Neutral Citation Number: [2025] EWHC 3214 (Comm)

Case No: CL-2022-000466

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08/12/2025

Before :

MR JUSTICE CALVER

- -

Between :

ROBERT GAGLIARDI	**Claimant**
- and -	
EVOLUTION CAPITAL MANAGEMENT LLC	**Defendant**

- -
- -

Andrew Legg and Gretta Schumacher (instructed by **PCB Byrne LLP**) for the **Claimant**
Paul Downes KC and Emily Saunderson (instructed by **Hogan Lovells**) for the **Defendant**

Hearing dates: 06-28 October 2025

- -

APPROVED JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Monday 08 December 2025.

Contents

Mr Justice Calver:

INTRODUCTION

1. By this action the Claimant, Mr. Robert Gagliardi ("**Mr. Gagliardi**"), brings a claim against the Defendant, Evolution Capital Management LLC ("**ECM**"), for breach of his employment contract ("**the employment contract**") by reason of ECM's failure to pay him any discretionary bonus in respect of the highly remunerative block trading which he carried out when he was employed by ECM. ECM counterclaims for the return of certain sums which it has already paid to him.

THE PARTIES

2. Mr. Gagliardi is a highly experienced portfolio manager. He has worked in the financial industry for more than thirty years. He has been a market maker for several major banks including Credit Suisse, Hambrecht & Quist and Bank of America, where he was also an execution trader. Since commencing work for buy-side funds in around 2007, Mr. Gagliardi focused on US and European equity capital markets and in around 2013 he became specifically focused on "block trading" and initial public offerings ("**IPOs**"). Block trading is a strategy which consists of privately buying (to avoid adverse market reactions) large quantities of securities in bulk (or "blocks") from financial institutions (selling them on behalf of shareholders), and then subsequently reselling those securities. Terms are agreed in advance with the relevant financial institution, enabling faster execution once a counterparty is identified. It is a skilled and high-risk form of trading.

3. Prior to joining ECM, between 2018 and 2020 Mr. Gagliardi first worked as a portfolio manager for Segantii Capital Management ("**Segantii**"), an Asia-based hedge fund with around US$4 billion in assets, and then subsequently worked for Weiss Asset Management ("**Weiss**") from 2020 to 16 April 2021.

4. ECM is a Nevada-based investment fund management company, which was founded by Mr. Michael Lerch in May 2002. ECM is part of the wider "Evo Group" of companies controlled by Mr. Lerch, which includes Evo Capital Management Asia Limited ("**Evo Asia**"), a Hong Kong-based fund management company. The Evo Group also has offices in Japan, Los Angeles, and London, and employs around 55 staff in total[1].The management team consists of Mr. Lerch, Mr. Richard Chisholm, and Mr. Adrian Brindle. Mr. Lerch makes the key

[1] See Mr. Brindle's second witness statement at pargraph 6.1. The 2022 Bonus Spreadsheet refers to 62 staff.

strategic decisions for ECM; Mr. Chisholm, as CEO, has oversight of legal issues; and Mr. Brindle, as CFO, is responsible for the Evo Group's financial actions.

5. ECM was originally based in Tokyo, Japan before it moved to Hawaii, US. This move enabled Mr. Lerch to keep costs down while maintaining a focus on investment in Asia. ECM's first fund, which invested Mr. Lerch's personal funds together with some of his friends' funds, was called the "Evo Fund".

6. Mr. Robert Toresco, a trader who had been an intern and subsequently an employee at Evo Asia between 2007 and 2012 before joining an asset management company called Och-Ziff Capital Management Group ("**Och-Ziff**") and then Segantii, contacted Mr. Lerch in around July 2020 for advice about starting his own hedge fund, with a focus on equities and equity-linked products in Asia. Mr. Toresco had already obtained a seed-investor, Mr. Zoltan Varga, for whom Mr. Toresco had worked at Och-Ziff. Given the difficulties in setting up a new fund generated by the Covid-19 pandemic, Mr. Lerch suggested that Mr. Toresco should instead use the Evo Group platform to set up his hedge fund.

7. That is what happened. The Evo Group provided the infrastructure for the hedge fund, set up the necessary fund companies, and provided the operational and administrative support and systems that were necessary for the hedge fund to operate. Mr. Toresco, who was based in Hong Kong, was the CIO. Mr. Lerch and Mr. Varga co-seeded the new fund, each making an initial investment of US$20 million. Mr. Toresco also invested a smaller sum of approximately US$2 million.

8. The typical structure for a hedge fund is that there are two feeder funds and a master fund. One feeder fund is typically a Delaware limited partnership, which accepts funds from US investors. The other feeder fund is typically a Cayman Islands-registered company, which accepts funds from non-US investors. Each feeder fund then invests in the master fund, which is in turn typically a Cayman Islands-registered company.

FEES FROM THE A1 SHARE CLASS AND THE EARMF

9. Mr. Lerch's plan was eventually to launch a new master fund feeder structure for Mr. Toresco's fund which was to be known as Evo Absolute Return Master Fund ("**EARMF**").[2] However, this structure and the necessary broker and fund administrator relationships take

[2] The EARMF is at times (interchangeably) referred to by the parties as the "EARF" and so these acronyms are used interchangeably in this judgment.

time to set up, so rather than spending time on establishing a new master fund, Mr. Lerch decided to launch the new fund as a separate share class of the Evo Fund ("**the A1 share class**"),[3] so that trading could commence as quickly as possible using the existing Evo Group infrastructure, before EARMF was set up. The A1 share class launched in around September 2020 and was focused largely on equity capital markets in Asia.

10. The plan was accordingly that once the EARMF trading structure and the necessary third-party relationships were in place, investors in the A1 share class would redeem their shares and invest their funds in the relevant feeder fund for EARMF. Although EARMF was registered in the Cayman Islands on 17 March 2021, it did indeed take time to arrange the prime broker and fund administrator relationships and EARMF did not in fact begin trading until August 2021, at which point all investors in the A1 share class redeemed their shares and invested in the EARMF feeder funds.

11. EARMF's two shareholders (in which the non-US investors and the US investors respectively buy shares) were Evo Absolute Return Fund, a Cayman Islands company ("**Offshore feeder fund**") and Evo Absolute Return Fund LLC, a Delaware company ("**Onshore feeder fund**").

12. The fund managers for the A1 share class and EARMF were ECM and Evo Asia. EARMF paid fees out of its revenue to those fund managers as follows:

    (1) It paid Evo Asia:

        (a) management fees of 2% of the assets under management ("**AUM**"); and

        (b) performance fees equal to 20% of the net realised and unrealised appreciation (i.e. in respect of the increase in the value of the EARMF)[4].

---

[3] The A1 share class is at times (interchangeably) referred to by the parties as the "A1 Fund", as can be seen below.

[4] As Mr. Brindle states in paragraph 14.2 of his second witness statement: "*As with the Class A1 shares, the fees comprised a management fee of 2% of the net asset value of the fund calculated and paid every quarter, and a performance fee of 20%, paid annually. One hundred percent of these fees were paid by the fund to Evo Asia. Evo Asia in turn had revenue share agreements with Toresco, Varga and Lerch in addition to a compensation agreement with ECM for 30% of the fees and a small monthly reimbursement fee arrangement with Evolution Japan Asset Management for JPY 4mn per month.*"

(2) It paid an IPO Appreciation Fee earned by EARMF in respect of New Issues derived in the US and Europe, namely 20% of the IPO Appreciation (i.e. profits) which is passed through to Evo Asia and ECM[5].

13. It follows that, as Mr. Deetz, the forensic accountant called by Mr. Gagliardi explained, 100% of the relevant management and performance fees, which are expenses of the EARMF and the A1 share class ("**the Funds**"), are accordingly income or revenue paid to ECM and Evo Asia[6]. In addition to these two elements of revenue, the IPO Appreciation Fee (earned by EARMF) is a third element of revenue to the fund managers.

14. 30% of the fees received by Evo Asia were then paid to ECM under a Compensation Agreement between them.

15. Mr. Lerch and Mr. Varga were additionally entitled to 10% each of the management fees and performance fees from the Funds in exchange for providing the initial investment.

16. In his second witness statement at paragraph 7.1, Mr. Lerch explained that the A1 share class "*attracted good interest from outside investors*" and had "*around US$100m to US$200m under management when we hired Robert Gagliardi*." In his third witness statement at paragraph 3.1, he said that prior to Mr. Gagliardi joining ECM on 28 April 2021, Mr. Toresco had managed the A1 share class for seven months and the performance of the fund was "*extraordinarily positive*". Mr. Gagliardi disputed this in his fourth witness statement at paragraph 4.3, stating that "*At the time I was recruited, I understood there was no large institutional money or investors who had committed money yet.*" Whatever the true position, it is clear that ECM did not have trading expertise in the US or European equity capital markets.

THE IMPORTANCE OF THE DOCUMENTARY RECORD

17. In a case such as this where the relevant events took place some four years ago, and where the parties are hostile towards one another with their positions entrenched, it is important to keep firmly in mind the approach of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), which was approved by Lord Kerr (in a dissenting judgment) in *R (on the application of Bancoult No 3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 at [103] as follows:

---

5 Out of this sum Mr. Gagliardi was paid 17%.
6 First report, paragraph 52.

> "*Although said in relation to commercial litigation, I consider that the observations of Leggatt J in* Gestmin *SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), paras 15-22 have much to commend them. In particular, his statement at para 22 appears to me to be especially apt:*
>
> *"… the best approach for a judge to adopt … is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose - though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.""*

18. In the present case, the following passage from *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 at [48] should also be kept firmly in mind:

> "*In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in The Ocean Frost [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely, cited:*
>
> *"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that*

> *the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case.""*

19. I approach the evidence in this case in the same way, and I consider the documentary record in this case to be the best guide as to where the truth lies in the case of the many factual disputes which exist between the parties.

THE WITNESS EVIDENCE

20. Both parties invite the court to find that the witnesses called by their respective adversaries were either not telling the truth or were "*thoroughly unsatisfactory*".

21. ECM is, in particular, highly critical of Mr. Gagliardi's evidence, submitting that he was untruthful, inconsistent, evasive and that he disregarded the court's warning not to discuss his evidence with anybody during any breaks in his evidence. Mr. Gagliardi was subjected to a cross-examination over almost 4 days, with the weekend intervening. He was accused of serious wrongdoing in respect of matters which were not properly pleaded by ECM, as I explain below.

22. In particular, it was suggested to Mr. Gagliardi in cross-examination, without any forewarning, that he had lost a mobile phone in a river sometime between 2018 and 2020 when he worked at Segantii, with the intended implication, presumably, that this was done deliberately by him in order to hide damaging communications. Mr. Gagliardi was explicitly asked "*Did you deliberately lose it in the river, Mr. Gagliardi?*" to which he responded "*…no I didn't deliberately lose my phones, no*".[7] Despite this answer and further saying that he did not "*remember a compliance officer ever having a problem with me losing a phone*"[8], he was continually pressed on the topic and it was clear that he was both confused and stressed by the line of questioning. Indeed it was further suggested in cross-examination that Mr. Gagliardi either conveniently forgot or deliberately failed to reset his passwords during document extraction processes;[9] that he deleted WhatsApp messages on his phone between himself and Mr. Pawan Passi (which Mr. Gagliardi denied: "*That is false*"[10]); that he instructed his solicitors not to take steps to retrieve the iPhone seized by the FBI for the purposes of these proceedings, and that when it was returned, he deliberately

7 Day2/45/17-19.
8 Day2/47/4-6.
9 Day2/82/1-12.
10 Day2/90/18-23.

delayed shipping it to the UK;[11] and that he otherwise deliberately lied about his phones during the disclosure exercise.[12]

23. This questioning led Mr. Gagliardi on the evening of Sunday 12 October, whilst he was still giving his evidence, to send an email to his legal team with the subject heading "NOBODY RESPOND UNTIL WE CAN COMMUNCIATE." In that email he said

> "*I was asked by [Mr. Downes KC] about a phone I dropped in a river. This has been bothering me all week and weekend because I never remembered that or anyone at Segantii questioning me. I was caught off guard and was thinking about it for days. [Mr. Downes KC] asked me in a way that was confusing to me. THAT NEVER happened. I just read about it in a conversation btw Toresco and Sumner*[13] *referenced by Dan Larocca (even though I don't believe he said that). WHEN WE CAN COMMUNCIATE PLS explain TO ME HOW I CAN CORRECT THE RECORD. THAT NEVER HAPPENED. I RESPECT THE RULES OF COURT AND JUST SENDING THIS t see if I CAN SPEAK TO IT BEFORE OR AFTER I GET OFF THE STAND. NOBODY REPLY!!*"

24. This was obviously ill-advised but I accept that, by stating "NOBODY RESPOND UNTIL WE CAN COMMUNCIATE" and "NOBODY REPLY", Mr. Gagliardi was not intending to act in breach of the court's direction that he should not discuss the case or his evidence with anybody whilst he was still giving his evidence. His actions were misguided rather than dishonest and arose out of his discovery over that weekend that the accusation about losing a phone in a river was based upon a hearsay allegation in a transcript by a Mr. Daniel Larocca which had not even been put to him in cross-examination. Mr. Gagliardi readily apologised to the court and I consider that no further action is necessary in respect of this inadvertent breach of the court's direction.

25. Mr. Gagliardi was also questioned about numerous specific (often brief) individual interactions with other ECM employees in 2021 by reference to WhatsApp messages and emails which I accept must have been difficult for him to recollect. Indeed, ECM spent a very large part of its written closing submissions (at pages 10-21 and Appendix A) attacking the detail of Mr. Gagliardi's evidence on a number of factual matters, several of which were peripheral to the issues in the case, in order to suggest that his evidence was untruthful, inconsistent, evasive, argumentative, implausible or otherwise unsatisfactory.

---

11 Day2/112/4-9; letter from Hogan Lovells to PCB Byrne LLP dated 12 October 2025, paragraphs 5-7.

12 Day2/101/1-17.

13 Mr. Sumner Garber was an employee and Head of Trading at ECM. Mr. Lerch in his second witness statement at paragraph 12.9 described Mr. Garber as Mr. Toresco's "*second in command*".

26. Despite all of this, he remained, on the whole, impressively calm, albeit that his answers to questions from Mr. Downes KC (counsel for ECM, together with Emily Saunderson) were from time to time somewhat long-winded. He was also willing to accept that the tensions within the firm that bubbled to the surface were at least partly his fault and also that he could be volatile, which is undoubtedly true.

27. Whilst in some respects I reject Mr. Gagliardi's evidence, I consider that his evidence was, on the whole, consistent with the key issues in the case and the documentary record. I do not consider that his evidence was dishonestly given.

28. For the reasons which I set out below, I accept the submission of Mr. Legg and Ms. Schumacher (counsel for Mr. Gagliardi) that the documentary record establishes that ECM's witnesses did not consider at the relevant time (from 28 April 2021 until the termination of Mr. Gagliardi's employment on 7 March 2022) most of the issues they now raise to be of any material relevance to his ongoing employment or to his discretionary bonus entitlement. The reality is that the witnesses on both sides were entrenched in their views: Mr. Gagliardi in his view that he has been wrongly deprived of his bonus and Mr. Lerch in his view that he should be entitled to award Mr. Gagliardi no bonus at all. Each of them has convinced himself of the fairness of his position and each was determined to hold that position throughout. This led both of them, and the factual witnesses they called to support their respective cases[14], at times to be evasive or to give evidence which was inconsistent with the documentary record, having convinced themselves of the truth of their evidence. But I do not consider any of the witnesses to have been dishonest. Ultimately, I consider that most of this witness evidence was either unhelpful or irrelevant in light of the proper construction of the contract and the established documentary record.

FACTUAL ANALYSIS

(a) The pre-contractual period

Mr. Gagliardi's introduction to ECM

29. In January 2021, Mr. Toresco telephoned Mr. Lerch and suggested that he should speak to Mr. Gagliardi, with whom Mr. Toresco had worked at Segantii. Given his experience in the US markets, Mr. Gagliardi presented ECM and the EARMF with an opportunity to expand

[14] For ECM: Mr. Chisholm, Mr. Brindle, Mr. Devesa and Mr. Tsai; for Mr. Gagliardi: Mr. Murphy and Mr. Jones.

into the much larger US market. In particular, Mr. Gagliardi's expertise in US equity capital markets and block trading was clear to ECM, he had a long track record of successful equity capital markets trading and had developed strong relationships with the syndicate desks of the world's most well-regarded financial institutions, including Morgan Stanley, Goldman Sachs, JP Morgan, Bank of America, Credit Suisse, and the Royal Bank of Canada. These relationships were very valuable and critical to a successful block trading strategy.

30. At the time Mr. Gagliardi was contacted by Mr. Toresco in early 2021, he had already started to look for opportunities beyond Weiss. On 1 April 2021, Mr. Toresco introduced Mr. Gagliardi to Mr. Lerch by email:

> "*I wanted to introduce you to Rob Gagliardi (Gags)*[15] *who is one of the most experienced US/Euro capital markets PMs [portfolio managers] out there. Gags and I overlapped at Segantii while I was there … Gags is currently working for a firm called Weiss where he is running a cap markets strategy from London. I think given our growth trajectory, platform set-up, dynamic capabilities, and long term capital providers, it's worth chatting to gags about his longer term aspirations and explore ways for us to potentially work together in the future…*"

31. On 5 April 2021, Mr. Gagliardi and ECM had an introductory WhatsApp call, in which they had an "*easy dialogue … spoke for over an hour*" (see Mr. Gagliardi's second witness statement at paragraph 4.1). Mr. Gagliardi further "*liked Lerch's approach – it was big picture and proactive and he understood my work intimately.*" On 6 April 2021, Mr. Gagliardi responded to Mr. Toresco's email and made clear that he was looking to join a new firm: "*I have made up my mind with [Weiss] and will start exploring opportunities*". He also noted that "*q2/q3 in U.S. will be very good on IPO side.*"

32. ECM was seeking to integrate lucrative US block trading/IPOs into its existing equity capital markets trading framework, and Mr. Lerch was therefore keen to hire Mr. Gagliardi because of his track record and contacts with the major financial institutions in this field. In a WhatsApp exchange between Mr. Lerch and Mr. Toresco dated 7 April 2021, Mr. Lerch said it was "*safe to say [Mr. Gagliardi] just wants to trade and get paid and mop up these relationships for as long as possible… We are buying his relationships essentially and using it to scale so he should be rewarded.*" Mr. Toresco replied "*I think that is fair… He can elevate us in a speed that we just can't do ourselves.*"

---

15 "Gags" is Mr. Gagliardi's nickname.

33. On 8 April 2021, Mr. Lerch emailed Mr. Brindle and Mr. Chisholm, outlining the opportunity to have Mr. Gagliardi join ECM, explaining the benefits of doing so, and displaying his enthusiasm about the opportunity:

> "*Gags got me a meeting with the global head of syndicate at MS*[16] *on Friday. I am flying to Newport Beach and meeting him in the morning. I am not even sure the guy would take a meeting with me if we called and requested so this is awesome. One strong email that is pro-Evo globally and we are in a great spot…*
>
> *Gags has top 5 account status with JPM, GS, and MS…*
>
> *Gags just wants to trade and get paid. He doesn't care about having a fund and dealing with any of the operations/IT/management. I think this is ideal. While he is older and more senior in many ways than Toresco, he can work under the trading structure…*
>
> *My vision for this is we hire Gags and go global. He is based in London. He would live there for 9-15 months and build out the US business…*
>
> *I called Bersch at JPM to take his temperature on this and not only was he supportive he offered to do a call with Gags to let him know capital is not going to be an issue…*
>
> *I love this strategy and as it fits our risk taking DNA perfectly…*"
>
> (emphasis added)

34. I find as a fact that is it clear from the start that Mr. Lerch knew that Mr. Gagliardi was not somebody who wanted to be involved in the operations/management side of the business. He just wanted to "*trade and get paid*". ECM were also benefiting from his valuable contacts in the industry.

35. Soon after their first introduction, Mr. Lerch spoke with Mr. Gagliardi's contacts at various banks, including Mr. Michael Daum at Goldman Sachs, all of whom confirmed that they liked working with Mr. Gagliardi, and "*considered [him] a money maker*". Notably, on 9 April 2021, Mr. Lerch met the Global Head of Syndicates at Morgan Stanley, Mr. Charles Leisure, at a meeting arranged by Mr. Gagliardi. In a WhatsApp message sent to Mr. Chisholm soon after, Mr. Lerch said that the meeting with Morgan Stanley was extremely straightforward and "*[v]ery validating of Gags*" and that both Morgan Stanley and Goldman Sachs put him in the top five people they deal with; and "*so long as we have a*

[16] Morgan Stanley.

good relationship with MS, the shows follow Gags. Since we do, I'm very excited about this." Moreover, Mr. Lerch noted:

> "*It would be difficult to get a meeting with Charles Leisure without an introduction from Mr. Gagliardi, which in itself spoke to the closeness of their relationship".*
>
> *Charles Leisure was also very positive about Mr. Gagliardi. I explained that we were a small fund looking to grow and we discussed how the relationship between ECM and Morgan Stanely would look if we brought Mr. Gagliardi onboard. Mr. Leisure indicated that Mr. Gagliardi would be able to help us grow, and that Morgan Stanley would work with us.*
>
> *I wanted to know if Morgan Stanley would maintain the same relationship with Mr. Gagliardi and give him access to upcoming deals if he joined us. Mr. Leisure was positive about this. He also said our existing business with Morgan Stanley in Asia would be an advantage in terms of building the relationship in the US.*"

36. Mr. Gagliardi was accordingly a very attractive prospect for ECM because he promised an extensive network of contacts and access to a demonstrable and profitable block trading strategy in the US equity capital market. Moreover, successful block trading comes with the prospect of access to large US IPO allocations, the profit from which would in turn provide ECM with the chance to grow its AUM by attracting different institutional investors who sought participation in those IPOs. In view of what Mr. Gagliardi could bring to ECM, Mr. Lerch was extremely eager to secure Mr. Gagliardi's employment: "*My goal is to sign you while the [Weiss] papers are still drying. Sorry if presumptuous just excited and confident this is a win win*".

37. Mr. Gagliardi accepted in cross-examination that he, too, was keen to engage in discussions with Mr. Lerch and to join ECM. His evidence, which I accept, was that the market conditions at the time favoured his US equity capital markets trading strategy and presented him with a lucrative opportunity. He wanted to find the right place to realise it. Indeed, Mr. Gagliardi "*wanted to leave Weiss because their systems weren't set up for the type of transactions we were doing…*" and that he perceived ECM "*to have more of an understanding of the type of trading I was doing*". Mr. Gagliardi and Mr. Lerch had discussed the key components of the block trading strategy, which Mr. Lerch had "*understood intimately*", as Mr. Gagliardi recognised in his fourth witness statement at

paragraph 4.1, and which Mr. Lerch accepted in oral evidence that he "*love[d]*"[17]. Joining ECM was also attractive to Mr. Gagliardi because, since he was bringing his lucrative block trading strategy to ECM, he was able to propose and negotiate the specific remuneration package he wanted, and was assured that Mr. Lerch wanted to support his ambition to grow the AUM.

38. Mr. Gagliardi understood that Mr. Lerch wanted him to bring his "*brand*" to ECM, and in particular to build ECM's brand in the US. As he explained in his fourth witness statement at paragraph 4.3: "*[a]t the time I was recruited, I understood there was no large institutional money or investors who had committed money yet. A key part of the growth strategy was to get these institutional investors. Varga and Lerch had some contacts, but [ECM] needed additional checks and a portfolio manager with a 'brand' in the [equity capital markets] strategy, track record, and credibility – that was me…*". I find as a fact that this was true. Mr. Gagliardi and Mr. Lerch both understood that a large part of ECM building a US equity capital markets business included bringing Mr. Gagliardi's contacts and relationships with the major US banks to ECM. This is reflected in Mr. Lerch's acknowledgement that "*[h]e was hired because of his excellent track record and contacts with key figures and banks in the industry, in particular Goldman Sachs, Morgan Stanley and JP Morgan, all of whom were involved in and important to the execution of this particular strategy*." ECM did not at the time have those relationships in the US markets, or at least did not have them anywhere near to the extent that Mr. Gagliardi did, and ECM did not have a large institutional fund with access to US IPO allocations. Hiring Mr. Gagliardi was therefore critical to ECM's desired strategy succeeding. In the circumstances, Mr. Lerch proceeded to offer Mr. Gagliardi a job as ECM's US Portfolio Manager.

(b) Negotiation and drafting of the employment contract

39. Mr. Gagliardi and Mr. Lerch spoke by telephone several times in the pre-contractual period. The focus of the discussions early on, alongside the requirements of the strategy, concerned Mr. Gagliardi's remuneration package. It was clear to Mr. Lerch, as he accepted in oral evidence, that there had to be suitable incentives in place for Mr. Gagliardi to join ECM and he was extremely keen to ensure that he did so.

[17] Day6/58/11-24.

40. During these negotiations, Mr. Lerch kept his co-managers Mr. Chisholm and Mr. Brindle updated. After telling Mr. Chisholm in a WhatsApp message dated 8 April 2021 that he was "*very excited*" about hiring Mr. Gagliardi, Mr. Chisholm asked what kind of remuneration package Mr. Gagliardi would be expecting, and suggested that they might need to offer 50% of the performance fee (which is 10% of profit and loss ("**PL**"[18])). If so, Mr. Chisholm said that Mr. Lerch might need to revisit Mr. Toresco's remuneration agreement in order to accommodate Mr. Gagliardi. In response, Mr. Lerch said "*[w]e are going to have to get creative*", in order to find a way to incentivise Mr. Gagliardi with much of ECM's profit already committed to Mr. Toresco.

41. On 11 April 2021, Mr. Lerch described Mr. Gagliardi's remuneration package and remit in a WhatsApp message to Mr. Toresco (but not Mr. Gagliardi), as follows:

> "*1. Base commensurate with market*
>
> *2. Base scale on AUM. I told him you have this*
>
> *3. 17% of all New Issue PL for US*
>
> *4. Discretionary bonus for business contributions, team development, and leadership and mentoring staff.*"

42. On 13 April 2021, there was a telephone call between Mr. Gagliardi and Mr. Lerch. After this call, Mr. Lerch sent a WhatsApp message at 13:29 to Mr. Gagliardi, to "*recap the framework*" for employing him which they had discussed by way of seven items:

> "*1. Gags joins Evo as Partner – Head of US/Europe*
>
> *2. reports to Lerch*
>
> *3. integrated into the team*
>
> *4. base salary 250k. salary kicker of 5% of [management fees] the fund takes in*
>
> *5. 17% of new issue PL in Us and Europe*
>
> *6. discretionary bonus on any other trading activity. target range 10-15% of pl*
>
> *7. Evo pays all other people traders back office etc. all of the above goes to gags.*"
> (emphasis added)

[18] Profit and Loss – i.e. net profit.

43. Mr. Lerch followed up by saying "*i am flexible on all this and just want to trade at [face value]. i think we would work great together…*". It is clear that Mr. Lerch was amenable to meeting Mr. Gagliardi's financial demands, in particular that his discretionary bonus, which is an important part of the remuneration package for equity capital market traders, would be calculated on his "*trading activity*."

44. In cross-examination, Mr. Gagliardi maintained that the various telephone calls he had had with Mr. Lerch had directly addressed the framework in item 6, which became the discretionary bonus in his concluded contract. Mr. Gagliardi was frank during his recollection of these discussions and accepted (when questioned by the court) that he and Mr. Lerch had not discussed what would happen if he had only made US$1 of PL: "*I don't remember us specifically talking about that*"[19] and "*[n]o one ever brought that up to me*"[20]. He intimated that he would have expected to be fired if he had made no money at all.

