motion to Strike.)

On September 30, 2022, I ruled that JAMS has jurisdiction over the claims and counterclaims pursuant to Section 12.14 of the LLCA, and by reason of the affirmative claims Levona filed as counterclaims in this arbitration. (C-01813.)

The LLCA § 12.14(a) provides:

> Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof (including the determination of the scope or applicability of this agreement to arbitrate) shall be determined by arbitration in New York County in the State of New York or any other mutually agreeable location, before a single arbitrator. The arbitrator shall be selected by agreement of the parties. If the parties are unable to agree on an arbitrator within 15 days after the demand for arbitration is made, JAMS shall designate the arbitrator. The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. The Federal Arbitration Act shall govern the interpretation and enforcement of such arbitration proceeding. The arbitrator shall apply the Law of the State of Delaware and the Republic of the Marshall Islands, as the case may be, in accordance with Section 12.13. (J-1.)

I ruled that "the arbitration provision in the LLC Agreement is broad, encompasses the claims asserted, and the parties agree that this arbitration provision was not replaced or

superseded by the arbitration [provision] in the Transaction Documents." (C-1813 p. 12.) I further found that "by filing counterclaims, Respondent availed itself of this forum, submitted to JAMS, and waived its jurisdictional challenges." (C-1813 p. 12.)

I reiterate and emphasize the waiver ruling, as Levona continues to insist that JAMS does not have jurisdiction to enforce the Transaction Documents.

Specifically, in its Post Trial Brief, Levona argues:

> The Option was not exercised. But, more importantly from a legal standpoint, an obligation to meet contract obligations external to the LLCA is not an obligation under the LLCA itself. As a result, not only is there no breach of contract but, the only way to find a breach of "good faith and fair dealing" is to look to the Transaction Documents—not the LLCA. *The Transaction documents are governed by English Law and are to be determined by either a British arbitration or court. Given that this Tribunal is not an expert in British Law, not seated in London, has heard no evidence or argument related to British Law,* ***and in fact does not have jurisdiction to enforce the Transaction Documents,*** this argument is outside the scope of this matter from a simple legal perspective.
> (Respondent Post Trial Brief pp. 55-56.)

However, Levona has itself sought relief for its counterclaims that I can only award if I interpret, enforce, and provide relief for pursuant to the Transaction Documents. For example, in its Proposed Order, Levona specifically requests declarations interpreting the Transaction Documents (e.g., a through f), for example, seeking a finding that Levona holds the preferred shares, and Levona further seeks a ruling awarding damages as a result of Eletson's conversion of the Symi and Telendos (e.g., b and c)—relief that depends on my interpreting and enforcing the terms of the Transaction Documents. It also asserted a claim for tortious interference with the Unigas LOI—which is not a claim for a breach of the LLCA. Thus, Levona has waived any jurisdictional objection concerning the claims and counterclaims.

On October 10, 2022, I entered a Temporary Restraining Order, pending a decision on the parties' cross-motions for preliminary injunctive relief ("TRO"). The TRO

confirmed the oral Order rendered during the October 7, 2022 conference, and specifically provided that "during the pendency of this Temporary Restraining Order the parties hereto shall maintain the status quo and shall not, among other things: (1) engage in the transfer or sale of any assets of Eletson Gas LLC (the "Company") absent the joint written consent of the parties, which shall be sent to the undersigned Arbitrator; or (2) notice or conduct of any board meetings for the purposes of proposing or considering transfer or sale of any assets of the Company." (C-1816.)

On November 7, 2022, I clarified the parameters of the "status quo" (C-1838.) Levona argued that the TRO did not apply to "the sale of the Symi and Telendos" because "those vessels are not assets of … Eletson Gas." (C-1838.) I made clear that "Respondent's interpretation of the TRO is incorrect. By its terms, the TRO directed the parties to 'maintain the status quo.' Any attempt to sell or otherwise transfer the Symi and Telendos vessels will be deemed to be in violation of the TRO." (C-1838.)

On January 12, 2023, I then issued a decision on the parties' cross-motions for preliminary injunctions and entered a Preliminary Injunction, extending the TRO's prohibition on actions upsetting the status quo until further notice. (C-1887.)

The Preliminary Injunction stated:

> The parties hereto shall maintain the status quo and shall not, among other things: (a) engage in the transfer or sale of, or attempt to sell or otherwise transfer, any assets of Eletson Gas LLC (the "Company"), or assets in dispute in this arbitration, absent the joint written consent of the parties, which shall be sent to the undersigned Arbitrator; or (2) notice or conduct of any board meetings for the purposes of proposing or considering the transfer or sale of any assets of the Company or other assets in dispute in this arbitration. (C-1887 p. 26.)

The Preliminary Injunction was to "stay in effect until amended by subsequent order of the undersigned arbitrator" (C-1887 p. 26.) The TRO, the November

clarification, and the Preliminary Injunction collectively are referred to herein as the "Status Quo Injunction".

I also rendered various discovery rulings relating to Levona and Murchinson's communications with its law firm, Watson Farley & Williams ("WFW"). On December 12, 2022, I found WFW represented both Eletson and Levona in connection with the Transactions and that because of this dual representation, Levona was not permitted to withhold documents on the basis of attorney-client privilege. (C-1880 pp. 9-10.)

On March 6, 2023, I held a status conference and oral argument to address additional outstanding discovery disputes. During that conference, I made certain oral rulings ordering Respondent to produce various categories of documents. These oral rulings were subsequently memorialized in a March 10, 2023 email. With respect to WFW communications, I held as follows:

> With respect to any documents or communications relating to WFW withheld on the basis of attorney-client privilege, the privilege has been waived due to Respondent's failure to comply with Procedural Order No. 4, which required that it produce a log including certain specific information "identifying any document required to be produced in response to any previously made document requests and demands that it is withholding from production on the basis of privilege." Respondent misconstrued Procedural Order No. 4 as the order did not state that the parties were to specifically identify only those documents this tribunal previously compelled or ordered to be produced. Rather the plain meaning of the order read in its entirety demonstrates that any documents responsive to requests for production being withheld on the basis of privilege were to be identified specifically and those withheld on other bases could be logged categorically. Nor is there anything in prior rulings that would have placed a temporal limitation on my ruling finding that WFW jointly represented Levona and Eletson. If Respondent wanted to raise these issues, it could have done so, but first, it needed to identify the documents and communications at issue by logging them pursuant to Procedural Order No. 4.

On March 7, 2023, Pach Shemen—a special-purpose vehicle owned and directed by the same entities and representatives as Levona—was one of the petitioning creditors who commenced an involuntary bankruptcy petition against Eletson Holdings. (C-749; C-

751; C-746.) As a result of this filing, Levona insisted that the Bankruptcy Court's automatic stay applied to these proceedings. Claimant emphatically disagreed, but on March 10, 2023, by an order issued by email, I stayed the instant arbitration proceedings "pending further order or notice from the Bankruptcy Court for the Southern District of New York." I did so despite Claimants' objections, in part, because Respondent insisted that continuing with the arbitration proceedings, and/or any compliance with orders of this tribunal, would violate federal law. In other words, they would not comply with any further rulings by me or appear at the evidentiary hearing, which at that time, was scheduled to commence on April 24, 2023, and continue for thirteen days.

In staying the proceedings, however, I reminded the parties that, "pursuant to the arbitration agreement requiring the parties to in good faith work towards an evidentiary hearing within 150 days, if the Bankruptcy Court shall find that this arbitration is not stayed, I will take the steps necessary to ensure timely completion of this arbitration and order the immediate completion of the pending and near term deadlines for document production and the exchange of expert reports. In the event the Bankruptcy Court denies a stay, any party that fails to comply with these deadlines may be subject to preclusion." (March 10, 2023 Email Order.)

On April 17, 2023, by stipulation and order of the court, the Bankruptcy Court lifted the Automatic Stay. (C-00781; LEV214.) I held a status conference that same day and this arbitration resumed. At this April 17th conference, the parties agreed to dates for the evidentiary hearing, which, at that time, was to commence on May 8, 2023, and continue for ten days.

On May 3, 2023, by email, the parties entered into a stipulation, pursuant to which they agreed, *inter alia*: to abbreviate the hearing schedule and split the hearing time equally

between them. The parties futhte stipulated that "the schedule is fair and reasonable and [they] waive any objection to the schedule ordered or otherwise determined by the Arbitrator. The parties stipulate that each has no challenge or objection to the arbitration on fairness grounds or on the basis that it has not been granted enough time to prepare for or present its case." This stipulation was memorialized in Procedural Order No. 6, dated May 6, 2023.

On May 5, 2023, the parties served their JAMS Rule 20(b) submissions. In their submission, Claimants stated that "The preferred interests at issue in this arbitration, from their issuance up until the execution of the BOL and even thereafter, were never owned or controlled, directly or indirectly, by Holdings, Eletson Corporation, the Company, or any other entity directly or indirectly affiliated with any of these entities. (Claimants' Rule 20(b) Statement ¶ 100.) Rather, from "January 2022, at the latest, the families owning or controlling the Eletson holdings in the Company determined to nominate three entities independent of Holdings, Eletson Corporation, the Company, or any other entity directly or indirectly affiliated with any of these entities to hold the preferred interests." (Claimants' Rule 20(b) Statement ¶103.) The three entities are Cypriot entities by the names of Fentalon, Apargo, and Desimusco ("Preferred Nominees"). (*Id.*) Each of the three Preferred Nominees is related to one of the three principal Eletson families. In response to this claim, on May 10, 2023, Respondent filed its Motion to Strike Claimants' New Allegations of the Transfer of the Preferred Shares to the Preferred Nominees, or in the Alternative, to Dismiss Claimants' Claims in Chief ("May 10, 2023 Motion to Strike or Dismiss").

Also on May 5, 2023, in addition to their JAMS Rule 20(b) submissions, the parties filed motions in limine. Eletson filed a motion in limine to bar Levona from using documents from Peter Kanelos as Eletson admissions. Levona's motion sought to exclude:

(1) extrinsic evidence relating to the BOL and Transaction Documents; (2) evidence unrelated to claimed breaches of the LLCA, including allegations of misconduct before and after Levona acquired its interest in the Company; (3) evidence related to the actions of Pach Shemen; and (4) correspondence between Levona and WFW. The parties opposed each other's motions on May 10, 2023.[2]

On May 12, 2023, I issued Procedural Order No. 7 addressing additional motions to compel. Relevant to this Corrected Interim Award I specifically ordered the following:

> Respondent has represented that it has produced all communications between Levona and WFW, but that it has not produced communications between Murchinson and WFW based in part on the grounds that Murchinson is a separate entity, with its own separate extension of the attorney-client privilege, and not under Respondent's or its counsel's control. However, throughout these proceedings, the information provided thus far gives the impression that Murchinson is substantially responsible for the creation of Levona. It has also been involved in this arbitration, including having the principal of Murchinson, Mr. Bistricer, attend depositions and potentially appear as a witness for Respondent at the evidentiary hearing. Moreover, in response to a prior ruling ordering the production of documents relating to Peter Kanelos, Respondent's counsel indicated that it was able to get Murchinson to voluntarily produce documents. Counsel is advised to make its best efforts to produce documents responsive to Claimants' request--specifically for relevant communications between Murchinson and WFW--or be prepared for the possibility of an adverse inference or other consequence, if circumstances shall warrant such action based on the evidence presented to me during the evidentiary hearing. (Procedural Order No. 7 p. 5.)

On May 12, 2023, three days before the commencement of the evidentiary hearing, Murchinson's separate counsel sent a letter regarding its production of communications with WFW, which it had still not provided. Insisting that it was not a party to this arbitration, Murchinson was willing to produce documents *in camera*, but had not yet produced the documents in this arbitration because it did not want such production to be a

[2] As will be addressed throughout this Corrected Interim Award, Levona's motion is denied. Eletson's motion is largely mooted—as discussed, *infra*, I have given any documents drafted by Mr. Kanelos appropriate weight.

waiver of its claimed attorney-client privilege. It urged me to reconsider my ruling in Procedural Order No. 7. After additional correspondence, I declined to do so.

First, Murchinson could not have it both ways—on the one hand, insist it wasn't a party to these proceedings and that therefore I lacked jurisdiction over it, but on the other hand, cherry-pick which documents to provide Levona to produce, and have its representatives actively appear and participate in status conferences, depositions, and the evidentiary hearing in this arbitration. Second, I disagreed with Murchinson's claim that it had not waived its attorney-client privilege. Finally, Murchinson's proposal to produce the documents *in camera* was unreasonable and unfeasible given that the evidentiary hearing had already commenced. Thus, by email order, dated May 17, 2023, subject to certain protections upon production, I reiterated my ruling that "Murchinson and WFW communications shall be immediately produced, or Levona should be prepared for the possibility of an adverse inference or other consequence, if circumstances shall warrant such action based on the evidence presented to me during the evidentiary hearing."

The evidentiary hearing proceeded on May 15, 16, 18, 19, 22, 23 and 24, 2023.

IV. PRELIMINARY MATTERS

A. Levona/Murchinson/Pach Shemen

In early 2021, Blackstone contacted Murchison about possibly acquiring its preferred interests. The evidence reflects that there is no correspondence between Blackstone and Levona relating to the acquisition of Blackstone's shares. All correspondence was between Murchinson and Blackstone, as Levona did not exist, and was created for the sole purpose of holding the acquired interests. Levona is owned by Nomis Bay and BPY, which in turn are managed and controlled by Murchinson. (C-802;

C-1053; May 22, 2023 Transcript p. 8:8-22; C-1782 (Deposition of Bistricer) pp. 19:22-20:19.)

It is undisputed that Levona does not have any employees. Similarly, it is undisputed that Levona does not have an email domain, its own bank accounts, or financial records of any kind that would reflect how it valued the preferred shares of the Symi and Telendos after the shares of those vessels were transferred to it. (May 22, 2023 Transcript pp 73:11-74:2.) Curiously, Murchinson's owner Mark Bistricer conceded that Murchinson kept financial records of Levona, but no financial records were exchanged in this arbitration or presented at the evidentiary hearing. Levona insisted throughout these proceedings that it does not have custody or control over Murchinson documents, and as a non-party to these proceedings, Murchinson did not have any obligation to produce documents. Yet, Murchinson did voluntarily produce some categories of documents.

Murchinson employees or agents, including its owner, Marc Bistricer ("Bistricer"), counsel, Mark Lichtenstein ("Lichtenstein"), and agent, Adam Spears ("Spears") also voluntarily appeared throughout these proceedings. It was presumably Bistricer/Murchinson who designated Hasset, Fenttiman, Lichtenstein, and Spears as Levona directors to sit on the Company's Board, as Levona has no employees. Bistricer, Spears and Lichtenstein all attended one or more depositions of Eletson witnesses in this arbitration. (*See, e.g.,* J-40 (Deposition of Lascarina Karastamati); J-41 (Deposition of Vassilis Kertsikoff).) Indeed, at several Zoom status conferences and arguments, "Murchinson" was one of the remote participants. Bistricer and Spears both voluntarily appeared for depositions in this arbitration. (C-1782; C-1783.)

Despite these facts, throughout these proceedings, Levona has insisted that Murchinson is a separate entity and not a party to these proceedings. The evidence

presented at the evidentiary hearing, however, demonstrates conclusively that although technically two separate corporate entities, Murchinson and Levona are not distinct for any purposes relevant to these proceedings. Levona, a shell entity, is controlled and directed by Murchinson. While Levona may be the named party, Murchinson is the real party in interest. Bistricer testified: "We bought from Blackstone their position in Eletson Gas . . . we bought everything.") (May 22, 2023 Transcript p. 7:20-8:3.) The documentary evidence further supports this. (*See, e.g.,* C-841 (Bistricer stating "Shareholders say Murchinson related entities. Levona Holdings is the SPV *we* made acquisition in.")(emphasis added); C-950 (discussing a loan of $2 million to the Company, Spears states, "this took a lot of work to get Marc [Bistricer] to agree to open his wallet."); C-1240 (Spears states "I have included . . . a background on Murchinson which is the firm behind the investment in Eletson Gas LLC.").) Murchinson's own counsel represented to third parties that Levona was owned and controlled by Murchinson. (C-1463 (email from WFW attorney, Saunders stating "Levona Holdings (an entity owned and controlled by Murchinson) . . .").)

Thus, any ruling I render in this arbitration extends to Murchinson. Any award in favor of Levona is really in favor of Murchinson, and similarly, any award finding liability and damages against Levona, is owed by Murchinson.

The same is true for Pach Shemen—another special purpose vehicle, with the identical ownership as Levona, directed by the same Murchinson representatives, including Spears and Lichtenstein, and seemingly created for the sole purpose of purchasing a controlling interest in the outstanding bond debt of Holdings so that three weeks later, it could direct the involuntary bankruptcy filing against Holdings. (C-751.)

Correspondence relating to the purchase of these bonds demonstrates how Pach Shemen is intertwined with, and indistinct from, Levona. In fact, "Levona II" was the

originally-contemplated name for the Pach Shemen entity. In a December 8, 2022 email from Spears to a selling bondholder, setting out the trade terms in connection with the purchase of these bonds, Spears promises the following to the selling bondholder:

> 2. $500k *if the arbitration ends* to ***our*** satisfaction on Eletson Gas and ***we*** can exercise our rights to act as Preferred to sell Eletson Gas vessels and/or the Company (Eletson Gas) without legal interference. 3. 10% of the value received by Levona for its Preferred Shares in Eletson Gas . . . 4. 1/3 of the first $3 million profit ***realized by the entity buying these notes (Levona II)*** . . . 5. Thereafter 25% of any profit realized by ***Levona II*** after the first $3 million profit . . . . (C-0746.0008 (emphasis added.)

Notably, Spears is promising potential monetary benefits received in connection with this arbitration, and any value relating to the preferred shares of the Company, as compensation in connection with the purchase of the notes by Levona II, which when subsequently created, was instead named Pach Shemen. If truly separate entities, how could Spears make such a promise? The answer is because the separateness is in name only. Pach Shemen and Levona are not distinct for any meaningful purposes relevant to these proceedings. They are alter egos of one another, with identical corporate ownership and management.

Accordingly, Ideny Levona's motion in limine to exclude evidence relating to Pach Shemen.

B. <u>WFW and Peter Kanelos</u>

i. Peter Kanelos

Peter Kanelos was the CFO of Eletson Corporation and a representative of the Company. The parties dispute whether he was also CFO of the Company. The evidence demonstrates that before it acquired the preferred interests from Blackstone, Murchinson was secretly communicating with Kanelos about strategies for (a) lowering the purchase price to acquire the Blackstone shares and (b) what to do with the assets of the Company

once Levona became the preferred holder. (C-1599; C-1600; C-1615; C-1616; C-1617; C-1618; C-1623; C-1625; C-1635; C-1638; C-1640; C-1641; C-1642; C-1647; C-1648; C-1649; C-1664; C-1960; C-2018.) Murchinson used Kanelos to acquire the Company's confidential information and to communicate that information to the Company's financiers, along with Murchinson's proposals, to refinance the Company's debt. (*See*, *e.g.*, C-463; C-1600; C-1615; C-1616; C-1618; C-1623; C-1640; C-1641; C-1642; C-1647; C-1648; C-1649; C-1664.)

Unbelievably, Kanelos, a long-time employee and confidant of the principals of the Eletson entities was promised compensation commensurate with the ultimate strategy Murchinson employed. For example, in an email dated October 1, 2021, Bistricer writes to Kanelos: "You will get 10% of whatever profit we make on this transaction, should it go forward. The 10% will be paid once we have received our capital back minus a reasonable return of capital." (C-1678.)

It is beyond cavil that Kanelos was acting contrary to his duties as an officer or representative of Eletson and the Company, and that he and Murchinson actively concealed their communications. In all of the above-cited correspondence, Kanelos intentionally used his personal gmail account, not his Eletson email address. In an October 31, 2021 email, Kanelos admitted that he was working on behalf of Murchinson's interest. "After sourcing the deal for Murchinson I have worked very hard for a year in your team's interest (and continue to do so even if the plan is to ultimately liquidate the company. *While I am happy to align my interests with Murchinson* . . . .") (C-1679, emphasis added.)

Murchinson and Kanelos both took active steps to conceal their clandestine communications. For example, on November 1, 2021, Lichtenstein sent Kanelos a "Confidential Summary of Terms" summarizing the compensation to be paid to Kanelos.

(C1680; C-1681.) Then just a few days later, on November 5, 2021, the day Levona became the preferred interest holder, Lichtenstein sent Kanelos an email to his Eletson address, attaching the notices of replacement of Blackstone directors, acting as if he had never met Kanelos. Addressing him formally, Lichtenstein writes: "Dear Mr. Kanelos, Nice to meet you. I have located your contact information on the Eletson website and am hoping you can be of assistance." (LEV025 p. 6.) There is also evidence that Kanelos would caution recipients of his emails not to disclose the communications or any negotiations to Eletson. (*See, e.g.*, C-1704.) As one example, on May 5, 2021, Kanelos sent an email from his gmail account, on behalf of Murchinson and stated that "[d]ue to the sensitivity of this deal ONLY use my Gmail to communicate to me." (C-567.)

After Levona became the preferred holder, Murchinson formalized its compensation arrangement with Kanelos in a certain Services Agreement, dated December 19, 2021. (C-1698; C-1699.) Levona/Murchinson followed through with its terms by wiring Kanelos $100,000 on December 21, 2021. (C-1700; C-1701.)

In an attempt to defend its secret communications with Kanelos both pre- and post-acquisition of Blackstone's interests, Levona has insisted that Kanelos was the CFO of the Company, not just Eletson Corporation, and that its communications with him were entirely proper as the preferred shareholder of the Company. Upon closer look, however, this argument quickly falls apart and only bolsters Eletson's assertions of impropriety. Even if he were the CFO of the Company, he was also the CFO of Eletson Corporation—he had duties to Eletson and his secret incentivization agreement with Murchinson was clearly a conflict of interest that was induced by Murchinson and never disclosed by anyone to Eletson. Moreover, the nature of the correspondence pre-November 2, 2021—before Murchinson/Levona had any claimed interest in the Company—makes it clear that Kanelos

was acting against the interests of the Company and was aligned with Murchinson. Accordingly, even if Kanelos was the CFO of the Company, this does not absolve Murchinson.

In fact, Levona's insistence that Kanelos was a representative of the Company, only serves to undermine its arguments that there was an attorney-client privilege between Murchinson and WFW.

ii. WFW

Throughout these proceedings, there has been a lot of discussion concerning the representation of WFW. Based on the evidence presented, separate offices of the firm represented both parties both pre- and post- Levona's acquisition of Blackstone's interests, including in connection with the Transaction Documents. The Athens Office represented Eletson and the London office represented Murchinson/Levona. WFW partner, George Paleokrassas, testified that he believed an appropriate ethical wall was in place to protect the propriety of this dual representation, although no documents were provided in support of this claim. (May 19, 2023 Transcript pp. 243:22-244:8.)

In attempt to preserve its claimed "attorney-client privilege," Murchinson argues that it was told by WFW that there was no conflict. While WFW represented that it would not have a conflict, WFW attorney Frank Dunne also stated that the firm had done work for Eletson Gas, knew the Company well, and that his "understanding [was] that [Murchinson was] looking at doing something at the shareholder level, which would not put my Firm on the other side of anything from you." (C-1973 p. 7.) This turned out not to be true, and Murchinson was well aware of this.