45. However, it is apparent from the documentary and witness evidence that ECM, Mr. Lerch, and Mr. Gagliardi all anticipated that Mr. Gagliardi would be a very successful trader and would likely generate large profits for ECM; it was never considered that he would not succeed in doing so or would likely only generate small profits.

46. Mr. Lerch accepted in cross-examination that the key components in points 1-5 of this framework represented the agreement he made with Mr. Gagliardi. He also said that he agreed that Mr. Gagliardi would report to him directly. Mr. Lerch did not accept that points 6 and 7 reflected the terms of the discretionary bonus contained in the concluded employment contract and he sought to emphasise that the use of the word "*target*" in the phrase "*target range 10-15% of pl"* meant only "*aspiration*". Mr. Lerch accepted, however, that the 10-15% PL figure in point 6 equated financially to 50-75% of the 20% performance fees. He maintained his position that the 10-15% "*target*", even when used as a contractual formula for calculating Mr. Gagliardi's discretionary bonus, meant that he intended to retain an absolute discretion to decide whether to pay any bonus at all. When asked "*[w]hy refer to a target at all?*", Mr. Lerch did not answer the direct question but instead said that it was "*what might happen if the exercise of discretion is done and the revenue*

[19] Day5/132/13-19.
[20] Day5/134/4.

contributions are there and the litany of other factors in the bonus discussion were satisfied. That is how I would manage expectations"[21].

47. Although Mr. Lerch acknowledged that he had to incentivise Mr. Gagliardi to join ECM, he maintained in cross-examination that it was the IPO bonus alone that was sufficient for this purpose. This is despite Mr. Lerch's acceptance that block trading was "*treacherous*"[22] and would take up the majority of Mr. Gagliardi's time, skill, and focus, and there was a need for him to be incentivised to make profit on block trading as well as IPOs. I do not accept Mr. Lerch's evidence in this respect. Indeed, it is noteworthy that Mr. Lerch himself would only benefit from Mr. Gagliardi's block trading (because he could not benefit personally from IPOs) and so he was himself incentivised to motivate Mr. Gagliardi to make profit on trading activity other than IPOs.

48. It can be seen that none of the factors that are listed in point 4 of Mr. Lerch's WhatsApp message to Mr. Toresco ("*business contributions, team development, and leadership and mentoring staff*") feature in his WhatsApp message to Mr. Gagliardi on 13 April 2021, recapping the framework of their proposed agreement. Instead, Mr. Lerch is recorded as having agreed that the discretionary bonus will be payable purely on "*any other trading activity*" (i.e. trading activity of the fund/EARMF other than IPOs).

49. Mr. Gagliardi and Mr. Lerch also had a telephone call on 11 April 2021 at around 09:30. Although Mr. Lerch said that he did not specifically remember this call with Mr. Gagliardi, he said it was likely to have included a discussion of the intangible factors concerning the discretionary bonus which he had discussed with Mr. Toresco. Absent any documentary record of what was discussed, I do not accept that this telephone call included such a discussion, and do not accept that these negotiations between Mr. Lerch and Mr. Gagliardi about the discretionary bonus suggested anything other than that the bonus would be based on Mr. Gagliardi's trading activity.

50. I find that, as was put to Mr. Lerch, the difference between Mr. Lerch's two WhatsApp messages is likely to be accounted for by his not wishing to upset Mr. Toresco at that time with such a generous package for Mr. Gagliardi. I reject the evidence of Mr. Lerch that he "*wasn't worried about [Mr. Toresco] seeing what Mr. Gagliardi got because he's the CIO of the fund and he would know anyway. So if I didn't say it specifically here, he would have*

21 Day6/75/4-8.
22 Day6/80/3.

known soon thereafter what the deal was."[23] The 10-15% discretionary bonus that had been offered to Mr. Gagliardi (which was equivalent to 50-75% of the performance fee) clearly cut across Mr. Toresco's entitlement to 50% of the performance fee (i.e. 10% PL). This was why Mr. Lerch needed to "*get creative*", so as to make the financial package offered to Mr. Gagliardi an attractive one in order to ensure that ECM persuaded him to join them. It is clear that Mr. Lerch saw Mr. Gagliardi as a money-making machine and was firmly set on employing him on a highly attractive package of remuneration.

51. On 16 April 2021, Mr. Lerch transferred Mr. Gagliardi's remuneration framework into a formal contract. In doing so, Mr. Lerch accepted in cross-examination that ECM began with a standard form contract which was subsequently tailored to Mr. Gagliardi's unique situation. Mr. Lerch stated in cross-examination that he had not personally made changes to the standard form contract but agreed that he was closely involved in the process and that he monitored the developments at each stage.

52. This first draft contract was sent to Mr. Chisholm and to Mr. Tsai, who was ECM's General Counsel and Global Head of Compliance, to see if any changes needed to be made. Mr. Tsai sent back a revised version dated 22 April 2021 and said: "*I just added a reference to our payroll plan and the employee NDA.*" This second version of the draft contract was substantively unchanged from the seven-point remuneration framework recapped on WhatsApp to Mr. Gagliardi, apart from three main alterations.

53. First, the salary wording was amended from "*base salary 250k. salary kicker of 5% of [management fees] the fund takes in*", to:

> "*Your annual salary will be equal to the greater of: (i) 10% of the management fees collected in the [EARMF] or (ii) $250,000, payable in accordance with [ECM]'s established payroll plan. Your salary will be recalculated on a quarterly basis using the preceding formula.*"

54. Secondly, the wording of the discretionary bonus was expanded from "*discretionary bonus on any other trading activity, target range 10-15% of pl*", to:

> "*For each calendar year, provided you are an employee in good standing on each fiscal-year-end bonus payday, you may receive a discretionary bonus based on your individual performance and [ECM]'s overall performance ("Discretionary Bonus"). The target*

[23] Day6/70/7-10.

> *range of the Discretionary Bonus will be 10%-15% of profit of your revenue contributions but will be purely discretionary.*"

55. Thirdly, a sign-on bonus of US$610,800 was included to compensate Mr. Gagliardi for the bonus that he would forgo by leaving Weiss early.

56. There was no suggestion that "*individual performance and ECM's overall performance*" was concerned with anything other than "*trading activity*". Indeed, ECM's "*overall performance*" obviously cannot refer to its performance by way of team development, leadership etc. It is referring to its overall *trading* performance. The juxtaposition of that phrase to Mr. Gagliardi's "*individual performance*" clearly likewise is intended to refer to his individual *trading* performance.

57. On 24 April 2021, Mr. Lerch sent a third draft contract to Mr. Gagliardi by WhatsApp with one further change. He stated that so far as the sign-on bonus was concerned: "*[I m]ade it 625 so it's a clean amount.*"

58. On 25 April 2021, Mr. Gagliardi sent this draft contract to his US counsel, Mr. Seth Redniss, for review. On 26 April 2021, Mr. Redniss sent several comments on the draft to Mr. Gagliardi, which were forwarded to Mr. Lerch and Mr. Chisholm, as follows:

> "*1. The letter needs to accurately reflect that you'll be providing services from the UK as well as the US so that you're not required to relocate.*
>
> *2. The term "management fees" for purposes of your salary should be defined with examples showing what the actual salary would be assuming certain AUM so it's clear what the salary would be but also how this is calculated and reconciled quarterly.*
>
> *3. The 17% payout should clarify that applies to gross proceeds (i.e. no deductions) from the business you generate, with examples/scenarios showing what you would actually receive.*
>
> *4. I'm not clear on the discretionary bonus. "Profit" needs to be defined. Again, I suggest a simple example.*
>
> *5. By far the most important point is that the letter needs to clarify that if your employment terminates for any reason, that you still get paid for the business you have generated.*"
>
> (emphasis added)

59. On the morning of 26 April 2021, Mr. Lerch had a telephone call with Mr. Redniss about the contract, after which Mr. Lerch by email dated 26 April 2021 thanked Mr. Redniss for

his input and said that he would "*clarify the matters below ASAP and have a new draft over as soon as possible*".

60. Meanwhile, Mr. Lerch forwarded Mr. Redniss's email to Mr. Chisholm and Mr. Tsai and stated at 7:19 on the same day: "*Better if we hop on a call and I can run through the asks which are mainly clarifications.*" After a telephone discussion, Mr. Tsai responded to this email and attached a new draft. Importantly, he said this: "*With respect to his discretionary bonus, our earlier drafts stated that it was based in part on the company's overall performance. I changed this to the profit generated from the "Business", which I think is more reflective of what we had in mind*" ("the Business" being EARMF).

61. Subsequently that evening, Mr. Lerch sent a further marked-up draft contract to Mr. Gagliardi and Mr. Redniss. In addition to Mr. Tsai's revision, this draft included the definitions and worked examples that were requested by Mr. Redniss, and also included a section on the pro-rata payment of bonuses in the event of early termination of Mr. Gagliardi's employment which Mr. Redniss had wanted so that Mr. Gagliardi would still get paid for the business he had generated in the event of such early termination (point 5 in paragraph 58 above).

62. It is clear that Mr. Lerch was keen to provide Mr. Gagliardi with all that he wanted in terms of his remuneration.

63. On 27 April 2021, Mr. Redniss responded to this email and the attached marked-up contract, stating: "*This looks good to me*". The final version of the contract was signed by Mr. Gagliardi on 28 April 2021. He had initially signed a copy of the marked-up contract in London on 27 April 2021 and provided a copy to Mr. Brindle, but he signed a clean copy of the employment contract at Mr. Lerch's home in Incline Village, Nevada. The employment contract provided for four heads of remuneration: (i) an upfront payment referred to as a "*signing bonus*" (to make up for a loss that Mr. Gagliardi would forgo at the hands of Weiss as a result of entering into a contract of employment with ECM); (ii) a base salary, which was expressly tied to management fees paid (assuming that US$250,000 is exceeded); (iii) a new issue bonus relating to the gross income from IPOs ("**IPO Bonus**"). This was passed through the EARMF (rather than being dependent on what the fund manager made) and was payable annually within 30 days of 31 December; and (iv) the discretionary bonus with a "*target range*" of 10-15% of "*Profit*", reflecting an assessment of Mr. Gagliardi's "*revenue contributions*" (hereafter, "**Discretionary Bonus**").

64. It is important to recognise that the parties treated these four heads of remuneration as an entire "*remuneration package*"[24]. Mr. Gagliardi's employment contract is contained in a letter of just two and a half pages, which reflects the fact that, as the evidence suggested, his function was straightforward, albeit highly skilled: to increase the profitability of the funds in the high-earning and competitive activity of income generation from block trading and IPOs, in which the payment of discretionary bonuses is a typical part of the remuneration structure of employers.

65. Mr. Gagliardi requested that ECM also employ Mr. Steven Murphy (to be based in New York, US) with whom he had previously worked in order to execute Mr. Gagliardi's trades. Mr. Lerch immediately agreed, and Mr. Murphy was employed by ECM on 27 April 2021. Again, it is clear that Mr. Lerch would readily agree to Mr. Gagliardi's demands in order to ensure that he came to work for ECM.

(c) Mr. Gagliardi's employment at ECM

Trading in the A1 share class at the start of his employment

66. Following the execution of the employment contract, and because the EARMF had not yet been set up to trade, Mr. Gagliardi's trading initially took place in the A1 share class of the Evo Fund between 28 April 2021 and 31 July 2021. As I have already mentioned, on 1 August 2021, the EARMF was launched and the investors in the A1 share class redeemed and reinvested in that fund in which Mr. Gagliardi continued to trade. There is no record of anyone suggesting that, until the launch of EARMF, Mr. Gagliardi was not entitled to be paid for his work pursuant to his contract, or that the profit generated for the A1 share class would not count towards his IPO Bonus or Discretionary Bonus. I find as a fact that both parties understood that he was going to be trading on the A1 share class until such time as the EARMF became operational.

67. Mr. Lerch confirmed in his oral evidence that it was indeed the "*spirit of*" the employment contract, that Mr. Gagliardi would be remunerated on his trading in both the A1 share class and the EARMF:[25]

> *Q. In your interactions in 2021 to 2022 during Mr Gagliardi's employment, it was fairly commonplace, wasn't it, for both you and for others within Evo to refer to the trading within the A1 class fund as EARF trading or Absolute Return Fund trading as well?*

[24] Mr. Lerch himself refers to it as a "*remuneration package*" in his second witness statement at paragraph 10.5.
[25] Day6/125/8 – 127/5.

> *A. Yes.*
> *Q. So there's a discussion about swaps and whether they're going to be ready for the A1 trading or whether they will be ready in time for the new fund, but there's no suggestion that trading should only be within one fund or the other fund. Both funds were traded, and it was all -- the trading occurred within A1 prior to the establishment of EARF in August; that's right, isn't it?*
> *A. So is the -- am I being asked to comment on whether the trading occurred in the A1 Fund until August?*
> *Q. Yes.*
> *A. Yes.*
> *Q. If there was trading in the old fund, as it were, in the A1 Fund, there was no suggestion at any time that Mr Gagliardi would not be compensated in respect of that trading, is there?*
> *A. There may have been conversations about that.*
> MR JUSTICE CALVER*: Sorry, what do you mean by that? What did you understand he would be compensated for -- he starts trading at the A1.*
> *A. Yeah, I did -- the spirit of the agreement and my opinion was that the trading would occur in the A1 Fund, and then transition to the other fund, and he would be compensated for IPOs and such for the A1 Fund, in advance of the other fund being launched.*
> MR JUSTICE CALVER*: Yes, so you viewed it really as effectively one -- for the purposes of his compensation, you were viewing it as sort of one fund effectively.*
> *A. Well, my Lord, I paid him on the IPO generation of both funds, so that's --*
> MR JUSTICE CALVER*: Yes.*

68. Mr. Gagliardi gave evidence which was consistent with Mr. Lerch's understanding in his sixth witness statement at paragraph 3.45, as follows:

> *"I understand that the Defendant contends that "Business" as defined in the Contract means that my Discretionary Bonus is limited to just the trading I did for the EARMF. I disagreed. The contract did not mean that I would only get paid for my performance after the EARMF was launched. If I had understood I would only be paid bonuses for the EARMF performance, I would have said, "call me when EARMF starts". Why would I have entered the contract if that was the deal? Why would I have put myself through all the stress of managing the A1 portfolio before EARMF was launched? It makes no sense. I had the clear understanding, which I believe was shared with Lerch, that I would start trading immediately, and that the fund I was trading for was "the Business".*"
>
> (emphasis added)

69. Indeed, Mr. Gagliardi's salary was to be calculated on 10% of the management fee collected by the investment managers (if it exceeded US$250,000), which management fee was calculated as 2% of the assets under management. Those AUM were held in the A1

share class when Mr. Gagliardi commenced his employment up until August 2021. It was never suggested by ECM prior to the conclusion of the employment contract that so far as his Discretionary Bonus was concerned, he would not be remunerated by way of that bonus for any of his trading on the A1 share class before the EARMF became operational. Indeed, when it became operational, EARMF was treated both by ECM and by Mr. Gagliardi as a continuation of the A1 share class. That is apparent from Mr. Lerch's "*spirit of the agreement*" evidence, as well as his agreement in cross examination with the proposition that "*that's what happened, isn't it, everybody basically shifted their assets across as of 1 August from the A1 share class into the new fund*"[26].

70. Mr. Gagliardi started trading straight away, as soon as his employment began. Mr. Lerch's evidence was that he had not told Mr. Gagliardi that he could start trading straight away. He gave evidence in his second witness statement at paragraph 12.7 that Mr. Gagliardi was not authorised to trade at the outset and that he "*did not realize how much work had to be done to get him set up properly to trade … He did not seem to understand how risk limits worked, particularly given that we were managing external capital, which meant that we were accountable to investors*". And at paragraph 12.14: "*Mr. Gagliardi's attitude was that simply providing him with access to a Bloomberg terminal meant he had to trade*."

71. Mr. Lerch explained in his second witness statement at paragraphs 12.3 and 12.4 that Mr. Toresco as CIO and Mr. Devesa as Risk Manager were responsible for setting risk limits for the A1 share class and the EARMF. He explained that *risk limits* are:

> "*limits to the amount of capital from an investment portfolio a trader can commit to a single trade. Each trader and type of trading activity has risk limits associated with them. These usually include individual position limits, overall limits for the investment strategy/portfolio and fund management limits. The individual position limits and strategy limits tend to be set internally. Fund management limits or investment parameters are usually specified in the private placement memorandum or "PPM" provided to investors.*
>
> *… We set internal risk limits so that any positions taken over this limit can be discussed and if considered appropriate, approved. … it would be generally unacceptable for a trader to breach their internal risk limits, and to do so repeatedly.*"

[26] Day6/18/23 – 19/2.

72. Mr. Gagliardi agreed that it was "*partly true*" that he began to trade before receiving any risk limits:[27]

> "*Q. ... Isn't it the case that on 28 April, before you'd even been set up on Bloomberg and the like, and before you'd been given any risk limit, you were agreeing blocks with Mr Passi?*
>
> *A. So, let me put some context to this.*
>
> *Q. Is that -- before you do, is that true or not?*
>
> *A. It's partly true.*
>
> *Q. Right. Go on, give the context.*
>
> *A. So in order to interact with the counterparts, the way we communicate mainly was on Bloomberg.*"

73. After Mr. Gagliardi's first trade, on 28 April 2021 at 8:27, Mr. Lerch sent a WhatsApp message to Mr. Gagliardi, which read: "*Please speak to Zoltan. Despite this disconnect out of the gate here, I think this is the best opportunity for you that exists. I think Murph would agree. The integration may take longer than you like but it will be worth the wait. I appreciate your candor and immense focus on doing things with urgency and I share that.*" In response, Mr. Gagliardi replied: "*I don't dictate the pace of the [equity capital markets]…*", "*I like you Mike and we both very direct … u did tell me to get on Bloomberg and if I needed to do anything speak to Sumner.*"

74. It appears from these exchanges that Mr. Gagliardi did indeed believe that by allowing him access to the trading market via Bloomberg, Mr. Lerch was agreeing to him starting trading immediately, whereas Mr. Lerch had wanted him first to complete his compliance and integration training at ECM.

75. In a WhatsApp message to Mr. Lerch at 8:49 that same day, 28 April 2021, Mr. Gagliardi adopted a conciliatory tone, stating "*Let's just move forward at a pace that suits you … it's your firm.*" In response, Mr. Lerch stated:

> "*Our goal is to get to 1 bil by Feb 1 and 2 in short order. In order to do that you need process. It's a balancing act and the people like Zoltan are all about process. Zoltan is 10x more about process than me – hence having Crystal [Krystal Bojan][28] as his CFO.*

---

[27] Day3/58/8-17.

[28] Ms. Krystal Bojan is married to Mr. Toresco and the head of Mr. Varga's family office in Hong Kong.

> *I'm closer to you than Rob or Zoltan but trust me on this – it is needed. I think Murph would strongly agree and I think the reason beyond you he wants to be at evo is he sees the potential to scale and that our team thinks like he does.*"

76. It is clear that Mr. Lerch was keen for Mr. Gagliardi to start trading in order to get to US$1 billion in short order but also recognised the need for an onboarding "*process*" to be undertaken by Mr. Gagliardi. Unfortunately, Mr. Gagliardi mistakenly understood this message to be an insult about his trading process, responding: "*By saying that I will try not to interpret it as if you saying my process isn't complete. I wouldn't have gotten this strong of connectivity broadly or made p/l over years without staying in my lane and having tight process. Things don't need to be complicated.*"

77. Mr. Lerch clarified in response that he was referring to the *company's* integration process, while praising Mr. Gagliardi's work: "*I'm not talking about your process. Your process is excellent. I am talking about the integration process.*"

78. Meanwhile on 28 April 2021, Mr. Varga then did speak to Mr. Gagliardi and everything was smoothed over. Mr. Lerch said, in an email to Mr. Chisholm, Mr. Toresco, and Mr. Brindle, that "*Whatever Zoltan said to Gags his attitude has swung 180 degrees. I think he was able to just get the point across that this isn't a trading desk but rather an institutional asset management business we only have 1 shot at here in the US. Will follow up individually but relieved and happy the vol went from 60 to 22 (maybe 30)*".

79. In any event, it is important to understand that Mr. Lerch confirmed in his second witness statement at paragraph 12.23 that he merely considered these disagreements or misunderstandings to be, in his words, "*teething problems*".

80. The documentary record does not suggest that Mr. Lerch told Mr. Gagliardi to stop trading as a result of these teething problems. Indeed, the next day, on 29 April 2021, Mr. Gagliardi initiated another trade with Mr. Passi. Mr. Toresco sent an email to Mr. Lerch with Mr. Devesa and Mr. Brindle copied on 30 April 2021, with the subject "*Need to talk ASAP*", which read:

> "*Lerch, I'm sorry I am emailing you during a difficult weekend with Brent's funeral, and I wouldn't if I didn't think it was of the utmost importance. We need to be clear about what we have EXPLICITLY told Gags around his interactions with the street and trading capabilities.*

He traded again after market last night with MS.[29] MS called him late at night (head of MS ECM Pawan Passi) and said he could offer 97k shares of some name (gags doesn't remember the name), MS said its "not volatile" and "franky fu took 400k". It's supposedly around $4m of stock. Obviously the size doesn't bother me, but we need to be clear here on a few things:

What has Gags been told in regards to trading? I thought we had told him to stop until he is onboarded, until he is an authorized trader, until we have a compliance process in place, has limits, has access to systems, our risk systems are updated and recalibrated, and the rest of the team understands how we are going to operate across all trading/operational verticals.

I again tried to explain to him that I'm okay to miss out on opportunities until we are set up, or at least until we can all chat possibly early next week to discuss broad guidelines as to where we want to be active until we are 100% operational, but before we have the conversation with Lerch, PD, me, and the trading team, we cannot be active. He can't understand this point. He can't accept the fact that he is on BBG[30] and can't be active.

I told him that "I wasn't wild about the fact that he advised on a trade given our conversations over the last few days". He blew up at me and told me, "you keep talking about fkn process, process, process. I don't get what that means. If you think that when the head of MS ECM calls me, I'm not going to trade, then you are fking crazy. This is crazy. We are getting looks that only a few guys get. MS ECM wouldn't even know who EVO fkn was without me. These are small trades, these aren't big trades. Stop talking to me like I'm a fkn child."

I told him that the size of the trade doesn't matter. The fact that he hasn't been on boarded, we have no process, workflow, etc. I said that our process isn't even heavy compared to every other fund and that we will get up to speed quickly but he needs to give us some time.

I told him that I am never disrespectful to him and he shouldn't be to me. I said he needs to trust me that I and the rest of the team has every incentive to make sure we get up and running quickly and we have all hands on deck. He then said ok then Philippe should just add me to authorized trading list today. I told him it doesn't work like that, but he again, doesn't understand why that is the case.

I have continued to try to tell him that we will be ready in short order but he needs to stop talking to the street or get off Bloomberg if he can't handle himself. He blamed us for giving him a Bloomberg and that once he gets a Bloomberg everyone thinks he's ready to go so he has to go and will go. He said that he was under the impression after speaking to

29 Morgan Stanley.
30 The Bloomberg trading terminal.

> *Lerch that we wanted to do stuff right away, doesn't have to be big, but start being active right away.*
>
> *I don't know how to deal with him at this point. We need to figure out if we can ever trust this guy to do the right thing. I don't know what he has explicitly been told but I think it was clear he wasn't supposed to trade yet before we had the chance to discuss all of the points above. There is too much at risk for all of us If we don't address this now…*"
>
> (emphasis added)

Mr. Gagliardi accepted in cross-examination that he had used words to the effect of those in Mr. Toresco's email[31].

81. On 1 May 2021 Mr. Lerch responded to Mr. Toresco's email. It is significant, in my judgment, that he did not say that Mr. Gagliardi should not trade or that he had already told him that he could not trade, instead he said:

> "*Let's talk over the weekend. I think the first thing we can do is establish some limits. It doesn't seem like there is a meeting of the minds as to how we deal with the risk during the integration.*
>
> *Risk limits*
>
> *Reporting trades*
>
> *Just a basic set of rules for the next month until we get the infrastructure where we need it.*
>
> *The bigger issue is the abusive behaviour and attitude. That obviously has to stop or we are gonna have to shut this project down.*"
>
> (emphasis added)

82. In cross-examination when asked whether he had appreciated the level of speed and engagement in the US market once Mr. Gagliardi started trading, Mr. Lerch said: "*I'd say that this is over a course of a week or so, so for a very short period of time, I would say that the activity was higher than I expected, but overall, I understood what the business was and how the business works and how many transactions there are*".[32] Mr. Lerch clearly did not object to some level of trading activity from Mr. Gagliardi from the outset, and importantly, the reference to a "*basic set of rules for the next month*" in his email to Mr.

---

31 Day3/86/20-21.
32 Day7/2/4-8.

Toresco assumes that Mr. Gagliardi will be trading in the A1 share class during his integration, with a basic set of risk limit rules.

83. On 3 May 2021, and pursuant to Mr. Lerch's request for a basic set of rules in respect of Mr. Gagliardi's US trading in May, Mr. Devesa sent a proposed limit framework for the US trading to Mr. Lerch, Mr. Toresco, Mr. Langford,[33] and Mr. Garber, with reference to the then current limits for the A1 share class. Mr. Devesa commented that "*I think the idea of 1 trader operating in a time zone where there is no Risk Management to control is a bit dangerous, and we will need to address that …*" Mr. Lerch thanked Mr. Devesa for the limits and indicated that they would speak to each other soon afterwards.

84. On 4 May 2021, Mr. Lerch replied, emailing Mr. Devesa, Mr. Toresco, Mr. Langford, and Mr. Garber:

> "*The main thing is to just go over the basic limits and what to do if there is a trade over the limit. These limits as you point to below are interim limits. Goal is to increase them as we improve our execution capabilities.*
>
> *To make this very simple:*
>
> *1. SS limit of 10$*
>
> *2. Max number of SS positions 3*
>
> *3. Gross 30$*
>
> *4. Net 20$ (ie. If he has 3 10$ positions we need a market hedge of at least 10$)*
>
> *5. If he wants to trade bigger, run it by Rob and if Rob is asleep call Lerch*
>
> *I presume everyone is ok with me increasing the limit to say 20$ on a trade if I think the edge is there. I don't intend to do that without understanding the trade. Anything I get involved in I will be messaging Sumner etc. in real time.*"

Again, this email assumes that Mr. Gagliardi will indeed be trading at that time, and that the temporary limits may need to be increased.

85. On 10 May 2021, Mr. Devesa responded to this email:

[33] Mr. John Langford was an employee and trader at ECM.

> "*I guess we need to recalibrate all limits because at moment US is so much bigger than any other market and so much over the recently agreed limits. I know there were requests to increase overnight which were cleared, so for today its ok, but will work on revising into something usable and validate with Rob. On a sector and net delta basis exposure is not too large fyi.*
>
> *I expect that we will revise limits regularly anyway with growth of AUM, until we reach some kind of plateau, but it would be helpful for me to know if when we go really over the limit it is specific situation or more persistent trend which requires reset of limits.*"
>
> (emphasis added)

86. Mr. Lerch in turn responded on the same day:

> "*100% agree. Gags is in the US with me for the next 3 days and I want to strongly encourage/require to stick to the limits until we are better set up. There's edge in these trades but the potential slippage with execution may reduce the edge hence we should be smaller for now. Good to see a lot of activity but we all need to continue to communicate and stay on track with a measured increase of risk in US.*"
>
> (emphasis added)

87. It is clear from these exchanges that Mr. Lerch was again allowing Mr. Gagliardi to trade in the A1 share class, and indeed that Mr. Lerch was both content with and positively encouraging Mr. Gagliardi's busy trading activity. Mr. Lerch recognised that the limits were, at this stage, a moveable feast until ECM was "better set up" to deal with this.

88. It was put to Mr. Devesa in cross-examination by Ms. Schumacher that it was obvious at this point of time, i.e. on 10 May 2021 (being just two weeks after his employment began), that it was contemplated that there would be a number of revisions to the risk limits in the future, because of the likely size of the US trading positions. Mr. Devesa responded: "*Partially. I think the revision---we know that the fund was in a phase where it was going to grow in AUM, so I needed both to see the level where the AUM were going to dock, and also solely integrate those traders.*"

89. The following exchange then took place between the court and Mr. Devesa:

> "*MR JUSTICE CALVER: Is it fair to say that you knew that the risk limits were going to be exceeded for the US, but that it was anticipated that you'd get -- he'd get individual approvals for those exceeding risk limits until it plateaus out at a level which everybody can work with?*

> *A. I would rather say, my Lord, that it was that -- rather than say the approval, we would have an excess, that we would need to find the right limits that would be in place and more stable while we were in that phase of growing. It might increase for -- we would -- I would revise a few times, you know, that risk framework, until I arrived to a set of limits which are stable and don't need extension, don't need various approvals.*
> *MR JUSTICE CALVER: In that interim period, until you reach that stage, it's going to be a case of subsequently approving individual risk limits when they have been exceeded.*
> *A. Or at least escalating according to the procedure so that we would really analyse each time, you know, we are above a limit.*
> *MR JUSTICE CALVER: Yes, so if you have a group -- sorry, if you've got a group of cases where the limit has been exceeded, you might say there's an issue here, but if they're just individual ones on a few transactions, you would just look at them and approve them subsequently.*
> *A. Correct, my Lord.*
> *MR JUSTICE CALVER: Yes.*
> *MS SCHUMACHER: I think it's implicit in your answer to my Lord's question that the US positions would periodically be a lot bigger than what had been taken in respect of the Asia trading in the past; is that fair?*
> *A. It's fair to say, yes.*"

90. From these exchanges it is clear that it was anticipated by all concerned that risk limits would be exceeded by Mr. Gagliardi on individual trades from time to time (as occurred) and that the limits generally would likely have to be increased from time to time until they reached a settled point, as ECM adjusted to the volume and size of Mr. Gagliardi's US trading activity which was much greater than it had been used to thus far. Insofar as individual limits were exceeded in this way, it was recognised that they could be approved subsequently. I find that Mr. Lerch in particular was aware of this, did not consider it to be a serious issue, and it was in fact both anticipated and considered necessary by him in order for ECM's business in the US market to grow quickly and substantially, which was what he wanted. Mr. Lerch was happy for Mr. Gagliardi to continue trading and at no time discouraged or prevented him from doing so.

Visit to Incline Village

91. At this stage, Mr. Lerch had not yet met Mr. Gagliardi in person, but wanted to do so given his uneasy start with the ECM team. A trip was arranged for Mr. Gagliardi to fly out from London and visit Mr. Lerch at his home in Incline Village, Nevada, US for a few days starting on 10 May 2021.

92. During the flight out on 10 May, Mr. Gagliardi indicated on a trade (EAF) with Goldman Sachs. It is evident that Mr. Gagliardi was aware of the risk limits which applied for the trade because during the flight, he asked Mr. Lerch for permission to exceed those limits. In a WhatsApp sent to Mr. Lerch at 11:08, Mr. Gagliardi said: "*We need a limit increase in EAF*", and "*We also got a limit increase in HAIN earlier*". There were corresponding emails from Mr. Murphy sent to Mr. Lerch, Mr. Toresco, and Mr. Devesa with Mr. Gagliardi copied in: "*Can we please get a limit increase on HAIN. Currently short 150k shares, roughly $6m notional*" to which Mr. Toresco responded "*… I think the stock is low vol and already post earnings so I would be good up to 400k shares*"; and "*Can we get a limit increase on EAF, we would like to aim to be short 850k-1m shares by the close of today (roughly 13-15m notional)*". Mr. Lerch replied: "*Fine. No more than 15$ please.*" On the same day, Mr. Murphy sent another email requesting three further risk limit increases in PXD, INFO, and LXP, also copied to Mr. Gagliardi.

93. I accordingly accept the following evidence of Mr. Gagliardi (in his fourth witness statement at paragraph 7.25) which is consistent with the contemporaneous documents:

> "*I do not recall Lerch communicating a specific, fixed limit figure to Murphy and me. I do recall some kind of daily limit or parameters. None of [ECM]'s limits appeared to be static or fixed. Limits would change from week to week, and you could obtain a limit increase, for example by calling Lerch…*"

94. I also broadly accept the evidence of Mr. Gagliardi (contained in his sixth witness statement at paragraph 6.4):

> "*Risk limits overall are evolving and opportunistic. That is especially the case with the strategy Steve and I were doing, where we were managing the risk and exposure based on the opportunities that came up. We were doing negative selection, meaning we were not proactively going to put the positions on ourselves - we were taking positions from people. If a lot of people want to sell something, they were going to come looking for liquidity providers like me. We did not dictate the velocity of the market; the market dictated it. That is why there needed to be constant conversations about risk.*
>
> *Just like everything else that took place at Evo, the approach to risk limits seemed off the cuff. Regarding trading limits, it was a dynamic conversation and, from what I remember, it was never really set in stone.*"

95. Mr. Gagliardi recalled (in his fourth witness statement at paragraph 9.3) that upon his arrival at Incline Village, he had the following exchange with Mr. Lerch, in which he expressed a concern about the difficulty of ECM being spread across different time zones:

> "*When I arrived in LA, Lerch greeted me warmly and thanked me for making the trip. Lerch and I discussed the trade.*[34] *Lerch was laughing and saying words to the effect "you're a 24/7 guy - this is great." I work while I travel – I'm never on holiday while the market's open – I have a responsibility to the investors to stay on. Lerch also said "the guys in Asia are surprised, so let's do a call the next day." I remember saying "the multiple time zones are a problem here. Is their concern going to be an everyday occurrence?" Lerch said words to the effect "no, we just need to iron out some things - these guys just need to get used to the speed of the US ECM market.""*

Mr. Gagliardi further explained to Mr. Lerch that it was "*impossible*" for Mr. Toresco and Mr. Garber to be involved in each of Mr. Gagliardi's trades, "*given the time zones and the need to make decisive, rapid decisions…*".

96. While at Incline Village with Mr. Gagliardi, Mr. Lerch took a telephone call from Mr. Toresco, who said he needed to hedge some of Mr. Gagliardi's trades and wanted Mr. Lerch's advice. Mr. Lerch's evidence (in his second witness statement at paragraph 14.8) is that "*I agreed with his assessment and told him to do what he needed to do. As CIO, sometimes, you have to reduce positions even if they are not above a trading limit because of other positions that have been taken in the fund*". This again suggests that Mr. Lerch was not particularly troubled by Mr. Gagliardi's approach to risk limits.

97. When Mr. Murphy told Mr. Gagliardi that Mr. Toresco had hedged his trades at a loss without consulting Mr. Gagliardi, Mr. Gagliardi viewed his action as an attack upon him personally: "*This was done behind my back. One of the biggest insults you can deliver to a portfolio manager is to take away their discretion … Toresco's actions had created a loss, which made my job even harder as I then had to recover that loss.*" He said he told Mr. Lerch that selling out of his position was completely unacceptable and "*if this is going to be a common response then I didn't think we should work together.*"[35]

98. Mr. Lerch gave evidence in his second witness statement at paragraph 14.10, that Mr. Gagliardi said: "*this is bullshit. No one has ever done this to me. You do not dictate what*

---

34 This is a reference to a trade organised mid-flight with Mr. Daum of Goldman Sachs.

35 See Mr. Gagliardi's fourth witness statement at paragraphs 9.5 and 9.6.

to do, the market does". Mr. Gagliardi did not dispute that he had said words similar to those alleged by Mr. Lerch, and recalled (in his fourth witness statement at paragraph 9.6) saying words to the effect "*the pace of market is something we need to get used to if we want to be relevant in the US.*"

99. On 12 May 2021 whilst still at Incline Village, Mr. Lerch, together with Mr. Gagliardi, Mr. Toresco, and Mr. Garber had an online meeting in which they sought to come up with a plan to manage Mr. Gagliardi's integration into the wider ECM operation and to resolve these tensions. This meeting was subsequently summarised in an email from Mr. Garber and sent to Mr. Lerch, Mr. Gagliardi, and the wider A1 share class traders' group. They discussed various issues, including the importance of good lines of communication and managing risk across the global portfolio with traders operating in different time zones. In particular, Mr. Garber's email stated:

> "*With everyone across time zones and markets and not yet knowing each other well, the number one problem we need to solve for is communication.*
> - *Gags already speaks with Rob, Murph, Lerch, but more direct communication between Gags and Sumner, Aaron, Richie*[36]
> - *New WhatsApp US risk group can be used for time-sensitive group texts and voice chats.*
> - *On an opt-in basis, we will use ejam-video-conf Slack group, where anyone live to US can please dial in whenever possible.*
> - *Larger deltas require special treatment*
> - *Asia desk will communicate to US any positions over S10M and also general view of markets and large pnl days.*
> - *Gags will communicate all indications and allocations above $10M (interim) to Rob, Sumner or Aaron prior to instructing an indication*
> - *Murph will communicate with Rob, Aaron or Sumner prior to confirming any indication above $10M USD*
> - *Murph will send email to _A1 list each day after close including all indications and new risk over SSM USD*
> - *Murph or Richie will update stock loan on any new borrows each day –*
> - *Rob will be live to US markets until 12:30/1PM EST, then either Sumner or Aaron will be live until Asia open and beyond*
> - *Openness and honesty about where our edge lies or at least some kind of edge number to articulate*

[36] Mr. David Richie was an employee and trader at ECM.

> *We all want to move fast and get this business off the ground, but we must be responsible stewards of capital.*"
> (emphasis added)

Once more there is no suggestion that Mr. Gagliardi should cease trading in the A1 share class; everyone wants to move fast in terms of the US trading and Mr. Gagliardi is given interim limits which it is anticipated may need to be exceeded by him.

100. Despite Mr. Lerch's opinion (expressed in his second witness statement at paragraph 14.14) that Mr. Gagliardi was "*somewhat volatile and thin-skinned*" (which I accept), Mr. Lerch believed that Mr. Gagliardi could be successfully integrated into the ECM team. He continued to praise and support Mr. Gagliardi whenever he thought he had performed well, and he encouraged him in his US trading.

Compliance and training

101. Earlier, on 10 May 2021, Mr. Brindle had sent an email to Mr. Lerch about, amongst other things, Mr. Gagliardi's trading: "*In order to get him in a position to be able to trade from the UK, the fastest way is to use Mirabella. Jerry has to run point on this. I have given him all the information (attached for reference). It's an 8 weeks process.*"

102. Mr. Brindle had identified a potential issue with Mr. Gagliardi directing trades from the UK as this could arguably be classed as a regulatory activity requiring authorisation from the Financial Conduct Authority ("**FCA**"). Mr. Brindle's evidence was that it could take more than six months to obtain a licence from the FCA, and a better alternative was to use a company known as Mirabella Financial Services LLP ("**Mirabella**"). Mirabella operates a platform that is used mainly by hedge funds to gain access to the UK and European markets. It has the requisite FCA authorisations and fund managers are able to contract and trade through it. This required Mr. Gagliardi to undertake UK regulatory and compliance training with Mirabella, but according to Mr. Brindle, "*he said he had already done it, albeit around five years earlier*" and "*saw it as a waste of time*". Mr. Lerch acknowledged that Mr. Brindle was trying to get Mr. Gagliardi set up on Mirabella, but he said he "*left the details of this to [him].*"[37]

103. On 13 May 2021, on his way back to London from Incline Village, Mr. Gagliardi stopped off at Los Angeles to meet with Mr. Tsai for a compliance training session. It is not clear

[37] Second witness statement at paragraph 14.3

exactly what this involved as neither Mr. Gagliardi nor Mr. Tsai could expressly recollect it, but as Mr. Tsai explained in evidence "*on the basis of how I usually presented the training, I would have explained about the [Personal Trading Control Centre – "PTCC"] to Gags during the training session.*" The PTCC was a system through which employees make their reports online. PTCC sends automatic reminders for some of the reports, and logs when those reports have been completed. Mr. Tsai gave evidence that "*[a]lthough I am not absolutely certain, I think I had printed out the Compliance Manual and I think I took it with me so Gags was able to look at it and take a hard copy with him if he wanted to. But I am fairly sure that Gags did not take it with him…*".

104. Mr. Tsai also presented Mr. Gagliardi with the ECM SEC[38] Compliance Training slide deck, which outlined various compliance features such as the compliance manual, access person responsibilities, outside business activities, code of ethics, personal securities reporting, pre-clearance, identity theft, gifts and entertainment, insider trading, pay-to-play, electronic communications, social media, information security, whistleblower policy, and participating affiliates.

105. On 26 May 2021, Mr. Tsai arranged for the ACA Group ("**ACA**") to provide training on US trading, which Mr. Gagliardi duly attended. He is recorded as having completed "*ECM May 2021 Compliance Training including Evo Global Information Barrier Standards and Compliance training – May 13, 2021*"; "*ACA Trader Training – May 26, 2021, 9.30am Session*"; and "*Rule 105 Training – June 7, 2021, 10:00am Session*". On 7 June 2021, Mr. Tsai arranged a further training session on Rule 105,[39] because he did not think that the training given by ACA provided sufficient detail on the mechanics of that rule.

106. Mr. Gagliardi was late in filing some of his compliance documents. For example, Mr. Gagliardi's "Initial Holdings Report" "Outside Affiliations Certification", "Review and Certification Form" (which confirmed his receipt of and agreement to comply with the Compliance Manual), "Insider Trading Policy Acknowledgement" and "New Employee Political Contributions Form" were all due to be submitted by 21 June 2021. These forms and certifications were not completed on time, and in some cases were apparently not

[38] United States Securities and Exchange Commission.

[39] This rule is designed to prevent manipulative short selling practices in the securities market, particularly around public offerings.

completed until 51 days after they were due. Mr. Gagliardi only provided confirmation of his agreement to comply with the terms of the compliance manual on 8 August 2021. It is clear that Mr. Gagliardi's focus on compliance matters was poor. Indeed, it is apparent from the recent disclosure taken from his (seized) iPhone that he had Mr. Murphy complete various certifications on his behalf, which he ought not to have done (although I do not accept that there is any or any sufficient evidence to suggest that the actual content of the certifications themselves was false). However, Mr. Gagliardi's compliance failings did not lead to Mr. Lerch either preventing Mr. Gagliardi from trading or initiating disciplinary measures against him. I do not accept that this was a serious issue for Mr. Lerch at the time; nor do I consider that if Mr. Lerch had been told that Mr. Murphy had completed certifications on behalf of Mr. Gagliardi that that would have been treated as a serious issue by him. He was content to allow Mr. Gagliardi to continue to trade and make profits for ECM regardless of his shortcomings concerning his compliance certifications.

Meetings with investors

107. Soon after the commencement of Mr. Gagliardi's employment, in May 2021 Mr. Lerch had a number of meetings or calls (together with Mr. Gagliardi) with both existing and new investors in an attempt to attract further substantial investment from them. One example was a call with BlackRock. Prior to the call, Mr. Lerch sent a WhatsApp message to Mr. Gagliardi, which said: "*if it comes up on the call how much you are investing in the fund. your answer is 50-70% of your LIQUID net worth. i don't think he will ask about numbers as that would be very out of bounds on a call like this*". Mr. Gagliardi never did indicate on the call that he would be investing any money in the fund, and as it happened, BlackRock did not increase their investment either. Nevertheless, Mr. Lerch was impressed with Mr. Gagliardi's performance during the call and sent the following enthusiastic WhatsApp message to him afterwards: "*i think you did an awesome job on this. as you can see Albert is just hammering so they can bet on us. he's a huge advocate but having the entire team see how we think is key. you come off as being exceptionally connected and focused on details*".

108. Similarly, between 21 and 25 June 2021 Mr. Lerch and Mr. Gagliardi travelled to New York to meet more of Mr. Gagliardi's important contacts as well as investors. These contacts included people at Credit Suisse, BTIG, Bank of America, Goldman Sachs, Morgan Stanley, JP Morgan, and BlackRock. It was also at this time that Mr. Lerch met

Mr. Murphy in person for the first time. Clearly, Mr. Lerch was very keen to utilise Mr. Gagliardi's connections in order to generate substantial amounts of revenue for the A1 share class and EARMF.

Criticism of Mr. Devesa

109. A little earlier in the chronology, on 19 May 2021, Mr. Devesa emailed a May risk limit "tearsheet" to "*A1@evofund.com*", which set out the risk limits for the A1 share class traders. In his second witness statement at paragraph 6.6, Mr. Devesa said "*I usually provided these charts to Mr. Toresco who then provided it to the traders in the fund, as it was the CIO's responsibility to distribute risk limit information to individual traders. However, in this case I also provided it directly to Mr. Murphy – an example of this risk limit chart, what we call a "risk tearsheet" was provided to Mr. Murphy on 19 May 2021"*. Mr. Murphy subsequently forwarded the email to Mr. Garber, so it is clear that he did receive it. I also assume that Mr. Gagliardi was included in the "*A1@evofund.com*" group and therefore received the tearsheet.

110. Mr. Gagliardi and Mr. Murphy continued to trade via the A1 share class thereafter until some two months later, on 13 July 2021, Mr. Devesa sent an email to Mr. Lerch, Mr. Toresco, and Mr. Garber in relation to risk limits. This concerned his re-writing of risk limits for block trading in the risk limit tearsheet. Mr. Devesa explained in his first witness statement (at paragraph 9.1) that he was trying to achieve two things with this email, as Head of Risk Management:

> "*Firstly, to resize the risk limits for the US business, as following feedback conversations with Michael Lerch and Rob Toresco, we determined that our objectives in the US were bigger than we had initially anticipated. Secondly, I wanted to provide the EARMF with more flexibility with regards to risk, considering (i) I operated in a different time zone and was not in Asia; and (ii) I recognised that with block trades, there is a short position taken prior to an allocation of a block of stock, which allows for a risk assessment on a net basis. So I wanted our risk limits to reflect the assessment on the position as a whole.*"
>
> (emphasis added)

It is clear from this that Mr. Devesa considered the existing risk limits to be too low which was leading Mr. Gagliardi to exceed them, and which accordingly required Mr. Lerch to give retrospective approvals of individual risks.

111. In the same email chain, on 29 July 2021 Mr. Toresco emailed Mr. Devesa in respect of risk limits for a potential trade in Uber. Mr. Gagliardi, along with Mr. Murphy, Mr. Richie, and Mr. Alexandru Stoicovici (who provided IT support for the Evo Group) were copied into the email. Mr. Devesa responded to this email and the points raised by Mr. Toresco and sought information as to how the team were seeking to manage the risk on the position. Mr. Devesa subsequently approved the trade once Mr. Toresco provided this further information to him. This led Mr. Gagliardi to respond as follows:

> "*Philippe [Devesa] to be the head risk manager and never once have a conversation with me about risk (not once) is appalling. Also to write emails like the [one] below Rob referenced about U.S. risk and not include me is unprofessional. I don't like speaking thru people so any conversations about U.S. risk please speak to me directly as well. I respond much better to people that are direct. Thx Gags*"

112. There appears to be some merit in Mr. Gagliardi's complaint in this respect because, as Mr. Devesa explained in his first witness statement at paragraph 9.3, he did not usually deal with ECM's traders. Instead, he dealt with the relevant fund's CIO, in this case Mr. Toresco, because (he said) it is the CIO who is responsible for the traders in the relevant fund. In cross-examination, Mr. Devesa gave evidence that he had spoken to Mr. Gagliardi before this email: once on 14 April 2021, and again in May 2021 when they discussed Mr. Gagliardi's trading strategy. Mr. Devesa said he could not recall whether he told Mr. Gagliardi that he would be engaging primarily with Mr. Toresco about risk limits. I find that it is likely that he did not. Following Mr. Gagliardi's email, Mr. Devesa sent an email to Mr. Lerch, Mr. Chisholm, and Mr. Brindle, which read:

> "*I don't have time for assholes like this. I have been in touch constantly with [Mr. Toresco] to put procedures and limits in place that would allow us to operate with this fast growing business in US where on multiple occasions both gags and Murphy have blatantly Ignored and showed little understanding of Risk. And when we get close to launch and put nice Procedures in place I get that. … I do not need to talk at this point to this guy.*"

113. This is itself an intemperate email which does not fairly record the varied ways in which the US trading had been allowed to operate up until this point in terms of risk limits. This episode also demonstrates that there was inconsistency within ECM as to who should be communicating with Mr. Gagliardi about risk limits and that had caused understandable irritation to Mr. Gagliardi, albeit that he accepted that his response to Mr. Devesa's email was an overreaction. Indeed, Mr. Lerch accepted in cross-examination that for someone

in the position of Mr. Gagliardi running a very substantial portfolio, he would fairly expect to be included in any conversations about how risk limits operate in respect of his block trading strategy, and Mr. Lerch accepted that if this was not happening, "*it's understandable that he would react*"[40].

114. On 30 July 2021, Mr. Toresco and Mr. Lerch spoke to Mr. Gagliardi about this email chain. Mr. Gagliardi's response was commendably conciliatory in that he apologised in a WhatsApp message which he sent to Mr. Lerch: "*Also apologies if put u in a difficult spot yesterday, I will do a call with u and Philippe his weekend or meet him in person*". Mr. Gagliardi also apologised to Mr. Devesa in person, in London.

115. Just after this disagreement, on 1 August 2021 the EARMF was launched and as planned the investors in the A1 share class redeemed their investments and reinvested into the EARMF.

116. On 18 August 2021, Mr. Gagliardi sent a WhatsApp message to Mr. Lerch to ask what ECM's AUM was at that time, to which Mr. Lerch answered "*$300 [million]*". Mr. Gagliardi said "*We should be closer to $4-500 mil by now*", and Mr. Lerch assured him that they would get there: "*we will get there dude. just keep doing what you are doing*". Later in that exchange Mr. Lerch said "*you have a huge edge… you can manage risk and be tactical … and you also know how to treat people*". Mr. Gagliardi then said "*Lets get to 500 mil by jan*", to which Mr. Lerch said "*that is the plan*".

117. Thus, whilst Mr. Lerch now criticises Mr. Gagliardi for being "*disparaging of others in the firm, including our risk manager in front of more junior employees, which set a terrible example*", and he maintains that this provides a reason for refusing Mr. Gagliardi a Discretionary Bonus, it can be seen that (i) it is not fair to generalise in this way and (ii) in any event the traffic was not all one way in this respect and at times ECM's employees could be unreasonable in their dealings with Mr. Gagliardi. Even after this run-in with Mr. Devesa it can be seen that Mr. Lerch was continuing to praise Mr. Gagliardi and encourage him in his trading. I do not think it is fair simplistically to accuse Mr. Gagliardi of showing a lack of teamwork, and in any event there was no suggestion at the time that this type of workplace disagreement would have any effect whatsoever on his remuneration.

[40] Day8/6/1-5.

Criticism of Mr. Garber

118. Mr. Garber sent an email on 19 August 2021 requesting the overnight risk sheet for the US positions from Mr. Murphy. Although Mr. Murphy accepted in cross-examination that he knew Mr. Garber was acting CIO at this time (in place of the absent Mr. Toresco), he sarcastically responded: "*Can you send me an overnight sheet of what's going on in asia?*", and "*you also have the sheet too … so open it up*". Mr. Garber responded: "*You seem to be missing the point. When we have bids out in stuff that is the primary consideration here. Also I was not aware that you were risk managing the fund.*" In cross-examination, Mr. Gagliardi sought to characterise Mr. Murphy's email as trying to be collaborative. I reject that evidence. This was a rude and ill-judged response by Mr. Murphy. Indeed, Mr. Murphy himself accepted in cross-examination that his email was sent by him in frustration and he certainly did not attempt to characterise it as a collaborative response.

119. Mr. Murphy then forwarded this exchange to Mr. Gagliardi, who was in the Bahamas at the time, and Mr. Gagliardi responded, adding Mr. Lerch to the chain:

> "*Sumner if u talk to Steve like that again we will have a problem. That's unacceptable, he shouldn't be spoken to like that. He won't be spoken to like that, he works his ass off everyday and deserves more curtesy. No days off for Steve. Be more professional, condensing email about him running risk of the fund is JV. Btw are you the risk manager ?*"

120. This was an intemperate response. Mr. Garber subsequently attempted to call Mr. Gagliardi to discuss this matter, but Mr. Gagliardi did not answer the call. There were some further exchanges. Mr. Garber wrote to Mr. Gagliardi and stated: "*It seems we already have a problem. Please call me back.*" Mr. Gagliardi did not call Mr. Garber, instead he emailed as follows:

> "*Don't speak to Steve like that again. What did he do wrong? No problems from me bro I haven't heard a peep from you all summer. Steve is with me, don't attack the guy after he been working everyday. We will have a problem if you do for no reason*"

121. There were some further exchanges by email, including with Mr. Garber seeking to explain to Mr. Gagliardi what had occurred:

> "*… yes I am helping to manage the fund in Rob's absence due to the 24 hour nature of the biz and that is why my name is on the risk limits for this purpose. And the reason you "don't hear a peep from me" is that you left our chat. In spite of that I have still sent over a few things like*

> *VIEW the other day, and then you left that chat as well. I have also tried to call you on numerous occasions and you don't pick up. All of this is extremely unprofessional*."

122. Mr. Gagliardi finally responded:

> *"I have nothing to say to you. Nothing.*
>
> *I don't [want to] be in any chats on what' s app etc with anybody that isn't locked in the whole trading day of my market. Not for me. Toresco finds a way from HK. If you think I am extremely unprofessional then be a man and never speak to me again. I don't speak to people I don' t respect"*

123. At the same time, Mr. Toresco responded to Mr. Gagliardi's first email:

> "*This exchange is unacceptable. I will not put up with this type of email exchange. Sumner does help risk manage the fund as he is my 2 IC. If he makes a request (a request that I have made from the start) and Steve refuses to do it, there is a problem. We do need to learn to work together respectfully. This is not a US vs Asia business and this has been my intention from the start. I view everyone as a member of the team. EVERYONE is working their tails off since the start of this thing almost around the clock. The lack of proximity is making this very difficult to see. This is not the type of environment I want to create. Everyone is stressed at the moment as markets are very difficult. As we grow we will need to work together even closer as the business scales in complexity. Having insights from around the globe I find to be very valuable. I think that will be part of the edge going forward. If we cannot communicate different views and insights constructively it's a waste and a real shame. We need to figure this out."*

To which Mr. Gagliardi responded:

> "*Steve didn't refuse anything. Stop telling me we need to work together, I won't accept that man it's unfair. How many times have I vouched for you or Evo since starting. You calling me selfish ? I am not stressed. Far from it, be very careful when u say Steve refused something. He didn't. Rob I don't want to be lectured by you either, we speak often almost everyday. You know what I am thinking? Yes or no? Be balanced!*
>
> *Btw what is 2 IC ???"*

124. As Mr. Toresco rightly stated, everyone was stressed at that time as the markets were very difficult. It is also clear that Mr. Gagliardi was very defensive of Mr. Murphy and that, as Mr. Lerch rightly stated, he can be "*thin skinned*" and volatile. However, this was a high-pressure environment in which people were working round the clock. It was inevitable that from time to time there would be flare-ups or disagreements and misunderstandings,

particularly with much of the communication taking place in different time zones by email and WhatsApp messages, which are liable to be misconstrued. However, Mr. Lerch at no point told Mr. Gagliardi or Mr. Murphy to stop trading; nor did he suggest that Mr. Gagliardi's bonus was under threat, or that disciplinary proceedings were being contemplated by reason of these occasionally hostile exchanges.