The main problem with any claim of attorney-client privilege between WFW and Murchinson is that Peter Kanelos climbed back and forth over this supposed ethical wall

numerous times and Murchinson/Levona knew this. Kanelos indicated in emails to Murchinson that he was working with WFW Athens in connection with pre-acquisition Murchinson strategies. (*See, e.g.,* C-1598; C-1614.) On May 26, 2021, attorney Karamacheras from WFW Athens sent Kanelos an email providing an analysis of the Company's restructuring of certain Company financing, pursuant to which WFW acted as the Company's counsel in 2020. Kanelos then forwarded this analysis to Murchinson and indicated that there was a "[n]eed to speak with Frank Dunne"—the attorney on Murchinson's side of the wall. (J-35.) Kanelos was also copied on communications from Dunne to Murchinson. For example, on June 13, 2021, Dunne sent an email to Murchinson, copying Kanelos at his gmail account providing an analysis to liquidate the Company. (C-465.)

Thus, Murchinson/Levona knew Kanelos was sharing Eletson "privileged" information with Murchinson and receiving Murchinson "privileged" information. Thus, Murchinson could not have reasonably had any expectation of privacy in its communications with WFW. Murchinson cannot on the one hand claim that Kanelos was the CFO of the Company, and on the other hand, claim attorney-client privilege with WFW-London when it is sharing communications with Kanelos. Thus, as per my prior rulings, any claim of attorney-client privilege has been waived by both Levona and Murchinson, based in part on the dual representation of the firm in connection with the Transactions, and Murchinson/Levona's inability to claim an expectation of privacy when it was knowingly providing WFW communications to Kanelos. (*See* Procedural Order Nos. 4, 7 and May 17, 2023 Email Order.) Thus, any communications between Murchsinon/Levona and WFW are admissible and Levona's motion in limine is denied.

Eletson asks me to go one step further and find that WFW conspired with Murchinson against the Company. However, WFW is not a party to these proceedings. What WFW knew or did not know, and what WFW may have done or not done, is outside my jurisdiction. I therefore decline to reach any conclusions with respect to the propriety of WFW's dual representation.

C. The Preferred Nominees

Eletson claims that if they fulfilled the obligations under the Transaction Documents and bought out Levona, the preferred interests were transferred to the "Preferred Nominees." Eletson witnesses testified that from the outset of the time that the parties began discussing the buyout of Levona's interests, Eletson intended the preferred units to go to nominees of the Company, and that it told Levona of this intention. (C-1963 ¶101; C-1964 ¶ 193.)

The parties confirmed this language in the BOL, which expressly provides that "Levona hereby grants Eletson Gas the option . . . for either Eletson Gas or its nominee to purchase all of the membership interests held by Levona in Eletson Gas . . . ." (J-6 ¶ 2.1.) Indeed, this issue was acknowledged and agreed to by the parties in correspondence relating to the proposed buyout. For example, on February 21, 2022, Kertsikoff responded to a draft of the BOL sent by Spears and states that in regards to Clause 2.1, "we also need to delete references to Eletson Corporation in this clause and allow for Eletson Gas 'or its nominee' to be the buyer of the interests." (C-107.) (*See, also,* J-14 (reflecting that Levona knew about the Company's intention to transfer the interests to nominees in a January 10, 2022 email from Spears stating "We agree that upon closing . . . Levona shall transfer to the Company or, as the case may be, its nominated affiliate . . . all of the Membership Interests.").) Indeed, Spears stated that Murchinson did not object to the Company's

"constitutional documents being amended upon completion so that all membership interests in the Company become common units . . . although we do see this as technically a post closing matter than can be agreed between the new shareholders without Levona's involvement." (J-14.) *See, E. I. Du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1990 Del. Super. LEXIS 351, *17-18 (Del. Super. Ct. Sept. 19, 1990) (even where the parol evidence rule applies, it only applies to prior or contemporaneous evidence "offered for the purpose of varying or contradicting the terms of an integrated contract and does not exclude evidence offered for the purpose of interpreting and giving a meaning to those terms."); *see also Fox v. Paine*, 2009 Del. Ch. LEXIS 10, *17-18 (Del. Ch. Jan. 22, 2009) (even for unambiguous contract, court may "consult extrinsic evidence secondarily to confirm the 'conclusion that the contract language is unambiguous, evidencing . . . the shared intent of the parties' at the time of they entered the contract. Situations exists where the court may 'consult undisputed background facts to place the contractual provision in its historical setting without violating' the principle that the court not consider extrinsic evidence when interpreting an unambiguous contract") (footnotes omitted), aff'd, 981 A.2d 1172 (Del. 2009).

The evidence presented in this arbitration demonstrates that the Eletson families agreed to the contingent transfer. (*See* C-786; C-787; C-788; C-789; C-790.) This agreement would take effect immediately upon Eletson's exercise of the option, *i.e*. the transfer of the Symi and Telendos and the assignment of the claims. (C-1964 ¶¶ 194, 198; C-1963 ¶ 104; C-1968 ¶¶ 105-109.)

The initial discussions are corroborated by a note drafted by Kertsikoff's sister on January 10, 2022. (C-789.) The note informed Kertsikoff's mother that "our Cypriot [company] is about to acquire a new asset," and further stated, in part, that "as soon as

[Murchinson/Levona] leave, their position needs to remain outside the group" (C-789; C-1964 ¶ 197.) In early March 2022, Mr. Hadjieleftheriadis prepared a document memorializing the agreement to transfer the preferred shares, on a contingent and conditional basis, to the Cypriot companies, including the amount that was agreed to be paid. (C-1968 ¶ 105.) The document included the total estimate of the amount of the preferred shares and how those shares would be split among the three Cypriot companies. (C-787; C-1968 ¶ 105.) Mr. Hadjieleftheriadis also included information about the prospective sale of the assets that the three Cypriot companies own, and what percentage of the asset would be paid, which was €3 million. (C-787; C-1968 ¶ 105.)

Testimony and evidence reflect that on August 2, 2022, the three principal families owning or controlling the Eletson holdings in the Company had a meeting in Piraeus, Greece. (C-1968 ¶ 106.) During that meeting, the families discussed the contingent transfer of the preferred shares to the Preferred Nominees. (*Id.*) Mr. Andreoulakis, Eletson in-house counsel, took concurrent notes with this respect to this meeting. (C-786; May 16, 2023 Transcript p. 26:14-21.) The notes state, in relevant part, that Levona suddenly reneged on its exit obligations and maintained—albeit wrongly—that the preferred units remained under their control, even though Eletson had told Levona before the BOL was executed that the preferred units would go to nominees outside of the Company. Eletson did not tell them the names of the nominees but told them that it was not Eletson Holdings. (C-786; C-1963 ¶ 108.)

On October 11, 2022, the three principal families had another meeting. Again, the families discussed the agreement and that the Preferred Nominees would support the cost of the litigation as part of their obligations under the agreement. Mr. Andreoulakis took notes with respect to this meeting as well. (C-790; C-1963 ¶ 109; C-1968 ¶ 107.)

In October 2022, Mr. Hadjieleftheriadis forwarded to his brother and sister, through his secretary, the 2018 and 2019 financial statements of his Cypriot company, Desimusco (C-788.) The post-it note on the document stated: "Kostis/Helen please sign. I remind you that this company owns since March the 1/3 of the Blackstone share in Gas" (C-788; C-1968 ¶ 108.)

It is undisputed that Eletson raised this contingent transfer to Cypriot nominees for the first time in its Rule 20(b) submission on May 5, 2023. Accordingly, Levona then filed its May 10, 2023 Motion to Strike or Dismiss. I reserved decision on this motion.

I now deny Respondent's Motion to Strike or Dismiss.

While Levona cites statements made by Eletson witnesses or counsel in various filings in this arbitration that purportedly contradict Eletson's current stance, I disagree with Levona's interpretation of these statements. For example, Levona cites to statements made by Kertsikoff and Eletson's counsel that post-March 11, 2022, "Eletson held itself out as the sole shareholders of the Company." (*See* May 2023 Motion to Strike or Dismiss, pp, 2-4.) "Eletson" in this context, however, includes its affiliates. (*See, e.g.,* J-43 ¶ 1.) Both Karastamati and Kertsikoff testified at the hearing that the Preferred Nominees are affiliates of Eletson. (C-1963 ¶ 104; C-1964 ¶ 194.) In addition, at the evidentiary hearing, Karastamati testified "when we say Eletson we mean Eletson family, we mean Eletson affiliates, we mean Eletson family, Eletson Group . . . it is the common shares and the Eletson family." (May 16, 2023 Transcript pp. 150:15-151:2.)

While I acknowledge that the lack of earlier notice by Claimants to Levona of the contingent transfer of any preferred shares to the Preferred Nominees initially raised concern to me, the Eletson witnesses' testimony was both wholly credible and sincere. It is clear that even when Blackstone was the preferred holder, the Eletson witnesses viewed

the Company as a family company. In their day-to-day discussions, they may not have spoken in corporate formalities, however, there is nothing in the record supporting a determination that there was any bad faith or misconduct on their part. Moreover, representatives from each of the Preferred Nominees have testified that they are bound by any award in this arbitration.

In addition, Levona was not prejudiced by the late reference to the Preferred Nominees. Eletson produced to Levona the limited documents reflecting this transfer in April, a few weeks before the evidentiary hearing, giving it plenty of time to review the evidence. The parties subsequently entered into the May 3 joint stipulation agreeing to the fundamental fairness of this hearing. "The parties stipulate that each has no challenge or objection to the arbitration on fairness grounds on the basis that it has not been granted enough time to prepare for or present its case." (Procedural Order No. 6, ¶ 8(g).)

Moreover, Eletson's explanation for why the transfer to the nominees was not raised earlier in the proceedings is credible. Karastamati testified that the families "considered [it] to be an intrafamily matter, so [they] thought and believed it was not relevant to this arbitration." (May 16, 2023 Transcript pp. 108:5-11.) It was only after the Levona-related entities including its affiliate Pach Shemen made clear in the Holdings bankruptcy that they would attempt to use the bankruptcy proceedings as an end-run around against any adverse award in this arbitration by claiming that the preferred shares were part of the bankruptcy estate of Holdings, that Eletson felt compelled to set the record straight and make it clear that Eletson Holdings was never intended to directly or indirectly, as owner of the common shares of the Company, own the preferred shares.

Paradoxically, given the strenuous objection made by Levona in its motion to strike, Levona never sought additional discovery nor requested depositions on the issue of the

nominees before or during the arbitration hearing. At the arbitration hearing, Levona did not conduct any meaningful cross-examination of the three Eletson witnesses who testified about the contingent transfer to the Preferred Nominees or present any contradicting evidence. Levona also did not raise any credible reason why this transfer, at the time of the closing or post-closing of the Transactions, would be prohibited under the Transaction Documents.

Given the full history of these proceedings, the pleadings, and the evidentiary record in these proceedings, including the credibility of the Eletson witnesses, I deny Levona's May 2023 Motion to Strike or Dismiss.

V. ANALYSIS AND DECISION OF THE MERITS OF THE PARTIES' CLAIMS AND COUNTERCLAIMS

A. Eletson Exercised the Option Pursuant to the Terms of the BOL

Pursuant to the BOL, Levona granted the Company and Eletson Corporation a purchase option, whereby Levona agreed to be bought out of its stake in the Company.

Section 2.1 of the BOL provides:

> Subject to and in consideration of the Transfer occurring and the conditions set out in Clause 2.2 and 2.3, Levona hereby grants to Eletson Gas the option exercisable by written notice to Levona by both of them (an "Option Notice"), for either Eletson Gas or its nominee to purchase all the membership interests held by Levona in Eletson Gas (the "Option Membership Interests") for a consideration equal to the Purchase Option Consideration payable in cash on completion of the transfer of the Membership Interests to such account as Levona may nominate in writing. (J-06 § 2.1.)

Section 2.2 provides that an Option Notice may only be served after either:

> (a) the Loan and any interest accrued thereon is fully repaid; or
>
> (b) adequate security and/or collateral is provided for the Loan (the adequacy of such security being at the sole discretion of Levona). (J-06 § 2.2.)

Pursuant to Section 2.3, Eletson Gas had to exercise the option by sending the Option Notice within thirty days from the date of the BOL, unless the period was extended pursuant to Sections 2.4 or 2.5. (J-06.)

"Purchase Option Consideration" is defined as "an amount equal to US$1 plus an amount equal to US$23,000,000 less the Net Value. If the Net Value is equal to US$23,000,000, the Purchase Option Consideration shall be US$1. If the Net Value exceeds US$23,000,000 the amount outstanding under the Loan shall be reduced by the amount of the difference." (J-06 § 3.2.)

Section 3.3 of the BOL specifies that "The Net Value shall be calculated as follows: . . . the Net Value shall be based on a third party independent valuation of the vessels owned by the Companies less the mutually agreed debts, costs, outgoings, expenses, trade debts and other liabilities of the Companies (including, if such vessels remain on finance lease, the purchase option price thereunder and the estimated fees and expenses of an eventual onward sale of the vessels) plus bunkers and lubs at the time of the transfer of the Companies to Levona." (J-06.)

Following the execution of the BOL, on March 11, 2022, the parties entered into a series of transactions and executed the Transaction Documents.

The language in the BOL is unambiguous, and neither party argues otherwise. "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Motors Liquidation Co. DIP Lenders Tr. v. Allianz Ins. Co.*, No. N11C-12-022 PRW CCLD, 2017 Del. Super. LEXIS 279, at *16 (Super. Ct. June 8, 2017). Moreover, the BOL and Transaction Documents contain merger clauses. (*See e.g.,* J-06 ¶ 9.2.) It is well settled that "where a contract contains a merger clause, it will be enforced as written and cannot be added to, varied, or contradicted by

parol evidence." *Revolution Retail Sys., Ltd. Liab. Co. v. Sentinel Techs., Inc.*, No. 10605-VCP, 2015 Del. Ch. LEXIS 276, at *57 (Del. Ch. Oct. 30, 2015) (citation removed); *see also Matthius v. Platinum Estates, Inc.*, 2010 NY Slip Op 4965, ¶ 2, 74 A.D.3d 908, 909, 903 N.Y.S.2d 477, 479 (App. Div. 2nd Dept.) ("The purpose of a merger clause is to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary, or contradict the terms of a written agreement.")

It is undisputed that the Loan remains outstanding and has not been fully repaid pursuant to Section 2.2. Thus, Eletson could only have exercised the option to buyout Levona pursuant to the BOL if it paid Levona the Purchase Option Consideration and provided adequate security and/or collateral for the Loan. (J-06.) The record establishes that Eletson satisfied both of these conditions.

i. Purchase Option Consideration

The evidence establishes that Levona received the Purchase Option Consideration. Pursuant to the Share Transfer Agreement, on March 11, 2022, the Company paid the Purchase Option Consideration by transferring the shares of the Symi and Telendos. (J-08.) The total transfer had and still has a value in excess of the $23 million price set forth in the BOL. (C-1900 ¶¶ 48-89; C-1897 ¶¶ 24-31.)

The record does not support Levona's contention that the transfer of the shares of the Symi and Telendos was the consideration for the option to buyout Levona, rather than the Purchase Option Consideration exercising that option. Section 2.1 expressly provides that "consideration equal to the Purchase Option Consideration" would be paid "on completion of the transfer of the Membership Interests." Meaning, the $23,000,000 (plus $1) would be paid at the same time the preferred interests were transferred, not for receiving an option to purchase the preferred interests.

In addition, transferring the shares in the Symi and Telendos without transferring Levona's interests in the Company would lead to a breach of the LLCA. Section 6.2 of the LLCA prohibits Members (which would include Levona as the preferred interest holder), from acquiring or owning any vessels such as the Symi and Telendos.

Section 6.2 provides, in relevant part, that:

> 6.2 Restrictions on Activities of the Members. Eletson and the Special Member agree that, except for activities engaged in through the Group Companies, none of Eletson or any of its Affiliates (including the Special Member) will directly or indirectly acquire, own, operate, charter or engage in the management of any LPG, ethylene, petrochemical gases and ammonia sectors. Each of BX, Blackstone Family and BTO SMD agrees that it shall not have a direct interest in the ownership of any vessels employed in the transport of LPG, ethylene, petrochemical gases or ammonia . . . . (J-01 § 6.2.)

This is essentially a non-compete clause—a concept also reflected in the LLCA's definition of "Ineligible Person." (J-01 p. 9.) Indeed, Levona should have been aware of this restriction as Blackstone flagged this issue for WFW, Murchinson's, counsel in October 2021—ensuring that Murchinson did not compete with the Company, otherwise it would be ineligible to purchase Blackstone's interests. (CM-2003.) Thus, the only reasonable interpretation of the BOL is for the transfer of the shares of the Symi and Telendos to constitute consideration for the buyout of Levona. Any other reading would be inconsistent with the parties' obligations under the LLCA.

Here, the parties' correspondence leading up to, and in connection with, the drafting of the BOL confirms this interpretation and the shared intent of the parties. *See, E. I. Du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1990 Del. Super. LEXIS 351, *17-18 (Del. Super. Ct. Sept. 19, 1990) (even where the parole evidence rule applies, it only applies to prior or contemporaneous evidence "offered for the purpose of varying or contradicting the terms of an integrated contract and does not exclude evidence offered for the purpose of

interpreting and giving a meaning to those terms."); *see also Fox v. Paine*, 2009 Del. Ch. LEXIS 10, *17-18 (Del. Ch. Jan. 22, 2009) (even for an unambiguous contract, a court may "consult extrinsic evidence secondarily to confirm the 'conclusion that the contract language is unambiguous, evidencing . . . the shared intent of the parties' at the time of they entered the contract. Situations exists where the court may 'consult undisputed background facts to place the contractual provision in its historical setting without violating' the principle that the court not consider extrinsic evidence when interpreting an unambiguous contract") (footnotes omitted), *aff'd*, 981 A.2d 1172 (Del. 2009).

Early negotiations in January 2022 demonstrate that Murchinson sought $23 million in return for its preferred interests to be paid either in cash or by transferring the title in the Symi and Telendos. (J-14, stating "Should the Closing not take place by 28 February 2022 (the 'Longstop Date'), the parties agree that the Company shall transfer title to two of its vessels to Murchinson Ltd. *as good and valuable consideration for the transfer of the Membership Interests* to the Company or, as the case may be, its nominated affiliate; the two vessels which shall be transferred should the Closing not take place by the Longstop Date are v. Symi and m.v. Tenendos [sic]" and "Immediately upon transfer of the Membership Interests, whether at the Closing simultaneously with payment of the Consideration *or in exchange for the transfer of title in the Vessels* . . . the Company's constitutional documents shall be amended so that all membership interests in the Company become common units….") (emphasis added).

While the scope of the buyout changed to include Levona's providing a loan to the Company, the negotiations concerning the ultimate consideration to be paid to Levona for its interests remained $23 million, not $23 million plus the value of the Symi and Telendos (which, not coincidentally, at the time of the negotiations of the BOL was valued at or

around $23 million). (*See, e.g.,* C-0107, email from Kertsikoff to Spears stating "as you are aware, we have been negotiating the sale of the Symi and Telendos for some time now and the latest price we have (as of yday [sic] is at (NAV equivalent) $22.7m.") For example, Spears confirmed the expected value for the transfer of Levona's interests on February 22, 2022: "our intention is not to try and get more than $23 million through this arrangement.") (C-1037.) Spears confirmed this at the hearing stating that Murchinson/Levona wanted "23 million . . . for the sale of the preferred [shares]." (May 22, 2023 Transcript pp. 198:22-199:10.)

In addition, the evidence demonstrates that the transfer of the Symi and Telendos was adequate consideration. Eletson's experts Peter Daniel and Nikolaos Veraros both calculated the Net Value of the Symi and Telendos, using independent valuations, as contemplated by the BOL. I find both of these calculations reasonable and credible. Mr. Daniel calculated the Net Value as $24.2 million. (May 18, 2023 Transcript 190:3-12.) Mr. Veraros calculated the Net Value as of March 11, 2022 as $24,858,651, less a 1 percent broker commission. (C-1903 ¶¶ 26-31; C-1903.0017.) Then, following the BOL, Mr. Veraros testified that he "adjusted for the rest of the assets and the liabilities of these two companies, as per the information from the company," and concluded that the Net Value was approximately $24.8 million (May 18, 2023 Transcript p. 276:14-23.) He further testified that he felt that a 1 percent broker commission would likely be standard for this transaction, and that approximately $665,000 should accordingly be deducted from his Net Value calculation. (May 18, 2023 Transcript pp. 276:18-278:12.)

Levona's expert, Kristoffer Slangsvold's valuation is not persuasive. Rather than rely on independent valuations, such as those by Arrow and Braemar, as Eletson's experts did, and as contemplated by the definition of Net Value in the BOL, Mr. Slangsvold

decided to conduct his own valuation of the Symi and Telendos. (J-47.) In addition, Mr. Slangsvold, prior to being retained as Levona's expert for the arbitration, had communications with Levona personnel about the potential sale of the Symi and Telendos. Notably, at the time of this outreach, the contemplated value for the two vessels was more than $23 million. Accordingly, Mr. Slangsvold testimony does not carry as much weight as the valuations of Mr. Daniel and Veraros. (May 24, 2023 Transcript p. 37:04-15.)

Moreover, as Dr. Furchtgott-Roth explained, the transfer of the Symi and Telendos without the reciprocal transfer of Levona's membership interests in the Company would be economically irrational, and that despite the references to the word "option" in the BOL, the BOL would more accurately be characterized as a "forward contract." (C-1902 ¶ 29.) He states:

> I have not seen any explanation why, according to Levona, Eletson would have transferred assets worth $23 million but then never bothered to exercise the option that would then have cost it $1.00. An economist would not lightly assume any such economic irrationality. Although the BOL describes parts of the contract as an "option" and other parts without reference to an option, I find, from an economic perspective, that the BOL would more accurately be characterized as a "forward contract," in that both parties to the BOL agree to a future transaction at a price agreed upon in the BOL. (C-1902 ¶ 29) (footnotes omitted).

ii. Adequate Security and/or Collateral

The evidence also proves that Eletson provided adequate collateral for the Loan, which thereby should have triggered the exit of Murchinson/Levona from the Company. Pursuant to the Assignment of Claims executed on March 11, 2022, Eletson and EMC Gas, subsidiary of Eletson Gas, assigned Levona claims against the Company and the vessel subsidiaries for management fees and liquidity support. (J-9.)

Eletson's expert, Dr. Furchtgott-Roth testified that there is a clear distinction between security and collateral: "To me, in the context of BOL, collateral would be -- could

be a broad class of assets where a security probably means something that there's a direct party involved. . . . A security would be an asset where there is a marketable -- marketable -- it's an asset such as a bond, something that you can go into some market and trade it for a -- . . . . What I'm saying is, in this case, security in my mind is -- is narrower. And collateral would include security, but could include things that might not qualify as a security" (May 19, 2023 Transcript pp. 194:15-195:13.) Levona did not provide any persuasive contradicting evidence. Accordingly, I find that the assignment of claims constituted "collateral" not "security under the BOL.

While the terms of the BOL provided Levona sole discretion to approve "security," it did not have sole discretion to approve collateral, and nothing in the BOL precludes the management fees or liquidity support claims from constituting collateral (J-06 ¶ 2.2(b) ("adequate security and/or collateral is provided for the Loan (the adequacy of such security being at the sole discretion of Levona.").) The evidence supports the conclusion that Eletson discussed the nature of the collateral it would provide and sent information to Levona relating to the value of these claims prior to the execution of the Assignment of Claims. (C-1004, providing that the management fees as of February 15, 2022 totaled $6,870,204, and the liquidity claims totaled $4,525,076; May 16, 2023 Transcript pp. 330:5-331:13; 336:2-339:8; 348:9-349:11.) Mr. Kertsikoff's testimony as to his conversations with Mr. Spears is credible. (May 16, 2023 Transcript pp. 330:5-331:13; 336:2-339:8; 348:9-349:11.)