125. Despite this, Mr. Lerch suggests in his second witness statement (at paragraphs 20.13 and 20.14) that at around this time, 20 August 2021, he started to think about "*what terminating Mr. Gagliardi and Mr. Murphy would look like in terms of ECM's financial liability to them*" and:

> "*At the same time I considered whether a discretionary bonus would be payable to Mr. Gagliardi if I fired him then. My view was that no discretionary bonus would be payable because of his behaviour and attitude … I also believed that there were a litany of reasons to terminate Mr. Gagliardi for Cause (as defined in his employment contract), e.g. his threatening and bullying behaviour to other members of the ECM team. Managing Mr. Gagliardi was taking huge levels of time and energy.*"

126. Mr. Chisholm also states in his third witness statement (at paragraph 8.1):

> "*During a management call I participated in on around 23 August 2021 with Mr. Lerch and Mr. Brindle, Mr. Lerch said words to the effect "It's not working out with Gagliardi. He's unmanageable. He's insane. I've reached my wit's end. I can't do this anymore. I think we're going towards termination. Let's figure it out. I can't do this anymore". This was the first time I recall us (as a management team) discussing terminating Mr. Gagliardi's contract. We all agreed that Mr. Gagliardi was not a good fit for Evolution. Following this, I started looking into how we could terminate Mr. Gagliardi's contract, so that there would be minimal disruption to our business. I prepared information and advice that would assist Mr. Lerch in his decision making on the matter.*"

127. I do not accept Mr. Lerch's evidence on this point and nor do I accept Mr. Chisholm's evidence on it; their evidence is not supported by any contemporaneous documentary evidence and is inconsistent with Mr. Lerch's written communications to Mr. Gagliardi at the time.

128. Indeed, plans were made for ECM personnel to meet Mr. Gagliardi in Las Vegas with a view to constructively resolving the argument between Mr. Gagliardi and Mr. Garber.

129. Before that meeting took place, after his return from the Bahamas, Mr. Gagliardi left two WhatsApp group chats, one with Mr. Garber on 26 August 2021, and another with Mr. Devesa on 27 August 2021. In cross-examination Mr. Gagliardi said that he left these group chats because they were inactive. I do not accept that evidence. I consider the obvious inference, in the context of the above exchanges, is that he did so because he was annoyed with Mr. Garber and Mr. Devesa.

130. ECM argues that this incident demonstrates that Mr. Gagliardi has an abrasive attitude to authority and in particular to members of ECM's senior management. Specifically, Mr. Lerch in his second witness statement (at paragraph 33.2(c)) cited as a reason for not paying Mr. Gagliardi a Discretionary Bonus, that "*he was rude and had been abusive to other members of staff including Sumner*". I consider this to be an exaggeration. Mr. Gagliardi understood – wrongly, as it happens – that his close colleague Mr. Murphy was being criticised and he overreacted in a stressful and high-pressure environment. It was no more than that. Mr. Lerch did not even hint to Mr. Gagliardi that there was the possibility of disciplinary proceedings being brought against him or the non-payment of his bonus if he continued in this vein.

Visit to Las Vegas / tensions within ECM

131. On the contrary, on 2 September 2021 Mr. Lerch, Mr. Chisholm, Mr. Gagliardi, and Mr. Garber all met in Las Vegas. The purpose of this trip was, amongst other things, to give Mr. Gagliardi the opportunity to meet with Mr. Garber, consistent with Mr. Lerch's view that it is easier to get along with someone if you have met them in person. This was also the first time that Mr. Gagliardi had met Mr. Chisholm. During this trip, Mr. Lerch spoke to Mr. Gagliardi about how ECM's risk management worked, they discussed compliance and investor relations issues. I find that he would not have done so if he was seriously thinking about terminating Mr. Gagliardi's employment.

132. In his sixth witness statement at paragraphs 7.25 and 7.26, Mr. Gagliardi acknowledged that there was "*friction between Steve [Murphy] and the guys in Asia*" following the email chain between Mr. Murphy and Mr. Garber. He explained that "*At a lunch at a hotel, Lerch said that he was thinking about firing Steve as a result of the 20 August 2021 email incident. I said words to the effect of, "if Steve goes, I go". I'm loyal to Steve – he works extremely hard [and] was under a lot of pressure, but was doing his job and doing it well*". In cross-examination Mr. Gagliardi explained: "*it wasn't a threat … I was standing*

up for Steve, Steve was getting bullied by these guys in Asia, and I wasn't going to have it"[41]. I accept that evidence. In any event, the incident fizzled out.

133. Three weeks later, on 23 September 2021, Mr. Devesa sent a WhatsApp to Ms. Yamamoto[42]:

> "*I got so angry again yesterday, I saw in PMS[43] a very large delta exposure, well above all the limits I set and which they know they should clear and I sent [t]o a chat where Lerch / Sumner / rc / rob are to ask if delta correct and Lerch said yea sorry I am aware as I am with guys In NY and it's a 48 hr trade .. but of course they don't clear so it's always same for me, it happens all the time and then I have to be on those calls or committees or explain data and say we have a good process <u>but risk limits are useless coz L[erch] approves.</u>. <u>the fund works well so it's ok</u> but when I see how strict he was with me for 15 years on evofund every time small drawdown, its really frustrating*
>
> *So I think all I will focus on is reporting stuff coz I am wasting my time trying to do intraday risk .. they don't care and I am not part of the process clearly*" (emphasis added)

And:

> "*Delta limit is 80mm, with a level 2 limit if approved of 95, and they were at 130 mm long and zero notification to risk … more than 50 pct breach .. <u>its not really a problem if I had been in loop o would have cleared probably coz it was liquid futures delta</u> but still … if I ever get asked if limits get breached and by how much I look stupid…*
>
> *Yea yesterday I did 2 committees Of ejam and had to report 46 days of value at risk excess in the quarter .. and of course I find reasons that's its ok but it puts me in annoying situations all the time*"
>
> (emphasis added)

134. This is an important internal message because it throws light on the employee tensions within ECM itself, in particular as to the way in which Mr. Lerch ran the company. Mr. Devesa was here expressing frustration that he did not feel like he was able to do his job controlling risk, because risk limit breaches would go to Mr. Lerch and he would subsequently approve the trades regardless and without consulting Mr. Devesa. This was

41 Day3/178/21-25 – 179/1-5.
42 Ms. Suki Yamamoto was an employee and Head of Operations at ECM.
43 Portfolio Management Service.

put to Mr. Lerch in cross-examination who said "*That's his opinion … I don't agree with him.*"[44]

135. The court asked Mr. Lerch the following: "*is that how it worked, that risk limits would be exceeded from time to time and then there would be a discussion with you or Mr. Toresco about it, and then you'd find a solution?*" Mr. Lerch explained that "*the trader, whoever wants to take the risk, contacts Toresco, Devesa, or myself and explains the risk and if it's above the limit, like the situation with DoorDash, they would call in advance, get an approval to do that, and either myself or Mr. Toresco or Mr. Devesa would evaluate that risk on the spot and decide whether or not they were comfortable with that.*" Mr. Lerch said "*It wasn't supposed to be*"[45] done after the event but seemed to accept that it would sometimes happen after the event: "*there were individual limits that may have been breached at times and permission asked for after the fact, which wasn't the process.*"[46]

136. I find as a fact that Mr. Devesa is accurately explaining in this WhatsApp exchange with Ms. Yamamoto what happened in practice, much to his annoyance. Mr. Lerch was very keen to keep Mr. Gagliardi on-side as he was making ECM a lot of money. The risk limits were fluid in any event and Mr. Lerch was in the habit of approving Mr. Gagliardi's trades after the event when, from time to time, he exceeded them. This did not concern him at the time.

New York meetings; Mr. Lerch praises Mr. Gagliardi

137. On 20 September 2021 (and until 24 September 2021) Mr. Lerch, Mr. Toresco, and Mr. Garber travelled to New York for meetings with some of the contacts that Mr. Gagliardi had introduced them to earlier in the year, including Mr. Passi, and to discuss between themselves the possibility of setting up an office in New York. Mr. Lerch would not have done this if he was considering terminating Mr. Gagliardi's employment or refusing his bonus. Mr. Lerch had asked Mr. Gagliardi to take part in the meetings but he did not wish to do so having been to New York only the previous week, and because he had Covid. Mr. Gagliardi's evidence was that Mr. Lerch was impressed by Mr. Gagliardi's performance and in developing ECM's reputation and brand:

> "*After the meeting, Lerch told me that the meeting went well, saying, in summary, that it went great; the guys love you; and I had made Evo*

[44] Day7/125/17-19.
[45] Day7/125/23 – 126/14.
[46] Day7/126/24-25 – 127/1.

> *relevant in the US market, which they said could take years, but now Evo was in a position to be top 5. Lerch kept saying that I was elevating the Evolution brand immensely; he was proud of me and my reputation and the resources I was bringing to my colleagues.*"

138. I accept this evidence of Mr. Gagliardi. Indeed, just a few days later, on 24 September 2021, Mr. Gagliardi updated Mr. Lerch in relation to some allocations from Goldman Sachs, Morgan Stanley and JP Morgan which were profitable, but he still said "*Blocks suck this week*", to which Mr. Lerch responded: "*Considering you were expecting it to be adult swim and very risky time I think the results are fantastic*." This is another illustration that at this time Mr. Lerch was very happy with Mr. Gagliardi's trading for the fund. The suggestion that he was not and that he was considering terminating his employment is belied by the documentary record.

Mr. Gagliardi's request to be made Co-CIO; threats to resign?

139. Meanwhile, after the meeting in September between the ECM team and Mr. Passi, as well as between ECM and Mr. Gagliardi's other contacts at Morgan Stanley, Mr. Passi spoke to Mr. Gagliardi and asked whether it was the case that he reported to Mr. Toresco. That was because at this meeting, Mr. Toresco had given a business card to Mr. Passi which recorded that he (Mr. Toresco) was CIO of the EARMF. Additionally, it appears that this meeting resulted in confusion about where the profit in the EARMF was being generated, Mr. Toresco having indicated that profits were from his trading in Asia, rather than from Mr. Gagliardi's trading in the US. This upset Mr. Gagliardi, who on 23 September 2021 contacted Mr. Lerch and requested that he be made Co-CIO with Mr. Toresco.

140. This was not the first time that Mr. Lerch had considered making Mr. Gagliardi a Co-CIO. This idea was first discussed on 28 May 2021 when Mr. Lerch sent a slide deck to Mr. Toresco, in which he, Mr. Toresco, and Mr. Gagliardi were all referred to as CIOs. The slide deck listed Mr. Lerch as the Group CIO, Mr. Gagliardi as the Americas CIO, and Mr. Toresco as the Asia Pacific CIO. Mr. Toresco did not like this proposal however, and accordingly the idea was shelved.

141. On 27 September 2021, Mr. Lerch informed Mr. Gagliardi via WhatsApp that he did not think that making him Co-CIO would achieve what Mr. Gagliardi needed:

> "*I've been thinking about this a lot. It's not a simple issue. The goal is to give you the remit that allows you to do what you do in size and not have your counterparts like Passi think incorrectly about how important*

> *your role is to the mission. I'm not sure co-CIO does this. I can envision that drawing questions as well.*"

It is clear from this WhatsApp message that Mr. Lerch appreciated why Mr. Gagliardi was asking to be made Co-CIO but he did not think it was a simple issue. Indeed, Mr. Lerch obviously had to keep Mr. Toresco happy as well, so he was in a difficult position.

142. But Mr. Gagliardi responded:

> "*It's very simple. Your goal and mine seem different. I told you its important to me and nothing or nobody will talk me out of it …*
>
> *So if u saying no, just be clear with me now pls …*
>
> *Then our conversation will go in a different direction.*"

143. ECM has argued that these messages, including the earlier messages "*If Steve goes I go*" and "*If this is going to be a common response then I don't think we should work together*", amounted to threats from Mr. Gagliardi to resign from ECM. Mr. Lerch in his second witness statement at paragraph 33.2(f) suggests that Mr. Gagliardi "*used threats to get what he wanted*" and that "*he threatened to resign on several occasions when he was not getting his own way.*"

144. I consider that to be an exaggerated characterisation of these messages; it was not as simple as that. Mr. Gagliardi was on each occasion clearly upset by the way in which he perceived he or Mr. Murphy was being treated. He was also somewhat thin skinned as Mr. Lerch himself knew. But I consider it to be understandable why Mr. Gagliardi was upset by these incidents; there was clearly tension between him and his new colleagues as a result of the fact that Mr. Lerch had not yet properly worked out how to accommodate Mr. Gagliardi in his new role within the ECM organisation so as to keep Mr. Toresco, Mr. Devesa and Mr. Garber happy. But Mr. Gagliardi never took any serious steps towards resignation, and I do not consider that Mr. Lerch ever took Mr. Gagliardi's occasional expression of frustration as serious or realistic threats to resign on his part.

145. On 7 October 2021, Mr. Lerch instead took the significant step of adding Mr. Gagliardi to the ECM risk committee, which fact he communicated to Mr. Gagliardi in an email of the same date. Again, this is inconsistent with the suggestion that he was considering terminating Mr. Gagliardi's employment and refusing his bonus. Mr. Lerch tried to reassure Mr. Gagliardi, telling him in the same email: "*I also discussed with Rob a couple*

of other matters. 1) no titles on business cards for anyone 2) no visits with your [equity capital market] contacts without you being there. Purpose is to avoid any confusion on the street." Mr. Lerch continued to congratulate Mr. Gagliardi for his successful trading in respect of EARMF.

146. Mr. Lerch's evidence is that the reason that he added Mr. Gagliardi to the risk committee was not because he thought that he would be good at risk management, but rather because it might give him a better understanding of risk and show him that there was more to running a hedge fund than simply trading. In cross-examination, Mr. Lerch contended that this was a remedial action intended to educate Mr. Gagliardi, rather than an elevation.[47] I do not accept this evidence. I consider it much more likely that he did this in order to keep Mr. Gagliardi – his prize asset – happy. Indeed, it seems to have worked because, as Mr. Gagliardi said in his cross-examination[48], he considered this to be an endorsement of his judgment and expertise:

> "*In any hedge fund that has institutional investors, such as the two – two of the biggest on planet earth, like BlackRock and JP Morgan Asset, to put someone on the risk committee is a very big deal. You are holding out to the investors that you have complete faith in this person while they're managing their money. So yes, it's a big deal, and I took it as a compliment.*"

Spin-out fund: "Project Gags is over"

147. In October 2021 a proposal was formulated to spin out the US trading into its own fund led by Mr. Gagliardi ("**the spin-out fund**"). It is not clear whether this was Mr. Lerch's or Mr. Gagliardi's idea. However, Mr. Lerch accepted in cross-examination that he was enthusiastic about this opportunity because he thought it would "*eliminate friction*" within ECM (particularly about the Co-CIO issue) and be a "*good opportunity*"[49]. This is consistent with his WhatsApp message to Mr. Brindle and Mr. Chisholm on 10 October 2021: "*Subject to Devesa, the idea of spinning out Gags into a separate fund seems like a good way forward. Lots of details obviously but doing this will create a focused fund that will be a great opportunity to make $$$$ and eliminate all the friction.*"

148. Initially, the idea was that the spin out fund would be part of the Evo Group itself and that Mr. Gagliardi would be supervised by Mr. Brindle and Mr. Devesa, since they were both

47 Day7/38/5-25.
48 Day3/175/3-9.
49 Day7/44/13-14.

experienced and both in London. I reject Mr. Lerch's evidence (in his second witness statement at paragraph 23.4) that by assisting Mr. Gagliardi to set up a new fund, he was hoping to avoid any disparaging remarks that Mr. Gagliardi might have made about Mr. Lerch and ECM in the marketplace if Mr. Lerch terminated his employment. There is no hint of this in any of the contemporaneous documents. I also reject Mr. Lerch's evidence that he did not want Mr. Gagliardi to set up a new fund in order that Mr Lerch could *personally* benefit from IPOs which he could not do in the case of EARMF. In fact, I find that that was undoubtedly one of the main reasons why Mr. Lerch was keen for this to happen (the other being the elimination of friction within ECM).

149. On or around 12 October 2021, discussions about the spin-out fund took place between Mr. Gagliardi, Mr. Brindle, and Mr. Devesa. To communicate the spin-out plan to investors, a slide deck dated October 2021 was prepared, entitled "*EARF – Potential Strategy Segregation*". The slide deck was prepared by Mr. Lerch with input from Mr. Toresco and possibly Mr. Chisholm, before being run past Mr. Varga, but not Mr. Gagliardi.

150. This slide deck includes a historical timeline of the A1 share class/EARMF, according to which ECM states as follows:

(1) The strategy launch of the fund is said to have been in Q4 2020 in the A1 Fund;
(2) In Q2 2021, the fund is said to have expanded into the US equity capital markets business.
(3) In Q3 2021, the strategy is said to have been spun out of the A1 Fund and into the EARMF.
(4) In Q4 2021, it is said that the EARMF Asia/Europe/US strategy would be segregated within the EARMF, with a view at that point in time to spinning out the US/Europe strategy into a new spin-out fund in Q2 2022.

The presentation of the timeline in this way again indicates that the A1 share class and EARMF were viewed by ECM as effectively one fund.

151. The plan and its rationale were also explained, with Mr. Gagliardi being praised once again:

> "*We made a strategic hire in Rob Gagliardi in 2Q2021 to help expand our Asia focused strategy into a single global capital markets strategy.*

> *By utilising Evolution's global capital platform, infrastructure, and risk framework we were confident we could monetize synergies across regions. Gagliardi has done a great job in helping to expand our global footprint and elevate our brand in the US and Europe. We have succeeded in both building a global brand and generating returns. More recently, Gagliardi has expressed his personal ambitions to spin out his US/Europe strategy and we plan on helping him to achieve this goal. We will also be approaching investors who may be interested in allocating to Gagliardi*"
>
> (emphasis added)

152. On 26 October 2021, Mr. Lerch sent this slide deck by WhatsApp to Mr. Gagliardi with the filename "*Refocus_2021.10.21v2(1).pdf*", together with a message as follows: "*i prepared this to sync everyone on what we are doing here. please digest and if you are around for a call either now or in a few hours let me know. will get brindle on the call too*".

153. Mr. Gagliardi responded within three minutes of receiving this message:

> "*Sure, let me digest it some more but I already have issues on how the messaging is framed and the vague wording around very important distinctions and facts. I appreciate u taking the time and effort with this however how it stands I won't be proceeding. …*
>
> *Also tell Toresco I hear everything, like the call I got from MS early today about his conversation with Chapman (hire from JPM). Out of respect for you I bit my tongue and laughed to myself. Also I highly doubt you wrote this refocus piece. I have never lost focus and will be very vocal about my opinions. I won't allow him or his wife to exaggerate anything to the market ever. Tell him to man up and give credit to you, me and Zoltan or he would still be knocking on doors in Asia*"

154. It is apparent that there was still tension between Mr. Gagliardi and Mr. Toresco and within ECM more generally. Mr. Lerch responded: "*I did write most of it and got input from people. I thought it was a good plan. Sorry you don't agree and have all these issues.*"

155. Mr. Gagliardi replied:

> "*All these issues ? It's about truth, facts and transparency I don't lie and make up shit because I don't fear anyone or anything. I have no issues mike when people operate the same way as me. You know exactly what I mean stop coddling this kid.*
>
> *Since u got input from people, why don't u get my Input and listen to the tweaks I would make?"*

156. There was nothing in the slide deck that indicated that Mr. Gagliardi had lost focus, indeed the word "*refocus*" only appears once in the slide deck: "*EARF will refocus on the Asian strategy and remain opportunistic in terms of markets outside of Asia…*".

157. Mr. Gagliardi's thin-skinned reaction, probably provoked by the fact that his input on the slide deck was unfortunately not sought by Mr. Lerch when it was being prepared, prompted an irate email from Mr. Lerch to Mr. Chisholm on the same day, "*I'm Done. Project Gags is over. Let's prepare for moving on. He's petty unprofessional and unhinged.*" (emphasis added). It is clear to me, and I find as a fact, that what Mr. Lerch meant by this somewhat knee-jerk response was that the spin-out proposal for Mr. Gagliardi to run his own fund was over; not that Mr. Gagliardi's employment was to be terminated.

158. In a WhatsApp to Mr. Brindle at the same time, on 26 October 2021, Mr. Lerch said "*i am going to just leave it to [him] to tell me what messaging he wants because i am not going to sit around and keep serving up menu items. i am about at the very end of the line here with this … leave it to him*". Mr. Brindle responded: "*right Plan B. do nothing and hopefully he makes good PnL in the IPOs before year end*", to which Mr. Lerch said "*yes*".

159. Accordingly, whilst Mr. Lerch was understandably irritated by Mr. Gagliardi's response, he and Mr. Brindle were nevertheless content to "*do nothing*" and allow Mr. Gagliardi to continue to trade, generating significant PL by way of the lucrative IPOs for ECM. Mr. Lerch does not suggest terminating his employment.

160. Almost immediately after Mr. Lerch's last message, he followed up by saying "*it's been good to feel more like we are at the fork in the road and either way i am cool but standing at the fork or many forks is no bueno*". Mr. Brindle responded: "*he'll probably now start running around town looking for a gig telling people he's already raised $100mn from UBS*", to which Mr. Lerch responded "*Good for him … He will learn the meaning of discretionary very fast*".

161. This is the first suggestion of Mr. Lerch that, by way of retaliation to Mr. Gagliardi's refusal to entertain the spin-out fund, he will seek to withhold some or all of Mr. Gagliardi's Discretionary Bonus.

162. Mr. Lerch's evidence was that he considered firing Mr. Gagliardi at this stage and felt that he had "*cause*" to do so (within the meaning of the employment contract). This evidence

was supported by that of Mr. Brindle and Mr. Chisholm. I do not accept this evidence, but in any event Mr. Gagliardi's employment was not in fact terminated for cause at this time or at any time by ECM.

163. That Mr. Lerch's reaction had been an instantaneous, knee-jerk response in the heat of the moment is supported by the fact that Mr. Chisholm gave evidence (in his third witness statement at paragraph 10.3) that on or around the same date, 26 October 2021, Mr. Lerch confirmed to him that he still wanted to see if he could make the spin-out fund work with Mr. Gagliardi; that he thought it might enable Mr. Gagliardi to continue to be profitable but at the same time separate him from the employees of the Evo Group with whom he was unlikely to cooperate. It is evident that Mr. Lerch still saw Mr. Gagliardi as a money-maker and did not want to lose him. "*Project Gags*" was accordingly not yet over and indeed Mr. Lerch allowed Mr. Gagliardi to continue to trade.

DoorDash limit breach

164. The next day, on 27 October 2021, Mr. Gagliardi entered into a trade concerning a company known as DoorDash which exceeded the relevant risk limit: Mr. Gagliardi took a US$60 million position in DoorDash when his risk limit was US$40 million. Mr. Gagliardi explained (in his sixth witness statement at paragraph 7.36) that "*I knew that the security was very liquid and I could reduce the exposure very quickly, which we did.*"

165. Mr. Gagliardi and Mr. Murphy both maintained that Mr. Gagliardi had sought ECM's approval for this trade. Mr. Gagliardi said (see his sixth witness statement at paragraph 7.37): "*I remember trying hard to get a hold of someone before the trade … I tried to call Michael [Lerch] multiple times. I also tried to contact Devesa. I couldn't get hold of anyone at [ECM].*" Similarly, Mr. Murphy (in his first witness statement at paragraph 16.1) said: "*I remember Gagliardi tried to contact people to get approval for the trade, I can't remember who, but that no one was answering the phone*." There is, however, no documentary record of either Mr. Gagliardi or Mr. Murphy having attempted to contact anyone at ECM. This is in contrast to previous trades in which they requested a risk limit, where there is a documentary trail. Accordingly, I do not accept that they did.

166. It was suggested to Mr. Devesa during cross-examination that it was not true that Mr. Gagliardi did not have approval for the trade, and that he had spoken to Mr. Devesa about it. The screenshot of a WhatsApp message that Mr. Garber sent to Mr. Lerch on 27 October 2021 relied upon for this line of questioning in fact showed that Mr. Gagliardi

did *not* speak to Mr. Devesa about the trade. In the screenshot, Mr. Devesa said the following to Mr. Garber: "*I spoke to him this morning for a while but he did not mention anything during the day or at any point about this…*" Moreover, Mr. Devesa in his first witness statement at paragraph 11.1 said that "*In any case, even if Mr. Gagliardi was unable to reach me or Rob Toresco or Michael Lerch to get approval, he should have refrained from making any trades exceeding the established risk limits as he lacked authorisation to do so.*"

167. Accordingly, I accept neither Mr. Gagliardi's nor Mr. Murphy's evidence in this respect; I consider it unlikely that Mr. Gagliardi did request approval to exceed the risk limit for the DoorDash trade and instead he knowingly exceeded it.

168. Mr. Lerch noticed the risk limit breach and emailed Mr. Gagliardi and Mr. Murphy about it on the same day, 27 October 2021, with the subject line "*DASH – LIMIT BREACH*" and said: "*Please provide colour on this ASAP. I was not notified of this nor did I approve it. Perhaps there was some communication with Toresco or Devesa but I have not seen anything.*" Mr. Lerch forwarded this email to Mr. Chisholm on the same date and commented: "*The limit was ~40 mil usd and they took 60 mil usd of a position without notifying anyone on the risk committee or getting approval.*"

169. Whilst I find as a fact that Mr. Gagliardi did not request approval to exceed the risk limit for the DoorDash trade, I do accept his evidence that he knew that the security was very liquid and he could reduce the exposure very quickly, such that Mr. Lerch would be likely to approve the trade. Indeed, in cross-examination by Ms. Schumacher, Mr. Devesa accepted that given the liquidity of the position, and the fact that the risk could have been reduced quickly, he probably *would* have approved the DoorDash trade had he been asked. Mr. Devesa's issue with the trade was that at that time, he thought ECM were starting to work well with Mr. Gagliardi, and he had specifically told Mr. Gagliardi the previous day in an email to contact him if there was anything "*urgent risk wise*", but Mr. Gagliardi did not seek his pre-approval for this trade: "*when put with – in front of a trade I think he wanted to do, he just didn't call me.*" [50] That clearly annoyed him.

[50] Day9/45/25 – 46/1.

170. Mr. Devesa sought to suggest in his evidence that this was a very serious breach: "*There was no – pre-approval … A level 2 breach without pre-approval is very serious*"[51].

171. Whilst I accept that Mr. Gagliardi entered into the DoorDash trade in breach of his risk limits, as has already been shown ECM was consistently trading in excess of its internal risk limits as it adjusted to the US market, and Mr. Lerch frequently granted retrospective approval of risk limit breaches. Mr. Lerch trusted Mr. Gagliardi's risk management in this regard, and Mr. Gagliardi knew that he could get this liquid trade back within the limits before the end of the day in the unlikely event that the trade was not approved. Mr. Devesa's evidence was that he would have approved the trade had he been contacted. It is therefore clear that at the time, this was not as "*serious*" an issue as Mr. Devesa now suggests.

172. In his second witness statement at paragraph 33.2(a), Mr. Lerch states that one of the reasons he ultimately decided not to pay a Discretionary Bonus to Mr. Gagliardi was because "*he used up an incredible amount of management time because of his persistent breaches of risk limits and other of ECM's processes and procedures*". I do not accept Mr. Lerch's evidence in this respect. It is obviously the case that Mr. Gagliardi's trading activity took up a fair amount of management time in view of its importance and it can be seen that he was guilty of occasional risk limit breaches. However, at the time this was something which Mr. Lerch accepted and retrospectively approved, because ECM was still adjusting its processes to the circumstances of the US market, and Mr. Gagliardi was generating extraordinary levels of profit for ECM. This was not a rational reason to refuse the payment of a Discretionary Bonus to Mr. Gagliardi (even if ECM's construction of the employment contract were correct – which it is not for the reasons I set out below), nor is there any suggestion at the time that Mr. Lerch considered it to be so.

Winding down of the US trading

173. Mr. Lerch eventually decided to separate the US trading operation from the EARMF. This was characterised in the evidence of ECM's witnesses as a protective measure to "*stop*" Mr. Gagliardi from trading any further. Thus, Mr. Brindle in his second witness statement at paragraph 18.1 stated that "*I was an observer to an ECM risk committee meeting at*

[51] Day9/55/11-16.

which the decision was made to stop Gags trading." I do not accept that evidence; the decision was not as black and white as Mr. Brindle portrays it to be.

174. The Risk Committee met by telephone on 1 November 2021, with Mr. Lerch, Mr. Toresco and Mr. Devesa attending, Mr. Brindle observing and Mr. Tsai taking a note. Mr. Gagliardi did not attend. It was recorded that the Committee "*discussed the pros and cons of separating the U.S. trading strategy versus retaining it in EARF with additional controls such as reduced limits or a change in reporting structure to include Messrs. Devesa and Brindle, in addition to Mr. Toresco*". In other words, Mr. Gagliardi was not being prevented from trading; rather he would continue to trade in one or other form. The Committee decided to offer Mr. Gagliardi the opportunity to continue to pursue his US trading strategy with ECM in a standalone fund where he would be the portfolio manager:

> "*Mr. Lerch called for a motion to commence de-risking EARF of its U.S. positions. Mr. Gagliardi would be given the opportunity, if he desired, to continue to pursue his U.S. trading strategy with Evolution in some standalone form where he would be the portfolio manager. Mr. Toresco seconded the motion and the Committee unanimously approved Mr. Lerch's motion.*
> *The Committee discussed winding down Mr. Gagliardi's open positions. Messrs. Toresco and Devesa indicated that the U.S. book was highly liquid and could be expeditiously unwound. Mr. Devesa said he would reach out to Mr. Gagliardi after this meeting and instruct him to not take on any new positions, other than what is required to cover outstanding commitments. He would work with Mr. Gagliardi to de-risk with the expectation of being mostly unwound by the end of the following week. Mr. Devesa would also communicate to Mr. Gagliardi that Evolution was willing to work with him on pursuing his trading strategy in a standalone structure, details to be determined.*"
> (emphasis added)

175. During his cross-examination, Mr. Brindle rowed back from the suggestion in his second witness statement (at paragraph 18) that ECM "*Prevent[ed] Gags from Trading*":

> "*Q. Earlier on, when you were giving evidence, you described the US trading as stopping, and in your witness statement, there's a slightly different phrase you used where you say: preventing Mr Gagliardi from trading. I wondered if that was an intentional choice of word that makes it look like he needed to be prevented from trading and held back from trading?*
> *A. No, there was no hidden meaning there.*
> *Q. You just meant the trading came to an end?*

A. Trading came to an end."

176. By an email of 3 November 2021 from Mr. Brindle to Ms. Danielle Hawthorn of ACA, he informed her that ECM were thinking of moving Mr. Gagliardi into a new fund or share class in 2022:

> "*This is not being widely discussed internally at the moment, but we are thinking to move the Gagliardi strategy out of Evo Absolute Return Fund into a managed account or separate share class of the Evo family office fund and then into its own fund vehicle in 2022. … I think this makes our discussion with Mirabella much simpler and doesn't draw in all the other parts of the Evo Group. It would be managed purely out of London with some legal support from Jerry in LA but everything else done locally.*"

177. Once again, there is no suggestion that Mr. Gagliardi's employment might be terminated for cause or that his discretionary bonus would in any way be adversely affected by anything that he had done up to this point in time.

178. On 5 November 2021, matters progressed significantly when Mr. Lerch sent a letter to EARMF's investors in relation to the new strategy. On 9 or 10 November 2021, Mr. Tsai emailed Mr. Lerch, Mr. Toresco, and Mr. Brindle a draft shareholder letter and amended PPM in order to establish an offshore fund for the spin-out fund.

179. Also on 5 November 2021, Mr. Tsai circulated an email to ECM's officers including Mr. Toresco, Mr. Chisholm, Mr. Lerch, Mr. Devesa and Mr. Brindle, amongst others, but not Mr. Gagliardi. This was in preparation for an EARMF board meeting scheduled for 11 November 2021, and the email contained some attachments. One attachment was a document entitled "*Report of the Investment Managers to the Board of Directors/Advisory Board*" dated 8 November 2021. It included a table of contents, item 5 of which was "*Risk Management*", which had been prepared by Mr. Devesa. Mr. Devesa accepted in cross-examination that "*I was responsible as a CRO of defining the limits of the strategies, after, of course, a discussion with Mr. Toresco and Mr. Lerch.*" Importantly, under the sub-heading "*Reporting and Limit Enforcement*", Mr. Devesa confirmed that: "*All limit breaches are identified daily (for example a Value at Risk breach), and discussed between the responsible trader, Chief Investment Officer and Risk Management and either validated or lead to reduction/liquidation of exposure*."

180. In cross-examination by Ms. Schumacher, Mr. Devesa accepted that this statement necessarily presupposes that there *would be* risk limit breaches. The following exchange took place[52]:

> *"Q. Yes. It's fair to say, isn't it, that this presupposes that there will be limit breaches? This statement presupposes there will be limit breaches?*
> *A. Well, yes and no.*
> *Q. Okay.*
> *A. It supposes that if there is a limit, a position that goes over the limit, it is escalated, not that it won't -- there won't be any limit breach, which is -- maybe, my Lord, I should make a little kind of simple explanation why -- what's level 1 and level 2.*
> *MR JUSTICE CALVER: Yes.*
> *A. I think it's quite standard, you know, but you will see this concept of level 1, which is more like an alert, where I try to identify a position that is a bit larger than usual, and which is something I want to analyse; and then above that will be a level 2, which is like really something we think as a fund, we want more people to look at it and clear it. I tend to sometimes --*
> *MR JUSTICE CALVER: What, because the breach of the limit is greater?*
> *A. Because the limit is greater. I tend to sometimes use the parallel with some -- you know, where you have a car and some alerts that tell you that you're slipping or that -- not just that you are over the speed limit, that's not the point, but some little tools that help you say what is a little bit out of the ordinary, and you need to pay attention. These are the level 1s and risk management, and sometimes with the chief risk officer, will analyse a bit. And the most important is level 2. These are more limits where we think it's really a trade that requires more validation from senior people. So that's the difference, and it's quite -- it's quite standard, and it's also something that we have in our electronic systems where there is a soft limit which alerts the trader that his trade is a little bit bigger than his normal trading, but I have defined it, just to help him know that it is a bit bigger than usual, and then there is a limit that's above, you know -- well, he can't go over, but it will pop up on the risk manager's screen for validation if necessary.*
> *MR JUSTICE CALVER: The first of those two categories, there's still a breach of the risk limits, is there?*
> *A. It's not a breach in a sense, it's a -- I find the word "breach" a bit strong, but it's just like an alert. That's why I call often the level 1 as an alert level.*
> *MR JUSTICE CALVER: But you've gone over the limit for the particular risk.*
> *A. Yes, yes.*

[52] Day9/31/23 – 34/2.

> *MS SCHUMACHER: When you say alert, you said alerting the trader for a bigger limit than is normal. You mean normal for the strategy in which they're trading, right?*
> *A. Yes, correct.*
> *Q. So the risk would have to be calibrated to the particular market in which the trader is trading?*
> *A. Correct.*
> *Q. Even on level 2 breaches, so number 6 that we were just looking at, that says all limit breaches, and can be discussed and either validated or lead to reduction or liquidation. That applies across the board, doesn't it?*
> *A. Correct.*"

181. This procedure suggests that it was anticipated by ECM that there would be risk limit breaches. Some would not be concerning (level 1) but even those which might be concerning (level 2) would then be discussed and either validated or reduced/liquidated.

182. It is notable that after this time and up until 10 November 2021, Mr. Gagliardi was permitted to complete further trades via EARMF which included a trade in PING and the Rivian Automotive IPO, which was very profitable indeed (generating more than US$7 million). Mr. Lerch confirmed at this time that Mr. Gagliardi should continue to pursue certain specific IPO allocations, and on 10 November 2021 Mr. Lerch once again congratulated Mr. Gagliardi on his trading via WhatsApp: "*incredible allocation on Rivian. Great work. … the allocation is sick and definitely speaks to how you manage this shit and how much partnership you have with MS etc.*" It is evident that Mr. Lerch was still very impressed with Mr. Gagliardi's trading expertise, despite the friction which had been generated within ECM from time to time concerning his trading processes and compliance issues. Again, there is no suggestion that Mr. Gagliardi's employment might, for any reason, be terminated for cause or that his Discretionary Bonus would in any way be adversely affected by anything that he had done up to this point in time. Far from it; the opposite is true.

183. On 11 November 2021, Ms. Bojan on behalf of Mr. Varga asked for details on how investors could redeem their investment in EARMF and reallocate it to the new Gagliardi-Evo fund. In response, Mr. Brindle said: "*The basic idea is that investors who redeem EARF, submit a dollar amount redemption request to MSFS*[53] *and a subscription form for the same amount to Evo Fund A1. We are working with MSFS on the process to wire*

[53] Morgan Stanley Fund Services.

redemption cash to Evo Fund A1. Usually, this would have to go through the investor's own account." He recognised (in his second witness statement at paragraph 18.8), that "*From my response (that funds could be redeemed and invested back into A1) it looks like at this point, I thought Gags would be trading on an Evo Group platform.*"

184. It can be seen that everything was proceeding relatively smoothly at this stage towards the implementation of the Gagliardi-Evo fund and Mr. Lerch was very happy with Mr. Gagliardi's continued successful trading. However, this smooth transition was about to be overtaken by unexpected events.

(d) The DOJ/SEC subpoenas and subsequent developments

Subpoena and phone seizure

185. On 15 November 2021, Mr. Gagliardi and Mr. Brindle travelled to Los Angeles to meet Mr. Lerch and other ECM personnel in order to further discuss the spin-out fund. Upon arrival at the airport in Los Angeles, Mr. Gagliardi was served by two FBI agents with a subpoena from the US Department of Justice ("**DOJ**") to attend before a Grand Jury in New York, together with a Search and Seizure Warrant further to which his mobile telephone was seized. Mr. Brindle had travelled through immigration separately and was unaware that this had happened. In his fourth witness at paragraphs 16.3 – 16.6, Mr. Gagliardi said:

> "*From what I remember, it was early evening when I landed in Los Angeles. Brindle went through the UK immigration line, and I went through the US immigration line. When my passport was scanned, the official said he was required to conduct a spot check on my luggage. I only had my hand luggage and the official went through my bag and sealed it. They then took me to a room close by and inside were two FBI agents.*
> *The agents said they had a subpoena for me and a search and seizure warrant for my phone […]. They also checked I had no other devices. They asked if I knew why I was there, and I said absolutely not. They said there was a block trading investigation regarding Morgan Stanley. I asked if I was under arrest and was told I was not. I said I was in a hurry to meet my colleague (Brindle) and I would not answer any questions. I provided my contact details for where I was staying and provided my phone. It was a very brief interaction.*
> *I then met Brindle outside in an Uber and said I had left my phone on the plane. I did not think I could tell Brindle what had happened because of the wording on the front of the DOJ Subpoena.*

> *I contacted an attorney that evening, who assisted me in finding a specialist lawyer.*"

186. At the front of the pack of documents handed to Mr. Gagliardi was a letter dated 15 November 2021, with the subject-heading "*Grand Jury Subpoena*", it read:

> "*Please be advised that the accompanying grand jury subpoena has been issued in connection with an official criminal investigation of a suspected felony being conducted by a federal grand jury. The Government hereby requests that you voluntarily refrain from disclosing the existence of the subpoena to any third party. While you are under no obligation to comply with our request, we are requesting you not to make any disclosure in order to preserve the confidentiality of the investigation and because disclosure of the existence of this investigation might interfere with and impede the investigation.*
> *Moreover, if you intend to disclose the existence of this subpoena to a third party, please let me know before making any such disclosure.*"
> (emphasis added)

187. As described above, in his fourth witness statement at paragraph 16.5, Mr. Gagliardi explained why he did not immediately tell anyone at ECM about his mobile telephone being seized, namely because he thought he was prohibited from doing so according to the wording on the front of the DOJ subpoena.

188. I accept this evidence. It is largely consistent with Mr. Brindle's own evidence (in his second witness statement at paragraphs 20.6 – 20.11) as follows:

> "*Gags was able to go through immigration as a US citizen, and I knew he had no checked bag. I was therefore expecting Gags to have got through immigration fast and that he would be waiting for me when I had collected my baggage and got to arrivals.*
> *But when I got out, I couldn't see Gags anywhere. I looked around for him, messaged him on WhatsApp a few times and called him on his mobile phone but I got no response. My first thought was that he had got an Uber to the hotel without me and I was pretty annoyed.*
> *I called an Uber and went to wait for it outside. When the Uber was about five minutes away, I called Gags one final time, and he answered. This was maybe 25 minutes after I picked up my suitcase. Gags said he was on his way out.*
> *The Uber arrived. I got in and asked the driver to wait five minutes because my friend was on his way. We waited but Gags did not arrive. The Uber*

driver was getting increasingly nervous about waiting at the kerb, so I got out and let him go.
I called Gags again to tell him that the Uber had gone and to ask where on earth he was. I didn't get through a couple of times, and then he answered. I asked where he was. I think it was at this stage that Gags told me, over the telephone that he had lost his mobile phone on the plane, that someone else had also lost their phone, and that further to BA policy, they would not give Gags his phone back for 24 hours.
It occurred to me sometime later that this was odd given that I was calling Gags on his mobile number and he was answering that phone, which showed it was his. But at the time, it seemed quite credible BA would not just hand over lost property without checking who it belonged to."

189. Whilst it was untrue that Mr. Gagliardi had lost his phone, it was understandable that he might come up with such an excuse in this stressful situation, where he had been told not to discuss the investigation with anyone.

190. In cross-examination, Mr. Gagliardi was challenged on whether he read the subpoena documents which were served on him:

"*Q. Do you think at any stage you read this letter dated 15 November?*
A. I'm sure I read it. I don't know if I read it that night, but I'm sure I read it.
Q. Because if you read on, it says: "The Government hereby requests that you voluntarily refrain from disclosing the existence of the subpoena to any third party." Then it says: "While you are under no obligation to comply with our request, we are requesting you not to make any disclosure in order to preserve the confidentiality of the investigation and because disclosure of the existence of this investigation might interfere with and impede the investigation." Then it says: "Moreover, if you intend to disclose the existence of this subpoena to a third party, please let me know before making any such disclosure." Do you agree with me, that doesn't amount to a complete prohibition on you telling anybody about the subpoena?
A. I had two FBI agents directly tell me not to discuss it with anybody. Both of them.
Q. But the wording of the letter?
A. Okay, the letter was in my bag by that time. I remember the FBI agents, exactly what they said.
Q. I suggest to you that you knew as soon as you read this letter, which was, I suggest, at the very latest, back at the hotel, that you could in fact tell Evolution about this development, but you had to tell the US Department of Justice first. That's true, isn't it?

> *A. If I was intending to tell anybody outside of my lawyer, after reading this now, yes. Again, … you weren't in the room, I was. The FBI agents were very strict. They said: do not discuss it with anybody, including Mr Brindle when we go outside. They were explicit about that.*"

191. There was an air of unreality about this cross-examination. Mr. Gagliardi was being requested by the US Government, via the DOJ, not to discuss the subpoena with anybody. It is wholly unsurprising that he complied with that request. I accordingly accept this evidence of Mr. Gagliardi which is consistent with the letter of 15 November 2021 referred to above.

192. According to the subpoena, "*The devices to be searched are any cellular devices in the possession, custody, or control of GAGLIARDI (the "SUBJECT DEVICES")*". The subject offences are set out and include various provisions relating to securities fraud, insider trading, conspiracy to commit securities fraud or insider trading, wire fraud and conspiracy to commit wire fraud. The information sought by the DOJ was "*evidence of the relationship between and among the following individuals, including but not limited to communications between and among the following individuals…*". The list of names include: Siufu Fu "Frank Fu"; Pawan Passi; Charles Leisure; Felipe Portillo Bustillo; John Paci; Michael Daum; Michael Lewis; Robert Gagliardi; Amna Malik; Andrew Liebeskind; Jonathan Dorfman; Scott Beardsley; Joseph Samuels; David Earling; Evan Damast; Michael Germino; and Benjamin Dannhauser (emphasis added). These are the names of all of the key individuals active in the US block trading market, who represent various different banks and institutions. A reasonable reader of the subpoena in that market would, I find, reasonably assume that it related to a wide investigation that the SEC/DOJ was undertaking into the block trading market as a whole.

193. Mr. Gagliardi's evidence as to when he read the covering letter of the DOJ subpoena was somewhat confused:

> "*A. I was handed a document. I took it and put it in my bag. I wasn't sitting there reading it with him. …*
> *Q. Now, when did you first read that document?*
> *A. When I got back to Shutters, I actually read through the first three or four pages, and then I called my lawyer.*
> …

> *Q. Let me ask the question again. Try and see if you can answer it. Did you believe you could not tell anybody because of what the FBI agents had said to you, or because of what it says in that letter?*
> *A. Both.*
> *Q. So you must have read the letter when you were at the airport?*
> *A. But on all of the pages, if I remember correctly, it does say "confidential", 'confidential'.*"

194. ECM argued that this is inconsistent with his fourth witness statement which made no mention of any conversation with the FBI agents and only referenced the qualified prohibition in the covering letter. However, I accept that this would have been a very stressful event for Mr. Gagliardi and it may well have been difficult for him to recall the precise sequence of events. I consider it to be clear that Mr. Gagliardi understood, whether from the covering letter, the FBI agents or both that he was to preserve the confidentiality of the investigation, at least until he had spoken to a specialist lawyer, which he did, after locating one in very short order.

195. Mr. Gagliardi gave evidence (in his fourth witness statement at paragraphs 16.7 –16.8) that the next morning, on 16 November 2021, which was the day that Mr. Lerch, Mr. Chisholm, Mr. Brindle and Mr. Gagliardi all met in Los Angeles to discuss the spin-out fund, "*I got a new phone and spoke to a specialist lawyer, Ben Fischer (Fischer) who was based in New York. Fischer said he would contact [ECM].*"

196. And then the next morning, on 17 November 2021:

> "*I was sitting in the hotel courtyard with Lerch and Chisholm. Chisholm said words to the effect "I spoke to Fischer, he told me about the subpoena." Lerch said words to the effect "we had subpoenas and investigations in Japan, do you know anything about it." I said "absolutely nothing. I know as much as you do." I remember saying "I couldn't tell you because of the warning on the subpoena." I remember that Lerch didn't seem concerned and said something to the effect of "You've always got to follow your lawyers' advice""*

197. I accept that evidence. Mr. Gagliardi's evidence is that the lawyer whom he engaged to advise him at the time, Mr. Benjamin Fischer of Morvillo Abramowitz Grand Iason & Anello PC ("**Morvillo**"), contacted Mr. Lerch to tell him about the subpoena. Mr. Lerch gave evidence that Mr. Gagliardi told him about it. Either way, Mr. Lerch and ECM were informed about it promptly.

198. In his second witness statement (at paragraphs 26.15 and 26.16) Mr. Lerch said that, when he was told about the subpoena, he was "*in shock*" and "*wanted to get through the conversation with Mr. Gagliardi and speak to Richard [Chisholm] to try to understand what exactly was going on and if ECM was implicated*" and that he thought at the time "*that it was unfair of him to have withheld this from me given that it potentially affected my firm. I thought he had a duty to tell us about it as soon as he found out*."

199. Subsequently, according to Mr. Chisholm in his third witness statement at paragraph 11.4, Mr. Gagliardi said to Mr. Lerch, Mr. Brindle, and Mr. Chisholm: "*hey, you know that phone that I lost, I didn't lose it, it was confiscated by US Marshalls. This is nothing, I'm just caught up in some market thing. I didn't do anything wrong, I just needed to talk to my lawyer which is why I delayed in telling you, and yeah this is nothing.*" Mr. Chisholm further said at paragraph 11.3 that he was "*troubled by Mr. Gagliardi's dishonesty in having lied about the loss of his mobile phone*".

200. Mr. Lerch gave evidence that this untruth was a factor which he relied upon when deciding not to grant Mr. Gagliardi a Discretionary Bonus.

201. As I have said, I do not consider that this was dishonest behaviour on Mr. Gagliardi's part. Nor do I accept Mr. Lerch's evidence that this so-called "*untruth*" was a factor which he relied upon when deciding not to grant Mr. Gagliardi a Discretionary Bonus. Had it been, I consider that he would have said so at the time. Mr. Lerch was not afraid to speak his mind. He did not do so.

202. Indeed, had Mr. Lerch considered Mr. Gagliardi to have been dishonest, he surely would not have agreed to pay Mr. Gagliardi's legal fees in relation to the DOJ subpoena. But just two days later, on 19 November 2021, Mr. Chisholm confirmed in a letter to Mr. Fischer that that is exactly what ECM would do. Whilst Mr. Chisholm said in his third witness statement at paragraph 12.1 that this was purely "*to secure [Mr. Gagliardi's] cooperation in ECM's internal investigation into his block trading activities*", I do not accept that evidence which is unsupported by any documentary evidence.

203. Further still, had Mr. Lerch considered[54] Mr. Gagliardi to have been dishonest in respect of his mobile phone explanation or the SEC/DOJ investigation, and that that dishonesty justified termination of his employment for cause, he surely would not have allowed Mr.

[54] Or anyone else at ECM such as Mr. Chisholm: see Mr. Chisholm's third witness statement at paragraph 11.9.

Devesa, as Head of Risk, to continue to progress the spin-out fund with Mr. Gagliardi. But he did precisely that.

204. Thus, on 30 November 2021, Mr. Devesa and Mr. Gagliardi met to discuss the logistics of the spin-out fund and the mechanics of how it would operate. Mr. Devesa suggested in his first witness statement at paragraph 14.1 that he had not been immediately informed about the subpoena by reason of its "*highly confidential*" nature (which in itself affords justification to Mr. Gagliardi taking two days to consult with his lawyer about disclosing the investigation to ECM), but he was subsequently informed of it by either Mr. Brindle or Mr. Tsai "*towards the end of November 2021*".

205. At the end of November/beginning of December 2021, Mr. Lerch, Mr. Brindle, Mr. Chisholm, and Mr. Toresco had one of their regular, general catch-up meetings at Mr. Lerch's home in Incline Village. Mr. Chisholm and Mr. Lerch gave evidence that they discussed Mr. Gagliardi's future at ECM and specifically whether the EARMF should participate in certain IPOs in December 2021, in which Mr. Gagliardi had pre-positioned the fund to participate. According to Mr. Lerch, Mr. Chisholm and Mr. Brindle, they agreed that ECM could not take on any risk associated with Mr. Gagliardi's trading and that he should not engage in any further trading on behalf of ECM or the wider Evo Group. The WhatsApp messages between Mr. Brindle and Mr. Devesa on 1 December 2021 suggest that Mr. Lerch was going to tell Mr. Gagliardi that the new spin-out fund needed to be put on hold.

206. Also on 1 December 2021, Mr. Chisholm learned from a news article that Mr. Passi had been placed on administrative leave by Morgan Stanley. He forwarded the article to Mr. Lerch, Mr. Brindle, and Mr. Tsai. Mr. Lerch gave evidence (in his second witness statement at paragraph 27.5) that this was a "*game-changer for me... Given that he was one of Mr. Gagliardi's key contacts, I became more concerned that we might also have a problem because of Mr. Gagliardi's trading with him.*"

207. However, this evidence is somewhat inconsistent with the documentary record. On the same day, Mr. Chisholm sent an email to Mr. Richard Bersch of JP Morgan, with Mr. Lerch copied in, confirming as follows:

> "*As Lerch has discussed with you, Lerch redeemed $20 mm from the EARF fund in order to seed a potential launching of a fund managed by Robert*

> *Gagliardi. For the purposes of the side-letter, I just wanted to memorialize that fact (i.e., we are required to give JPM notice of any redemptions*)."

208. There is no suggestion that the launching of the fund may not now go ahead or that Mr. Lerch will no longer be investing in it by reason of the SEC/DOJ investigation; instead JP Morgan were being told that Mr. Lerch was planning on investing a very substantial sum of his *own* money into the Gagliardi-Evo fund.

209. On 3 December 2021, Mr. Lerch told Mr. Gagliardi via a WhatsApp message that: "*After a lot of deliberation with Adrian and Richard, unfortunately it's not going to work to put IPO trades in EARF. A1 is not ready either. We don't have any more options here so have to be on pause for the moment.*"

210. Mr. Gagliardi replied as follows:

> "*I appreciate the continuing support to set up the new fund as soon as practical in 2022 and the guidance on messaging you gave to Murph. Re 2021, since it is clear that we are done trading, and the numbers are set, can you please authorize payment of my performance comp before the close of the year?*"

In other words, Mr. Gagliardi understood that trading within EARMF was now finished, but that the parties still intended to progress the spin-out fund. Mr. Lerch did not contradict that understanding.

211. On around 7 December 2021, Mr. Gagliardi asked Mr. Brindle for the PL data for EARMF. It is clear from a WhatsApp message from Mr. Toresco to Mr. Lerch dated 2 December 2021 that ECM had that data by that time. Mr. Brindle accepted in his second witness statement (at paragraph 23.1) that Mr. Gagliardi wanted this information "*because he and Murphy wanted to work out how much their bonuses might be*". Nobody suggested to them that they would not be getting a bonus.

212. On 22 December 2021 ECM entered into a written agreement with Mr. Gagliardi to pay, as promised, his legal costs in respect of the DOJ subpoena investigation. Mr. Chisholm suggested during cross-examination that this was normal practice and was not based on a conviction that Mr. Gagliardi had done nothing wrong, but rather that there was a shared interest in protecting him and therefore ECM from any negative regulatory findings. However, had ECM been considering terminating Mr. Gagliardi's employment for cause, I do not consider that it would have entered into this agreement at this time. Nor did ECM

include any clawback provision in the agreement in the event that Mr. Gagliardi was found to be guilty of any wrongdoing; and nor did it ever suggest that in certain circumstances such costs could be deducted from any Discretionary Bonus which it paid. Indeed, in a later phone call between Mr. Gagliardi and Mr. Lerch on 21 January 2022, which I discuss below, Mr. Lerch rejected any suggestion that these legal costs might be so deducted.

213. On 3 January 2022, Mr. Gagliardi emailed Ms. Yamamoto, Mr. Devesa, and Mr. Brindle and asked for an update on the progress of the new fund.