Levona's contention that it required the Assignment of Claims not as collateral for the Loan, but as a separate protective measure to prevent Eletson Corporation from attempting to repay itself before repaying the Loan is unpersuasive. As of the date of the Assignment of Claims, the Company had already drawn down $5 million of the loan, on

February 23, 2022. Those funds had been paid to the Company's creditors, and Levona was fully aware of this. Thus, the Company had already received and spent a substantial portion of the loaned funds before any purported "protections" for the loan were put in place. (C-1964 ¶ 61.)

In addition, the assigned claims constituted adequate collateral under the BOL. Eletson provided extensive expert testimony concluding that the nominal and realizable value of the assigned claims, as of the time of assignment, exceeded $10 million. Eletson expert, Mr. Leptos-Bourgi of PricewaterhouseCoopers S.A., reviewed and analyzed the Company's financial data to confirm the nominal value of the assignment of claims, and found that the Management Fees were worth $5,729,362.86, and that the Liquidity Support Claims were worth $4,646,069.07. (C-1901 p. 8.) Experts Daniel and Verraros then analyzed the extent to which the nominal value of these claims was realizable by Levona as of the date of the assignment of claims, and both experts found that the realizable collective value of those claims exceeded $10 million (C-1900 ¶¶ 15-47); C-1897 ¶¶ 9-18).)

Levona's attempt to argue that the claims were valued at less than $10 million fails. First, Levona's expert, Danniel Baer did not conduct the realizable value of these claims, but rather, testified as to how, in his opinion, the claims should have been reported on the financial statements in accordance with GAAP. Mr. Baer did not consider, nor did he view it as relevant to his opinion, the legal ability of the holder of the assigned claims to enforce them (i.e., through the arrest of vessels or other rights such holders would have.) Despite this, he reached an opinion that the holder of the claims—regardless of who that may be—should take an impairment when reporting the value in their financial statements, and report the value of the assigned claims as zero. (May 23, 2023 Transcript pp. 108:22-116:7.)

I do not find Baer's testimony convincing in light of other testimony heard throughout the proceeding, including from Eletson's experts. (*See, e.g.,* C-1897 ¶¶ 15-23.) (*See, e.g.*, C-1917.0002 (testimony of Mr. Daniel stating: "I note that Mr Baer looks to financial accounting standards, and US GAAP in particular, as determinative of the value of the management fees. While the standards Mr. Baer employs may be authoritative tools for financial reporting purposes, they involve the exercise of judgement and are not authoritative bases to determine the value of assets such as the management fees for any purpose other than the preparation of financial statements.").)

Moreover, Levona did not provide any contradicting evidence—it did not produce any financial records reflecting how it valued the assignment of claims (or the Symi and Telendos) on its books as of, or post-March 2022. Murchinson has this information and as discussed, *supra*, did not produce any financial information despite Claimants' requests to do so.[3] (May 22, 2023 Transcript pp. 73:16-74:2.)

The documents and correspondence that have been provided undermine and disprove any notion that Levona did not attribute value to these claims or view the assignment as collateral and/or security. (*See* CM-1979 (email from Murchinson's WFW attorney emphasizing the significance of the management fees to any hostile takeover attempt); C-1951 (email from WFW to Murchinson dated February 20, 2022 suggesting as a condition that "ECorp assign[] all its claims against any group member to Levona as part of the security for any vent you pay in.").) On January 24, 2022, Spears emails Kertsikoff stating: "we allow you to replace some or all of the $4 million cash deposit with

[3] While I have sufficient basis to find that an adverse inference is warranted that Murchinson's records reflect that the value of the assigned claims is at least $10 million, and that the value of the Symi and Telendos is at least $23 million, the evidence presented to determine the adequacy of the consideration and collateral is sufficient without such an inference. (*See* JAMS Rule 29.)

consideration being the management fees that are accrued but unpaid from Eletson Gas (or the shipowning subsidiaries) to Eletson Corp . . . .” (J-15.) Most notably, on May 2022, after the BOL, Spears admits in an email that the assigned claims were worth $10,676,000. (C-1304.)[4]

As a result, the evidence supports the view that Levona knew these claims were worth more than $10 million and that these claims were provided as collateral.

iii. Option Notice

Levona contends that the option was never exercised, and the lack of an express written Option Notice confirms this. I agree with Levona that there does not seem to be a separate formal written notice provided to Levona by Eletson exercising the option. However, the evidence reflects that the parties acknowledged that Eletson was exercising the option.

The agenda for the March 10, 2022 Board Meeting—one day before the execution of the Transaction Documents—includes: “Update on Eletson’s intention to exercise the purchase option.” (J-04.) Ms. Karastamati testified that “for us, the intention means the actual fact because if it is one way [sic] before, it’s the intention, but one day after this is a fact so we believe, we strongly believe that we gave notice to Levona that we were

[4] Levona introduced evidence concerning a lawsuit filed in Greece by Eletson relating to the management claims on the vessels as proof that Eletson did not consider these claims collateral for the loan or assigned to Levona. Eletson offered evidence to the contrary establishing that: (1) the assigned claims included management claims on the Company’s vessels that accrued as of March 11, 2022; there were claims that had accrued after March 2022 that were still owned by Eletson; and (2) the purpose of that lawsuit was to obtain a TRO protecting the claims (both those assigned to Levona and those due to Eletson post-March 2022. Specifically, Eletson sought “to secure our claims” against the Greek Vessels by prohibiting the bareboat charterers “from taking any action which would directly or indirectly have the purpose of transferring or encumbering” the Greek Vessels, which could have impaired or eliminated the ability to collect those claims. (J-38; see also May 22, 2023 Transcript pp. 278:16-287:20.)

exercising the option and gave this notice on March 10 and March 11, we exercised the option. (May 16, 2023 Transcript p. 87:4-13.)

Levona relies on the purported minutes of this March 10th meeting as evidence that Eletson did not exercise the option. Specifically, Levona insists that the reference to "installment" in that document should be deemed to refer to the payment Eletson needed to pay pursuant to the BOL to extend the option period; in other words, proving that Eletson could not exercise the option on or about March 10th and needed an extension of time to do so. However, this document (J-33), and Mr. Lichtenstein's testimony surrounding it, is not credible. Eletson provided evidence about the metadata for this document that supports the inference that it was edited by Mr. Lichtenstein *after* this arbitration commenced. (C-2023.) In addition, the reference to "installment" more credibly relates to the offset to the Loan that would occur if the Net Value exceeded $23 million.[5]

As additional support for the conclusion that the parties acknowledge that Eletson exercised the option, in the Unanimous Written Consent, Ms. Karastamati and Mr. Kertsikoff were appointed and "authorized to sign, execute (under hand or under seal) and deliver the [sic] on behalf of the Company . . . any and all notices to be issued . . . in

[5] It is also worth noting that Mr. Lichtenstein's entire testimony lacked credibility. His witness statement (LEV255) consisted largely of hearsay and statements about events for which he had no personal knowledge, or opinions for which he had no expertise (i.e., rebuttals to expert reports). Prior to the hearing, Levona's counsel insisted Mr. Lichtenstein's presence at the entirety of the hearing was critical and it would be prejudiced if he was not able to attend the entirety of the hearing. Indeed, Levona insisted that Mr. Lichtenstein was a critical part of Levona's legal team, as he was purportedly Levona's General Counsel. Pursuant to my email order, dated May 12, 2023, and to protect against contamination of his witness testimony, I permitted Mr. Lichtenstein to attend the evidentiary hearing, "only after his affidavit of direct testimony is provided to Claimants." Despite its earlier claim of prejudice, Levona waited to call him as their last witness, and submitted his witness statement after almost every other witness (fact and expert) had testified. Yet, his witness statement somehow managed to address every, or almost every, contested issue in the hearing. For the above reasons, his entire statement was given little evidentiary weight and I viewed his live testimony incredible.

connection with the Binding Letter Agreement and be authorized to execute and deliver any notices, acknowledgments or otherwise, to be entered into and done in connection therewith and with the arrangements contemplated thereby." (J-11.) All directors, including the Levona directors signed this, but only the Eletson directors were given this authorization. The fact that only Eletson personnel were so authorized supports the conclusion that Levona was no longer to act as the preferred member. (J-11.)

In addition, Eletson's conduct following March 11 was consistent with the buyout. For example, after the transfer of the Symi and Telendos to Levona, Eletson assisted Levona with the sale of the two vessels to other third parties. Eletson also made efforts to cooperate with Levona's efforts to reflag the vessels from Greece to Liberia and novate the underlying bareboat charters to Levona's interests (C-1968 ¶¶ 9-10.)

Additionally, both parties acted in a manner consistent with the fact that Levona had been bought out of the Company. For example, Eletson continued to manage the day to day affairs of the Company, board meetings essentially stopped, business dealings between Eletson and Levona concerning the Company then revolved around Eletson's repayment of its loan obligations to Levona, plus extensive efforts by Eletson to assist Levona in on-selling the Symi and Telendos, and Eletson held itself out, as the family at large, as the sole shareholder of the Company and sole beneficial owners of the Company's remaining 12 vessels. (C-1964 ¶ 71.)[6]

[6] Levona spent considerable energy and time focused on a July 13, 2022 email from Mr. Kanelos with attachment entitled "Murchinson Buyout Steps" (J-29) and subsequent email from Ms. Karastamati on July 19, 2022. (LEV218.) In Levona's view, the July 13th email is the "smoking gun" of the arbitration and makes clear that the option was not exercised. Levona also insists that additional emails surrounding this document that Eletson withheld as privileged demonstrate that the memo was sent on the advice of counsel and was not privileged. I already denied Levona's motion to compel after reviewing those emails *in camera*. The emails were privileged and do not support Levona's position. As for the substance of the July 13th document, I do not view this as the "smoking" gun Levona does. First, it was drafted by Mr. Kanelos who was being bribed by

Vassilis Kertsikoff repeatedly represented to potential investors that Levona was out of the Company. (C-399 ("Eletson Gas is seeking $30m from a financial/strategic partner to refinance working capital facility provided by its *previous* shareholders and to refinance part of its fleet."); J-26; C-579; C-580; C-581 (emphasis added).)

At best, the absence of a written notice and payment of $1 dollar are formalities that the parties failed to observe.

Levona argues that the fact that the stock registry was updated when Levona purchased Blackstone's interests but has not been updated to reflect Levona's exit is also reflective of the failure to exercise the option. I disagree. The express language of the BOL explains the absence of any update to the stock registry.

Section 3.4 of the BOL provides in pertinent part: "The parties agree to work in good faith to determine and agree the Net Value promptly and no later than 5 days after service of the Option Notice. In the event of any failure to agree the Net Value within the aforementioned period: (a) the Option Notice shall remain valid but the transfer of the Option Membership interests shall be suspended pending agreement or determination of the Net Value" (J-06 at § 3.4.) It is undisputed that the parties have not agreed on the Net Value. Thus, the formal transfer of the interests has been suspended. Levona, however, ceased being the beneficial owner of the preferred since March 11, 2022, and no longer had the right to vote those preferred shares. *Len v. Fuller,* 1997 Del. Ch. LEXIS 78, at*7, 10 (Del. Ch. May 30, 1997 (even where "there has been no determination of a price to be

---

Murchinson and had every incentive to muddy the waters. Second, as confirmed by the testimony of Eletson's witnesses, the Kanelos email created fury and confusion. (May 16, 2023 Transcript pp. 264:13-265:9; 265:24-266:17; C-1963 ¶¶ 77-78.) Ms. Karastamati's follow-up email can be viewed as an attempt to "move forward" with the original transaction after Levona refused to follow-through with the exercise of the BOL. (C-1963 ¶ 81.) I find that at most, this memo is an inaccurate checklist of items needed to complete Levona's exit from the Company pursuant to the terms of the BOL.

paid for [record-owner's] shares pursuant to a procedure set forth in the Shareholders Agreement, no cancellation of the certificates, and no change on the company's stock ledger," a court of equity "may enforce equitable rights in the stock (including an equitable right to control the exercise of the vote attached to the stock)"; finding beneficial owner controlled vote).

Levona argues that the BOL expressly references the word "option" 34 times. (*See, e.g.,* May 23, 2023 Transcript pp. 183-21-184:3 (Mr. De Quillacq testifying "I think it's important to see whether that contract is an option or forward. If you see the word option 36 times, it's likely to be an option.")) This is simply an example of elevating form over substance. The substance of the BOL is more consistent with a forward contract, as explained by Dr. Furchtgott-Roth. (C-1902 ¶ 29.)

In addition to all the reasons already stated, and as Dr. Furchtgott-Roth testified, it would be economically irrational to find that Eletson never bothered to exercise the option that would have cost it $1 when the consequence of not doing so would be: Levona obtaining two liquified petroleum gas vessels valued at more than $23 million, more than $10 million in assigned claims, and a Fundamental Action Letter that gives Levona more rights to control the actions of the Company than those spelled out in the LLCA while Levona still retains the Company's preferred interests. (C-1902 ¶ 29.)

Accordingly, after weighing the evidence, I find that it is more likely than not that the conditions for the buyout were met. As such, pursuant to the BOL, Levona's interests should have been transferred to Eletson Gas, or its nominee. As discussed, *supra*, Eletson has proven that Eletson Gas transferred these interests to the Preferred Nominees. Thus, as of March 11, 2022, Levona was no longer the preferred holder and ceased having any ownership in the Company.

Accordingly, it follows that Levona did not have the authority to enter into the Unigas LOI, direct the operations of the Company, or otherwise assert control over the assets of the Company.

B. Eletson's Pre-BOL Claims

Eletson asserts claims for breach of the LLCA and breach of the covenant of good faith and fair dealing.

Under Delaware law, the elements of a breach of contract claim are: "1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff." *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003).

Under Delaware law, an implied covenant of good faith and fair dealing inheres in every contract. "The implied covenant is a 'judicial convention designed to protect the spirit of the agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain.'" *Bakerman v. Sidney Frank Importing Co.*, 2006 Del. Ch. LEXIS 180, at *71-72 (Del. Ch. Oct. 10, 2006) (*quoting Chamison v. Healthtrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999)). "Courts will find a breach of an implied covenant when it is 'clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith had they thought to negotiate with respect to that matter.'" *Bakerman*, 2006 Del. Ch. LEXIS, at *72.

The terms "good faith" and "fair dealing" in the context of an implied covenant have a different meaning from the fiduciary duty concept of good faith and the duties of loyalty and care. *Gerber v. Enter. Prods. Holdings*, 67 A.3d 400, 418 (Del. 2013),

overruled on other grounds by Winshall v. Viacom Int'l, Inc., 76 A.3d 808 (Del. 2013). The implied covenant imposes a duty "to deal 'fairly' in the sense of consistently with the terms of the parties' agreement and its purpose." *Id.* at 419 (internal quotation marks omitted). And "'good faith' [means] faithfulness to the scope, purpose, and terms of the parties' contract." *Id.* (italics omitted). "Both necessarily turn on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally." *Id.* (internal quotation marks and italics omitted).

Here, the members of the Company waived fiduciary duties. Under Delaware Law the fiduciary duties of a member, manager, or other person that is a party to or bound by a limited liability company agreement may be expanded or restricted or eliminated by provisions in the LLC agreement. *Smith v. Scott*, 2021 Del. Ch. LEXIS 76, 2021 WL 1592463 at *23 (Del. Ch. Apr. 23, 2021). If the LLC's operating agreement plainly disclaims, restricts or limits the duties of its managers and members, the parties must look to the agreement's provisions for their rights and remedies. *Id.* at *24. Where traditional fiduciary duties "have been clearly supplanted or modified, those contractual choices will be respected." *Ross Holding & Mgmt. Co. v. Advance Realty Group, LLC*, 2014 Del. Ch. LEXIS 173, 2014 WL 4374261 at *41 (Del. Ch. Jan. 24, 2014).

An LLC agreement, however, "may not eliminate the implied contractual covenant of good faith and fair dealing." *Miller v. HCP & Co.*, 2018 WL 656378 at *22 (Del.Ch. Feb. 1, 2018) (*quoting* 6 Del. C. § 18-1101(b). However, the "implied covenant applies only if the contract is silent as to the subject issue." *Miller*, 2018 WL 656378 at *23. Because a claim for breach of the implied covenant is contractual, "the elements of an implied covenant claim are those of a breach of contract claim: 'a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage

to the plaintiff.'" *Miller*, 2018 WL 656378 at *22 (citation omitted). The implied covenant applies only when one party "proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected." *Miller*, 2018 WL 65378 at *22 (*quoting Nemec v. Shrader,* 991 A.2d 1120, 1126 (Del. 2010)). The implied covenant does not "'establish a free-floating requirement that a party act in some morally commendable sense.' Instead, 'good faith' in the implied covenant context entails 'faithfulness to the scope, purpose, and terms of the parties' contract.'" *Miller*, 2018 WL 65378 *23 (citations omitted).

i. Pre-Acquisition Conduct

Prior to November 2, 2021, the Levona-related entities were not parties to the LLCA and therefore, could not have breached its terms or the covenant of good faith and fair dealing. To the extent Eletson seeks relief under any theory of liability for pre-November 2, 2021 actions, I do not have jurisdiction and deny such relief.

ii. Levona's acquisition of the Blackstone's interests

While the record provides sufficient evidence to conclude that Murchinson engaged in underhanded tactics and dishonest dealings in connection with its acquisition of the Blackstone's interest, I deny Eletson's claim seeking to void Levona's acquisition of Blackstone's interests *ab initio*. Eletson has not met its burden in establishing how, even assuming Murchinson engaged in the nefarious actions Eletson alleges, that gives Eletson the right to void the transfer of Blackstone's shares. Nor is the consequence of that clear—voiding that transfer would also void the BOL and the Transactions. Acknowledging this, Eletson seeks (1) rescissory damages relating to Levona's bad faith acquisition of its shares; (2) rescissory damages relating to the transfer of the Symi and Telendos to Levona, including that the proceeds of any sale of the Symi and Telendos and revenue related

thereto paid to Claimants/the Company. *See Creative Research Mfg. v. Advanced Bio-Delivery LLC*, No. 1211-N, 2007 Del. Ch. LEXIS 15, at *33 (Del. Ch. Jan. 30, 2007) (awarding rescissory damages). *Tam v. Spitzer*, 1995 Del. Ch. LEXIS 116, *27 (Del. Ch. Aug. 17, 1995) ("Where, as here, a party is fraudulently induced to enter into a contract, the defrauded party may elect either to affirm the contract and sue at law for money damages, or disaffirm the contract and seek rescission in equity.")

However, the sale of shares from Blackstone to Levona is not Eletson's contract to affirm or disaffirm—it is Blackstone's. Moreover, such a ruling would be incompatible with the basis for this arbitration's jurisdiction, as it would mean that Levona never had ownership in the Company, and therefore, was never bound by the LLCA. Finally, as I determined, *supra*, I am finding that Eletson exercised the BOL. Pursuant to the BOL, the shares of the Symi and Telendos were properly transferred to Levona. Also as discussed, *infra*, I am awarding Eletson damages for the amount Levona has been unjustly enriched by virtue of its holding the shares of the Symi and Telendos without simultaneously transferring the preferred interests to the Company or its nominee. To award rescissory damages tied to the Symi and Telendos under a theory of rescissory damages would be duplicative.

iii. Post-Acquisition/Pre-BOL Claims

Turning to the Post-Acquisition/Pre-BOL claims, the evidence presented at the hearing demonstrates that Murchinson bribed an Eletson officer and Company representative, breached the terms of its NDA with Blackstone, and disclosed Company confidential information. These actions, never disclosed to Eletson *after* Levona became a party to the LLCA, breached both the LLCA and/or the covenant of good faith and fair dealing.

a. Bribing of Kanelos

As discussed, *supra,* the evidence establishes that Murchinson bribed Kanelos to act against the Company's interest. The clandestine relationship commenced prior to November 2, 2021, but continued after Levona/Murchinson became the preferred holder. Indeed, the illicit so-called "Services Agreement" was executed between Levona/Murchinson and Kanelos in December 2021 pursuant to which Murchinson wired $100,000 to Kanelos. (C-1699; C-1700; C-1701.)

Kanelos was clearly an officer of Eletson Corporation, and, according to Levona, of Eletson Gas. The LLCA provides that "Each Officer shall have the fiduciary duties to the Group Companies as those of an officer to a corporation organized under the laws of Delaware"). (J-0 § 6.1(d).) Pursuant to Schedule VII (m) (Fundamental Actions) Levona could not "enter into, amend or waive any term in an agreement between the Company and any Officer or member of senior management." (J-01 Schedule VII(m).) The so called Services Agreement induced a breach of those fiduciary duties and constituted a breach of the covenant of good faith and fair dealing.

b. Violating confidentiality obligations and interfering with Company's contracts with its banks and financiers

The evidence also establishes that Murchinson breached its NDA with Blackstone by communicating directly with the Company's financiers and lenders.

The Blackstone NDA provided, in relevant part:

> 5. All inquiries and other communications are to be made directly to Blackstone or employees or representatives of Eletson specified by Blackstone. Accordingly, Receiving Party and its Representatives agree not to directly or indirectly contact or communicate with any of Eletson's employees, lenders, lessors, customers, suppliers, or any other person with whom Eletson has a business relationship, or to seek any information in connection therewith from such person, without the express written consent of Blackstone.
>
> …

> 13. Neither this paragraph nor any other provision in this letter agreement can be waived, amended or assigned except with the written consent of each party hereto, which consent shall specifically refer to this paragraph (or such other provision) and explicitly make such waiver or amendment.
>
> (C-1655, J-36.)

There is no evidence that Murchinson ever received written consent from Blackstone to reach out to anyone, especially the Company's financiers.

In addition, the LLCA contains several clauses governing and restricting the use of the Company's sensitive and confidential information. Under Section 12.3(a)-(b), a member may disclose the Company's confidential information "solely for the purposes of such Member monitoring and analyzing his investment in the Company or performing his duties as a Member, Director, Officer, employee, consultant or other service provider of the Company." (J-01 § 12.3(a).) Each Member must "take all appropriate steps to safeguard such [Proprietary Information] and to protect it against disclosure, misuse, espionage, loss and theft." (J-01 § 12.3(a).) Section 12.3(b) expressly provides that each Member will be responsible for a breach of Section 12.3 by its Representatives (J-01 § 12.3(b).)

In addition, Under Section 10.2(e)(ii), the Preferred Unit Exit provision, the Company and the Board are to be kept apprised of any attempts by the Preferred Member to disclose confidential information for purposes of selling the preferred units.

Section 10.2(e)(ii) provides:

> Notwithstanding anything to the contrary set forth in this Agreement, during the Class B-2 Period prior to the consummation a Qualifying IPO, the restrictions on the Transfer of Units set forth in this Agreement shall not apply to the Preferred Members or the Preferred Units held by the Preferred Members, and such Preferred Members may Transfer to any Person that is not an Ineligible Person any Preferred Units; provided, however, that any transferee pursuant to this Section 10.2(e) shall be treated as a Permitted Transferee for purposes of Section 3.3(b). **The Company and the Board will use commercially reasonable efforts to provide support to the**

> **Preferred Members in connection with the marketing and Transfer to transferees and potential transferees, including, without limitation, and subject to appropriate non-disclosure agreements, providing financial information, causing members of the Board and members of the Group Companies' management teams to be available (at reasonable times upon reasonable requests) to potential transferees and coordinating inspections of the Vessels.** The restrictions, covenants and agreements of this Section 10.2(e) shall terminate upon the completion of a Qualifying IPO.
>
> (J-01 § 10.2(e)(ii) (emphasis added).)

It is undisputed that the Company and Eletson directors were not kept apprised of Murchinson's disclosure of confidential information in connection with its purchase of the preferred shares.

The evidence reflects that contrary to the NDA's express terms, Murchinson communicated directly with the Company's financiers and lenders and provided confidential Company information. For example, on February 12, 2021, Kanelos, on behalf of Murchinson, sent Libera a proposal to restructure Libera's loan facility. (C-463.) On May 10, 2021, an agent of Murchinson from Seafin sent a third-party financier a datapack for "Project Sage" containing Company information stating "the [Eletson] family is not aware about this transaction . . . we need to reiterate that this transaction needs to be dealt under a strict private and confidential basis." (C-453.) Kanelos responded by disclosing the Company's financial statements and other confidential information. (C-453.) Indeed, the record is replete with examples of Murchinson's outreach to, and strategies regarding, Eletson's financiers and competitors, either by Bistricer directly or through Murchinson's agents, Kanelos and others. (*See, e.g.*, C-1621; C-1627; C-1628; C-1645; C-1651; C-1660; C-1661; C-1657; C-1667; C-1668; C-1672; C-1596; C-441; C-442; C-470.) Notably, Murchinson/Levona continued to disclose confidential information in breach of the LLCA,

without Eletson's and the Company's knowledge, and without NDAs, after Levona purported to join the Company. (C-998.)

The evidence also supports the finding that Levona breached the covenant of good faith and fair dealing by causing the Company's lenders to arrest five vessels and failing to disclose this conduct after it became a member of the Company. The documents presented at the hearing reflect that at some point in time, Murchinson, with its counsel, WFW, developed an aggressive strategy to take control over the company that included putting pressure on the Company's lenders, getting vessels arrested, firing and replacing the management companies for the vessels, and selling the fleet. (CM-1999 ("Plan B" inviting "a consensual foreclosure of the SEB LEG Vessels," and "Libera to take their ships away also…with as much cooperation as [Murchinson could] offer," as well as "allow[ing SEB] to do what they keep threatening").)

On October 24 and 25, 2021, SEB arrested two of the Company's vessels (Dilos and Kithnos). (C-498; C-499.) Eletson received "[n]o advance warning" "notice or indication that an arrest was coming." (C-498.) Then, after Levona's acquisition of Blackstone's interests in the Company, SEB proceeded to issue warrants of arrest for two more vessels, the Othoni and Paros, on November 11, 2021 and November 12, 2021, respectively. (C-1964 ¶ 132.) Libera proceeded to issue a warrant of arrest for the Kithira on February 1, 2022. (C-1964 ¶ 132.)

As Kertsikoff attested, based on his long experience in the shipping industry and his relationships with the Company's financiers, he believes these arrests were the direct result of Levona's misconduct. (C-1964 ¶¶ 133-142.) These arrests were extreme and unusual actions within the shipping industry, particularly as Eletson had a normal banking relationship with its lenders for years and was faithfully paying its debts prior to its

financial difficulties. (May 16, 2023 Transcript pp. 319:13-320:11; 323:3-326:14.) At no time before the end of 2021 had SEB taken any action in terms of arresting the Company's vessels. (May 16, 2023 Transcript pp. 319:23-320:2.) Moreover, as Mr. Hadjieleftheriadis testified: "we had given the syndicate, the banks, clear indications that first we would start paying down the debt interest and principal, but more importantly, though, we were prepared to refinance the facility. We had told them that we had a financier -- we had been in contact with a certain financier who would quickly finance the investments." (May 18, 2023 Transcript pp 112:9-17.)

As further evidence of Murchinson's corrupt intentions, on July 2021, Murchinson approached Eletson's broker, Thor Erik Lie from Grieg Shipbrokers, for information related to the Company's vessel values under the prospect of a "forced sale." (C-1659.) A "forced sale" is the "worst possible" valuation level. (May 18, 2023 Transcript pp. 111:10-21.) As Kertsikoff testified: "The fact that Levona, through Murchinson, was asking one of the Company's key brokers to provide forced sale values shows its mal-intent. Never in my experience have we sought out a forced sale valuation. A forced sale means that the vessels will be auctioned off and sold at a below market price in order to liquidate the assets on an expedited basis. There is no reason that Murchinson should have been asking *our broker* to provide it with those values except to account for forced sales in anticipation of the arrests." (C-1964 ¶ 128.)

Murchinson/Levona insists that the record does not support the finding that they wanted to have the lenders arrest the vessels or that their actions caused the arrests of the vessels. (*See, e.g.,* CM-1992; C-465.)

I disagree. First, I find the Eletson witnesses' testimony, combined with the record of communications between Murchinson and WFW reflecting Murchinson's intended

strategy, and between Murchinson and the banks and financiers, sufficient evidence to prove that Murchsinon's aggressive tactics more likely than not, contributed to the arrests of the ships, and that had Murchinson not interfered with the Company's relationships with its banks, the arrests would not have occurred. The emails Levona cites in its defense occurred before Murchinson turned to its "Plan B." (*Compare* CM-1992 and C-465 *with* CM-1999.)

Second, the record is incomplete, and we do not know what a full record would reflect. Murchinson took the position throughout the entirety of these proceedings that it is not a party to this arbitration. But as the evidence conclusively establishes, and as discussed, *supra*, Murchinson is the real party in interest in this arbitration. Despite this, Murchinson did not make a full production of documents and communications. It is only as a result of my orders directing Levona/Murchinson to produce its communications with Kanelos and WFW that we know about Murchinson's coordinated strategy (i.e., "Plan B") and the communications with the lenders. (CM-1999.)

For the avoidance of doubt, I do not believe that Levona's counsel in this arbitration was an active participant in its client's gamesmanship, but rather another pawn in its perpetual deceit.

Accordingly, I find that Murchinson's improper dealings with the Company's banks and financiers pre-acquisition of Blackstone's interests caused the arrests of the vessels and that its failure to disclose these actions to Eletson once it became a member in the Company was a breach of the covenant of good faith and fair dealing.

c. Breaching the LLCA by attempting to terminate management contracts

Levona also breached the LLCA immediately upon joining the Company by attempting to terminate management contracts and replace the directors of the Company's subsidiaries. (C-818; C-837; C-838; C-1964 ¶¶ 20, 115-121.)

Section 3.2 of the LLCA, provides as follows:

> 3.2 Fundamental Actions. Except for actions authorized to be taken by the Preferred Members pursuant to Section 3.6(c), the prior approval of at least four Directors (including at least one Eletson Director and at least one BX Director) shall be required in order for the Company to undertake, or permit or cause any Group Company to undertake, . . . (ii) during the Class B-2 Period, any of the actions set forth on Schedule VII (each a "Fundamental Action") (J-02 § 3.2.)

The parties agree that the carveout for Section 3.6(c) does not apply.

The Fundamental Action provision prohibits the Company from acting without an Eletson Director with respect to Schedule VII actions, a right made clear in the Amendment to the LLCA. (J-02 § 3.2.) Schedule VII enumerates 16 categories of actions that Levona cannot take without Eletson's approval (J-01, Schedule VII).

Those categories include the following:

> (b) other than the execution and delivery of the Management Agreements by the Shipcos and the Manager on the Initial Closing Date, enter into, or extend, amend, modify, renew or terminate any agreement or transaction, or waive performance under any such agreement, between a Group Company, on the one hand, and any member of the Group Company's management team, any Member, such Member's Affiliates or any other related party, on the other hand;
> . . .
> (h) approve the amendment, modification, termination, waiver or repeal of any provision of any Transaction Document (other than this Agreement), or provide any approval, consent to be provided to any Person on behalf of the Company or its Subsidiaries under the Transaction Documents (other than this Agreement), including without limitation, exercising any right of the Company or a Subsidiary to remove a manager under a Management Agreement;
> . . .

> (j) amend or modify any provision of any charter, articles, organizational or other governing document of the Company's Subsidiaries that would have the effect of (i) creating any additional requirement of Eletson to make Capital Contributions to the Company, (ii) modifying any voting threshold or approval right held by Eletson, (iii) materially and adversely change the express rights of Eletson set forth therein, other than as a result of dilution due to the issuance of additional Equity Interests;
>
> (k) other than in accordance with the terms of the Management Agreements, enter into any technical or commercial management agreement, any crewing arrangement or any other material vessel or maritime asset related agreement or any amendment thereto;
>
> . . .
>
> (p) enter into any agreement or commitment to effectuate any of the foregoing.
>
> (J-01, Schedule VII.)

In the context of Schedule VII (h), "Transaction Documents" does not refer to the BOL, but rather, the LLCA defines the terms as "this Agreement, the Contribution Agreement, the Management Agreements and the Financial Services Agreements (as defined in the Contribution Agreement)." (J-01.)

The provisions in Schedule VII prohibited Levona from taking unilateral action concerning Eletson's Management Agreements, including without limitation, terminating them directly or indirectly. Murchinson's counsel specifically advised it of this. (CM-2002.) Nevertheless, on November 5, 2021, Levona, through Bistricer, authorized WFW to terminate the Company's management agreements with Eletson Corporation and replace the board of directors of the Company's subsidiaries with Levona representatives. WFW, on Levona's behalf, issued a Notice of Replacement and Appointment of Directors purporting to replace Eletson's Directors and to appoint Lichtenstein, Spears, Fenttiman, and Hassett as the directors of the Company's subsidiaries. (C-837.)

Levona also issued a notice terminating the Company's affiliates' Management Agreements with Eletson Corporation. (C-838.)

Levona then attempted to use these termination notices to cut Eletson Corporation off from any communication with SEB: Lichtenstein sent SEB a notice of the termination. (C-839; C-840; C-1958.) Levona never informed SEB that the termination notice was in violation of the LLCA—despite being advised as such by WFW—but rather stated: "[P]lease be advised that Eletson Corporation have today been served with a notice of termination in relation to the management of the Vessels and the authority they may have had to deal with you regarding the Facility Agreement or the Vessels has been revoked. As such, Eletson Corporation has no right to correspond or otherwise deal directly with you in relation to the Facility Agreement or any Vessel." (C-839; C-818 (WFW advises Murchinson that "[s]ervice of the Management Agreement termination notice without consent from an Eletson Corp Director will breach the [LLCA] which could possibly render the termination notice invalid".))

Thus, the record overwhelmingly demonstrates that Levona's attempted termination of the management agreements was a willful and intentional breach of the LLCA.

C. Eletson's Status Quo Injunction Claims

Eletson asserts numerous allegations against the Levona-related entities for violations of the Status Quo Injunction. Some of those alleged claims, even if true and while harassing and menacing, did not cause quantifiable harm to the Company. For example, Levona's premature notice of default and acceleration of the Loan sent on October 25, 2022, and Levona's calling of board meetings. (C-404; C-405; C-086.)

As such, I will only specifically discuss those claims for which the violations caused quantifiable harm. The three actions are all related: Pach Shemen's purchase of a controlling interest in outstanding bonds issued by Holdings, Pach Shemen's directing of the trustee to commence litigation against Holdings, and Pach Shemen's directing of the commencement of the involuntary bankruptcy petition against Holdings.

On or about January 4, 2023, Pach Shemen purchased $183,851,546 in bonds of Holdings for $2 million. (C-746; May 22, 2023 Transcript p. 332:16-20.) Additionally, Mr. Spears, on behalf of the Levona-related entities, offered additional consideration to the bondholders contingent on the outcome of this arbitration stating that it would pay an additional "$500k if the arbitration ends to our satisfaction on Eletson Gas and we can exercise our rights to act as Preferred to sell Eletson Gas vessels and/or the company." (C-746.0008.) The Holdings bonds were purchased by Pach Shemen from Nomis Bay and BPY via private trades and then transferred to Pach Shemen. (C-746.) Mr. Spears testified that he had bought the bonds from four funds which had previously owned them, named Beachpoint, Caspian, Redwood, and Knighthead. (May 23, 2023 Transcript pp. Tr. 326:20-327:2.)

On January 11, 2023, Pach Shemen then instructed the bond trustee, Wilmington Savings Fund Society, to sue Holdings to collect the debt due on these bonds ("Bondholder Litigation").[7] Then on March 7, 2023, Pach Shemen and two other creditors of Holdings, filed involuntary bankruptcy petitions against Holdings in the Southern District of New York. The involuntary bankruptcy petition and some of the documents included in the filing were signed by Mr. Lichtenstein and Mr. Spears. (C-749; C-751; C-746.) The timing of this

[7] Eletson argues that Pach Shemen's purchase of these bonds and directing the trustee to commence litigation violated a standstill agreement Eletson had in place with the original holders of the bonds. This claim, while likely true, is outside my jurisdiction.

filing is notable—it was three days after I orally issued certain discovery rulings adverse to Levona, including that it had waived any claim of attorney-client privilege with WFW, and ordering the production of Levona/Murchinson's communications with Kanelos.

Levona argues that none of the actions taken by Pach Shemen are violations of the Status Quo Injunction because Pach Shemen is not bound by those orders, and with respect to the trustee litigation and the bankruptcy, Pach Shemen is not the only creditor directing those litigations.

As discussed, *supra*, Pach Shemen is the alter ego of Levona. The separateness is in name only. Its representatives, including Spears and Lichtenstein, were bound by the Status Quo Injunction. Despite this, Pach Shemen a/k/a Levona II, (C-746.0008), entered into a trade to purchase the notes, offering as consideration value associated with the assets in dispute in this arbitration. The TRO and November 2022 clarification expressly ordered the parties to "maintain the status quo" and prohibited the "transfer or sale of, or attempt to sell or otherwise transfer, any assets of . . . Gas . . .," and the Status Quo Injunction entered in January 2023, further extended the prohibition to include "or assets in dispute in this arbitration." (C-1816; C-1887; C-1838.) While technically Pach Shemen was not transferring the assets of Gas or assets in dispute in this arbitration, the overall strategy was intended to disrupt the status quo and find another path to obtain the "assets of Gas . . . or assets in dispute in this arbitration."

In other words, the Levona-related entities were looking to either strip this arbitration of its jurisdiction or hedge against a potential loss in this arbitration. They believed, at the time—although mistakenly—that if I ruled that Eletson had exercised the option and bought out Levona's interests, the preferred interests would pass to Holdings. Thus, by purchasing the bonds, it became a controlling creditor of Holdings with the ability

to put Holdings into bankruptcy. In the first instance, the filing of the bankruptcy led to Levona's insistence that it could not arbitrate these claims due to the automatic bankruptcy stay. This was certainly not "maintain[ing] the status quo." In the event the stay were to be lifted, and Levona lost in this arbitration, the Levona-related entities were then positioned to argue that, as creditor to Holdings, the value of the preferred shares passed to them.

Unfortunately for Levona, the strategy was misguided because the BOL expressly provided that in the event of a successful exercise of the option, the interests would transfer to "Eletson Gas or its nominee," (J-06 § 2.1), and as discussed, *supra*, Eletson Gas had transferred the interests to the Preferred Nominees. Although the actions of Pach Shemen may have been for naught, their actions were intentional and direct violations of the Status Quo Injunction.

D. Levona's Counterclaims

In light of my finding that Eletson exercised the option to buyout Levona's membership interests as of March 11, 2022, Levona's abovementioned counterclaims fail and are dismissed. I find, however, that as part of the consideration paid in connection with the BOL, the shares of the subsidiaries which control the Symi and Telendos were transferred to Levona and Levona retains all rights associated with the ownership of the subsidiaries of those vessels since that time.

VI. DAMAGES

A. Compensatory Damages

Eletson's expert Dr. Furchtgott-Roth presented credible and convincing evidence as to the damages suffered as a result of the Levona-related entities' misconduct. Levona did not provide counter-calculations. Dr. Furchtgott-Roth authored three expert reports in

this proceeding (C-1902, C-1918, and C-1934), and credibly testified in person at the hearing, where I determined he was qualified as an expert in economic analysis, options analysis, antitrust and competition, and damages. (May 19, 2023 Transcript pp. 108:22-109:3; see also C-1982 (hearing demonstrative).) He is a former Commissioner of the Federal Communications Commission and received a PhD in economics from Stanford University and an SB in economics from the Massachusetts Institute of Technology.

To calculate damages, Dr. Furchtgott-Roth reviewed extensive document discovery and company data listed in Exhibit B of his first report (C-1902.0105) and supplemented in subsequent reports. He explained that his "method for assessing economic damages begins with an assumption of Levona's liability as presented by Eletson," after which he would: (i) calculate, where possible, the compensation necessary to restore the injured party, Eletson, to the economic position they would have enjoyed but for the wrongdoing of the other party, Levona; and (ii) where harms to Eletson are not reasonably amenable to quantification," he offered a description of Eletson's injuries. (C-1902.0108.)

Due to the character of several of these harms, Dr. Furchtgott-Roth was not readily able to ascertain a specific quantum of damages for several kinds of actionable misconduct. (C-1902.0109.) As a result, he opined that his overall quantifications of damages are "necessarily a lower bound" of the full extent of harm Levona caused. (C-1902.0109.) However, he was able to quantify several categories of damages.

i. Damages Arising From Levona's Acquisition of the Symi and Telendos Without Reciprocal Transfer of the Preferred Interests

Dr. Furchtgott-Roth calculated $19,677,743.71 in directly calculable losses for the lost services of the Symi and Telendos. Dr. Furchtgott-Roth testified at the hearing that this figure is an estimate of what the Company would have made from those two vessels had it not transferred them, which he claimed was an appropriate measure of unjust enrichment

because the vessels were transferred without the reciprocal transfer of the preferred interests. (May 19, 2023 Transcript pp. 143:23-145:8; see also C-1902, Ex. C.7.) The damages should be paid to the Preferred Nominees, as they flow directly from Levona's refusal to relinquish the preferred interests, and the Preferred Nominees hold all title and interest in the preferred interests. *See, e.g.*, *Urdan v. WR Capital Partners, Ltd. Liab. Co.*, 2019 Del. Ch. LEXIS 313, at *32 (Del. Ch. Aug. 19, 2019) ("when the shares are sold, the rights to assert and benefit from direct claims pass with the shares to the new owner").

ii. Damages Arising from the Levona-Related Entities' Other Misconduct

Dr. Furchtgott-Roth calculated the directly calculable losses arising from Levona's conduct that led to the vessel arrests as $21,777,378.50. This includes: (a) approximately $17 million in lost time charter equivalent (TCE) revenues by comparing the projected time charter revenues for each arrested vessel against the actual revenues (i.e., zero), for time that each vessel was arrested; and (b) approximately $4.7 million in fixed costs incurred due to the arrests, such as legal expenses, hull cleaning, crew costs, and the like. (May 19, 2023 Transcript pp. 41:12-143:22; see also C-1902, Exs. C.1-C.5.) These damages shall be paid by the Levona-related entities to Eletson Gas as compensatory damages from the improper arrests of Eletson Gas vessels.

Eletson also seeks at least $10,000,000, to be determined by me in my discretion, for damages related to or arising out of Levona's other breaches of other contracts as to which Claimants were unable to specifically quantify damages, to be paid to Eletson Gas or the Preferred Nominees in my discretion. It argues that for each of those breaches, Eletson has proven that an injury in fact occurred. However, for several breaches, Dr. Furchtgott-Roth did not readily have facts available as of January 2023 sufficient to specifically quantify resultant damages. (*See, e.g.,* C-1902.0109 (noting that "due to the

character of certain of Eletson's injuries, various damages are difficult to quantify to a reasonable degree of certainty").)

Among these harms, are:

a. Risk of catastrophic loss of sensitive cargo or harm to vessels during the arrests;

b. As of result of the harmful acts of Levona and its affiliates, reduced bargaining position of the Company with business-sensitive information available to other parties, including those negotiating with the Company;

c. Reputational harm to the Company and Eletson from the actions of Levona and its affiliates with financiers and banks but also with customers, employees, and vendors;

d. Consequent to the reputational harm would be lost business opportunities, both with existing customers and with new customers;

e. The loss of access for the Claimants to both existing and new sources of capital as a result of the actions of Levona and its affiliates;

f. Management distraction to deal with the harmful acts of Levona and its affiliates; and

g. Permanent harm from the indelible record created by Levona and its affiliates.

I agree that the record supports the conclusion that the Levona-related entities' breaches caused the Company harm. For example, Mr. Hadjieleftheriadis elaborated on several of these harms in his witness statement, testifying that several of these breaches independently cost the Company millions of dollars. (C-1968 ¶ 91-101; ¶ 92 (asserting, among other claims that "Eletson would have paid millions of dollars to have avoided the breach of confidentiality and reputational damage that arose from" Kanelos' sharing of confidential information; ¶ 96 (claiming Levona's misconduct prevented the "refinancing of two of the facilities of the group—the Tufton facility and the Libera facility—which has resulted in lost financing opportunities and costs of several million dollars"); ¶ 99 ("Claimants have suffered tremendous harms due to Levona's conduct. Even if we were awarded the totality of the damages contemplated by Mr. Furchtgott-Roth's report, we still

would not be fully compensated, but Mr. Furchtgott-Roth's assessment of damages is a starting point.")

Delaware law is clear that, where a party has proven to a reasonable certainty that harm actually occurred, the trier of fact may use its discretion to determine the amount of damages that the plaintiff is entitled to. *Pers. Touch Holding Corp. v. Glaubach*, 2019 Del. Ch. LEXIS 66, at *48-49 (Del. Ch. Feb. 25, 2019) ("The law does not require certainty in the award of damages where a wrong has been proven and injury established. Responsible estimates that lack m[a]thematical certainty are permissible so long as the court has a basis to make a responsible estimate of damages. Speculation is an insufficient basis, however. Each situation must be evaluated to know whether justice will permit an estimation of damages given the testimonial record or whether the record affords insufficient basis to fix an award." (citation omitted); *see also Raishevich v. Foster*, 9 F. Supp. 2d 415, 417 (S.D.N.Y. 1998) ("a fact finder has some latitude to make a just and reasonable estimate of damages based on relevant data." (citations omitted)).

JAMS Rule 24(c) is also instructive here and it reads as follows:

> **Rule 24. Awards**
>
> (c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' Agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

Accordingly, and based upon my review of the totality of the evidentiary record, I award Claimants $2,000,000 to be paid to the Company for the following damages: (a) the reduced bargaining position of the Company with business-sensitive information available to other parties, including those negotiating with the Company; (b) reputational harm to

the Company and Eletson from the actions of Levona and its affiliates with financiers and banks but also with customers, employees, and vendors; (c) lost business opportunities, both with existing customers and with new customers, as a result of the reputational harm; (d) the loss of access for the Claimants to both existing and new sources of capital; and (e) permanent harm from the indelible record created by Levona and its affiliates.

iii. Damages Arising from the Violations of the Status Quo Order

Eletson is also entitled to damages for Levona's repeated violations of the Status Quo Injunction. In its Proposed Order, Eletson seeks "an amount to be decided by the Tribunal in its discretion for damages relating to or arising out of Levona's violations of the Tribunal's Status Quo Injunction, to be paid to Eletson Gas or the Preferred Nominees in the Tribunal's discretion." (Proposed Order E(f).) In its post-hearing submission, Eletson requests that "[d]amages flowing from these violations should be included in the punitive damages assessed Levona." (Claimants' Post-Hearing Brief ¶ 799.)