ECM subpoena

214. On 6 January 2022, ECM itself received a subpoena dated 5 January 2022 as part of the same block trading investigation. On the front page it stated: "*The enclosed subpoena requires your client to produce documents to the SEC by January 26, 2022*", and those documents to be produced were documents concerning Mr. Gagliardi's trading. It triggered obligations on ECM to inform some investors that ECM had entered into non-standard communications with the SEC, and provided a list of documents to be produced, which included:

> "*1. Robert Gagliardi's personnel file.*
> *2. Al Documents, including presentations, furnished by Robert Gagliardi during the hiring process.*
> *3. An electronic trade blotter for all trades in all securities, including stock and/or options and derivatives, including total return swaps, by Evolution in portfolios where Robert Gagliardi made investment decisions or had trading authority. Please include time-stamped order entry and execution detail for all trades in a structured format…*
> *4. All Documents Concerning any compliance or risk reviews Concerning Robert Gagliardi.*
> *[5-9. All Communications between Robert Gagliardi and Pawan Passi; Charlies Leisure; Felipe Portillo; Michael Daum; and Anthony Kontoloen, respectively.]*
> *10. All Documents Concerning the Firm's investment in block trades, secondary offerings, and unregistered secondary distributions between February 2021 and the present.*
> *11. All written supervisory procedures Concerning insider trading.*
> *12. All written supervisory procedures Concerning Rule 105 of Regulation M.*
> *13. All written supervisory procedures Concerning investing in block trades secondary offerings, and unregistered secondary distributions.*

> *14. Documents sufficient to identify the Firm's policy Concerning the use of personal devices to conduct Firm business.*"

215. Mr. Lerch gave evidence (in his second witness statement at paragraph 28.2) that the SEC subpoena represented an "*existential threat*" to his business because once the investigation became public knowledge, it would adversely affect ECM's relationships in the financial markets and would be a blight on ECM's record: "*The SEC and DOJ investigations concerned one of the largest markets in the world and the most powerful people in that market, such as Mr. Passi.*" Of course, this assumes that ECM's involvement (and the extent thereof) in the investigation *will* become public knowledge.

216. Mr. Lerch stated in his second witness statement at paragraph 28.5 that "*From the time we received the SEC subpoena*[55]*, my view was that the Evo Group was not going to be operationally involved with any fund of Mr. Gagliardi's. If he wanted to start his own fund and if anyone who worked for me, such as Adrian or Philippe, wanted to be involved that would be fine with me*". According to Mr. Lerch, Mr. Gagliardi now needed to leave ECM in a manner that caused the least additional harm to ECM (ibid, paragraph 28.5).

217. However, even after both Mr. Gagliardi and ECM had received their respective subpoenas, discussions and preparations in fact continued to progress in relation to the spin-out fund, as I shall explain below.

(e) The 21 January 2022 phone call

218. On 14 December 2021, Mr. Gagliardi sent a WhatsApp message to Mr. Lerch: "… *Re 2021, since it is clear that we are done trading, and the numbers are set, can you please authorize payment of my performance comp before the close of the year?*" This was a reasonable request as Mr. Lerch had not even hinted to Mr. Gagliardi that he would not receive a Discretionary Bonus for 2021 and Mr. Gagliardi had generated almost all of the revenue contributions to the A1 share class/EARMF.

219. In a WhatsApp message on 14 December 2021 Mr. Gagliardi asked for a telephone call with Mr. Lerch, which appears to have taken place later that day, as Mr. Lerch subsequently sent a cordial message to Mr. Gagliardi on that day stating: "*good to catch up. thanks for being positive and constructive. i greatly appreciate it*".

---

55 6 January 2022.

220. After the calendar year ended, Mr. Gagliardi and Mr. Lerch had some further discussions about year-end bonuses. One of these discussions in particular took place during a further telephone call on 21 January 2021. This conversation was recorded by Mr. Gagliardi, unbeknown to Mr. Lerch, because, Mr. Gagliardi said (in his fourth witness statement at paragraph 17.3), Mr. Lerch was "*displaying a lot of signs that he could not be trusted*" and he was "*being inconsistent and elusive*".

221. On this phone call, Mr. Lerch explained that Mr. Gagliardi's new issue bonus would be approximately US$6 million based on US$4 million being passed through to ECM from the EARMF for that specific purpose (this being 17% of around US$35.9 million of the EARMF fund-level profit on the IPOs), plus US$2 million in respect of the A1 share class that had not been passed through to the management company because it related to trading before the EARMF was set up ("*Yeah. So we passed through four million of the expense from the IPOs. We couldn't pass through two million of it because that occurred before we had the fund set up. …*"). The fund-level profit on the block trades was around US$28 million ("*the block P&L or the non-IPO P&L appears to be around 28 million in change*").

222. In respect of the Discretionary Bonus, Mr. Lerch said that if he was forced to make a decision that day with the SEC/DOJ investigation pending, the discretionary amount would be zero. This was a new development: this was the first time Mr. Lerch had told Mr. Gagliardi this[56]:

> "*Michael Lerch:*
> *37. So, you know, if it had been a normal year, okay, like a normal situation where we have an ongoing situation and everything is normal, we don't like have these issues that we're having ... but again, I don't think our, our you know issues they won't be resolved. But in the absence of having any issues and the firm doing well and the business doing well and the rest of the business doing well, you know, I put in there a discretionary bonus and I gave the range of 10 to 15% of the P&L. Now, under the circumstances ... if you just look at 10 to 15% of that, it's 2.8 million versus whatever, you know, four million or something like that. That would be additional bonus that you would get if I said, "Okay, well, all those factors, you know, were the way they were."*

[56] Save only that it seems from paragraph 34 of the transcript of the phone call of 21 January 2022 that he may have intimated this to Mr. Gagliardi on their prior phone call on 14 December 2021.

> *38. And my position right now is I don't know what the ... I'm not going to make ... if I have to make a decision right here today on whether or not the other factors would be detrimental in a material way to there being a discretionary bonus, if I have to be forced to do that, versus saying, "Everything is fine. This is awesome," I would say that you would be forcing me into a position, taking a conservative position, on that, which would be that things are not fine. This is not what, you know, was ... the reason why this was discretionary was to account for this very situation that we're dealing with and as a result of that, that discretionary amount is zero, okay?"*
> *39. Do I think I want it to be that way? No. But I'm not in a position right now to get into what that number's going to be and then there's also the factor of Murph. You know, if I'm bearing the Murph cost in its entirety, okay, that that definitely has an impact on this. So I mean, what I would propose on the Murph front is I pay you six million at the end of January. I pay him a half a million as a, a bonus and then there's another amount that would be considered down the road for both you and him if, at 100% of my discretion, things move in the right way. That's, that's where I am right now as far as the way I'm thinking about it…*
> *40. But I think the numbers are firm and if there was 63 million bucks of P&L in change, non-lPO around 28, IPO of 35. And that's kind of the way l'm ... and again, I want to ... my view is I'd like to move in a direction with things where we have a chance to, have a chance to make some money off of all the work that I've done in our relationship, in our friendship. And that would be getting to invest in what you're doing. I'd like to have an arrangement where I get some kind of capacity to invest in what you're doing, on full fees like anyone else you would bring in but the opportunity to be a participant in it is important to me and, you know, that's kind of like the general situation that I think, if I could describe it right now, that's, that's where I'm at."*
> *50. I'm saying that, like there's a very discretionary balancing out of various issues when it comes to discretionary bonuses…*
> *70. I can't predict where this goes.*"
> (emphasis added)

223. I consider it clear that Mr. Lerch was telling Mr. Gagliardi that he would not pay any Discretionary Bonus to Mr. Gagliardi if he was required to make a final decision at that time, because that he wanted to see how the various issues *concerning the SEC/DOJ investigation* played out. He could not predict where that investigation would go. This was the only material factor mentioned by Mr. Lerch in deciding how to exercise his discretion.

224. ECM submits that this phone call supports the conclusion that both parties understood the Discretionary Bonus to be discretionary in the sense contended for by ECM; in particular, ECM points out that Mr. Gagliardi accepted in his oral evidence that he did not contradict Mr. Lerch when Mr. Lerch said in respect of the Discretionary Bonus that "*there's a very discretionary balancing out of various issues when it comes to discretionary bonuses*". I do not accept this submission. Mr. Lerch did not refer in this telephone call, or at any stage before the telephone call, to any factors apart from the SEC/DOJ investigation as being relevant to the exercise of his discretion. Mr. Gagliardi's evidence was that he wanted to keep Mr. Lerch talking, trying to keep him sweet in order to get him to pay his bonus which Mr. Lerch was seeking to delay paying him. I accept that evidence.

225. Notably also in this phone call, Mr. Lerch reiterates that he is still keen to invest in Mr. Gagliardi:

> "*… I'd like to move in a direction with things where we have a chance to, have a chance to make some money off of all the work that I've done in our relationship, in our friendship. And that would be getting to invest in what you're doing. I'd like to have an arrangement where I get some kind of capacity to invest in what you're doing, on full fees like anyone else you would bring in but the opportunity to be a participant in it is important to me …*
> *I mean, I would like to have the right to invest up to 50 million bucks in what you're doing.*"

226. Again, Mr. Lerch's keenness to continue the relationship with Mr. Gagliardi belies any suggestion that he was considering terminating Mr. Gagliardi's employment for cause or that his discretionary bonus might be withheld by reason of anything other than the SEC/DOJ investigation (such as his allegedly abrasive attitude or disregard of ECM's internal policies etc).

(f) The Memorandum of Understanding

227. On 27 January 2022, Mr. Lerch sent an email to Mr. Gagliardi, which read in part: "*I attach an MOU for the go forward. I thought it would be good to put our discussions in form. I had a positive chat with Murphy as well on getting things up and running. Please review and we can do a call.*" The attached Memorandum of Understanding ("**MOU**") provided as follows:

> "***RECITALS***

WHEREAS, the Employee wishes to launch a fund to pursue his capital markets strategy (the "Fund'') and [ECM] fully understands and supports that decision;
WHEREAS, the Parties have discussed that it may make more sense for the Employee to launch the Fund either on his own or through another investment advisor complex;
WHEREAS, the Parties want to set forth some high-level terms for what the Fund launch would look like and define the Parties' relationship going forward;
NOW, THEREFORE, in exchange for the good and valuable consideration set forth herein, the adequacy of which is specifically acknowledged, the Parties hereby agree as follows:
AGREEMENT
1. Capacity in the Fund. *The Employee hereby agrees to give [ECM] and its affiliates up to $50,000,000 in investment capacity in the new Fund. [[ECM] agrees that the investment will be subject to the same fees that other institutional investments are paying.]*
2. Staffing for the Fund. *[ECM] agrees that the Employee may solicit and employ any of the employees of the Company either as full-time employees or as independent contractors to the extent such employees are amenable to the terms. It is also contemplated that Steven Murphy ("Murphy") would terminate his employment with the Company in order to assist the Employee with the Fund.*
3. Employment Relationship. *As the Parties contemplate that the Employee will launch the Fund either on his own or at another investment advisor, the Parties would agree to terminate the employment relationship pursuant to standard and ordinary documentation ("Document"). The Document would reflect the payment of the new issue bonus of $6,000,000 and the salary through the termination date and would include mutual releases. The Document would also reflect that a discretionary bonus may be paid in the future at [ECM]'s sole and absolute discretion."*
(emphasis added)

228. Mr. Gagliardi was not prepared to, and did not sign this MOU. In his first witness statement at paragraph 17.8 Mr. Gagliardi stated: *"I had never seen an MOU before, but I understood that if I signed the MOU I would waive my right to my discretionary bonus. I didn't sign it and I recall saying to Lerch "I'm not waiving my bonus.""* It is significant that Mr. Lerch considered it was necessary to record his position that ECM had an absolute discretion whether to pay any discretionary bonus in the future. This is likely because the outcome of the SEC/DOJ investigation (in the future) was unknown and Mr. Lerch wanted to arrogate to himself the right to refuse to pay any bonus if adverse findings

were made against Mr. Gagliardi (regardless of the terms of the employment contract). Mr. Gagliardi gave evidence as follows: "*I recall that Lerch said the MOU was "take it or leave it." I remember feeling angry and that Lerch was trying to change my deal – the MOU was the way forward as proposed by Lerch.*"

229. It is once again significant that ECM were asking for capacity to invest in Mr. Gagliardi's new fund. Again, if they genuinely considered Mr. Gagliardi to be a dishonest person whose employment they were considering terminating for cause, it is very unlikely that they would have wanted to do so.

(g) ECM's internal investigation

230. On 27 January 2022, by way of an ECM internal investigation into Mr. Gagliardi's block trading, Mr. Gagliardi was interviewed internally (via Zoom) by ECM's independent lawyers, Ms. Theresa Trzaskoma and Mr. Wesley Erdelack of Sher Tremonte LLP, in the presence of Mr. Tsai and Mr. Chisholm. Mr. Gagliardi attended this interview at the offices of Morvillo, with Ms. Kathleen Cassidy, Mr. Fischer, and Ms. Ariel Cohen. This interview, which was thorough, was recorded in a memorandum of the same date, and "*contains counsel's mental thoughts and impressions of the meeting with Robert Gagliardi and reflects counsel's professional judgment concerning portions of that meeting which may be important to the case. It is not a verbatim transcript.*"

231. Significantly, no wrongdoing or adverse issues were identified by ECM as a result of this interview or its internal investigation, and no further steps were taken by ECM pursuant to it. Mr. Lerch and ECM would accordingly have been aware of this at the time in their dealings with Mr. Gagliardi.

232. Consistently with this, it is apparent that in August 2022, as discussed further below, ECM issued a Questionnaire to its investors, confirming that it had received a subpoena from the SEC, which requested "*trading information and other materials related to block trades conducted for certain client accounts*" and that this was "*in connection with a broader market-wide inquiry into block trades*". ECM confirmed that "*after conducting an internal examination, we do not believe there has been any wrongdoing committed by the firm or its personnel*".

(h) Request for payment of the IPO bonus and further discussion of the MOU

233. On 1 February 2022 Mr. Gagliardi sent an email to Mr. Lerch in which he referred to the fact that he had not been paid the IPO bonus on time, given that it was due under the employment contract within 30 days of 31 December 2021:

> "*Under my contract, I should have been paid the IPO portion of my compensation yesterday, but I did not receive anything.*
> *When I asked Adrian about this earlier today, he explained that he had been told to withhold this payment until I signed a separation agreement.*
> *While I am happy to continue to explore different working scenarios, I expect Evo to honor its contract with me as a basis for continuing these discussions.*
> *I believe my performance speaks for itself and I shouldn't have to negotiate to receive what I've already earned.*
> *By holding up payments, you are putting me, and others like Murphy, in a very uncomfortable position.*
> *Please let me know what your intentions are with respect to the payments that were due by 1/31*."

ECM's failure to pay the IPO bonus was now bringing matters to a head for Mr. Gagliardi.

234. On 2 February 2022, Mr. Lerch replied to this email and explained that his "*intentions were/are to proceed along as I have outlined in the MOU. I sent that last Thursday and didn't get a response. Does the MOU look ok?*", and "*We will go ahead and pay the IPO bonus but we reserve all rights under the employment agreement*".

235. The IPO bonus was indeed then paid to Mr. Gagliardi in respect of both his trading under the A1 share class and the EARMF in the sum of US$5,956,948. Mr. Lerch did not suggest that the profit generated by the A1 share class trading ought not to be included in the calculation of the IPO Bonus, or that it was only being included as a goodwill payment.

236. On around 10 February 2022, Mr. Lerch and Mr. Gagliardi had a phone call to discuss the MOU. Mr. Lerch's evidence was that "*it was a good way out for both ECM and Mr. Gagliardi. But Mr. Gagliardi wanted me to commit to investing US$50m in his new fund, and I did not want to be bound in that way*." I do not accept this evidence. In fact, as the telephone call of 21 January 2021 makes clear, it was Mr. Lerch who wanted to invest "*up to 50 million bucks in what you're doing.*"

237. However, it does seem clear by this stage that the relationship between Mr. Lerch and Mr. Gagliardi was finally breaking down.

(i) Termination of Mr. Gagliardi's employment agreement and Mr. Lerch's exercise of his discretion not to pay him any Discretionary Bonus

238. By the end of February 2022, no agreement in respect of the MOU had been reached and ECM had decided to terminate Mr. Gagliardi's employment. On 27 February 2022, Mr. Gagliardi's US lawyer, Mr. Redniss, wrote to Mr. Chisholm in the following terms:

> "*Given the current intense press scrutiny, Rob [Gagliardi]'s sudden separation will almost certainly lead to negative coverage and defamatory inferences. There are a number of ways we can maintain the status quo while discussing the MOU and related issues in good faith -- and do so quickly. To do otherwise virtually guarantees a number of unintended, adverse consequences including serious reputational damage to Rob (and probably Evo). Evo can avoid causing this damage by continuing our discussions for a short period of time and I ask you to consider doing so.*"

239. Mr. Redniss invited ECM to maintain the relationship while the parties continued their discussions, but that invitation was declined by Mr. Chisholm in his reply email dated 28 February 2022. He stated: "*We can continue to negotiate points of the MOU (i.e. capacity) after the termination of Rob's employment.*" This suggests that ECM had still not ruled out investing in Mr. Gagliardi's new fund at this stage. Mr. Chisholm added that he was not sure there were any reputational issues for ECM if Mr. Gagliardi was looking to launch a fund by himself or through another investment advisor. That rather undermines Mr. Lerch's assertion in his second witness statement at paragraph 33.2(f) that one reason for not paying a Discretionary Bonus to Mr. Gagliardi was because "*He tried to use the threat of reputational damage to ECM to get a better deal on the terms of his departure*". I find that suggestion to be unjustified.

240. All that Mr. Redniss was saying, as he explained to Mr. Chisholm in his email dated 28 February 2022, was that: "*People will see he's off Bloomberg, so it will get out and probably picked up by the press, drawing attention to him and [ECM].*"

241. In a further email dated 28 February 2022 Mr. Redniss also explained that ECM could not terminate Mr. Gagliardi's employment contract at will because he was "*entitled to the same legal protections of any UK employee, regardless of the language of a US contract, and this definitively includes the employer's obligation to provide notice*".

242. On 28 February 2022 ECM served upon Mr. Gagliardi one week's notice of termination of his employment, effective on 7 March 2022. This concluded Mr. Gagliardi's employment at ECM. His employment contract was accordingly not terminated for cause.

243. Mr. Lerch's oral evidence was that "*I think at that time when he was terminated, and we had no way forward, I would say that that probably represents the time that my discretion was exercised*"[57] [i.e. not to pay Mr. Gagliardi any Discretionary Bonus]. That was on 28 February 2022.

244. At the same time, on 28 February 2022, a Separation Agreement and Release for Mr. Murphy was signed. According to this agreement, Mr. Murphy was paid US$500,000, described as a "*discretionary bonus as consideration for executing this Agreement*". Mr. Lerch in his second witness statement at paragraph 31.2 said that that despite this being labelled as a "*discretionary bonus*" payment, it was a "*separation amount*" and not a discretionary bonus further to his employment contract.

245. On 2 or 3 March 2022, after entering into the Separation Agreement and Release, Mr. Murphy spoke to Mr. Lerch by telephone and recorded the call. In particular, Mr. Murphy asked Mr. Lerch about Mr. Gagliardi's discretionary bonus and Mr. Lerch essentially repeated to Mr. Murphy what he had already told Mr. Gagliardi:

> "*He got a signed bonus, he got a high salary, he got a bonus contractor for his IPO, you know, and the rest of his bonus is discretionary. I told him two months ago that "under the circumstances, if you want to force me to make a decision about that today your discretionary bonus is zero because of a litany of issues that we have had. I do not want to go into them but if you are going to push me on this then the number is zero and if you want to just move on in a collaborative way we can discuss something more than zero at some point in time but this is a pretty serious fucking situation we are in".*
> *I mean, I do not know any person on the planet that would deal with this any differently than me. Like, it is -- you know.*"

246. If by this Mr. Lerch was seeking to suggest that in January 2022 he told Mr. Gagliardi that he was refusing to pay his discretionary bonus by reason of a "*litany of issues*" other than the SEC/DOJ investigation, then I reject that suggestion. Mr. Lerch had told Mr. Gagliardi that he wanted to *delay* payment of the discretionary bonus. That could only be in order

[57] Day9/96/25 – 97/2.

to await the outcome of the SEC/DOJ investigation. There was no other reason to *delay* payment.

247. Mr. Lerch gave evidence (in his second witness statement at paragraph 32.2) that also on or around 3 March 2022, he and Mr. Gagliardi had another telephone call, in which Mr. Gagliardi asked again about his discretionary bonus. Mr. Lerch states that "*I again tried to explain the severity and seriousness of the DOJ and SEC investigations and how they were potentially existential threats to the Evo Group.*" Once again, I consider that it is significant that Mr. Lerch does not suggest that he referred to any other matter as allegedly justifying the non-payment of Mr. Gagliardi's Discretionary Bonus.

248. On 7 March 2022, Mr. Gagliardi's employment at ECM formally ended, approximately 11 months after it had commenced.

(j) The End of the EARMF

249. On 10 March 2022, Mr. Chisholm sent an email to Mr. Lerch explaining that he had spoken to Mr. Albert Matriotti of BlackRock on that date. He said:

> "*The call then shifted to EARF. They would like to delay the investment until some of the dust settles around the [SEC/DOJ] investigation. He proposed a re-visit in June for a July investment. I did explain how our [internal] investigation did not result in any adverse findings and that Gags is no longer associated with Evo. He gets it. But I also understand their position. No huge downside to waiting.*"

250. On 20 March 2022, Mr. Bersch of JP Morgan emailed Mr. Lerch and Mr. Chisholm and stated:

> "*As I know we have discussed recently, our investment committee is concerned about the recent press and SEC/DOJ scrutiny surrounding the ECM/block trading business. While discussing the topic over the last couple of months, we have halted any new flows into EARF. We want to find a way to continue growing our exposure to the fund. To that end, we have been discussing different ways to mitigate the risk to our clients and have come up with a couple of ideas/requests that I wanted to run by you. Our IC [investment committee] has agreed that we will be able to "unfreeze" EARF for allocation if you guys can: 1. Agree that the management company will cover any related fines/disgorgements of profits, and 2. Provide us with immediate notification of any additional SEC/DOJ requests.*"

251. According to Mr. Chisholm, JP Morgan was the largest investor in EARMF, having invested around half of the fund. BlackRock were the second largest.

252. Mr. Lerch gave evidence that in mid-March 2022 he started considering the bonuses for the 2021 year. He said: "*I have seen an email from Adrian to me dated March 15, 2022, attaching a spreadsheet which sets out the bonus position as at that date.*" On 15 March 2022, the 2021 bonuses were paid to A1 share class/EARMF traders. For traders otherwise employed by ECM, the payment date was 22 March 2022.

253. On 25 April 2022, Mr. Lerch emailed to JP Morgan the profit and loss breakdown for the US and non-US IPOs and block trades for the A1 share class from January to July 2021, and for the EARMF from August to December 2021.

254. On 30 June 2022, ECM agreed to provide JP Morgan with an indemnity in respect of any fines arising out of the SEC/DOJ investigations as follows:

> "*With respect to the investments in the Manager Funds by JPMAAM Investors, the Manager agrees that the manager and not the JPMAAM Investors will bear any portion of any potential fine (including disgorgement of profits) imposed on the Manager or the Manager Funds by reason of the 2021 block trading inquiry and any related equity market investigations that otherwise would have been allocated, directly or indirectly to the JPMAAM Investors.*"

255. In his second witness statement at paragraph 35.1, Mr. Lerch asserted that the SEC/DOJ investigations changed the way that market participants viewed ECM and that they directly impaired their relationships with the major banks. Mr. Devesa also said in cross-examination:[58]

> "*A. … I think whether or not the EARF had a period, a short period of poor but not damaging performance in June was also in part because, you know, the whole block business was put on hold everywhere really in the world on the back of these various investigations. That's one thing.*
> *What I mention here in my statement refers more on, even to this day, how some counterparts were good counterparts, and we have very great relationships, you know, people relationships but, you know, some of these relationships have ended or been discontinued, and in some cases they don't give us the reason, but the timing of it clearly indicates that it was on the*

[58] Day9/51/1 – 53/7.

back of some of these investigations into the block business. That's what I mean.
Q. So you're inferring from the timing that the reason for the erosion of the relationship is Mr Gagliardi; is that correct?
A. That is what I am inferring, yes.
MR JUSTICE CALVER: Are you inferring it was Mr Gagliardi, or are you inferring that it was to do with the investigation in the marketplace about block trading?
A. I think that -- I mean, there is a bit of both. That's what I'm inferring. I think we share some of Mr Brindle's opinions that we saw some emails, some of his name was mentioned a few times, and many cases we were not given the exact reason as to why the relations were discontinued, but the timing of it, and since it was across the counterparts involved, led us to believe that it was -- it was the reason.
MR JUSTICE CALVER: Because, I mean, doesn't it stand to reason that if a relationship has been built with certain counterparts based upon block trading, and then block trading almost ceases because there's a market-wide investigation into it, relationships with those counterparts is going to be adversely affected?
A. Yes, but our relationship with these counterparts were in big part built in Asia, and not just for block trading; they were built across the whole spectrum of -- of the finance. We were doing, like, a lot of hard work with analysts; we had a great relationship on the prime brokerage side, on the stock lending side, on the --
MR JUSTICE CALVER: I understand, and that's true, isn't it, that you would be dealing with different people, wouldn't you, on the US side than on the --
A. Yes, yes, correct but the discontinuing of the relationship was across, and there's no reason for it to be -- if it was just, you know -- we know that clearly something happened big that they would decide to discontinue everywhere.
MS SCHUMACHER: … I put to you that it's not impossible that given the performance of the fund, and the block trading market was trending downwards, given that Mr Brindle was anticipating potential redemptions by the end of 2022, it's equally possible that the relationships broke down because the fund was performing poorly, isn't it?
A. My Lord, I would disagree with that. You know, most prime brokers don't care so much about the performance; they care about a lot of the time commissions. There was no risk of the fund going under, it was well margined, and we continued, we were still trading very well with those counterparts."

256. In his second witness statement at paragraphs 18.5 – 18.8, Mr. Chisholm stated:

> "*In 2022 and early 2023, BlackRock was among the investors who made frequent enquiries of the Evo Group regarding the status of the SEC and DOJ investigations. These investigations put a strain on Evolution's relationship with BlackRock, particularly given that they had questioned Mr. Gagliardi's involvement in ECM from as early as May 2021 (referred to in paragraphs 6.2 and 6.3 above).*
> *Ultimately, in late June 2023, I was informed on a phone call by my operational due diligence contact at BlackRock that they would be submitting a full redemption for all of their investments. I recall this conversation well, as I was at dinner with Mr. Brindle and Mr. Devesa in London when I received the call. They explicitly noted their concerns regarding the SEC and DOJ investigations into Mr. Gagliardi and Evo Group. Evo Group has had no dealing with BlackRock since the redemptions were processed.*
> *In the summer of 2023, the relationship between Goldman Sachs and Morgan Stanley and Evo Group also ended. Evo Group had had a long standing relationship with Goldman Sachs which had been our first prime broker when Mr. Lerch first founded the business.*
> *Following this, in August 2023, following conversations with Mr. Brindle and me, Mr. Lerch made the decision to shut down the EARF due to the redemptions made by investors and the termination of the administration agreement and the prime brokerage agreement with Morgan Stanley. We returned all outside capital to investors at the end of September 2023. This was effectively the end of the Evo Group's external fund management business.*"

257. Mr. Lerch's evidence in his second witness statement (at paragraph 35) that the EARMF and ECM's external fund management business closed because of the SEC/DOJ investigations was challenged in cross-examination:[59]

> "*Q. In due course, investors redeemed their funds and eventually the fund closed down and re-established itself -- the Evo Fund as part of -- sorry, the defendant re-established itself as a family office rather than as an institutional investor; that's correct, isn't it?*
> *A. Yes, that is correct.*
> *Q. That's in large part driven by the fact that there were redemptions made by investors?*
> *A. Well, I think we couldn't raise any new money because of this SEC/DOJ investigation. There was a disclosure matter. It was in the front of every investor's mind, and that impaired our ability to raise more capital; it froze*

[59] Day9/25/9 – 26/12.