Since I found that Pach Shemen's directing the trustee to commence litigation against Holdings and the commencement of the involuntary bankruptcy action both were intentional violations of the Status Quo Injunction, I award Eletson reimbursement of the attorney's fees and costs incurred in connection with those actions to be paid to the entity or individuals who paid those costs and fees. The LLCA provides that "the arbitrator shall have discretion to award reasonable attorneys' fees and reasonable travel expenses (excluding meals) to the prevailing party) (J-01, LLCA §12.14 (d); *See* JAMS Rule 24 (c).

B. <u>Punitive Damages</u>

Punitive damages in a contract action "can be awarded when conduct includes an element of ill will or an intent to cause injury or is malicious, willful or wanton." *Standard Distrib. Co. v. NKS Distribs.*, 1996 Del. Super. LEXIS 125, at *38 (Del. Super. Ct. Jan. 3,

1996) (finding punitive damages should be available for the deceit that accompanied the breach of contract in this case.") Punitive damages are permitted in breach of contract cases "[w]here the defendant's actions are similar in nature to that of a tort" or "it appears that the defendant has committed a 'willful wrong, in the nature of deceit.'" *Gillenardo v. Connor Broad. Del. Co.*, 2002 Del. Super. LEXIS 402, *36-37 (Del. Super. Ct. Apr. 30, 2002) (internal citations omitted). Dr. Furchtgott-Roth opined that if I determined that punitive damages were appropriate in this matter, a range of punitive damages measured at 3x to 9.6x compensatory damages would be appropriate. (C-1902 ¶ 94.)

Levona does not contest my ability to award punitive damages. In fact, Levona requested that I award it punitive damages of $2,000,000 for what it referred to as Eletson's "intentional and bad faith acts." (Respondent's Proposed Order p. 3.)

If there was a case warranting punitive damages, I believe this is one. The evidence establishes that Murchinson, on its own, and through Levona and Pach Shemen, has engaged in an intentionally hostile, corrupt, wanton, and deceitful campaign to the great detriment of the Company.

Murchinson corrupted and bribed an Eletson officer. The deceit continued with the intentional breach of the NDA with Blackstone. The deceit and backstabbing continued after Murchinson became the preferred holder and further continued after Eletson exercised the purchase option buying out Levona's preferred interests. It even continued during this arbitration as Murchinson disingenuously hid behind shell entities to avoid producing relevant documents and to repeatedly violate the Status Quo Injunction Order. To this day, I am convinced that all relevant documents have not been produced by Murchinson/Levona.

As discussed and cited throughout this Final Award, the record is replete with instances of Murchinson's agents engaging in deceitful and malicious behavior to further their own agenda: from Spears' secret dealings behind the Company's backs in which he bribed a Company officer and conspired with third-parties to the detriment of the Company (*see, e.g.,* C-1698, C-1699 ("Services Agreement"); C-1107 (Spears writing "I CANT STRESS ENOUGH – PLEASE DO NOT CONTACT THE VASSILIS X2 ABOUT THESE.")); to Murchinson/Levona's intentional breach of the LLCA's confidentiality obligations; to Murchinson/Levona's intentional interference with the Company's relationships with its lenders, causing the arrest of the Company's vessels, and their subsequent failure to disclose these violations to the Company; to Levona/Murchinson intentionally and knowingly breaching the LLCA by attempting to terminate management agreements and knowingly falsely telling the Company's lender that Eletson Corporation had "no right to correspond or otherwise deal with" its lenders (C-1958); to Lichtenstein's attempt to manipulate the evidentiary record by creating purported minutes of the March 10, 2022 board meeting after this arbitration was commenced (C-2023); to Levona and its agents knowingly violating—multiple times—the Status Quo Injunction Order (discussed, *supra*); to attempting to manipulate and deceive this tribunal by hiding behind shell entities while refusing to produce relevant documents, and misleading, if not outright lying, under oath.

It is clear to me that without some punitive deterrence, Murchinson's agents will continue to believe that they are not accountable for their actions.

Each of the Murchinson witnesses admitted that they actively concealed their activities, including their bribing of Kanelos, from the Company, without shame.

In addition to his attempt to perpetrate a fraud by creating a document after the commencement of this arbitration (C-2023), Mr. Lichtenstein, lied under oath, testifying that he was orally appointed "General Counsel" of Levona. There is absolutely no support for this statement, nor is it credible.

When Mr. Lichtenstein testified at the hearing on May 24, 2023, he had been practicing law for three years. He graduated from law school in 2019, articled as a Canadian lawyer in 2020 which he described as akin to a residency after law school and then joined Murchinson in 2021. (May 24, 2023 Transcript pp. 109-110).

He represented in his witness statement that he was the "general counsel" of Levona but his testimony at the hearing under oath belies that assertion. He testified as follows:

18 Q. In Paragraph 4 of your witness statement,
19 you say that "as the general counsel of
20 Levona..."
21 So, are you selling this tribunal that you
22 are the general counsel of Levona?
23 I notice it has a capital "G" and a
24 capital "C," that looks like something formal.
25 A. Yes.
Page 94
2 Q. Okay. You're the formal general counsel
3 of Levona?
4 A. I don't know what you mean by informal.
5 Q. You know what the word "formal" means?
6 A. Just as formal versus informal general
7 counsel, yeah, I don't understand it.
8 Q. Well, who appointed you to general counsel
9 of Levona?
10 A. Elliot Asa (phonetic).
11 Q. And what piece of paper did you do that
12 with?
13 A. It was orally.
14 Q. And when did he do that?
15 A. When he was the front desk director, I
16 spoke to him.
17 Q. You spoke to him, and he said you're the
18 general counsel. Do you have a business card, by
19 the way, that -- that identifies your general
20 counselship of Levona?

21 A. I don't have any business card of Levona.

(May 24, 2023 Transcript, pp. 93-94).

When pressed further by Claimant's counsel, he volunteered the following:

Q. Okay. You said you didn't have a business
6 card, but do you have an e-mail address at
7 Levona?
8 A. No.
9 Q. Do you have an e-mail address at Poch
10 Shemen?
11 A. No.
12 Q. Does Poch Shemen have an e-mail address?
13 A. Not to my knowledge.
14 Q. Does Levona have an e-mail address?
15 A. No.
Q. To communicate with you, you communicate
17 to Murchinson, correct?
18 A. Through my Murchinson e-mail address.
19 Q. Yes.
20 A. Yes.

(May 24, 2023 Transcript, p. 106)

Before the start of the evidentiary hearing, Levona's counsel insisted that Mr. Lichtenstein was critical to Levona's legal team and his presence at the entirety of the hearing was necessary. Despite my asking Levona to provide sufficient corporate records or anything in writing to substantiate its claim that Lichtenstein was an internal attorney for Levona, it provided nothing more than a certification by him where he called himself "(a Toronto based attorney for Levona and one of its board member representatives for Eletson Gas.)" (May 24, 2023 Transcript, p. 96.)

Despite that lack of support, and over the strenuous objection of Claimants' counsel, I gave Levona an opportunity for Lichtenstein to be present by permitting his attendance only after he provided his direct written witness statement to Eletson. My purpose in this prerequisite to his attending the hearing before his actual testimony was to prevent any contamination of his witness testimony. Apparently, however, that was

Lichtenstein's goal all along. He did not provide his witness statement until May 23, 2023—the penultimate day of testimony. His entire written witness statement—purportedly as "General Counsel" of Levona (LEV255 ¶ 4)—is over 37 pages and 161 paragraphs in length and addresses almost every contested factual issue in the arbitration. It is also almost entirely hearsay and relates to events of which he has zero firsthand knowledge. I give his written statement zero weight in these proceedings, as it is clear to me that he was either impermissibly listening into these proceedings remotely, or improperly speaking in depth with others who were in attendance during other witnesses' testimony so as to accomplish the very thing I intended to prevent—witness contamination.

Lichtenstein went so far as to actually manufacture evidence in this case. He tried to argue that minutes of a March 10, 2022 Board meeting were created contemporaneously and proved that Eletson did not exercise the purchase option. (J-33.) However, this document, and Mr. Lichtenstein's testimony surrounding it, is not credible. As discussed above, Eletson credibly provided evidence about the metadata behind the document that supports the inference that it was edited by Mr. Lichtenstein *after* this arbitration commenced. (C-2023.)

It is clear from his testimony that this young lawyer does not understand the most basic ethical obligations of an attorney including to at all times avoid the appearance of an impropriety. This is glaringly illustrated in the following colloquy during his hearing testimony:

> Q. You willingly participated in this -- you,
> 7 as a lawyer, willingly participated in this
> 8 communication, correct?
> 9 A. I wrote this e-mail.
> 10 Q. And, in fact, I think is what you are
> 11 telling The Court is that you never, in fact,
> 12 objected to doing this.
> 13 A. Object to doing what?

14 Q. Objecting -- objected to making pretend
15 that you didn't know Mr. Kanelos when you did.
16 A. It was none of the other
17 directors' -- they didn't have a need to know
18 this.
19 Q. You were making pretend, right?
20 A. I don't know if the word is making
21 pretend. It's just a game. (May 24, 2023 Transcript, p. 164)

Murchinson/Levona continue through today to engage in gamesmanship both in connection with their refusal to honor their obligations under the BOL including their attempts to control the Company's assets as well their continuation of the multiple legal proceedings they have commenced—through Spears and Lichtenstein—in violation of the Status Quo Injunction Order. This is none surprising since in the words of their own "General Counsel" this is all "just a game."

As a result of the bad-faith, deceitful, wanton and corrupt manner in which Levona treated Claimants with an intent to injure them, bribed an Eletson officer, disregarded their obligations to Claimants and to the Company, intentionally and willfully breached the LLCA, committed associated torts against Claimant, and violated the orders of this arbitration, I find that punitive damages in the amount of $43,455,122.21, equal to the amount of compensatory damages, are warranted to be paid to the same entities that are to receive the underlying compensatory damages. *See, e.g., Standard Distrib. Co.*, 1996 Del. Super. LEXIS 125, at *38; *Barba v. Bos. Sci. Corp.*, 2015 Del. Super. LEXIS 537, at *31 (Del. Super. Ct. Oct. 9, 2015) (*citing State Farm Mut. Auto. Ins. Co. v. Campbell.* 538 U.S. 408 (2003)).

C. Interest, Costs and Fees

Levona must pay pre-judgment interest on all non-punitive damages at 10 percent per annum. Eletson asserts that the appropriate pre-judgment rate of interest should be 10 percent, as established under the parties' agreements. Specifically, Eletson refers to the

Intra-Group Loan, which provides for a rate of 10 percent per annum, for the loan that Levona provided the Company. (*See* J-07 Section 6.2.) Levona has not offered an alternative rate that it believes is more appropriate. Thus, I conclude that it is reasonable to apply the rate previously negotiated by the parties in other transactions.

As indicated in Dr. Furchtgott-Roth's first report, all of the compensatory damages he quantified were adjusted for interest up through January 30, 2023. Thus, Levona is obligated to pay additional prejudgment interest on those damages from January 30, 2023 up through the earlier of the date of payment of the awarded damages or the date of confirmation of this award by a court of competent jurisdiction.

Eletson also seeks the recovery of its costs and attorneys' fees for its prosecution and defense of this action pursuant to Section 12.14(d) of the LLCA, which provides that "the arbitrator shall have discretion to award reasonable attorneys' fees and reasonable travel expenses (excluding meals) to the prevailing party, which fees may be set by the arbitrator of such action or may be enforced in a separate action brought before an arbitrator for that purpose in accordance with this Section 12.14, and which fees shall be in addition to any other relief that may be awarded."

Since Claimants have prevailed in this arbitration, I grant Claimants' request for its costs and attorneys' fees pursuant to Section 12.14(d) of the LLCA and JAMS Rule 24(g) which read as follows:

> **Rule 24. Awards**
> (g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys' fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator's discovery orders caused delay to the proceeding or additional costs to the other Parties.

VII. ELETSON'S APPLICATION FOR FEES, EXPENSES, COSTS AND INTEREST

In the Corrected Interim Award, I granted Claimants' request for the opportunity to produce evidence of their recoverable costs, fees, and interest, and set a briefing schedule, with which the parties have complied.

In its Opening Affirmation, Eletson seeks fees, expenses, and costs in the amount of $9,850,222.99 in connection with the arbitration, and $3,007,266.20 in connection with the Bankruptcy and Bondholder Litigation, for a total of $12,857,489.19. This amount includes:

- $7,179,802.80 in legal and support staff fees incurred by Reed Smith in connection with the arbitration;
- $301,689.66 in disbursable costs and expenses incurred by Reed Smith in connection with the arbitration;
- $1,794,950.70 of a success fee owed to Reed Smith by Eletson under their engagement letter for the arbitration, which was triggered by the finding in the Corrected Interim Award that Eletson is the prevailing party in this arbitration;
- $344,691.99 in fees charged by Eletson's expert witnesses in connection with the arbitration, other than certain fees charged by one Eletson expert, Peter Daniel, whose expenses are primarily included as professional fees in Reed Smith's bills and included in the $7,179,802.80 referenced above;
- $50,986.27 in fees charged for trial support by Magna Legal Services and Transperfect Legal Solutions in connection with their trial support services in the arbitration;
- $251,878.47 in costs paid to JAMS for administrative, arbitrator and law clerk expenses in connection with the arbitration;
- $2,996,173.35 in legal and support staff fees incurred by Reed Smith in connection with the bankruptcy and Bondholder Litigation; and
- $107,082.35 in disbursable costs and expenses incurred by Reed Smith in connection with the bankruptcy and Bondholder Litigation.

Claimants note that Eletson is not seeking the reimbursement of attorney and non-attorney timekeeper fees if such attorney or timekeeper did not bill at least 15 hours to one of the two applicable Reed Smith client matter numbers. As a result, their total fee request of $12,857,489.20 has been discounted in the amount of $73,776.90 for the arbitration and $95,989.50 for the Bankruptcy and Bondholder Litigation. Second, Eletson is not seeking fees for its Greek counsel at the Timagenis Law Firm, who expended at least 700,000 euro in relation to the relevant matters. Third, in the engagement letter for the Bondholder and Bankruptcy Litigation, Reed Smith provided Eletson with a ten percent discount on all legal fees, which is reflected in the attached invoices and in the overall amount sought through this application.

The requested sum, however, does include fees that were expended in Eletson's preparation and filing of a New York state court complaint against Murchinson, which was folded into the bankruptcy. Eletson has indicated that to the extent I believe that such fees are outside the scope of those recoverable by Eletson, based on Eletson's review of the applicable invoices for the Bondholder Litigation contained in Exhibit 6 to their Opening Affirmation, approximately $260,000 worth of billing entries made some reference to work relating to Eletson's complaint against Murchinson. (Opening Affirmation p. 16.). Eletson also acknowledges that their application includes *de minimis* fees, reflected in Eletson's invoices for the arbitration, in relation to two "nuisance litigations" that Eletson claims are part and parcel with the arbitration, that Levona filed, after the commencement of the arbitration, against persons associated with Eletson in Delaware Chancery Court, *Levona Holdings, Ltd. vs. Vassilis Kertsikoff, et al.*, 2022-0823-MTZ, and the United States District Court for the Southern District of Texas, *Levona Holdings, Ltd. vs. Vassilis Kertsikoff, et al.*, 4:22-cv-02988. (Opening Affirmation p. 16.)

Eletson argues that their billing rates and staffing were reasonable given that this arbitration was a "bet-the-company dispute seated in New York City" with lawyers "required to work on an expedited timeline . . . on many fronts in multiple proceedings that required different specialties." (Opening Affirmation p. 4.)

Part of the requested fee amount includes a success fee in the amount of $1,794,950.70. In December 2022, Reed Smith and Eletson reached an agreement that Eletson would withhold 25% of each invoice, retroactive to the commencement of the matter, and if they were successful in the arbitration, the client would pay Reed Smith two times the amount withheld. In other words, Reed Smith would receive an "upside" from this arrangement, in the event of success, of an additional 25% of its fees.

Eletson also seeks additional pre-judgment interest at the rate of 10 percent in the amount of $2,496,081.87, which is the amount of interest running from January 31, 2023 through August 31, 2023. (Opening Affirmation p. 25.)

Finally, Eletson requests that "the Tribunal retain jurisdiction under Section 12.14(d) of the LLCA and/or JAMS Rules to enable Eletson efficiently to seek a subsequent and related award for additional fees and expenses that it has and will be required to spend since July 28, 2023," including to enforce the Corrected Interim Award and this Final Award. (*Id.*)

Levona opposes each of Eletson's requests.

As for Claimants' requests for fees, expenses and costs in the arbitration, Levona argues that Claimants' requests should be denied because they were neither the prevailing party nor the party responsible for the costs of the arbitration.

First, Levona argues that to be a prevailing party for attorney-fee purposes, one must "prevail on the central claims advanced, and receive substantial relief in consequence thereof." (Respondent's Affirmation p. 12, *citing Liberty Mut. Ins. Co. v. Brutus*, 2022 N.Y. Misc. Lexis 4154 (Sup. Ct. NY, Aug 16, 2022) (*quoting Sykes v. RFD Third Ave. I Assoc.,*

LLC, 39 AD3d 279, 833 N.Y.S.2d 76 (1st Dept. 2007); *see also Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) ("where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.")).

Here, Levona contends that Reed Smith represents Eletson Holdings and Eletson Corporation, not Eletson Gas or the Preferred Nominees, the latter entities being non-parties to whom the Corrected Interim Award awarded compensatory damages. According to Levona, Eletson, despite being the party advancing the claims in this arbitration, did not receive substantial relief in consequence of those claims, and thus, Eletson is not the prevailing party.

Levona also argues that Eletson was not the party responsible for paying the legal fees and costs. (Respondent Affirmation pp. 13-14.) Rather, Ms. Karastamati testified that that the Greek families through the Preferred Nominees were responsible for supporting the legal expenses and Reed Smith's affirmation does not address how the fees were paid, or who was ultimately responsible for doing so.

As to specific objections to the amounts included in Eletson's fee request, Levona argues that Reed Smith's bills are unreasonable. First, Levona argues that curiously the total amount of fees across all lawsuits is the exact amount due under the IntraGroup Loan.

In addition, Levona argues that Reed Smith improperly block-billed their time entries, which makes Levona unable to discern what time may have been spent on unrelated matters, for example, the Texas and Delaware lawsuits. (Respondent's Affirmation pp. 16-17.)

Levona also contends that Reed Smith overstaffed the matter. One example of the alleged overstaffing was, according to Levona, the attendance and billing of ten attorneys at the closing argument for the hearing. (*Id.* p. 18.) Levona also points to the number of hours

Levona's primary counsel has billed for this matter, which, without providing any supporting documentation, Levona states was roughly half the total hours of Reed Smith. (*Id.*)

With respect to the success fee, Levona argues that Reed Smith has not provided any written evidence of the success fee, and therefore, has not satisfied its burden of proof. Moreover, Levona does not have responsibility to pay for Eletson's "bet" and if any award for attorneys' fees is awarded, it should be reduced to only the amount that Eletson has actually paid Reed Smith.

Levona objects to the inclusion of any fees for the Texas and Delaware lawsuits, as these suits are against officers of the Company, not parties to the arbitration, and the awarding of fees here would deny those "jurisdictions their application of the American rule." (Respondent's Affirmation pp. 14-15; *citing Mansfield Realty, I., LLC v. Mansfield LLC,* 2023 NY Slip Op 31419 (U), ¶; *see also Dreisbach v. Walton*, 2014 Del. Super. LEXIS 557, *10 (Del. Super. Ct. Oct. 27, 2014) ("The United States Supreme Court has held that attorney's fees should not be awarded for work related to claims distinct from the claim on which the party was successful.")

Levona argues that I lack "jurisdiction to make any ruling related to the appropriateness or validity of [the Bankruptcy or Bondholder Litigation], the entitled [sic] of any party to those actions to recover its incurred fees, or the reasonableness of any fees sought in respect of those actions." (Respondent's Affirmation p.6.) Rather, Levona asserts that only the Bankruptcy Court can award fees in a bankruptcy action and the awarding of fees in New York for a state action is prohibited unless it is authorized by statute. (*Id.*). It further argues that my awarding of fees here could result in inconsistent rulings if the other courts determine differently. Furthermore, Levona argues that I am not in a position to determine the reasonableness of the fees in the Bankruptcy or Bondholder Litigation, nor is Levona.

Finally, Levona argues that the debtor in the Bankrupty and the defendants in the Bondholder Litigation include, in addition to Eletson Holdings, third parties who are not present in this arbitration, and thus, a third-party may not claim the benefit of a fee shifting clause unless they are intended third-party beneficiaries, for which there is no evidence. (Respondent's Affirmation p. 7, *citing Hub Elec. Co. v. Gust. Constr. Co.,* 585 F.2d 183, 188-89 (6th Cir. 1978); *Redzepagic v. Hammer,* 2017 U.S. Dist. LEXIS 27984, at *22-23 (S.D.N.Y. Feb. 27, 2017) (party cannot benefit from attorney fee shifting provision because it was not the party that could recover under the agreement.)) According to Levona, Eletson has not met its burden in establishing how Eletson Holdings is entitled to full recovery of the fees incurred in connection with the Bankruptcy and Bondholder Litigation when the parties represented include non-parties to this arbitration. (Respondent's Affirmation p. 8.)

Thus, Levona requests that I deny Eletson's fee request in its totality.

Alternatively, Levona argues that in the event I am to award Eletson attorneys' fees, I should, at most, award $3,130,160.80, which reflects: (1) a reduction in the amount of $1,794,950.70 for the fees Reed Smith did not expect its client to pay and another reduction of $1,794,950.70 for the subsequent "success fee"; and (2) a further reduction of the fees by 50% due to Reed Smith's inappropriate proof and unreasonable overstaffing, block billing, and lack of detail. Levona argues that the 50% reduction is appropriate in light of the fact that Levona's counsel billed less than 50% of the time billed by Eletson's counsel. (Respondent's Affirmation p. 23.)

With respect to pre-judgment interest, Levona argues that because the Corrected Interim Award awards damages to Eletson Gas and the Preferred Nominees, Eletson is not entitled to seek additional prejudgment interest on their behalf. Thus, the request for an additional award is inappropriate and should be denied.

Finally, Levona asserts that it is neither appropriate, nor legally permissible, for me to retain jurisdiction over the parties so that Eletson can make a future application for additional fees. Rather, once I enter my determination on fees, this Tribunal becomes *functus officio*. (Respondent's Affirmation p. 9.) Moreover, this request by Eletson for continued arbitral jurisdiction was made for the first time in the Opening Affirmation and that alone is reason to deny it. (*Id.* p. 10.)

A. Fees, Expenses, and Costs.

I find that Claimants' request for fees, expenses, and costs in this arbitration to be reasonable, with one exception, which I will address below.

Section 12.14(d) of the LLC Agreement grants this Tribunal the "discretion to award reasonable attorneys' fees . . . to the prevailing party," and JAMS Rule 24(g) allows the Tribunal to "allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law." Under applicable law, "when a contract provides that in the event of litigation the losing party will pay the attorneys' fees of the prevailing party, the court will order the losing party to pay whatever amounts have been expended by the prevailing party, so long as those amounts are not unreasonable." *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1263 (2d Cir. 1987); *Diamond D Enters. USA, Inc. v. Steinsvaag*, 979 F.2d 14, 19 (2d Cir. 1992) (same); *Mahani v. EDIX Media Group, Inc.,* 935 A.2d 242, 245-46 (Del. 2007) (fees award was reasonable where it was "based on facts in the record, and was neither arbitrary or capricious").