> *some of the capital that was coming into the strategy, created some redemptions over time, but the redemptions eventually happened, yes.*
> *Q. You say it was related to the investigation, but that's an assertion, isn't it; there's no evidence of that?*
> *A. I think it was pretty clear to the entire planet that there was a serious block trading investigation, and that from an investment disclosure perspective, we were -- Mr Gagliardi's activities at Evo and before were being scrutinised. So that is a very difficult situation to be in as a manager.*
> *Q. Yes, but it's not the case that every single block trading strategy or institution that was connected with it closed down, Mr Lerch, is it?*
> *A. Well, I don't really sit down and track every single fund. I do believe there were funds that had a similar situation to Evo, in terms of turning into a family office.*"

258. There was very limited evidence (particularly documentary evidence) as to any reputational damage to ECM before the court and nor was any such case particularised in the Re-Amended Defence and Counterclaim. But in particular, ECM failed to establish a case at trial, based upon any reliable evidence (i) as to any damage to its reputation *at the time when Mr. Lerch exercised his discretion*, or (ii) which was caused by Mr. Gagliardi. The very limited evidential material which was before the court accordingly made it difficult to draw any firm conclusions as to (a) the extent of that reputational damage and (b) its cause. I find that the most that can be said on the evidence before the court is that whilst there was a market-wide block trading investigation underway into all of the main players in the industry, which included ECM, this understandably made investors anxious about investing in block trading generally. That anxiety was compounded by the fact that there was generally a downturn in the relevant market at around this time.

(k) Events at ECM after Mr. Gagliardi's departure

259. On 2 May 2022, Mr. Redniss wrote to Mr. Lerch to seek payment of Mr. Gagliardi's Discretionary Bonus. In his letter he set out why Mr. Gagliardi was entitled to a discretionary bonus in excess of US$7.5 million. Mr. Redniss explained:

> "*The EARMF earned $49,999,030 in net income after incentive fees, of which almost 100% was attributed to Gagliardi's individual performance. Based on the examples in Gagliardi's Agreement, the target range for his Discretionary Bonus was 10%-15% of this amount, or approximately $5 million to $7.5 million. Given Gagliardi's revenue and related contributions, ECM had no discretion not to pay him at the top of this range.*"

260. On 4 May 2022, Mr. Zeisler responded robustly on behalf of ECM, stating that this request was "*utterly meritless*", and "*at the risk of stating the obvious, the contract your client signed gave ECM the discretion to pay, or not to pay, a Discretionary Bonus*".

261. This was the first time that this case had been articulated by ECM and relayed to Mr. Gagliardi or his lawyer.

262. Separately, it is interesting to note that the documentary record at this time shows that it was not only Mr. Gagliardi who from time to time breached risk limits which Mr. Lerch was asked to approve retrospectively. On 24 June 2022, Mr. Toresco sent a WhatsApp message to Mr. Lerch, in which he said: "*Can you send a [response] to the L2*[60] *risk breach and say you spoke to me and approve. PD gave me approval so I went over but he said I shouldn't have without your pre approval. … I need you to document on email.*" To which Mr. Lerch responded almost immediately after, "*Done*". This affords a good example of Mr. Lerch's relaxed approach to approving a trade in breach of Level 2 risk limits after the fact.

263. On 23 June 2022 Mr. Devesa expressed considerable anger and frustration by reason of the fact that Mr. Toresco had exceeded a risk limit and had not pre-approved the trade with either Mr. Devesa himself or Mr. Lerch by way of the notification procedure. Mr. Devesa sent a WhatsApp message to Ms. Yamamoto in the following terms:

> "*i am pissed off with this breach, because that means that for the next year or 2 years, when regulators ask "have limits been breached", you always have to go and get those specific days and show what you did etc.. so unnecessary. they have been using 20% of limits for 6M, and they start getting some risk (long delta), and i have alert levels where if you breach its still ok, and we did that last week, and we have been very clear about fact that the next trigger needs pre-approval, but they don't do it.*"

This is reminiscent of Mr. Devesa's complaints about Mr. Gagliardi's trading from time to time.

264. On 19 August 2022, Mr. Tsai (on behalf of ECM) completed an annual investment questionnaire which ECM had received from one of ECM's investors. In response to question 7, which asked: "*Please provide an update of any regulatory visits or communication in the past 12 months. Highlight any matters raised by the regulator(s)*

[60] Level 2.

(where applicable) and what actions were taken to resolve these issues". ECM acknowledged that they had received a subpoena in January 2022 from the SEC which requested trading information and other materials related to block trades conducted for certain client accounts, which they supplied, and after which there had been no further written communication from the SEC. Mr. Tsai confirmed that "*After conducting an internal examination, we do not believe there has been any wrongdoing committed by the firm or its personnel.*"

265. In August 2022, these proceedings were commenced by Mr. Gagliardi in England. ECM in turn commenced proceedings in New York on 9 November 2022. At that time, it became public knowledge as a result of ECM's own New York proceedings that Mr. Gagliardi and ECM were both the subject of the relevant DOJ subpoenas. Indeed, ECM made an allegation in its New York proceedings that Mr. Gagliardi had violated US securities law. It was suggested to Mr. Lerch in cross-examination that initiating proceedings in New York in this way and in referring to the subpoena resulted in further press attention, and Mr. Lerch inevitably accepted: "*I think it may have*", and "*Likely, yes*"[61].

266. On 21 November 2022, Mr. Chisholm advised Mr. Gagliardi, through his lawyer Mr. Fischer, that ECM was going to stop paying his legal fees. On 8 March 2023, a letter confirming the decision to stop paying Mr. Gagliardi's legal fees was sent to Mr. Gagliardi by Mr. Chisholm "*in light of the UK filing and you and your counsel's failure to cooperate with ECM*". Mr. Gagliardi denied that he failed to cooperate; he was sure that it was his decision to commence these legal proceedings which led to the decision on ECM's part not to continue funding Mr. Gagliardi's legal costs.

267. In the summer of 2023, Goldman Sachs and Morgan Stanley ended their relationships with ECM. These were the EARMF's fund administrators and prime brokers at the time. Morgan Stanley stayed in place as administrators while ECM returned the EARMF capital to investors. It was sometime in late June 2023 that BlackRock submitted its redemption request in respect of their investment in EARMF. Mr. Lerch in his second witness statement at paragraph 33.2(g) said that Mr. Gagliardi's "*history had a negative effect on our efforts to raise capital in that BlackRock did not want to invest with his trading for us*". I do not accept this evidence. Indeed, as Mr. Chisholm recorded in his email exchange

[61] Day5/147/24 and Day5/149/20.

with Mr. Lerch on 10 March 2022, he had already communicated to Mr. Matriotti of BlackRock that ECM's internal investigation had revealed no wrongdoing on Mr. Gagliardi's part, that Mr. Matriotti "*proposed a re-visit in June for a July investment*", and Mr. Chisholm accepted on behalf of ECM that there was "*no huge downside to waiting*".

(l) The DOJ Statement of Facts and the SEC Orders

The Wells Notice

268. On 5 July 2023, a Wells Notice was sent by the SEC to Mr. Gagliardi's legal representative, Mr. Fischer. By this letter, the SEC stated that it had "*made a preliminary determination to recommend that the Commission file an enforcement action against your client, Robert Gagliardi. This proposed action would allege violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder as well as aiding and abetting those violations. The recommendation may involve a civil injunctive action and may seek remedies that include an injunction, disgorgement, pre-judgment interest, civil money penalties, and a collateral industry bar.*" In this letter, the SEC invited written submissions (known as a "Wells Submission") of up to 40 pages "*setting forth any reasons of law, policy, or fact why the proposed enforcement action should not be filed, or bringing any facts to the Commission's attention in connection with its consideration of this matter.*"

The Wells Submission

269. A Wells submission was duly prepared on behalf of Mr. Gagliardi on 31 July 2023. It referred to each of the allegations that could potentially be advanced against Mr. Gagliardi and provided detailed reasons why each would be unfounded. This is best summarised by its Preliminary Statement:

> "*It is difficult to imagine how the Staff [of the SEC] will be able to establish that Mr. Gagliardi participated in a scheme to defraud when the Staff: (1) has conceded that Mr. Gagliardi did not make and was not aware of any misrepresentations, and that there are no misrepresentations relevant to Mr. Gagliardi; (2) was unable to articulate who Mr. Gagliardi has allegedly defrauded; (3) did not explain how any purported victim was allegedly harmed; and (4) has not articulated any facts suggesting that Mr. Gagliardi engaged in the classic deceptive conduct courts have held is necessary to establish his participation in a scheme to defraud.*"

270. In short, the Wells submission made clear that Mr. Gagliardi's pre-positioning of trades was legitimate, being typical in the industry, and not predicated on the misuse of any confidential information, there being no basis to demonstrate that Mr. Gagliardi ever knew that any information conveyed to him was confidential. The submission specifically noted that Morgan Stanley's representations to its client selling shareholders about "*confidential auctions*" was not something that Mr. Gagliardi knew about. Mr. Gagliardi was not privy to the internal timelines of the banks as to when blocks which had been discussed in the public would become off limits and was entitled to rely on the banks to provide him only with (non-confidential) information that they were lawfully entitled to provide. In particular:

> "*Mr. Gagliardi did not understand that any information he received from banks was being provided to him in violation of a duty of confidentiality owed by the bank to the selling shareholder. To the contrary, the banks each had their own policies and procedures designed to ensure that they refrain from providing Mr. Gagliardi with any information about a block that was not appropriate to be shared. Mr. Gagliardi—who never had any contact with selling shareholders of blocks—reasonably and rightfully believed that if a bank spoke with him about a block without a wall-cross in place, the bank was permitted to share the information.*"

271. The Wells submission rebutted any suggestion that merely by participating in trades in respect of which Morgan Stanley, via Mr. Passi, may have breached *their* obligations to their clients, Mr. Gagliardi was somehow guilty by association. The submission specifically acknowledged that the "*Staff has informed us that this is not an insider trading case*" and concludes by confirming that if the SEC filed an enforcement action, it would be contested and that Mr. Gagliardi "*will demonstrate that he at all times acted appropriately, transparently, and in good faith, and he certainly did not participate in a scheme to defraud anyone.*"

272. On 12 January 2024, the DOJ published a Press Release together with a Statement of Facts that had been agreed by Morgan Stanley in relation to its investigation into Morgan Stanley and Mr. Passi. The results of that enquiry were a non-prosecution agreement between Morgan Stanley and the DOJ, and a deferred prosecution agreement between Mr. Passi and the DOJ. Also on 12 January 2024 the SEC published a Press Release in relation to its charges against Morgan Stanley and Mr. Passi together with an Order

Instituting Administrative and Cease-And-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-And-Desist Order against Mr. Passi ("**the SEC Passi Order**"), and an Order Instituting Administrative and Cease-And-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-And-Desist Order against Morgan Stanley ("**the SEC Morgan Stanley Order**"). Mr. Passi and Morgan Stanley (respectively) consented to the entry of these Orders.

273. On 4 March 2024 the SEC sent a letter to Mr. Gagliardi and informed his legal representatives as follows:

> "*We have concluded the investigation as to your client, Mr. Robert Gagliardi. Based on the information we have as of this date, we do not intend to recommend an enforcement action by the Commission against Mr. Gagliardi. We are providing this notice under the guidelines set out in the final paragraph of Securities Act Release No. 5310, which states in part that the notice "must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation.*"
> (emphasis added)

274. Mr. Gagliardi was never charged with any offence by the DOJ.

275. ECM received a materially identical letter from the SEC on 24 May 2024.

LEGAL ANALYSIS

276. In the light of my detailed factual findings set out above, I turn now to analyse the issues which fall for determination in this case.

277. As explained above, Mr. Gagliardi entered into a contract of employment with ECM on 28 April 2021 and started trading the same day.

(a) Express terms of the employment contract

278. The relevant express terms of Mr. Gagliardi's employment contract are as follows.

> "*[ECM] ("the Company") is pleased to confirm to you an Offer of Employment. Your title will be "Partner/US Portfolio Manager". You will report to Michael Lerch.*
> *Your employment will be in the Company's Crystal Bay, Nevada office although you may work remotely from the location of your choosing as*

approved by Michael Lerch. Your employment will commence on a date mutually agreeable to you and the Company.

Your annual salary will be equal to the greater of: (i) 10% of the management fee (the "Management Fee") collected by the Company and its affiliates in their capacity as the investment managers of Evo Absolute Return Master Fund (the "Business") or (ii) $250,000, payable in accordance with the Company's established payroll plan. Although the Management Fee accrues on a monthly basis, it is collected by the Company following each quarter-end. By way of example, if the Management Fee collected by the Company following a quarter end is $2,500,000 million ($10,000,000 annualized), your annual salary will be $1,000,000. Your salary will be recalculated on a quarterly basis using the preceding methodology.

You will also be entitled to receive a one-time signing bonus in the amount of $625,000, payable on the first regular payroll date following commencement of your employment.

In addition you will be entitled to 17% of the aggregate gross income generated from "New Issues" (FINRA Rule 5130 and 5131) derived in the United States and Europe in the Business ("New Issue Bonus"). If for example the Business generated $10,000,000 in aggregate gross income from New Issues derived in the United States and Europe in a calendar year, your New Issue Bonus would be $1.7 million. This New Issue Bonus will be paid annually within thirty (30) days of December 31st, subject to the conditions set forth herein.

For each calendar year, provided you are an employee in good standing on each fiscal-year-end bonus payday, you may receive a discretionary bonus based on your individual performance and the Profit generated from the Business (the "Discretionary Bonus"). "Profit" refers to the profit to the Company [the Defendant] and its affiliates attributable to the Business, net of all expenses including but not limited to overhead, operating, administrative, legal, compliance, and accounting expenses allocable to the Business, salaries and benefits of employees supporting the Business, and fund expenses borne by the Company and its affiliates, such as expenses related to investments and hedging, research, market data and Bloomberg terminal fees, reasonable and documented travel expenses, legal, accounting, taxes, external valuation and audit expenses, brokerage commissions, continuing offering and operating expenses (including, without limitation, administrative fees), and extraordinary expenses, such as any litigation costs. The target range of the Discretionary Bonus will be 10%-15% of such Profit, but will be purely discretionary in order to reflect the Company's assessment of your revenue contributions. For further

clarity, if the Business generates a Profit of $10,000,000 in a year, the target range of your Discretionary Bonus would be $1,000,000 to $1,500,000[62].

For the avoidance of any doubt, the New Issue Bonus and Discretionary Bonus payable to you in 2022 for your contributions in 2021 will be based on aggregate gross income generated from New Issues and Profit, respectively, produced after the date you commenced employment with the Company. If you are not employed by the Company at the time either bonus would typically be paid in any year, unless you were terminated for Cause, the Company will (a) pay you a pro-rated portion of the New Issue Bonus, adjusted to reflect the date on which your employment ceased, and (b) consider paying a similarly pro-rated Discretionary Bonus to you. Such pro-rated bonuses would be paid within a month following the cessation of your employment[63].

The term "Cause" refers to: (i) the commission of any act of fraud, embezzlement, dishonesty, gross negligence, or other misconduct; (ii) any wilful failure or refusal to perform your duties to the Company, failure to follow company policies as set forth in writing from time to time, or failure to follow the legal directives of the Company;(iii) misappropriation of any material assets of the Company;(iv) indictment for any felony, whether of the United States or any state thereof or any similar foreign law to which you may be subject; (v) use of alcohol or drugs to the extent it interferes with the performance of your duties; (vi) wilful unauthorised use or disclosure of any proprietary information or trade secrets of the Company or its affiliates; (vii) conduct which, in the Company's determination, is a material violation of your fiduciary obligations to the company; or (viii) intentional material damage to any property of the Company.

…

Your employment with the Company will be "at will" meaning that either you or the Company will be entitled to terminate the employment at any time for any reason, with or without cause. Any contrary representations which may have been made to you are superseded by this offer. This is the full and complete agreement between you and the company on this term. Although your job duties, title, compensation and benefits, as well as the Company's personnel policies and procedures, may change from time to time, the "at will" nature of your employment may only be changed in an express writing signed by you and approved by the Company's Manager.

…

This letter will be governed by and construed in accordance with the laws of the state of Delaware without giving effect to its principles of conflicts of law. This letter constitutes the entire agreement and supersedes all prior

---

62 I shall call this clause the "*Discretionary Bonus clause*".

63 I shall call this clause the "*pro-rata clause*".

> *agreements and understandings, both oral and written, among the parties with respect to the subject matter hereof.*"

(b) Delaware law legal principles

Contractual construction

279. It can be seen that the employment contract is governed by Delaware law. It is accordingly necessary to understand Delaware law principles of contractual construction. There was a large measure of agreement between the parties as to the relevant principles.

280. The court heard expert evidence on Delaware law only from Mr. Samuel Hirzel, a Delaware corporate and commercial litigator, who was called by Mr. Gagliardi. His evidence was clear and persuasive. ECM adduced written expert evidence from their own expert, Mr. Matthew Boyer, but in the end did not call him to give oral evidence, being content to accept the evidence of Mr. Hirzel subject only to Mr. Downes KC testing certain matters in cross-examination of him.

281. The parties are agreed on the following principles of Delaware law[64].

282. As to contractual interpretation[65], Delaware law adheres to the objective theory of contracts. The court will give priority to the party's intentions as they are reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. The court will accordingly enforce the plain meaning of clear and unambiguous language. Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language.

283. During his oral closing submissions, Mr. Legg appeared at one point to suggest that extrinsic evidence could be considered by the court even if there is no ambiguity by way

---

64 I shall advert later in this judgment to the Delaware law principles which pertain to equitable, promissory and quasi estoppel.

65 These principles of contractual interpretation are discussed in particular in *Salamone v Gorman*, 106, A.3d 354, 367-68, 374-75 (Del. 2014); *GMG Cap Invs. LLC v Athenian Venture Partners I, LP*, 36 A.3d 776, 779-80 (Del 201s) and *Lorillard Tobacco v AM Legacy Found*, 903 A.2d 728, 739-41 (Del 2006).

of factual background or factual matrix evidence[66]. Thus, in paragraph 82 of Mr. Gagliardi's written closing submissions it is stated as follows:

> "*Whilst Delaware law does not use the same language of "factual matrix" as English law, it is a necessary corollary of ascertaining the common meaning of the contract from the perspective of the reasonable person in the position of either party that this includes the objectively ascertainable factual matrix.*"

284. I do not consider that to be correct, and Mr. Hirzel did not suggest it to be the case in his written and oral evidence. In oral closing submissions Mr. Legg drew back from this submission, stating only that the "*commercial context*" of the contract may be considered[67] and that he did not intend to depart from the proposition that the court "*can only look at the four corners of the contract unless there is an ambiguity*"[68].

285. I consider that this point is put beyond doubt in *Town of Cheswold v Cent. Del. Bus. Park,* 188 A.3d 810, 820 (Del 2018), where the Supreme Court of Delaware stated, in a passage cited by Mr. Hirzel himself:

> "*While we have recognized that contracts should be "read in full and situated in the commercial context between the parties," the background facts cannot be used to alter the language chosen by the parties within the four corners of their agreement. It is only when an ambiguity exists that the court should resort to extrinsic evidence to discern the parties' intent. Contractual language "is not rendered ambiguous simply because the parties in litigation differ concerning its meaning." "Where no ambiguity exists, the contract will be interpreted according to the 'ordinary and usual meaning' of its terms.*"
> (emphasis added)

286. Thus, it is only where the plain meaning of the contract is susceptible to more than one reasonable interpretation, that the courts may then consider extrinsic evidence to resolve the ambiguity. However, a contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, an ambiguity exists when the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings.

---

66 As is the case under English law, applying *ICS v West Bromwich* [1997] UKHL 28.
67 Day12/142/1-4.
68 Day12/143/11 – 144/18.

287. Where a contract *is* ambiguous, the interpreting court must look beyond the language of the contract to ascertain the parties' intentions. The standard for interpreting ambiguous contracts is well settled. If the contract is ambiguous, a court will apply the parol evidence rule and consider all admissible evidence relating to the objective circumstances surrounding the creation of the contract. Such extrinsic evidence may include overt statements and acts of the parties, the business context, prior dealings between the parties and business custom and usage in the industry. After examining the relevant extrinsic evidence, a court may conclude that, given the extrinsic evidence, only one meaning is objectively reasonable in the circumstances of the negotiation.

288. In interpreting an ambiguous contract, a Delaware Court may even consider evidence of *post-contractual conduct* to the extent it helps demonstrate what the parties intended at the time of contracting, including internal discussions, communications with the counterparty, and continued performance[69]. So "*when the terms of an agreement are ambiguous, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement*".[70] The extrinsic evidence must speak to the intent of *all* parties to a contract, failing which it provides an incomplete guide with which to interpret contractual language[71].

Implied covenant of Good Faith and Fair Dealing

289. The parties agree that into every employment contract subject to Delaware law there is to be implied a Covenant of Good Faith and Fair Dealing ("**the Good Faith and Fair Dealing Covenant**"). This implied covenant requires a party to a contract to refrain from arbitrary or unreasonable conduct that has the effect of preventing the other party from receiving the fruits of the bargain. It is fact-specific and "*turns on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally. When applied to an exercise of discretion, this means that the exercise of the discretionary authority must fall within the range of what the parties would have agreed upon during their original negotiations had they thought to address the issue*".[72]

290. The implied covenant seeks to enforce the parties' contractual bargain by implying only those contractual terms that the parties would have agreed to during their original

69 *Sunline Com. Carriers, Inc. v CITGO Petro. Corp.*, 206 A.3d 836, 849–51 (Del. 2019).
70 *PJT Hldgs., LLC v Costanzo,* A.3d, 2025 WL 1417531, at *10 (Del. Ch. May 15, 2025).
71 *SI Mgmt LP v Wininger*, 707 A. 2d 37, 43 (Del 1998).
72 *Dura Medic*, 333 A.3d at 265

negotiations if they had thought to address them. The courts utilise the implied covenant to infer contractual terms "*to handle developments or contractual gaps that the asserting party pleads neither party anticipated*", and the courts will invoke the implied covenant to imply contractual terms when necessary to protect the reasonable expectations of the parties.[73] In *Oxbow Carbon & Minerals Inc v Crestview-Oxbow Acquisition LLC* 202, A 3d 482, 506-7 (Del. 2019) it was made clear that these must be "*unanticipated developments*", as the implied covenant is "*not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to the contract*."

291. Moreover, the court will only find an act to be a breach of the Good Faith and Fair Dealing Covenant when it is clear that the parties would have agreed to proscribe the relevant act had they thought to negotiate with respect to that matter: *ibid*, paragraph 1.2.2 and Mr. Hirzel's oral evidence[74].

292. The term 'good faith' in the context of the Good Faith and Fair Dealing Covenant is referable to the scope, purpose and terms of the contract in question. The covenant, which is case specific, requires more than just literal compliance with the contract. It also ensures that the parties deal honestly and fairly with each other when addressing gaps in their agreements. The court's goal is to preserve the economic expectations of the parties: *ibid*, paragraph 1.3.2; Experts' Joint Report paragraph 1.3.2.1 and see *Baldwin v New Wood Res., LLC*, 283 A.3d 1099 (Del 2022) at 1116-18.

Damages

293. The parties are agreed upon the approach of the Delaware Court to the question of damages for breach of contract, as summarised by Mr. Hirzel in paragraph 1.1 of his first report:

    (i) damages for breach of contract are determined by the reasonable expectations of the parties before the breach, and they are measured by the amount of money that would put the promisee in the position they would have been in had the promisor performed the contract; and

---

73 *Baldwin v New Wood Res LLC*, 283 A.3d 1099 (del. 2022), quoting *Dieckman v Regency GP LP*, 155 A.3d 358 (Del. 2017).

74 Day10/57/11.

(ii) pre-judgment interest is awarded as a matter of right, calculated from the date payment was due, and if there is no contractual rate, the usual rate is 5% over the Federal Reserve discount rate.

294. Mr. Hirzel further adds that "*[i]n addition to showing the existence of damages, the plaintiff must show 'that the damages flowed from the defendant's violation of the contract.' The court evaluates but-for causation by considering 'how the positions of the parties would differ in the 'but-for' world—i.e., the hypothetical world that would exist if the [a]greement had been fully performed*": *In re Dura Medic Hldgs., Inc. Consol. Litig.*, 333 A.3d 227, 255–56 (Del. Ch. 2025).

Implied term of Trust and Confidence

295. The parties also agree, and I accept, that the contract, being an employment contract, additionally included an implied term of trust and confidence ("**the Trust and Confidence Term**") further to which ECM would not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with Mr. Gagliardi. ECM maintains that a like duty applied to Mr. Gagliardi and I did not understand Mr. Legg to take issue with that.

296. As to this:

a. The implied duty of trust and confidence requires two things. First, that the person exercising a contractual discretion (such as that present in this case) exercises it in good faith in accordance with its contractual purpose and not irrationally, arbitrarily or capriciously (this might be called "outcome rationality"). Second, the decision maker must take account of matters which it ought to take into account and must not take into account matters which it ought not to take into account (this might be called "process rationality"): *Braganza v BP Shipping Ltd* [2015] UKSC 17. See also: *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The "Product Star") (No 2)* [1993] 1 Lloyd's Rep 397 per Leggatt LJ at p.404; *Clark v Nomura International plc* [2000] IRLR 766 at [40]; *Commerzbank v Keen* [2007] IRLR 132; and *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd* [2008] Bus LR 1304.

b. In determining whether there has been a breach of this obligation the court must not substitute its own view (on a "reasonableness" basis) for that of the decision-maker: *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd* [2008] Bus LR 1304 at [66]; *Commerzbank* at [39]-[41]; and *IBM United Kingdom Holdings Ltd and another v Dalgleish and others* [2018] IRLR 4 at [45]. As Lord Sumption stated in *Hayes v Willoughby* [2013] UKSC 17 at [14] (albeit in a different context):

"

Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions. ... A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

c. Thus, whilst it is for the court to determine whether a particular matter ought rationally to have been included in or excluded from the decision making; it is for the decision maker alone to determine what weight should be given to such factors[75], see *Braganza* and *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 764G-H per Lord Keith.

d. Furthermore, the court does not expect a decision maker to exercise the same degree of "*expert, professional and almost microscopic investigation of the problems, both factual and legal, that is demanded of a suit in a court of law*"; nor would "*some slight misdirection*" matter, at least if it were clear that, had the legal position been properly appreciated, the decision would have been the same: *Braganza* at [31].

e. The duty of trust and confidence cannot override express terms, such as the eligibility or ineligibility of an employee for a particular benefit: *Commerzbank v Keen* [2007] IRLR 132 at [74]-[76] (where the claim failed because the

[75] Unless the weight that the decision maker gives to the relevant factors is irrational.

claimant was not an 'employee' at the time when the bonus payment was payable).

f. Where a breach of the obligation is established, the court must place itself in the position of the decision maker and determine what conclusion the decision maker would have reached but for the breach: *Cantor Fitzgerald International v Horkulak* [2004] EWCA Civ 1287 at [51].

(c) Proper construction of the employment contract

297. In my judgment, the proper construction of the different elements of the employment contract set out in paragraph 278 above is as follows.

Individual performance: how is the Discretionary Bonus to be calculated?

298. The starting point is that for each calendar year, provided Mr. Gagliardi is an employee in good standing on the relevant fiscal year-end bonus payday, he may receive a Discretionary Bonus based on his individual performance and the Profit generated from the Business. I consider that the reference to "*individual performance*" in this context is plainly a reference to his individual revenue performance (i.e. his revenue contribution to the profit of the Business) for reasons which I shall explain. It follows that the reason why the clause provides that he "*may*" receive a Discretionary Bonus based on his individual performance and the Profit generated from the Business is explained by the fact that if the Business generates no Profit in the relevant year, or if Mr. Gagliardi contributes no revenue to the Profit of the Business in the relevant year (because, for example he worked on a different aspect of the ECM's business for a particular year; or he was on leave, or absent ill in a particular year etc), then he may not receive any Discretionary Bonus.