In determining reasonableness, Delaware courts look at the following factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. *See Mahani*, 935 A.2d at 246 (*citing in part,* Del. Lawyers' R. of Prof. Conduct 1.5(a)(1)).

These factors support Eletson's fee request. Reed Smith's hourly rates are within what courts in New York City have found reasonable. Reed Smith's lawyers' hourly rates ranged from $1610 for Mr. Solomon, Claimants' lead counsel, $1275 for Mr. Underwood, Claimants' second chair, and between $900-$425 per hour for other partners, counsel, associates, and paralegals.

Indeed, several Southern District courts have found that Reed Smith's current rates, when adjusted for inflation against the rates considered during the litigation at issue, were reasonable. *See, e.g. New York City. Vista Outdoor, Inc. v. Reeves Family Tr.*, 2018 U.S. Dist. LEXIS 102224, at *19 (S.D.N.Y. May 24, 2018) (hourly rates up to $1,260 in 2018 were "not excessive in the New York City 'big firm' market"); *Angelo, Gordon & Co., L.P. v. MTE Holdings, LLC*, 2021 U.S. Dist. LEXIS 70271, at *6 (S.D.N.Y. Apr. 12, 2021) (partner rates of $1,175 and $1,350 per hour for partners at large law firm, "though on the higher end, [were] comparable to rates awarded in this jurisdiction"); *see also In re Relativity Fashion, LLC*, No. 15 Br. 11989 (Bankr. S.D.N.Y. June 10, 2016) (ECF No 1965) (awarding hourly rates of up to $1,225—in 2016—for Jones Day partners).

Moreover, as reflected in recent bankruptcy fee application filings submitted by New York City counsel at large firms, rates at even $2,000 an hour are common for lead

counsel. *See, e.g., In re SVB Financial Group*, Case No. 23-10367 (MG) (Bankr. S.D.N.Y. 2023) (ECF No. 475) (fee application by large New York firm with rates over $2,000 for partners, between $1,500 and $1,700 for counsel, and $775 to $1,475 for associates).

Notably, Levona's counsel does not argue that the hourly rates of Reed Smith were unreasonable or even high. It is further worth noting in this connection that Levona recently retained new counsel, Quinn Emanuel Urquhart & Sullivan, LLP, a firm that has been reported to have hourly rates ranging for partners between $1,385-$2,130, as of October 2022. (*See* Opening Affirmation, Exhibit 10.)

In addition, the amount of time billed by the Reed Smith attorneys in this arbitration is reasonable in light of the extensive number of filings and the highly contested nature of these proceedings. I adjudicated numerous disputes, including multiple challenges to JAMS' jurisdiction, several requests for injunctive and other preliminary relief by both parties, successive motions to strike Eletson's pleadings, many motions to compel discovery from both parties, and multiple motions *in limine*. Each of these applications entailed substantial factual and legal research and development, briefing, and often extensive oral argument. According to Claimant—and notably, not disputed by Levona—over 200 litigation documents were filed in JAMS, over 10 hearings were conducted before me, even before the plenary hearing, 4 witnesses were deposed, 15 expert reports were submitted, and approximately 26,000 documents totaling over 160,000 pages were produced. (Opening Affirmation p. 6.)

In addition, the parties (i) submitted pre-hearing briefs that collectively exceeded 130 pages of legal argument, (ii) submitted proposed exhibit lists that collectively exceeded 2,200 exhibits, (iii) participated in a pre-hearing conference that lasted the

better part of a day, (iv) held an evidentiary hearing that lasted 7 full days, during which several hundreds of exhibits were introduced and 14 witnesses were examined and/or cross-examined, (v) submitted post-hearing briefing that collectively exceeded 320 pages of legal argument and proposed findings of fact, and (vi) conducted a long and extensive post-hearing oral argument lasting many hours. (Opening Affirmation p. 6.)

This said, I agree with Levona that an award of attorneys' fees should not include the time incurred in connection with the state court action that Eletson commenced against Murchinson. Eletson has estimated its fees for that action to be approximately $260,000. Notably, Levona has not contested the amount estimated by Eletson, nor proposed a different calculation.

I disagree with Levona's argument for the exclusion of fees incurred in this arbitration that relate to the Texas and Delaware litigations, which Eletson claims to be "de minimis". Levona does not challenge or dispute Eletson's claim that these costs are "de minimis," and acknowledges that Reed Smith did not represent the individual Eletson officers in connection with those suits. (*See* Respondent Affirmation p. 16.) Thus, it is reasonable to conclude that the time entries referencing those actions are directly related to this arbitration. Reed Smith needed to review the Texas and Delaware complaints and stay apprised of those lawsuits in order to understand their connection and relevance to the claims in this arbitration.

As for the non-attorney amounts requested, including disbursable expenses, expert fees, trial support costs, and JAMS administrative and arbitrator costs, these costs are shiftable to Respondent under the LLCA and JAMS Rule 24(f). *See, e.g.*, *Themis Capital v. Democratic Republic of Congo*, 2014 WL 4379100, at *9 (S.D.N.Y. Sept. 4, 2014) ("[C]ourts in this District routinely reimburse prevailing parties for the costs of

expert witnesses and consultants"); *Weiwei Gao v. Sidhu*, 2013 WL 2896995, at *6 (S.D.N.Y. June 13, 2013) (granting expert costs because they were "reasonable and necessary" and because the "Fee Sharing Agreement provides for recovery of 'other costs incurred"); *Austrian Airlines Oesterreichische Luftverkehrs AG v. UT Fin. Corp.*, 2008 WL 4833025, at *9 (S.D.N.Y. Nov. 3, 2008) (because the contract "clearly—and undisputedly—provide[d] for reasonable attorneys' fees 'and other costs'" and because defendant did not use "duplicative or unnecessary expert witnesses," the Court declined to "make any reductions in the costs related to [defendant's] use of these witnesses"); *Ambac Assur. Corp. v. Adelanto Pub. Util. Auth.*, 2013 WL 4615404, at *1, *7 (S.D.N.Y. Aug. 29, 2013) (awarding expenses billed by e-discovery vendor pursuant to a fee-shifting provision); *HSH Nordbank AG N.Y. Branch v. Swerdlow*, 2010 WL 1141145, at *3, *6–7 (S.D.N.Y. Mar. 24, 2010) (awarding $408,071.34 for services related to electronic data storage and hosting for e-discovery pursuant to a fee-shifting provision). Indeed, Respondent does not even address these costs and expenses in its opposition to Eletson's application.

I further award Eletson the "success fee" in the amount of $1,794,950.70. In circumstances such as this, the law is clear that the fee shifting provision in the parties' agreement obligates Levona to pay these contingent fees that Eletson now owes to Reed Smith. *See IAC/InterActiveCorp v. O'Brien,* 26 A.3d 174, 179 (Del. 2011) (rejecting argument that contingent legal fees were "not incurred because they do not represent work done, but rather the success achieved"; finding "A premium or contingent fee is payable for work done, if that work is successful. The fact that the amount of the fee is not set until the result is obtained does not change the fact that the fee is incurred based on hours or work performed for the client."); *Williams Cos. v. Energy Transfer LP*, 2022

Del. Ch. LEXIS 207, at *7-8 (Del. Ch. Ct. Aug. 25, 2022) ("There is nothing inherently unreasonable in enforcing a contractual fee-shifting arrangement to cover a contingent fee award"; awarding fee shifting on contingent fee arrangement); *S'holder Representative Servs. LLC v. Shire US Holdings, Inc.*, 2021 Del. Ch. LEXIS 81, at *2-3 (Del. Ch. Ct. April 27, 2021) (same; noting party opposing fee shifting could have negotiated for a contract that did not permit the shifting of contingent fees).

Accordingly, I award Claimants payment of their attorney's fees, expenses and costs for this arbitration in the total amount of $9,590,222.99.

For many of the same reasons, I also find Claimants' application for fees and costs for the Bankruptcy and Bondholder Litigations in the amount of $3,007,266.20 reasonable.

I note that Claimants submitted 10 supporting exhibits along with their Opening Affirmation that further substantiate the reasonableness of their application for fees, expenses, and costs in this arbitration, the Bankruptcy and the Bondholder Litigation:

- Exhibit 1 is the client Affidavit of Laskarina Karastimati attesting to the reasonableness of the fees and expenses paid and incurred by Eletson in connection with the matters as to which the Tribunal awarded fees and expenses;
- Exhibit 2 is the expert Affidavit of Dr. Harold Furtchgott-Roth calculating the additional interest the Tribunal awarded to Eletson in the Corrected Interim Award;
- Exhibit 3 is a set of summary charts of the totals set out herein;
- Exhibit 4 is a list of Reed Smith timekeepers by title, listing hours billed, rates, and value;
- Exhibit 5 is combined invoices related to this arbitration;
- Exhibit 6 is combined invoices related to the Bankruptcy and Bondholder Litigation;
- Exhibit 7 is combined expert invoices related to this arbitration;
- Exhibit 8 is combined trial support invoices related to this arbitration;

- Exhibit 9 is the biographies of Reed Smith attorneys that worked on this arbitration, the Bankruptcy, and/or the Bondholder Litigation; and
- Exhibit 10 is an article setting forth the rates of Quinn Emanuel Urquhart & Sullivan, LLP as of October 27, 2022.

Curiously, Levona did not submit any documentation to support their opposition to Claimant's application or support their argument that Reed Smith overstaffed or overbilled the matter. Indeed, I do not have any documentation to support Levona's assertion that Reed Smith billed more than double the hours of Frankel, Rubin, Klein, Payne & Pudlowski P.C. ("Frankel Rubin"). Levona did not attach, as is customary in responsive opposition submissions to fee applications, any supporting documentation demonstrating their own legal fees.

Levona's additional arguments in opposition to Claimants' application are unavailing.

Levona's argument that Eletson was not the prevailing party and that "the prevailing party was not a party to the Arbitration" is completely without merit. (Respondent's Affirmation p. 13.) In making this argument, Levona also implies that the propriety of the award to Eletson Gas and the Preferred Nominees, as purported non-parties, requires further adjudication. Putting aside that this is a merits issue that was already decided in the Corrected Interim Award, Levona's contention is simply untenable. The possibility that, if Eletson succeeded on its claims, relief would not be awarded to Eletson, but for example to Eletson Gas, has been known since the commencement of this arbitration.

From the start of this arbitration, the claims—*and Levona's counterclaims*—related to who held the preferred interests. A primary question to be answered in this arbitration was whether Eletson exercised the option under the BOL, thereby transferring the preferred interests pursuant to the terms of the BOL. The express terms of the BOL

made clear that, in the event the option was exercised, the preferred interests would transfer to Eletson Gas or its nominee: "Levona hereby grants Eletson Gas the option . . . for ***either Eletson Gas or its nominee*** to purchase all of the membership interests held by Levona in Eletson Gas . . . ." (J-6 ¶ 2.1 (emphasis added); *see also*, Corrected Interim Award pp. 26-31.)

Despite filing motions on numerous issues, including multiple motions to strike claims and allegations, Levona never objected to Eletson having standing to enforce the terms of the BOL, even though, if successful, relief would be awarded—as expressly set forth in the BOL—to "Eletson Gas or its nominee."[8]

Indeed, given the disputed ownership of Eletson Gas, which was the catalyst to the filing of this arbitration, the only entities who could bring this arbitration to dispute the ownership of the preferred interests of Eletson Gas, would be Eletson and Levona, as shareholders of Eletson Gas. In other words, Eletson Gas could not bring this claim on its own given that Levona contended it continued to own the preferred interests of, and therefore had a controlling interest in, Eletson Gas. It has also been clear throughout these proceedings that Eletson would turn over any damages to Eletson Gas, depending upon my ultimate determinations in this arbitration. (*See* Third Amended Statement of Claims at ¶ 64(p); *see also* Claimant's Post-Hearing Brief at ¶ 11.)[9]

Accordingly, it is Eletson that substantially prevailed on its claims in this arbitration and any attempts by Levona to undermine previous findings in this arbitration

---

[8] Levona objected only to Eletson's argument that the preferred interests had been contingently transferred *from Eletson Gas* to the Preferred Nominees.

[9] It is worth noting that had I found that Levona retained the preferred interests and awarded Levona certain relief that it had requested, some of that relief would have in fact been derivative relief. While Levona sought damages under a theory of tortious interference in connection with the Unigas offer letter, any damages suffered as a result of a decrease in sale price, would have been to the Company, and only indirectly to Levona, as the preferring shareholder.

based on new arguments that the relief was inappropriately granted to Eletson Gas, or a nominee of the Eletson Gas, are summarily rejected.

In addition, contrary to Levona's assertion, Reed Smith's use of block billing is not unreasonable, and a review of Reed Smith's invoices support a finding that sufficient detail was provided in the invoices to demonstrate that the time was billed productively. *See Gentel Wave Shipping S.A. v. Transfield Shipping, Inc.*, 2010 U.S. Dist. LEXIS 13210, *4 (S.D.N.Y. Feb. 11, 2010) (use of block billing "has been held to comply with Second Circuit standards and client expectations."). Courts will award attorneys' fees in connection with block billed entries where there is "enough detail and specificity so as to afford reasonable confidence that the time billed was productively spent, even if it is impossible to reconstruct the precise amounts of time allocable to each specific task listed in the block entry." *Beastie Boys v. Monster Energy Co.*, 112 F. Supp. 3d 31, 54 (S.D.N.Y. 2015); *Aurora Comm. Corp. v. Approved Funding Corp.*, 2014 U.S. Dist. LEXIS 108949, *16 (S.D.N.Y. Aug. 6, 2014).

I also reject Levona's claim that Reed Smith overstaffed the matter. To use one of the examples Levona raised, the fact that ten attorneys attended and billed time at the closing argument does not lead to the conclusion that Reed Smith overstaffed the matter. In evaluating the reasonableness of staffing, it is not proper to isolate one event and evaluate it in a vacuum. This arbitration concerned the ownership of the preferred interests in Eletson Gas, a company with assets that were indisputably valued in the hundreds of millions of dollars, as well as a request for an award of compensatory damages in eight figures.

Moreover, the billing entries for the closing argument fees to which Levona cites as evidence of overstaffing reflect that time was spent not just attending the argument but

also on working on the closing argument presentation. (*See,* Opening Affirmation, Exhibit 5 pp. 308-333.) Regardless, to determine that the time billed by attorneys was reasonable, I need not reach a conclusion as to the value added by each timekeeper at each event. Rather, in determining fees, I look to "what a reasonable, paying client would be willing to pay." *Arbor Hill Concerned Citizens Neighborhood'Ass'n v. City of Albany & Albany Cty. Bd. of Elections,* 552 F.3d 182, 194 (2d Cir. 2008). Here, the fees incurred by Reed Smith that have been already paid, or that the client has agreed to pay, are reasonable and the reasonableness of those fees has been attested to in client affirmations.

Importantly, it should not be forgotten this arbitration was a bet-the-company case for Eletson, with a mandated expedited timeline for arbitration. I agree with Eletson that, even putting aside the lack of any evidentiary support for Levona's assertion that Levona's counsel expended half as many hours as Reed Smith, the time expended by Frankel Rubin is not an appropriate measure for comparison, given my repeated suggestions at various times in this arbitration that Frankel Rubin should increase its staffing to meet the expedited timelines of this arbitration.

Similarly, the arguments Levona raises in opposition to Claimants' requests for fees in connection with the Bankruptcy and Bondholder Litigation fail. Levona's invocation of the American rule is misplaced. In the Corrected Interim Award and in this Final Award , I ruled that Levona's alter ego, Pach Shemen repeatedly violated the Status Quo Injunction Order. Since I ruled that Pach Shemen's directing of the commencement of the Bondholder Litigation against Eletson Holdings, and the commencement of an involuntary bankruptcy action against Eletson Holdings were both intentional violations of the Status Quo Injunction, I awarded Eletson reimbursement of the attorney's fees and

costs incurred in connection with those actions to be paid to the entity or individuals who paid those costs and fees. (*See* JAMS Rule 29 stating that the "Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses, assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.")

In other words, the award of attorneys' fees was as damages to compensate for the intentional violations by Levona, through its alter ego, Pach Shemen, of the Status Quo Injunction Order—not a finding of a prevailing party's entitlement to fees or a finding under a fee-shifting provision. The court jurisdictions remain free to render any rulings relating to fees in connection with the merits of those litigations. "Where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate. This is because it is 'not the role of the courts to undermine the comprehensive grant of authority to arbitrators by prohibiting' them from fashioning awards or remedies to 'ensure [] a meaningful final award.'" *Reliastar Life Ins. Co. v. EMC Nat'l Life Co.,* 564 F.3d 81, 86 & n.2 (2d Cir. 2009).

Moreover, the attorney affirmation, client affidavit, and invoices from the Bankruptcy and Bondholder Litigation also provide me with sufficient basis to determine the reasonableness of the fees requested. *See Simmons v. N.Y.C. Transit Auth.*, 575 F.3d 170, 174 (2d Cir. 2009) ("The presumptively reasonable fee boils down to what a reasonable, paying client would be willing to pay, given that such a party wishes to spend

the minimum necessary to litigate the case effectively.") (citation omitted). Levona itself also had the ability to determine the reasonableness of Reed Smith's invoices. Even if Frankel Rubin may not be counsel of record in those lawsuits, Levona's agents, Spears and Lichtenstein, in particular, are involved in those proceedings, and subject to compliance with the confidentiality restrictions ordered in this arbitration, could have assisted Levona's counsel in connection with its opposition to Eletson's fee application.

Finally, Levona's argument that the Bondholder Litigation and Bankruptcy involve Eletson-related entities that are not parties to this arbitration, and therefore, Eletson is not entitled to the full recovery of the fees billed in those cases, is unavailing. The invoices reflect that the work done by Reed Smith that is included in the fee request was done solely on behalf of Eletson Holdings or jointly on behalf of Eletson Holdings and the other entities. The information provided in support of Eletson's application meets their burden of reasonableness. Levona has provided nothing to infer that the amount of fees incurred was greater simply because Reed Smith is representing multiple related entities in those litigations, as opposed to only Eletson Holdings.

B. Additional Pre-Judgment Interest

The Corrected Interim Award provided for compensatory damages that included pre-judgment interest running up through January 30, 2023 at a rate of 10 percent, and also provided for the recovery of additional pre-judgment interest at the same rate running until such date that the award is paid or confirmed in a court proceeding. Claimants submitted, along with the Opening Affirmation, the Fourth Expert Report by Dr. Harold Furchtgott-Roth, which calculates the relevant amounts of additional pre-judgment interest owed by Levona. In accordance with Dr. Furchtgott-Roth's

calculations, the total amount of pre-judgment interest running up to August 31, 2023 is $2,496,081.88. (Opening Affirmation p. 25.)

Thus, the pre-judgment interest running up to August 31, 2023 is awarded as follows:

- To Eletson Gas: $1,319,163.14.
- To the Preferred Nominees: $1,176,918.74.

To the extent Levona did not satisfy the Corrected Interim Award by August 31, 2023, additional pre-judgment interest will continue to run in accordance with the terms of the Corrected Interim Award. Dr. Furchtgott-Roth sets out how to calculate that additional interest during that indefinite time period using the following formula:

> {(Award amount as of August 31, 2023)*(1.008333)^[(number of whole months since August 31, 2023) + ((number of days in partial month)/(total number of days in partial month))] – (Award amount)}.
>
> (Opening Affirmation p. 26, citing Exhibits 2, 3.)

I agree with Claimants that pre-judgment interest at a rate of 10% running from the date of this Final Award until the earlier of the date of payment of the amount due or the date of confirmation of this award by a court of competent jurisdiction shall accrue on the awarded amount of attorneys' fees, costs and expenses and the calculation of that interest amount shall be done using the same formula above, except substituting the total amount of attorneys' fees, costs, and expenses determined by the arbitrator for the "Award amount".

Notably, Levona does not challenge the calculation of the interest amount Eletson requests or the calculation proposed to calculate additional interest that may be due in the future. Nor does it respond to Eletson's request for interest on the fees, costs and

expenses, other than arguing that both attorneys' fees and interest should be denied outright.

With respect to pre-judgment interest, Levona argues that because the Corrected Interim Award awards damages to Eletson Gas and the Preferred Nominees, Eletson is not entitled to seek additional prejudgment interest on their behalf and therefore the request for an additional award is inappropriate and should be denied. This argument by Levona is both untimely and without merit.

C. Retention of Arbitral Jurisdiction

I deny Eletson's request to retain jurisdiction after this Final Award to enable Eletson to make future fee applications and agree with Levona that I made clear in the Corrected Interim Award, that "[u]pon receipt of all these papers, the matter shall be deemed submitted for a decision on the final award at that time." I also agree with that the arbitrator becomes *functus officio* after the issuance of a final award.

This said, both in the Corrected Interim Award and tin his Final Award I make clear that I have awarded Eletson fees, costs, and expenses in connection with this arbitration as well as the Bankruptcy and the Bondholder Litigation. Moreover, there is a continuing accrual of pre-judgment interest on any accrued and unpaid amounts running up until the earlier of the date of payment of the amounts due or the date of confirmation of this Final Award by a court of competent jurisdiction, as well as the formula that should be used to calculate any additional interest. Eletson has, among other options, the ability under Section 12.14(d) of the LLCA to seek additional relief in the event it needs to enforce payment of the amounts awarded.

VIII. CONCLUSION AND FINAL AWARD

This Final Award resolves all issues submitted for decision in this arbitration. The undersigned has considered and resolved all the issues and arguments raised relating to the merits of the claims, counterclaims, requests for attorney's fees, costs, expenses, and pre-judgement interest, including those not explicitly addressed herein. Any argument not addressed in this Final Award was found to be unavailing, without merit, academic, or unnecessary to reach.

This Final Award finds and orders as follows:

1. Claimants have proven breaches of the LLCA and the covenant of good faith and fair dealing and established that Eletson exercised the purchase option pursuant to the BOL, and are therefore entitled to the declaratory relief, compensatory damages, punitive damages, prejudgment interest, and attorney's fees, as set forth below.

2. Respondent has not proven any of its counterclaims and they are dismissed. Respondent is entitled to recover nothing from the Claimants.

A. <u>Declaratory Relief</u>

I hereby enter the following findings, determinations, and declarations:

1. Eletson effectively exercised the buyout option granted in the Binding Offer Letter dated February 22, 2022 on and as of March 11, 2022, and any alleged precondition to the exercise of that option was either satisfied or waived.

2. As of March 11, 2022, Respondent Levona had no membership interest in the Company, Eletson Gas.

3. The Company exercised its rights under the BOL to nominate three entities—Fentalon, Apargo, and Desimusco, (the Preferred Nominees)—affiliated with the

principals of Claimants, as the parties to receive the preferred interests in the Company, previously held by Levona.

4. The preferred interests in the Company were transferred to the Preferred Nominees, effective as of March 11, 2022, and the Preferred Nominees are permitted transferees under the LLCA. They have stipulated to be bound by this Award and any Judgment entered hereon.

5. Eletson Holdings and Eletson Corporation never held any of the preferred interests in the Company.

6. The shares of the subsidiaries which control the Symi and Telendos were transferred to Levona as of March 11, 2022 as the Purchase Option Consideration in connection with the BOL. Since March 11, 2022, Levona retains all rights associated with ownership of the subsidiaries of those vessels.

7. The Status Quo Injunction shall stay in effect until the later of the final court judgment being entered on any Award or any further order of this Arbitrator.

8. Levona, Murchinson, and Pach Shemen, are each alter egos of the other concerning every fact proven in this matter and every item of relief awarded herein. Any references to Levona herein are therefore to all the alter-egos and for the avoidance of doubt, any judgments against Levona are also against each alter-ego.

9. Levona breached its LLCA and related obligations, including without limitation common law and contractual duties to Claimants and the Company, in at least the following ways:

i. Bribing an Eletson Corporation employee, and Company representative, Peter Kanelos, and causing him to disclose the Company's confidential information;

ii. Violating confidentiality obligations by disclosing the Company's confidential information to third parties, failing to take steps to recover such information, and then deceiving Claimants and the Company concerning said breaches after it became a member of the Company;

iii. actively engaging in unlawful behavior by wrongfully influencing Company financiers to turn against the Company and Claimants, including without limitation by causing the arrest of five of the Company's vessels and not disclosing this misconduct to Eletson or the Company after it became a member of the Company;

iv. Failing to acknowledge that Eletson fully complied with the terms of the BOL Purchase Option, and failing to act in good faith by remaining silent about its purported belief that the Company would or might fail to meet its BOL terms;

v. Improperly purporting to act on behalf of the Company in its business dealings with third parties, including by attempting to sell the Company's assets to its primary competitor, Unigas, and concealing such misconduct from Claimants;

vi. Improperly threatening Eletson and affiliated officers and directors, including by pursuing litigation against them;

vii. Improperly purporting to seize control of the Company's board of directors post-March 11, 2022;

viii. Improperly purporting to direct the day-to-day operations of the Company post-March 11, 2022;

ix. Improperly purporting to assert control over the assets of the Company post March 11, 2022;

x. Improperly purporting to call and hold meetings of the Board of the Company without following proper procedures and for unlawful and improper purposes of approving unlawful and improper conduct post March 11, 2022;

xi. Breaching its obligations under the LLCA, including without limitation by purporting to terminate management agreements that Eletson Corporation has with the Company's subsidiaries, purporting to change management of the Company's subsidiaries, precluding Eletson Corporation from communicating with the Company's financiers, all of which Levona knew was unlawful and in breach of the LLCA; and

10. Violating this arbitration's Status Quo Injunction by:

i. Wrongfully declaring the Company in default of the loan from Levona and wrongfully purporting to accelerate payment of the principal;

ii. Trying to sell vessels, including the Symi and Telendos, while the Status Quo Injunction was in effect; and

iii. Directing and/or causing Levona's affiliates to purchase a controlling position in securities of Eletson Holdings in January 2023 for the purpose of wrongfully commencing and then actually causing the commencement of litigation

against Eletson Holdings and the filing an involuntary bankruptcy petition against Eletson Holdings.

B. Compensatory Damages

Levona, Murchinson and Pach Shemen, as alter-egos, jointly and severally, shall pay $43,455,122.21 in compensatory damages as follows:

1. $21,777,378.50, to be paid to Eletson Gas, as compensatory damages for the improper arrests of Eletson Gas vessels, which includes prejudgment interest at a rate of 10% from the date of the arrests (or approximate date the expenses were incurred) through January 2023;

2. $19,677,743.71, to be paid to the Preferred Nominees, constituting the lost profits (EBITDA) due to Levona's unjust enrichment arising from available use of the Symi and Telendos since March 11, 2022, without the reciprocal transfer of the preferred interests, which includes pre-judgment interest through January 2023;

3. $2,000,000 to be paid to Eletson Gas, as compensatory damages arising out of Levona's other breaches of contract, with prejudgment interest at 10% from the date of this Corrected Interim Award until the earlier of the payment of either this award or confirmation in a court of competent jurisdiction of this award.

4. The entities referred to in B.1 and B.2 respectively shall also be awarded pre-judgment interest on the principal amount of the compensatory damages in paragraph B.1. above, (damages for improper arrests), and paragraph B.2. above (damages for lost profits due to Levona's unjust enrichment) at a rate of 10% running from January 30, 2023 through the earlier of either the payment of the award or confirmation of the award in a court of competent jurisdiction.

C. Punitive Damages

Levona, Murchinson and Pach Shemen, as alter-egos, jointly and severally, shall pay punitive damages in the total amount of $43,455,122.21, as follows:

1. $23,777,378.50, to be paid to Eletson Gas; and

2. $19,677,743.71 to be paid to the Preferred Nominees.

D. Attorney's Fees, Costs, Expenses and Additional Interest

Levona, Murchinson and Pach Shemen, as alter-egos, jointly and severally, shall pay:

1. Attorney's fees, costs, and expenses to Claimants incurred to date in connection with this arbitration, the Bondholder Litigation, and the Bankruptcy pursuant to the LLCA Section 12.14(d) and JAMS Rule 24(g), as follows:

i. Attorneys' fees, costs, and expenses due in connection with this arbitration in the amount of $9,590,222.99.

ii. An additional amount of $22,366.10 representing additional JAMS costs incurred in this arbitration since the filing of Eletson's Opening Affirmation, and which Eletson has paid both its share and covered Respondent's share.

iii. Attorneys' fees, costs and expenses due in connection with the Bankruptcy and Bondholder Litigation in the amount of $3,007,266.20;

2. Additional pre-judgment interest on the compensatory damages as awarded in the Corrected Interim Award through August 31, 2023, in the amount of $2,496,081.88, to be paid as follows:

i. To Eletson Gas: $1,319,163.14.

ii. To the Preferred Nominees: $1,176,918.74.

3. Additional prejudgment interest on compensatory damages running from August 31, 2023 until the earlier of the date of payment of the amount due or the date of confirmation of this Final Award by a court of competent jurisdiction calculated by using the formula set forth above in this Final Award; and

4. Additional prejudgment interest on any fees, costs and expenses that have been awarded in this Final Award running from the date of this Final Award until the earlier of the date of payment of the amounts due or the date of confirmation of this Final Award by a court of competent jurisdiction calculated by using the formula set forth above in this Final Award.

The foregoing constitutes the Final Award in this arbitration.

Any other relief requested is hereby denied.

Dated: New York, NY
September 29, 2023

Hon. Ariel E. Belen (Ret.)
JAMS Arbitrator

Affirmation

State of New York)
:ss:
County of New York)

I, Hon. Ariel E. Belen (Ret.), do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my Final Award in this arbitration.

Dated: New York, New York
September 29, 2023

AEBelen

Hon. Ariel E. Belen (Ret.)
JAMS Arbitrator

EXHIBIT C

EXHIBIT C

JAMS ARBITRATION
NEW YORK, NEW YORK

Eletson Holdings, Inc., et al.,

Claimants,

and **JAMS Ref. No. 5425000511**

Levona Holdings Ltd.,

Respondent.

Decision on Cross-Motions for Preliminary Injunction

I. Introduction

1. Parties and Counsel: The parties to this arbitration are identified in the caption and are represented as follows:

Counsel for Claimants:

Louis Solomon, Esq.
Reed Smith LLP
599 Lexington Avenue
22nd Floor
New York, New York 10022
Tel: 212 521-5400
Fax: 212 521-5450
Email: lsolomon@reedsmith.com

Nancy Savitt, Esq.
Reed Smith LLP
599 Lexington Avenue
22nd Floor
New York, New York 10022
Tel: 212 521-5400
Fax: 212 521-5450
Email: nsavitt@reedsmith.com

Colin Underwood, Esq.
Reed Smith LLP
599 Lexington Avenue
22nd Floor
New York, New York 10022
Tel: 212 521-5400
Fax: 212 521-5450
Email: cunderwood@reedsmith.com

Counsel for Respondent:

Mayer Klein, Esq.
Frankel, Rubin, Klein, et al.
231 South Bemiston Avenue
Suite 1111
Clayton, Montana 63105
Tel: 314 725-8000
Fax: 314 726-5837
Email: mklein@frankelrubin.com

Reid Simpson, Esq.
Frankel, Rubin, Klein, et al.
231 South Bemiston Avenue
Suite 1111
Clayton, Montana 63105
Tel: 314 725-8000
Fax: 314 726-5837
Email: rsimpson@frankelrubin.com

2. JAMS Arbitrator:

Hon. Ariel E. Belen (Ret.)
JAMS
620 Eighth Avenue
34th Floor
New York, New York 10018
Tel.: 212 751-2700
Fax: 212 751-4099
Email: abelen@jamsadr.com

3. JAMS Law Clerk:

Rachel Gupta, Esq.
JAMS
620 Eighth Avenue
34th Floor
New York, New York 10018
Email: rgupta@guptaresolutions.com

4. JAMS Case Manager:

Burton King, Esq.
JAMS
620 Eighth Avenue
34th Floor
New York, New York 10018
Tel.: 212 607-2758
Fax: 212 751-4099
Email: BKing@jamsadr.com

5. The claims are set forth in a certain "Demand for Arbitration Form," dated July 29, 2022, and in a certain "Statement of Claims," dated July 29, 2022, with exhibits attached thereto. Respondent submitted "Levona Holdings LTD's Response to Statement of Claims and Statement of Counterclaims," with exhibits, dated August 19, 2022. Respondent also submitted a Letter, dated September 5, 2022. Claimant then submitted a Letter, dated September 5, 2022.

6. This arbitration is brought pursuant to a certain "Eletson Gas, LLC, Third Amended and Restated Limited Liability Company Agreement," dated July 29, 2022. The arbitration provision is contained in subsection 12.14(a), page 69 of the LLC Agreement. The parties disagree as to the scope of this arbitration provision and the arbitrability before JAMS of some of the claims.

This decision is based upon a review of all the pleadings in this arbitration proceeding as well as the submissions that follow that were considered by the undersigned

arbitrator. The submissions that were reviewed and considered are as follows: Respondent's Motion for Preliminary Injunction ("Levona Motion for PI"), Memorandum in Support of Motion for Preliminary Injunction ("Levona Mem."), with supporting affidavits and exhibits, dated October 25, 2022 (collectively, "Levona Motion"); Claimants' Cross-Application for Preliminary Injunction, Claimants' Memorandum of Law in Support of Cross-Application for Preliminary Injunction ("Eletson Mem."), with supporting affidavits and exhibits, dated October 25, 2022 (collectively, "Eletson Cross-Motion"); Respondent's Response in Opposition to Claimants' Cross-Application for a Preliminary Injunction ("Levona Opposition"), with supporting affidavits and exhibits, dated November 8, 2022; Claimants' Memorandum of Law in Opposition to Respondent's Motion for a Mandatory Preliminary Injunction ("Eletson Opposition"), with supporting affidavits and exhibits, dated November 8, 2022; Respondent's Reply in Support of Respondent's Motion for a Preliminary Injunction ("Levona Reply"), with supporting affidavit and exhibits, dated November 18, 2022; Claimants' Reply Memorandum of Law in Further Support of Claimants' Cross-Application for a Status Quo Preliminary Injunction ("Eletson Reply"), with supporting affidavits and exhibits, dated November 18, 2022; and the parties' presentations and oral argument on November 22, 2022.

The undersigned arbitrator recognizes and appreciates the high quality of the presentations by counsel for each party. The result of this decision is not a reflection on any difference in the quality of those presentations, but of the arbitrator's review of the record.

II. Cross-Motions for Preliminary Injunction

The parties' disagreements in this arbitration revolve around allegations that Respondent breached the Third Amended and Restated Limited Liability Company Agreement, as amended, ("LLC Agreement") for Eletson Gas LLC (the "Company"), and the parties' express and implied duties thereunder. Respondent contends that it holds preferred units in the Company, whereas Claimant argues that it exercised a purchase option that effectively bought Respondent out of its preferred shares. Respondent asserts counterclaims alleging that Claimant breached duties that Respondent is owed pursuant to the LLC Agreement and to various transactions. In connection with a series of documents the parties signed, certain interests in two vessels, the Telendos and Symi, were transferred from Eletson to Respondent. The parties dispute the purpose and effect of that transfer.

On October 10, 2022, the undersigned arbitrator issued a Temporary Restraining Order ("TRO) ordering that "the parties hereto shall maintain the status quo and shall not, among other things: (1) engage in the transfer or sale of any assets of Eletson Gas LLC (the "Company") absent the joint written consent of the parties, which shall be sent to the undersigned Arbitrator; or (2) notice or conduct of any board meetings for the purposes of proposing or considering transfer or sale of any assets of the Company." On November 7, 2022, I clarified that under the TRO, "[a]ny attempt to sell or otherwise transfer the Symi and Telendos vessels will be deemed to be in violation of the TRO."

The parties bring these cross-motions each seeking a preliminary injunction and opposing the other's proposed preliminary injunction.

A. Respondent's Motion

Respondent brings its motion seeking the following relief:

(1) A preliminary injunction prohibiting Eletson, including in their role as managers, from (a) refusing any directive provided to it by Levona, as it relates to the Symi or Telendos or their respective holding companies; (b) refusing to cooperate with Levona with respect to the Symi and/or Telendos; and (c) interfering with Levona's attempt to sell the Symi and/or Telendos should it so choose; and

(2) A preliminary injunction prohibiting Eletson, including in their role as managers, from refusing to cooperate with the due diligence process related to Unigas or any other potential buyer of the nine vessels owned by the Company.

(Levona Motion for PI, pp. 1-2). Respondent argues that "the standard for determining whether to grant [a] preliminary injunction is procedural" and that it has met the requirements for a preliminary injunction under both New York and Delaware law as there exists no conflict between the two laws. (Levona Mem., p. 3 citing *Deloitte & Touche U.S.A. LLP v. Lamela*, No. 1542-N, 2005 Del. Ch. LEXIS 164, at *17 (Del. Ch. Oct. 21, 2005)). Specifically, Respondent contends that it has demonstrated, "by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of equities in [its] favor." (Levona Mem., p. 3 citing *Scialdone v. Stepping Stones Assocs., L.P.,* 2017 NY Slip Op 01902, ¶ 1, 148 A.D.3d 950, 951-52, 49 N.Y.S.3d 543, 545 (App. Div. 2nd Dept.) (citations omitted)).

With respect to Respondent's request for a preliminary injunction relating to the Symi and Telendos, Respondent argues that there is "*no* determination of facts in this case that result in the Symi and Telendos remaining assets of the Company and thus, Levona will succeed on the merits regarding the issue of its right to sell [them]." (Levona Mem., p. 4).

According to Respondent, there are three potential outcomes in this arbitration: First, Levona prevails because the plain language in the Binding Offer Letter ("BOL") makes clear that the vessels were transferred to Levona "in consideration for the right to execute the [purchase] option." (Levona Mem., p. 6). Respondent argues that the plain language of the BOL demonstrates that it is likely to prevail in this arbitration as the preferred shareholder. "A contract is prima facie evidence to support grounds for injunctive relief pursuant to CPLR 6301." (Levona Reply, pp. 22-23 citing *Lezell v. Forde*, 2009 NY Slip Op 29411, ¶ 4, 26 Misc. 3d 435, 440, 891 N.Y.S.2d 606, 612 (Sup. Ct.)). The other transaction documents, including for example, the Unanimous Written Consent, further support this interpretation and according to Respondent, Claimants will not be able to demonstrate otherwise. (Levona Reply, pp. 4-6). Respondent argues that the documents and all supporting evidence demonstrate that Eletson never exercised the option, and thus, Levona remains the preferred shareholder. (Levona Reply pp., 8-10). As such, Respondent should proceed with the sale of the two vessels.

The second potential outcome is that Claimants prevail, and the arbitrator determines that they transferred the vessels to Respondent in connection with their exercise of the option. In that case, Respondent's "ownership and control of the Symi and Telendos is pivotal to Eletson's own theory of their case." (Levona Mem., p. 7). Respondent asserts that the option could not have been exercised without the transfer of the two vessels to Respondent. Otherwise, Respondent would not have obtained the $23 million in value required pursuant to the BOL. (Levona Mem., p. 8). Thus, if Eletson prevails, Levona owns the two vessels and can proceed with their sale.

And the third outcome according to Respondent (although Respondent asserts this claim for relief is not included in Claimants' Second Amended Claim), would be that Claimants are awarded the return of the two vessels and obtain a declaration that their transfer never occurred. (Levona Mem., p. 9). In other words, if the vessels were found to have been never transferred, the series of transaction documents "represent nothing more than a Loan" and Respondent remains the preferred shareholder. As preferred shareholder, Respondent would have the right to (a) sell the vessels under the LLC Agreement, or (b) "initiate a Drag-Along transaction" in which "Eletson would have "no consent, voting or appraisal rights" and Respondent "would be authorized to sell 'all or substantially all' of the Company's assets." (Levona Mem., pp. 9-10, internal citations to the LLC Agreement omitted). Thus, Respondent argues that regardless of which party ultimately prevails, Respondent will have the right to proceed with the sale of the two vessels, satisfying the first prong of the injunctive relief standard—likelihood of success on the merits.

Respondent further argues that it will suffer irreparable harm if it is not granted injunctive relief immediately, while Claimants will benefit by the delay of these sales. (Levona Mem., pp. 10-12). Specifically, Respondent contends that while Claimants continues to improperly collect management fees for the Symi and deny Respondent access to the Telendos bank accounts, it is being deprived of the funds from the sale and any interest from such profit. (Levona Mem., p. 11). According to Respondent, the balance of the harm favors Respondent and the arbitrator should issue its requested injunction.

As for the sale of the nine vessels to Unigas or another buyer, Respondent insists that as the preferred shareholder, it should be allowed to proceed with the prerequisites necessary for their sale. "This includes proceeding with the due diligence necessary for

any potential sale, including the Unigas deal." (Levona Mem., p. 13). It claims it is not asking for an order for a sale of the nine vessels at this time, but only for the ability to conduct due diligence during the pendency of the arbitrations so that if Respondent ultimately prevails in this arbitration, as it believes is likely, it can quickly proceed to sale. *See id.* Respondent argues that as the preferred shareholder, it has two paths to sell the vessels—as a "Specified Event" under the LLC Agreement or through the initiation of a Drag-Along. (Levona Mem., p. 14).

Respondent disputes Claimants' contention that there are "serious anticompetitive repercussions" in allowing the due diligence to proceed and argues the assertion by Eletson is "nothing but innuendo." (Levona Mem., pp. 14-15). To the contrary, Respondent argues that there would be irreparable harm in blocking the due diligence. The Unigas Letter of Intent reflects that Unigas has offered to pay Eletson $262,500,000 for the purchase of the nine vessels. (Levona Mem., p. 15). "Should the deal stall for the next six plus months, Unigas will not just sit around and wait and will withdraw its offer." *Id.* Alternatively, "given the volatility of the market, there is a distinct possibility that Unigas would seek to revise the deal and decrease the purchase price if proceeding with due diligence is stalled until after the Arbitration hearing." *Id.* According to Respondent, when "balancing the possibility for absolutely devastating loss of the Unigas or any other potential sale compared with the complete lack of harm to Eletson for cooperating with the due diligence, it is clear that equitable relief favors providing an injunction to prohibit Eletson from refusing to cooperate with the due diligence of any potential buyer." (Levona Mem., p. 17.)

Finally, Respondent argues that in determining the "status quo" that is to be maintained, the arbitrator should "base the status quo on the only evidence that cannot be 'spun'—signed contract agreements or official company documents. As such, Levona simply seeks the ability to maintain the status quo as established by the signed agreements between the Parties." (Levona Reply, p. 14). "If a party bargains for, and obtains in a written contract, the ability to exercise its rights vis a vis the counterparty, even that causes significant change to the counterparty, a preliminary injunction is appropriate so long as it simply enforces the terms of the agreement. Moreover, if [sic] the contract's terms are clear on their face, the Court is not permitted to examine parol evidence." (Levona Reply, p. 15, n citing *True N. Communs. v. Publicis S.A.,* 711 A.2d 34, at 37-38 (Del. Del. Ch. 1997) ruling that a preliminary injunction should hinge on contract interpretation). Respondent argues that the Company is contractually required to assist with the sale of the Symi and Telendos, and to agree to fundamental actions of Levona, including selling or preparing to sell the nine vessels. (Levona Reply, pp. 15-20). Thus, a preliminary injunction ordering the relief Respondent seeks is appropriate.

Claimants oppose Respondent's motion characterizing its request as one for a mandatory preliminary injunction, which is an "extraordinary and drastic remedy that exceeds the type of relief available." (Eletson Opposition, p. 1). First, Claimants argue that the relief Respondent requests affirmatively requires Eletson to perform certain actions, which equates to asking the arbitrator to "grant the ultimate relief it would be entitled to in a final judgment." (Eletson Opposition, p. 15). According to Claimants, this is not permitted under Delaware law, which requires that a higher standard be met for a mandatory injunction. *See id.* (citing See *Alpha Builders, Inc. v. Sullivan*, Civil Action No.

698-N, 2004 Del. Ch. LEXIS 162, at *9 (Del. Ch. Nov. 5, 2004) (noting that Delaware Courts utilize the higher mandatory injunction standard where, instead of seeking "to preserve the status quo as interim relief, Petitioners, as a practical matter, seek the very relief that they would hope to receive in a final decision on the merits."); *In re Mount 2012 Irrevocable Dynasty Tr. U/A/D December 5, 2012*, No. 12892-VCS, 2017 Del. Ch. LEXIS 295, at *22-23 (Del. Ch. Sep. 7, 2017) (denying injunctive relief where the request for mandatory injunctive relief was "completely disconnected from the plain language of the Settlement Agreement" and sought to impose obligations that did not exist in the agreement)).

Moreover, Claimants argue that the LLC Agreement does not permit the relief Respondent seeks. The LLC Agreement provides the arbitrator only with the authority to grant injunctive relief "to preserve such party's rights pending a final resolution on the merits." (Eletson Opposition, p. 16 citing Ex. C-2 § 12.14(c)). And the mandatory injunction Respondent seeks is not available in court either because the LLC Agreement in Section 12.14(b) makes clear that arbitration is the exclusive forum for their dispute and the parties waived any right to go to court except to compel arbitration or secure judgment. (Eletson Opposition, p. 16).

Claimants argue that the plain language of the LLC Agreement also prohibits the relief Respondent seeks—it explicitly provides that Eletson has a "blocking right for any Fundamental Action, which . . . includes all the mandatory injunctive relief that Levona seeks preliminarily now." (Eletson Opposition, p. 17). Thus, granting Respondent's requested injunction would "read out key provisions of the LLC Agreement protecting

Eletson." Accordingly, Claimants argue that Respondent cannot obtain a mandatory preliminary injunction.

Additionaly, Claimants assert that Respondent has not produced sufficient evidence to establish an entitlement to a preliminary injunction. (Eletson Opposition, pp. 18-19). Claimants argue that Respondent has failed to produce documents, other than the contracts at issue and affidavits that are "devoid of evidentiary detail to support Levona's claims." (Eletson Opposition, p. 21). Accordingly, Claimants argue that Respondent has not met the "stringent evidentiary requirements to obtain a preliminary injunction." *Id.*

Even if Delaware's standard for a preliminary injunction applied, Claimants contend that Respondent has not satisfied that standard either. First, Respondent cannot establish that it is likely to succeed on the merits. (Eletson Opposition, p. 22). Claimants contest Respondent's argument that regardless of the outcome of this arbitration, the Symi and Telendos will be sold. *Id.* To the contrary, Claimants argue that Respondent is wrong in claiming that it "could have in the past, could now, or will in the future be able to make fundamental decisions affecting the Company without the consent of Eletson." (Eletson Opposition, p. 24). Pursuant to Schedule VII to the LLC Agreement, Eletson has a blocking position for certain actions, which includes the sale of vessels or changing managers. (Eletson Opposition, p. 25). In addition, if the arbitrator determines that Eletson did not exercise the purchase option, Claimants will seek the return of the Symi and Telendos, because Respondent failed to comply with its exit obligations, and this breach will lead to rescission as a matter of law. (Eletson Opposition, pp. 26-27).

Claimants argue that Respondent also cannot establish that it will be irreparably harmed absent mandatory relief. Respondent has offered no evidence to substantiate its

claim that Unigas will withdraw its offer. (Eletson Opposition, p. 28). The letter of intent with Unigas is non-binding and Unigas can walk away at any time, including after due diligence. *See id.* On the other hand, Claimants insist that Eletson will be irreparably harmed if the arbitrator grants Respondent's request to conduct due diligence. As explained in Eletson's witness affidavits, the disclosure of the information Respondent requests would "indisputably disrupt the Company's business operations and would provide Unigas with an unfair disadvantage, getting insight into the Company's finances and operations of the vessels, all at the Company's expense." (Eletson Opposition, p. 29). Claimants are adamant that the disclosure of this confidential information would give rise to "serious anti-competitive concerns given Unigas' position in the relevant market." *Id.* Claimants state that if they were compelled to share this confidential information with Unigas, on the basis of a nonbinding letter of intent, "they would risk being subjected to investigations and/or sanctions by regulatory agencies for facilitating or engaging in anticompetitive conduct." *Id.* Furthermore, any physical inspection of the vessels would cause significant damage to the Company's business and interfere with its relationship with its crews. (Eletson Opposition, p. 30). Thus, Claimants argue that the balance of hardships tips in their favor. (Eletson Opposition, pp. 32-33).

B. Claimants' Cross-Motion

Claimants ask the undersigned arbitrator to enter a preliminary injunction in substantially the same form as the TRO, however, should the arbitrator seek to be more specific, Claimants propose that the injunction maintain the status quo in four key areas:

(i) Maintain the status quo so that there will be no sale or transfer of Company assets or other assets in dispute, including sales of the Symi and Telendos, other than as jointly in writing agreed to by the Parties and under conditions agreed to by the parties (such as escrowing proceeds, discussed below);

(ii) Maintain the status quo so that management of Company Vessels remains as it is now;

(iii) Maintain the status quo so that Levona does not attempt, through incessant improper notices for Board meetings, to alter the business and affairs of the Company or otherwise for the purposes of proposing or considering transfer or sale of any assets of the Company; and

(iv) Maintain the status quo so that Levona does not loot or otherwise diminish or divert Company financial assets.

(Eletson Mem., p. 1-2).

Claimants argue that Sections 12.14 and 12.15 of the LLC Agreement provide the arbitrator with the authority to grant injunctive relief as well as the standards for doing so. "The parties agree that the arbitrator shall have the authority to grant injunctive or other forms of equitable relief (including, without limitation, a temporary restraining order or preliminary injunction) to any party . . . ***to preserve such party's rights pending a final resolution on the merits.***" (Eletson Mem., p. 19, citing Ex. C-2, §12.14(c) (emphasis added)). Moreover, the parties agreed that "any breach by a Member of any of the provisions of [the LLC] Agreement may irreparably injure the Company and its Members and that money damages will not provide an adequate remedy for such injury." Eletson Mem. p. 19 (citing Ex. C-2, § 12.15). Thus, Claimants contend that there is no need to establish the elements under New York or Delaware law because the language in Sections 12.14 and 12.15 sets forth the governing standard. *See id.* (citing, e.g., *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Tr. Co., N.A.*, No. 13-CV-1582, 2015 U.S. Dist. LEXIS 90118, at *26 (S.D.N.Y. July 10, 2015) ("The law favors contractual guideposts because a contract makes the parties the masters of their destiny."); *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 880-81 (Del. Ch. 2009) ("Limited liability companies are creatures of contract, and the parties have broad discretion to use an LLC agreement to define the

character of the company and the rights and obligations of its members. Among other things, a company's LLC agreement defines when members of the LLC can be liable for breach of provisions of that agreement."). Furthermore, Claimants argue that the LLC Agreement provides that "[t]he Company will not be required to post any bond in order to obtain such equitable relief." (Eletson Mem., p. 19). Accordingly, despite Delaware or New York law to the contrary, no bond is required here. (Eletson Reply, pp. 14-15 citing *e.g.*, *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, No. 3369-VCP, 2008 Del. Ch. LEXIS 44, at *44-45 n.92 (Del. Ch. Apr. 3, 2008) ("Concord argues that, although Court of Chancery Rule 65 requires a bond to accompany injunctive relief, Defendants contractually agreed to waive that requirement in the APA ...Therefore, Concord will not be required to post a bond."); *T1 GS Cell Site Mgmt. LLC v. 201 Jerusalem Ave. Massapequa, LLC*, No. 9969-11, 2011 N.Y. Misc. LEXIS 4777, at *15 (Sup. Ct. Nassau Cnty. 2011) (declining to require the plaintiff to post as a condition of injunctive relief, in light of language in agreement between the parties expressly waiving the requirement of a bond); (additional citations omitted)). However, even if the above standard for granting a preliminary injunction does not apply, Claimants argue they have established the elements under Delaware law. (Eletson Mem., p. 20). Moreover, Claimants contend that the arbitrator has the authority to impose a bond, both the imposition and the amount is in the arbitrator's discretion. (Eletson Reply, pp. 15-16) (citations omitted). Claimants contend that no bond or at most a nominal bond should be imposed. (Eletson Reply, p. 16).

In support of their motion for an injunction maintaining the status quo, Claimants ague that by seeking to sell or transfer nine of the company's vessels, Respondent is "unilaterally attempting to dispose of substantially all of the Company's assets for its own

benefit and to the detriment of the Company." (Eletson Mem., p. 23). They argue that "the sale of the Company's nine vessels is 'quantitatively vital to the operation of the [Company] and is out of the ordinary and substantially affects the existence and purpose of the [Company]." *Id.* (citing *Gimbel v. Signal Cos.*, 316 A.2d 599, at 606 (Del. 1974) (granting injunctive relief to prevent the sale of all capital stock in defendant's oil company subsidiary on the basis that the agreed upon price of the sale was in dispute and potentially inadequate.)). This warrants the imposition of an injunction because this potential loss of the Company's only revenue stream would be a harm not compensable in any other manner. *Id.* (citing *Zrii, LLC, v. Wellness Acquisition Grp., Inc.*, 2009 Del Ch. LEXIS 167, at *46-47) (Del. Ch. Sep. 21, 2009)(granting motion for preliminary injunction where "monetary damages are not likely to provide an adequate remedy)).

Claimants further argue that they are likely to succeed on the merits. They argue that "Levona cannot dispute that Eletson transferred, and Levona accepted, the shares of the *Symi and Telendos*, which constituted the consideration for the exercise of the purchase option to buy out the shares held by Levona in the Company." (Eletson Mem., p. 26). In Claimants' view, Respondent wants to accept the consideration but ignore its obligations. *See id.* As such, Claimants contend Respondent has breached, and continues to breach, the LLC Agreement through various actions. *See id.* They also claim that Respondent has breached the covenant of good faith and fair dealing by entering into a letter of intent to sell substantially all of the Company's assets to a competitor for less than market value. (Eletson Mem., p. 27).

Finally, Claimants argue that the balance of hardships weighs in their favor. There is no potential harm to Respondent by granting an injunction maintaining the status quo

until a resolution on the merits. A preliminary injunction will "prevent Levona from taking extraordinary unilateral actions, such as engaging in the transfer or sale of any assets of the Company absent Eletson's consent or noticing or conducting any board meetings for the purpose of proposing or considering transfer or sale of any assets of the Company." (Eletson Mem., pp. 29-30). However, with respect to the Symi and Telendos, "the TRO and the proposed preliminary injunction include an exception for selling assets if the parties agree otherwise and so advise the Arbitrator. The purpose of that exception is that Eletson is prepared to consent to the sale of the Symi and Telendos provided that Levona places the proceeds in escrow, under the aegis of the Arbitrator, pending a final resolution of the merits and otherwise protects Eletson's rights." (Eletson Mem., p.31).

A preliminary injunction will also prevent harm to the business that will result from allowing Unigas to conduct due diligence. "The disclosure of [confidential] information would indisputably disrupt the Company's business operations and would provide Unigas with an unfair advantage, getting insight into the Company's finances and operations of the vessels, all at the Company's expense." (Eletson Reply, p. 19). They further argue that "Levona's reliance on the Affidavits of Mr. Argyropoulos and Mr. Zolotas, who are finance brokers, utterly fails to appreciate—let alone minimize—the harm that will be suffered by the Company." (Eletson Reply, p. 19). They contend "there is no question that the disclosure of the Company's confidential information gives rise to serious anti-competitive concerns given Unigas' position in the relevant market." (Eletson Reply, pp. 21-22, citing Kertsikoff Supp. Aff., ¶¶ 21-22); *United States v. United Techs. Corp.*, 466 F. Supp. 196, 200 n.5. (N.D.N.Y. 1979) ("[I]f there is a probability that anticompetitive effects will occur as a result of an acquisition, a preliminary injunction . . . should be entered.")) Moreover,

Claimants argue that "[a]t a time when current gas supply market faces ongoing disruptions . . . [Claimants] and the Company must ensure that its relationships remain intact and the supply of gas remain uninterrupted." (Eletson Mem., p. 30). Moreover, if Respondent is able to transfer or sell the vessels, Eletson will be prevented from recovering the assets should the arbitrator rule that the transaction should be unwound. (Eletson Mem., p. 31).

Respondent opposes Claimants' Cross-Motion arguing that the "status quo" that Claimants seek to maintain is in fact "a departure from the *status quo*" and the language in the TRO is too broad. (Levona Opposition, pp. 1, 10-11). According to Respondent, the "status quo" is that "Levona is the preferred shareholder and holds four seats on the board." (Levona Opposition, p. 11). Respondent contends that in this arbitration, Claimants seek to force Levona to transfer its preferred interest in the Company. Thus, Claimants seek to change the relationship of the parties, which currently means that Levona is the preferred shareholder and should be able to take the actions afforded to a preferred shareholder. (Levona Opposition, pp. p. 12). Claimants' assertion that Levona is violating the TRO by calling a board meeting to obtain basic financial information of the Company is actually the opposite—by refusing to provide this information, Eletson is ignoring the status quo. *See id.*

Respondent argues that there is no justification in delaying the sale or transfer of the Symi and Telendos. It argues that there is no likelihood that Claimants will succeed on the merits because the plain language in the BOL, and other transaction documents "all point to the transfer of the Symi and Telendos ships as consideration for the granting of an Option, not for the execution of the same." (Levona Opposition, p. 16). Moreover, there is no merit to Claimants request to place the proceeds from any sale of the Symi and

Telendos into escrow as every "version of the facts, and every conclusion therefrom, dictate that funds are paid out from the sale of the Symi and Telendos to Levona." (Levona Opposition, p. 18). Similarly, because the ownership documents of the Symi and Telendos provide that Levona holds the interests, there is no justification to require that Eletson should be allowed to provide its consent "jointly and in writing" to any transfer or sale. (Levona Opposition, p. 19).

In the event the arbitrator enjoins Levona from selling the Symi and Teledos, Respondent insists that Eletson must post a bond. *See id.* Under both New York and Delaware, "denying a party access to its legal rights, particularly access to finds of a sale, is only appropriate if a mandatory bond is put in place protecting the enjoined." *Id.* Respondent argues a bond is mandatory: "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant." (Levona Opposition, pp. 19-20 citing De. Ct. of Chancery Rule 65(c) and NY CPLR § 6312 (b)). The amount of the bond is a matter of discretion, but must be "exercised in a manner consistent with the purpose of an injunction bond—to protect a party that is wrongfully enjoined." (Levona Opposition, p. 20 citing *Guzzeta v. serv. Corp. of Westover Hills*, 7 A.3d 467, 471 (Del. 2010)). Respondent argues that if it were enjoined from receiving its proceeds from the sale of the Symi and Teledos until at least May or longer, it will "be in a position that it is unable to receive maximum value for the ships as dictated by the future market. In light of a looming global recession and given that the shipping market is highly cyclical in nature, time is of the essence for any sale," and Eletson's refusal to cooperate "risks not only the sale price of the vessels, but will force Levona to continue to accrue operating expenses, and potential damage, to the two vessels." (Levona Opposition, pp. 20-22). Thus,

Respondent requests a bond in the amount of $23 million in the event the arbitrator enjoins it from selling the Symi and Telendos. (Levona Opposition, p. 21).

Respondent further opposes Claimants' request to enjoin it from conducting the affairs of the Company. It argues that Claimants cannot demonstrate a likelihood of success on the merits given the language in the governing transaction documents. Similarly, it argues Claimants cannot demonstrate a breach of the covenant of good faith and fair dealing and the arbitrator need not look any further than Claimants' own brief which notes "the irreparable harm in denying or diluting a party's rights to control a board as it currently stands." (Levona Opposition, p. 23, citing *Flight Options Intl v. Flight Options, Ltd. Liab. Co.,* No. 1459-N, 2005 Del. Ch. LEXIS 149, at *40 (Del. Ch. July 11, 2005) ("A severe dilution" of a party's membership interest "has been found to constitute irreparable harm because, at least in part, of the difficulties in restoring the injured party to its proper status through a grant of final relief.")). Thus, Respondent argues that, as long as it does not sell a vessel currently owned by the Company (which excludes the Symi and Telendos since they are not currently owned by the Company), "Levona should be allowed to conduct the business affairs of the Company in a way that is beneficial to the Company." (Levona Opposition, p. 23). It should therefore be allowed to call a board meeting about anything it needs to discuss. *See id.* There is also no reason why Levona should be restricted from changing the management of the Symi and Telendos. (Levona Opposition, pp. 23-24).

Respondent also argues that it should be allowed to complete the due diligence of the Unigas transaction. Under the "status quo" Levona is the preferred member according to the corporate records, and it has the rights to inspect the books and conduct due diligence.

(Levona Opposition, p. 24). Any potential harm to Claimants claim is unfounded because "a due diligence on a vessel simply involves turning over basis technical specifications and specifics about the status of the ship, such as maintenance." (Levona Opposition, p. 25, citing Affidavit of Michael Zolotas ¶¶ 10, 11; Affidavit of Anthony Argyropoulos, ¶¶ 10, 11)). Nothing disclosed during due diligence would give a potential buyer a competitive edge. (Levona Opposition, p. 26). Nor would the physical inspection of the vessels cause Eletson any harm. *See id.* If the arbitrator enjoins Respondent's right to conduct due diligence, Respondent argues that Claimants should be required to post a bond for the value of the Unigas deal, $265,500,000. (Levona Opposition, p. 28).

Finally, Respondent argues that Claimants' final request to modify the TRO to prohibit Levona from "liquidating the Company or otherwise diminish or divert Company financial assets" is not necessary because Respondent does not seek to do so prior to a final resolution in this arbitration, although it wishes to be in a position to do so immediately after a decision by the arbitrator, if it so chooses. (Levona Opposition, p. 29). That said, Respondent carves out the ability to sell the Symi and Telendos because it deems these as "*not* assets of the Company." (Levona Opposition, p. 29). Respondent proposes a modification to the relief language proposed by Eletson:

> Maintain the status quo prohibiting Levona from liquidating the Company. However, Eletson will fulfill all requests and directives to it to assist with the due diligence of any assets of the Company so long as the transfer of those assets is not consummated until the Arbitrator issues a ruling related to the Option agreement in the Intragroup Loan.

(Levona Opposition, pp. 29-30).

C. Preliminary Injunction Decision

The undersigned arbitrator has the authority pursuant to the LLC Agreement to grant injunctive relief. Section 12.14(c) of the LLC Agreement reads in relevant part: "The parties agree that the arbitrator shall have authority to grant injunctive or other forms of equitable relief (including, without limitation, a temporary restraining order or preliminary injunction) to any party (i) to preserve such party's rights pending a final resolution on the merits or (ii) that prevails in any such arbitration."

In addition, Section 12.15 of the LLC Agreement provides (emphasis added):

> 12.15 Equitable Relief. ***Each Member hereby agrees and acknowledges that any breach by a Member of any of the provisions of this Agreement may irreparably injure the Company and its Members and that money damages will not provide an adequate remedy for such injury.*** Accordingly, in the event of a breach or threatened breach, the Company will have the right, but not the obligation, to seek equitable relief, including a temporary restraining order and/or preliminary injunction to preserve its rights pending a final resolution on the merits, by arbitration in accordance with Section 12.14. The Company will not be required to post any bond in order to obtain any such equitable relief. The Company's rights under this Section 12.15 ***shall be in addition to, and not in lieu of,*** any other rights and remedies available under this Agreement.

Section 12.14(a) of the LLC Agreement provides for arbitration and states that the "arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures." Rule 24(e) of the JAMS Comprehensive Rules and Procedures provides (emphasis added):

> (e) Interim Measures. The Arbitrator may grant ***whatever interim measures are deemed necessary***, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim or Partial Final Award, and the Arbitrator ***may require security for the costs of such measures***. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

Accordingly, the LLC Agreement grants the arbitrator the authority to order injunctive relief and both the LLC Agreement and JAMS Rule 24(e) set forth the governing standards for determining when such injunctive relief should be granted. Specifically, injunctive relief can be granted "to preserve such party's rights pending a final resolution on the merits" pursuant to Section 12.14(c)), the LLC Agreement, or for the "protection or conservation of property and disposition of disposable goods" pursuant to JAMS Rule 24(e). The parties need not prove irreparable harm under Delaware or New York law because the parties expressly agreed in Section 12.15 that a "breach . . . of any of the provisions of [the LLC Agreement] may irreparably injure the Company and its Members and that money damages will not provide an adequate remedy for such injury." And JAMS Rule 23(e) provides the arbitrator the ability to grant "whatever interim measures are deemed necessary," and "the Arbitrator may require security for the costs of such measures." *See, e.g., Deloitte & Touche U.S.A. LLP v. Lamela*, No. 1542-N, 2005 Del. Ch. LEXIS 164, at *17 ("The standard for determining whether to grant a preliminary injunction is procedural.")

It is clear, that finite, yet valuable, Company assets exist. Until the ultimate question is answered as to who the preferred holder is, it is necessary to preserve these assets and ensure that no steps are taken that could diminish their value or that of the Company. As such, injunctive relief is necessary to preserve each "party's rights pending a final resolution on the merits", (LLC Agreement, Section 12.14(c)) and "for the protection or conservation of property and disposition of disposable goods", JAMS Rule 24(e)). In other words, injunctive relief is necessary in order to preserve the "status quo."

The phrase "status quo" refers to, *inter alia*, the value of the Company, its assets, its current management and operations, and its relationship with the ships' crews. Levona's argument that the "status quo" means that it is the preferred holder until a ruling otherwise—and accordingly, it can do as it wishes with respect to the Company's assets or other assets in dispute (i.e., Symi and Telendos)—is flawed. Lenova takes that position based on its interpretation of the Transaction Documents and its version of the events that occurred. By the same token, Eletson asserts it is the current preferred holder because it believes it exercised the purchase option. Thus, preserving the "status quo" is not about who is the preferred holder, but concerns the rights each party has, and the current value of the Company that must be preserved until I issue a Final Award in this arbitration.

I disagree with Respondent that, in the event it prevails in this matter, the delay in being able to sell the Symi and Telendos, and therefore the corresponding delay in receiving the funds from that sale, creates a harm warranting an immediate injunction permitting the sale of those vessels before the end of the instant arbitral proceeding. Allowing the sale of the vessels and ordering that Eletson may not refuse to comply with Respondent's directives would be inconsistent with the LLC Agreement as it would not "preserve [a] party's rights pending a final resolution on the merits." To the contrary, it would be stripping Eletson of the rights and arguments it has asserted in this arbitration.

As for Respondent's request for the due diligence on the other nine vessels, I find that the risk of irreparable harm to the Company necessitates that no due diligence occur until a determination on the merits is made, as to who indeed is the preferred shareholder. First, permitting the disclosure of potentially sensitive information to a competitor on the basis of a non-binding agreement outweighs any purported benefit. Respondent's assertion

that Unigas may walk away from the deal or reduce the purchase price if it is required to wait until the conclusion of this arbitration is unavailing—that risk exists even if due diligence proceeds because the agreement is non-binding. Moreover, I do not find compelling Respondent's argument that the required due diligence entails only the disclosure of technical specifications and not any sensitive information. (Levona Opposition, p. 25). By its own admission, "the sale of this magnitude requires extensive due diligence including inspections, various flag transfers, access to corporate registries, and access to the financial documents of the vessels," and any sale would obviously be to a competitor. (Levona Mem., pp. 13, 14-15) The idea that fuel tankers would be sold to a 'competitor' seems obvious, given that no party except a company that operates and manages such vessels would buy a gas tanker vessel. *Id.* Respondent also admits that due diligence would require the physical inspection of the vessels, which could potentially create disruption to the operation of those vessels and the Company's relationships with the vessels' crew and management.

Finally, I decline to require the posting of a bond by Claimants. Unlike Delaware and New York law, JAMS Rule 24(e), provides that the decision as to whether to require security in connection with the issuance of injunctive relief is at the discretion of the arbitrator. *See* JAMS Rule 24(e) ("the Arbitrator ***may*** require security for the costs of such measures" (emphasis added).

Accordingly, I deny Respondent's Motion for a Preliminary Injunction and order that the restrictions in the TRO shall remain in effect until a Final Award on the merits is rendered. In an effort to address questions concerning the scope and interpretation of the

TRO that have arisen since its issuance, and for the avoidance of doubt, I hereby clarify the language from the TRO and order the following:

The parties hereto shall maintain the status quo and shall not, among other things: (1) engage in the transfer or sale of, or attempt to sell or otherwise transfer, any assets of Eletson Gas LLC (the "Company"), or assets in dispute in this arbitration, absent the joint written consent of the parties, which shall be sent to the undersigned Arbitrator; or (2) notice or conduct of any board meetings for the purposes of proposing or considering the transfer or sale of any assets of the Company or other assets in dispute in this arbitration.

The undersigned arbitrator has considered and resolved all the issues and arguments raised by the parties, including those not explicitly addressed herein. Any arguments not addressed here were found to be unavailing, without merit, academic, or unnecessary to reach.

III. Conclusion and Order

A. The foregoing constitutes the Decision on the Cross-Motions for Injunctive Relief. Claimants' Motion for a Preliminary Injunction is granted and Respondent's Motion for a Preliminary Injunction is denied, as per the Decision above.

B. The parties hereto shall maintain the status quo and shall not, among other things: (1) engage in the transfer or sale of, or attempt to sell or otherwise transfer, any assets of Eletson Gas LLC (the "Company"), or assets in dispute in this arbitration, absent the joint written consent of the parties, which shall be sent to the undersigned Arbitrator; or (2) notice or conduct of any board meetings for the purposes of proposing or considering the transfer or sale of any assets of the Company or other assets in dispute in this arbitration.

C. This order shall stay in effect until amended by subsequent order of the undersigned arbitrator.

D. The parties are directed to appear at a Zoom conference on January 17, 2023 at 11:00am EST.

Dated: New York, NY
January 12, 2022

Hon. Ariel E. Belen (Ret.)
JAMS Arbitrator