299. However, *if* a Profit *is* generated from the Business in the relevant year, then the parties have explained in the same clause the way in which the discretion is then to be exercised: the target range of the Discretionary Bonus will be 10-15% of that Profit, with the bonus being discretionary in order to (i.e. so as to) reflect ECM's assessment of Mr. Gagliardi's revenue contributions to the Profit generated by the Business. This is a discretionary assessment which must be exercised by ECM in good faith, in accordance with its contractual purpose (to assess the extent of Mr. Gagliardi's revenue contributions to the Profit of the Business), and not irrationally, arbitrarily or capriciously.

300. The parties then make this fact abundantly clear ("*For further clarity*") by giving a specific example in the last sentence of the Discretionary Bonus clause: if the Business generates a Profit of US$10,000,000 in a year, the target range of Mr. Gagliardi's Discretionary Bonus would be (not "might be") US$1,000,000 to US$1,500,000, depending upon the extent of his revenue contribution to the Profit of the Business.

301. That ECM is only entitled, in exercising its discretion as to what Discretionary Bonus to pay to Mr. Gagliardi, to take into account his individual revenue performance/contributions and not any other matters such as those relied upon in paragraphs 66(c)(iv) and 71(f) of the Re-Amended Defence, is further confirmed by the next clause in the contract, the pro-rata clause. That clause begins by stating "*[f]or the avoidance of any doubt, the New Issue Bonus and Discretionary Bonus payable to you in 2022 for your contributions in 2021 will be based on aggregate gross income generated from New Issues and Profit, respectively, produced after the date you commenced employment with the Company*" (emphasis added). The reference to "*contributions*" picks up on the wording in the previous clause, namely "*your revenue contributions*", and makes clear that the Discretionary Bonus for Mr. Gagliardi's financial contributions in 2021 is "*based on*" the income (i.e. revenue) generated from New Issues and the Profit. The discretion to award the bonus accordingly concerns purely a financial calculation, to be assessed within a target range of 10-15%.

302. It follows that I reject Mr. Downes KC's submission that it is "*obvious*" that the reason for the words "*purely discretionary in order to reflect the Company's assessment of your revenue contributions*" is that there may be cases where significant revenue contributions exist, but where nevertheless ECM's assessment of them (taking into account other 'individual performance' or risk factors, such as those issues referred to in paragraph 71(f) of the Re-Amended Defence) might mean that the value of those revenue contributions would be assessed to be of little value or no value at all. On the contrary, the relevant assessment concerns ECM's assessment of the extent of Mr. Galigardi's contributions to the revenue of EARMF: it is his "*individual performance*" in that sense with which the discretion is concerned.

303. Mr. Downes KC sought to rely upon *Clark v Nomura* [2020] IRLR 766 at [237] in support of his submission that "*individual performance*" included non-financial matters. I do not consider that the court's construction of the differently worded contract in that case assists

Mr. Downes KC. In *Clark v Nomura,* Burton J held that "*individual performance"* meant "*performance of his contract"*, and as such it could be wider than mere profitability. But that was because, unlike this case, other factors (corporate contribution, team working, capital usage and due regard to risk) were expressly referred to in Appendix A to the contract ("*this discretionary [bonus] element is dependent on corporate contribution, team working, capital usage and due regard to risk*") and the contract expressly provided that "*you will be eligible for payment as per Appendix A*". Despite this however, it is notable that Burton J still held that the significance of those factors (in terms of the exercise of the discretion) had to be set in the context of the requirements for, and the performance by (in the sense of profit making) the senior trader (who was referred to as a "*profit machine*"). That was his primary contractual obligation. Indeed, the wider factors which ECM had pleaded and sought to rely upon in the context of "*individual performance*" in that case were held to be irrelevant (at [36]–[37]).

304. I pause here to add that whilst I do not consider that there is any ambiguity on this point so as to permit resort to be had to extrinsic evidence, Mr. Downes KC submitted that the evidence demonstrated that "*individual performance*" went beyond the profit to be generated from Mr. Gagliardi's trading (i.e. referred to more than purely Mr. Gagliardi's financial or revenue performance). He relied upon the following features of the evidence:

    a. Mr. Gagliardi's own evidence that he was to establish a 'brand' for ECM;

    b. Mr. Gagliardi was hired to bring his relationships and business to ECM;

    c. Mr. Gagliardi's oral testimony regarding the 'intangibles' that were part of the 'individual performance' and that this was the subject of pre-contractual discussions between him and Mr. Lerch.

    d. Mr. Gagliardi accepted in cross-examination that his role was to "*build that business up.*"[76]

    e. Mr. Lerch repeatedly referenced his desire (which was not challenged) to build a business.

305. I do not find any of this persuasive. Mr. Gagliardi's evidence in these respects simply concerned some of the ways in which he said he would be able to bring about his considerable individual revenue contribution to ECM, such as by his introducing ECM to

[76] Day3/27/25 – 28/1.

his prestigious US counterparts in order that ECM could start generating profit from those contacts for itself. In other words, these were all means to an end, that end being the generating of Profit for the funds and ultimately for ECM. Accordingly, I do not consider that any of this evidence supports ECM's construction of the employment contract, nor does it detract from the plain meaning of the employment contract in any event.

306. Mr. Downes KC also argues that Mr. Gagliardi's case depends, impermissibly, on showing that the range of 10-15% was fixed and that there was no scope to go below the 10% end of the range. This, he says, may have been arguable but for the word "*target*", as "*target*" denotes an aspirational goal and not a fixed entitlement. The Merriam Webster[77] definition of "*target*" is: "*a mark to shoot at*" or "*a goal to be achieved*". Accordingly, Mr. Downes KC suggests that the only way to read this provision as stipulating a fixed range is to do violence to the language used by the parties by deleting the word 'target' from the provision.

307. I do not accept this submission. The last two sentences of the Discretionary Bonus clause make clear that the Discretionary Bonus will be awarded within the target range so as to reflect ECM's assessment of Mr. Gagliardi's revenue contributions, with a worked example to confirm this fact. Had ECM wanted to retain an absolute discretion to award Mr. Gagliardi nothing despite his making revenue contributions to the Business which generated Profit (as here), it would make no sense to refer to a target range of 10-15% of the Profit of the Business.

308. Of course, if the Business made no Profit, there would be no bonus payable to Mr. Gagliardi – in that sense the "*target*" would not be hit at all. But if, as anticipated, the Business made a Profit and Mr. Gagliardi made revenue contributions to it, then his bonus would be within the range of 10-15% of the Profit, with the "*target*" being selected by ECM, depending upon the extent of Mr. Gagliardi's revenue contributions to that Profit.

309. It follows that I reject Mr. Downes KC's submission that the effect of the Discretionary Bonus clause was that ECM had a broad discretion whether to award a Discretionary Bonus or not, including a discretion to pay nothing at all.

---

[77] Delaware law expert evidence is that the courts will resort to dictionary definitions in such instances, in particular the Merriam-Webster dictionary: see *Lorrilard Tobacco v American Legacy Foundation* 903 A.2d 728 (2006).

310. I consider that the employment contract is clear in this respect; it is not ambiguous and accordingly as a matter of Delaware law it is not permissible or necessary to refer to any extrinsic evidence as an aid to construction of the contract.

Employee in good standing on each fiscal-year-end bonus payday

311. The next issue of construction concerns the proviso or condition precedent to the beginning of the Discretionary Bonus clause, namely that *"[f]or each calendar year, provided you are an employee in good standing on each fiscal-year-end bonus payday, you may receive a discretionary bonus based on your individual performance and the Profit generated from the Business (the "Discretionary Bonus")*" (emphasis added). Mr. Downes KC submits that Mr. Gagliardi was not in fact an employee on the fiscal year-end bonus payday – which for the year 2021 was, according to Mr. Brindle, 22 March 2022 for traders in the A1 share class/EARMF employed by ECM – and accordingly he has no entitlement to a Discretionary Bonus. It is common ground that Mr. Gagliardi's employment ended on 7 March 2022.

312. Further, Mr. Downes KC submits that Mr. Gagliardi was not in "*good standing*" because he was in breach of the Trust and Confidence Term in that he traded without proper authority (Defence, paragraph 24a); he was disparaging of Mr. Devesa (Defence, paragraph 40); he traded in breach of his risk limits (Defence, paragraph 40); he "*disingenuously*" downplayed the importance of having his telephone seized by US Marshals and being served with a DOJ subpoena (Defence, paragraph 47); and he failed to disclose to ECM at the start of his employment that he habitually received confidential information from Mr. Passi and he continued that relationship once he had joined ECM (Defence, paragraph 69E). ECM also relies on the substance of the matters pleaded in paragraph 69C of the Defence in this regard.

313. Mr. Downes KC further submits that it is common ground that the SEC/DOJ Investigation had a detrimental effect on Mr. Gagliardi's reputation (or standing) such that this contributed to his inability to find employment in 2022 (before this claim was started). He cannot therefore be regarded as being in "*good standing*" as at 22 March 2022 either.

314. I do not accept these submissions. I consider that the Discretionary Bonus clause has to be read together with the pro-rata clause and that the way that these two clauses operate is as follows.

315. The Discretionary Bonus clause provides that for each calendar year, provided Mr. Gagliardi is an employee in good standing on each fiscal-year-end bonus payday, he may receive a discretionary bonus. The contract anticipates that the fiscal year-end bonus payday would *post-date* the end of the calendar year (31 December) – that is apparent from the wording of the pro-rata clause: "*… the Discretionary Bonus payable to you in 2022 for your contributions in 2021…*"[78].

316. There was obviously, therefore, a prospect that Mr. Gagliardi might be employed for part, or even the whole of a calendar year but his employment might terminate *after* the calendar year ended but *before* the chosen bonus payday.

317. That situation was, however, catered for by the pro-rata clause. That provided "*for the avoidance of doubt*" that the Discretionary Bonus payable to Mr. Gagliardi in 2022 for his "*contributions in 2021 will be based on aggregate gross income generated from New Issues*[79] *and Profit, respectively, produced after the date [he] commenced employment with [ECM]*" (emphasis added): in other words, it is based upon his contributions to revenue for that part of the calendar year 2021 for which he was employed.

318. The pro-rata clause then provides that if Mr. Gagliardi is not employed by ECM at the time either the IPO Bonus or the Discretionary Bonus would typically be paid in any year (i.e. on the bonus payday), then unless he was terminated for Cause[80] (as defined in the employment contract), ECM will (a) pay him a pro-rated portion of the New Issue Bonus (or "IPO Bonus"), adjusted to reflect the date on which his employment ceased, and (b) consider paying a similarly pro-rated Discretionary Bonus to him.

319. Such pro-rated bonuses must be paid within a month following the cessation of Mr. Gagliardi's employment. ECM has no entitlement to "*wait and see*" in the case of an investigation such as that conducted by the SEC/DOJ in the present case.

320. It follows that if his employment were to be terminated during the 2021 calendar year (i.e. before 31 December 2021), then Mr. Gagliardi would in principle be entitled to a pro-rated Discretionary Bonus for that part of the 2021 calendar year that he worked for ECM.

---

78 Indeed, as a matter of fact the bonus payday chosen by ECM in previous years always post-dated the end of the calendar year (i.e. 31 December), sometimes by several months.

79 Both the IPO Bonus and the Discretionary Bonus are based upon revenue generated in *a calendar year*.

80 He was not.

321. It also follows that if Mr. Gagliardi has (as here) worked up until 31 December 2021 (i.e to the end of the calendar year, and indeed beyond) and has had his employment terminated in the following year (2022) but before the bonus payday, then under the pro-rata clause he will in principle be entitled to a pro-rated Discretionary Bonus calculated on the entire period that he worked for ECM in 2021 (i.e. up until the end of the calendar year on 31 December 2021).

322. I reject Mr. Downes KC's submission that the reference in the pro-rata clause to "*(b) consider paying a similarly pro-rated Discretionary Bonus to you*" (emphasis added) means, on its proper construction, that if Mr. Gagliardi's employment has come to an end before the bonus payday but he has made revenue contributions in the 2021 year, then ECM has an unfettered discretion as to whether to consider paying him any pro-rated Discretionary Bonus at all. Rather, "*Discretionary Bonus*" in sub-clause (b) is being used as a defined term; the reference to "*consider*" simply reflects the fact that the bonus is discretionary in that it is only if Mr. Gagliardi has made a revenue contribution and the Business has generated a Profit that Mr. Gagliardi becomes entitled to a Discretionary Bonus, to be calculated in accordance with the last two sentences of the Discretionary Bonus clause.

323. ECM's construction of this clause is also wholly uncommercial: it would allow ECM to refuse to pay Mr. Gagliardi any Discretionary Bonus despite the fact that he worked up to 31 December 2021 and generated substantial amounts of revenue for the EARMF resulting in substantial Profit generated from the Business, which is precisely what the pro-rata clause expressly focusses upon.

324. Finally on this aspect of construction, I must deal with Mr. Downes KC's submission that it is not open to Mr. Gagliardi to rely upon the pro-rata clause because he has not pleaded it. I reject that submission. In paragraph 27(c) of the Amended Reply, Mr. Gagliardi pleads as follows:

> "*Even if, contrary to the Claimant's principal case, he was no longer an employee as at the relevant date, he was not dismissed for Cause. The Defendant was therefore required to consider paying him a Discretionary Bonus, and such consideration was subject to the constraints set out in paragraphs 13 and 14 of the PoC*[81] *and could only lawfully be exercised as set out in the PoC*".

[81] viz, the Good Faith and Fair Dealing Covenant and the implied Trust and Confidence Term.

325. That is clearly a reference to, and reliance upon, the pro-rata clause.

326. It follows that I reject ECM's case that Mr. Gagliardi is not entitled to any Discretionary Bonus because he was not an employee on the fiscal year-end bonus payday. Moreover, I consider that the employment contract is clear in this respect; it is not ambiguous and accordingly as a matter of Delaware law it is not permissible or necessary to refer to any extrinsic evidence as an aid to construction of the contract.

327. Further, it is notable that the pro-rata clause contains no reference to Mr. Gagliardi needing to be an "*employee in good standing*". Instead, the pro-rata clause makes clear that the pro-rated bonus will in principle be paid "*unless you were terminated for Cause*". The term "*Cause*" is then defined in the next clause of the employment contract, and it relates to serious misconduct issues, as one would expect. If the pro-rata clause is read together with the Discretionary Bonus clause, as it should be as a matter of Delaware law so as to construe the agreement as a whole and give effect to all its provisions, then it is clear that the reference to the requirement for Mr. Gagliardi to be an employee in "*good standing*" must mean that he should not be an employee whom ECM could terminate for Cause (as defined). I again consider that the employment contract is clear in this respect; it is not ambiguous and accordingly as a matter of Delaware law it is not permissible or necessary to refer to any extrinsic evidence as an aid to construction of the contract.

328. In any event, in the present case ECM did not terminate Mr. Gagliardi's employment for cause. It simply gave him notice under the employment contract.

329. It follows that Mr. Gagliardi was entitled to a good faith consideration by ECM of whether it should pay him a Discretionary Bonus for his 2021 revenue contributions and if so in what sum (within the 10-15% range). In order to determine that question, it is necessary to address (at first, at least) further issues of contractual construction and in particular, what is meant by "*Profit*" in the Discretionary Bonus clause.

Profit: plain meaning of the contract

330. The Discretionary Bonus clause provides in particular as follows:

> "*For each calendar year, provided you are an employee in good standing on each fiscal-year-end bonus payday, you may receive a discretionary bonus based on your individual performance and the Profit generated from*

> *the Business (the "Discretionary Bonus"). "Profit" refers to the profit to the Company [the Defendant] and its affiliates attributable to the Business, net of all expenses including but not limited to overhead, operating, administrative, legal, compliance, and accounting expenses allocable to the Business, salaries and benefits of employees supporting the Business, and fund expenses borne by the Company and its affiliates, such as expenses related to investments and hedging, research, market data and Bloomberg terminal fees, reasonable and documented travel expenses, legal, accounting, taxes, external valuation and audit expenses, brokerage commissions, continuing offering and operating expenses (including, without limitation, administrative fees), and extraordinary expenses, such as any litigation costs.*"

331. The parties disagree on the meaning of "*Profit*". Mr. Gagliardi maintains that it is referring to the profit generated by the trading in the Business; ECM maintains that it is referring to the profit in the sense of the fees (performance fees and management fees) earned by the investment managers (Evo Asia and ECM).

332. I consider that the proper construction of this part of the Discretionary Bonus Clause is also clear: the Discretionary Bonus is calculated upon the "*Profit <u>generated from the Business</u>*" (being EARMF[82]). The last two sentences of the clause are consistent with that fact: if the "*<u>Business generates a Profit</u>*" in 2021 then the Discretionary Bonus will be calculated so as to reflect the revenue contributions of Mr. Gagliardi to the Business in 2021 after the commencement of his employment.

333. Consistently with this construction, the 17% IPO Bonus which is payable under the preceding clause in the employment contract is similarly based upon <u>income generated</u> from New Issues <u>in the Business</u>.

334. The Discretionary Bonus clause then provides that "*Profit*" in this context refers to the profit to ECM and Evo Asia "*attributable to the Business*" (EARMF) and nothing else – again making clear that it is the profit generated by the trading of the Business which matters. The Business does not generate fee income; it generates revenue. From that revenue EARMF is then charged fees by the investment managers – those fees are an expense to EARMF.

---

[82] I shall come back to the question of whether "*the Business*" must in this context also include the A1 share class.

335. Indeed, as Mr. Legg points out, had the parties intended "*Profit*" to refer to the management fees payable to ECM they could easily have said so: in the third paragraph of the employment contract they had no difficulty in referring to management fees in the context of Mr. Gagliardi's salary.

336. This construction is reinforced by the fact that it is fund expenses, that is expenses of EARMF, which are deducted from the trading revenue in order to arrive at the profit of EARMF. Thus, the clause reads: "*net of all expenses including but not limited to overhead, operating, administrative, legal, compliance, and accounting expenses allocable to the Business, salaries and benefits of employees supporting the Business, and fund expenses borne by the Company and its affiliates*" (emphasis added).

337. It can be seen that the expenses include both the expenses of the investment managers (such as salaries and overheads) allocable to the Business as well as the fund expenses. It follows that the investment manager fees (performance fees and management fees) have already been deducted as an expense of the EARMF before the calculation of the Profit of the Business. Accordingly, "*Profit*" cannot be a reference to those fees as they have already been taken into account as an expense of the EARMF.

338. Moreover, it makes commercial sense that this is the formula by which Mr. Gagliardi's Discretionary Bonus is calculated: he is being rewarded in respect of the revenue, net of expenses, which he generates for EARMF.

339. Accordingly, I consider that this is the plain meaning of the clause when it is construed in the light of the surrounding wording of the contract and it is not necessary to resort extrinsic evidence in order properly to construe the contract.

"Profit" – extrinsic evidence

340. But in any event, even if the wording of the Discretionary Bonus clause in this respect were deemed to be ambiguous (in the sense that the definition of "*Profit*" is susceptible to more than one reasonable interpretation), such that all admissible evidence relating to the objective circumstances surrounding the creation of the contract as well as post-contractual conduct can be considered as a matter of Delaware law, then that evidence also leads to the clear conclusion that the foregoing is clearly the correct construction for the reasons which follow.

341. First, so far as prior dealings between the parties are concerned, as explained in the Factual Analysis above, the second draft of the employment contract which was amended by Mr. Tsai and sent by Mr. Lerch to Mr. Gagliardi on 22 April 2021 contained the following wording in the Discretionary Bonus clause:

> "*For each calendar year, provided you are an employee in good standing on each fiscal year-end bonus payday, you may receive a discretionary bonus based on your individual performance and the Company's overall performance ("Discretionary Bonus"). The target range of the Discretionary Bonus will be 10-15% of profit of your revenue contributions but will be purely discretionary.*"
> (emphasis added)

342. Mr. Gagliardi's lawyer at the time, Mr. Redniss, emailed Mr. Gagliardi on 26 April 2021 with five comments on the draft, stating "*feel free to forward this email on…*", which Mr. Gagliardi duly did on the same day, forwarding it to Mr. Lerch and Mr. Chisholm. In particular, Mr. Redniss said as follows:

> "*1. …*
> *2. …*
> *3. The 17% payout should clarify that [it] applies to gross proceeds (i.e. no deductions) from the business you generate, with examples/scenarios showing what you would actually receive.*
> *4. I'm not clear on the discretionary bonus. "Profit" needs to be defined. Again I suggest a simple example.*
> *5. By far the most important point is that the letter needs to clarify that if your employment terminates for any reason, that you still get paid for the business you have generated*" (emphasis added).

343. It can be seen that Mr. Redniss was keen to ensure, as indeed occurred, that Mr. Gagliardi's remuneration was calculated by being based upon the business that he generated, which was business that he was generating for EARMF.

344. In particular:

(1) Point 3 led to the wording of the IPO Bonus clause.

(2) Point 4 led to the inclusion of the last sentence in the Discretionary Bonus clause; and

(3) Point 5 led to the inclusion of the pro-rata clause.

345. It is apparent from Mr. Lerch's email of 26 April 2021 (and Mr. Lerch and Mr. Tsai accepted in cross-examination) that what then happened was that Mr. Redniss and Mr. Lerch had a telephone conversation on that same day during which Mr. Redniss made these points to Mr. Lerch, which Mr. Lerch then relayed to Mr. Tsai, asking him to amend the employment contract in order to incorporate them (as is confirmed by Mr. Lerch's email to Mr. Chisholm and Mr. Tsai on the same date).

346. Mr. Tsai then made the changes to the employment contract so as to produce the draft which came to be executed. In particular, that meant making the following changes:

> "*For each calendar year, provided you are an employee in good standing on each fiscal year-end bonus payday, you may receive a discretionary bonus based on your individual performance and the ~~Company's overall performance~~* ***Profit generated from the Business*** *(the "Discretionary Bonus"). "Profit" refers to the profit to the Company [the Defendant] and its affiliates* ***attributable to the Business****, net of all expenses including but not limited to overhead, operating, administrative, legal, compliance, and accounting expenses* ***allocable to the Business****, salaries and benefits of employees* ***supporting the Business****, and* ***fund expenses*** *borne by the Company and its affiliates, such as expenses related to investments and hedging, research, market data and Bloomberg terminal fees, reasonable and documented travel expenses, legal, accounting, taxes, external valuation and audit expenses, brokerage commissions, continuing offering and operating expenses (including, without limitation, administrative fees), and extraordinary expenses, such as any litigation costs. The target range of the Discretionary Bonus will be 10-15% of ~~profit of your revenue contributions~~ such Profit but will be purely discretionary in order to reflect the Company's assessment of your revenue contributions. For further clarity, if the Business generates a Profit of $10,000,000 in a year, the target range of your Discretionary Bonus would be $1,000,000 to $1,500,000*."
>
> (striking through and underlining is as in the original document but bold is the court's own emphasis)

347. Thus, ECM's overall performance is no longer the touchstone; rather, it is specifically the *profit generated from EARMF* which matters, consistently with point 5 of Mr. Redniss's email. On 27 April Mr. Redniss emailed Mr. Lerch to say that "*this looks good to me.*"

348. Insofar as Mr. Tsai sought to suggest in cross-examination that the inclusion of the specified fund expenses in the Discretionary Bonus clause supports the interpretation that

"*Profit*" is limited to the fees paid to the investment managers, I reject his evidence. Mr. Tsai accepted that the wording of the "*fund expenses*" was largely taken from the definition of the same in the Evo Fund's Confidential Private Offering Memorandum dated January 2021, to which he was taken in cross-examination[83].

349. It was necessary to include these fund expenses in the definition, together with the expenses typically incurred by the investment managers (such as salaries and overheads), because all of these expenses would have to be deducted from the revenue generated by EARMF in order to calculate any profit generated by it, so as to enable the calculation of the Discretionary Bonus.

350. Secondly, and consistently with this, Mr. Brindle accepted in cross-examination that ECM's suggestion that the "*profit to the Company and its affiliates attributable to the Business*" was understood to refer to the profit earned by ECM and Evo Asia in their capacity as investment managers of the Relevant Funds – which he agreed he had been asked by ECM's solicitors *to assume* to be the case – was <u>not</u> the approach taken by ECM at the time discretionary bonuses were being discussed by it in late 2021/early 2022[84]. To calculate the discretionary bonuses, Mr. Brindle accepted that "*Mr. Lerch generally looks at the profit generated by the fund itself*", and he agreed that these were the figures that Mr. Gagliardi was interested in as well.[85] It follows that this post-contractual conduct supports Mr. Gagliardi's interpretation of "*Profit*" as well.

351. Further still, considering the business context of the employment contract, I accept Mr. Legg and Ms. Schumacher's submission in paragraph 131 of their written closing submissions that if ECM's understanding of "*Profit*" were adopted, namely that it means the *fees* paid to the investment managers of EARMF, that has the effect of radically reducing the yardstick against which Mr. Gagliardi's bonus is assessed. Rather than being reflective of the direct impact of his trading strategy, his incentivisation is instead pitched against an *indirect* measure of his success, being the percentage fee set by the investment manager, fixed before his employment began and pegged at an industry standard level. That is a commercially absurd construction.

---

83 Day8/128/3-6.
84 Day8/102/18 – 103/7.
85 Day/8/102/20 – 103/19.

352. Indeed, if ECM's construction were correct, Mr. Gagliardi would be agreeing to a Discretionary Bonus of 10-15% of 20%, being just 2-3% of EARMF's profit. That is highly unlikely, particularly in view of the fact that, as is apparent from the factual background to the dispute set out above, Mr. Lerch was extremely keen to persuade Mr. Gagliardi to join ECM on an attractive remuneration package in order to develop what he anticipated would become ECM's highly lucrative US block trading strategy. This conclusion is supported by the internal ECM WhatsApp exchanges of 9 April 2021 in which Mr. Gagliardi's likely remuneration package was being discussed, shortly before Mr. Gagliardi agreed to join ECM:

> "*[4/9/21, 7:24:20 Lerch Whatsapp: So meeting with MS ECM was extremely straight forward. Very validating of Gags. That's MS*[86] *and GS*[87] *that put him in the top 5 people they deal with. Noted that so long as we have a good relationship with MS, the shows follow Gags. Since we do, I'm very excited about this.*
> *[4/9/21, 7:26:51] Richard Chisholm: Excellent. Great to hear. What kind of package is he expecting? We have 50 percent of performance fee going to Rob. Do we revisit that so he gets 50 percent of his pnl? Does Gags expect a fixed percentage of performance fee?*
> *[4/9/21, 7:27:45] Lerch Whatsapp: We are going to have to get creative.*"

353. I agree with Mr. Legg that it is plain from these exchanges that ECM understood that a very substantial portion of the trading profit of EARMF would need to be paid to Mr. Gagliardi in order to secure his services. The concern was that so much of the profit – 50% of the performance fee – had already been contractually committed to Mr. Toresco.

354. This is also supported by point 6 of the WhatsApp exchange between Mr. Lerch and Mr. Gagliardi on 13 April 2021, with Mr. Lerch "*recapping*" the framework they had been discussing:

> 1. *Gags joins Evo as Partner – Head of US/Europe*
> 2. *Reports to Lerch*
> 3. *Integrated into the team*
> 4. *Base salary 250k. salary kicker of 5% of [management fees] the fund takes in*
> 5. *17% of new issue PL in US and Europe*
> 6. *Discretionary bonus on any other trading activity. Target range 10-15% of pl*

[86] Morgan Stanley.
[87] Goldman Sachs.

> *7. Evo pays all other people traders back office etc. all of the above goes to gags.*

355. Each of points 4, 5 and 6 were essential elements of Mr. Gagliardi's required remuneration package. I find as a fact that Mr. Lerch knew that Mr. Gagliardi would only enter into an employment contract with ECM if all of these elements of the remuneration package were present and the entire remuneration package would be payable upon *any* trading activity once he began his employment at ECM[88]. It is clear from point 6 that Mr. Lerch was telling Mr. Gagliardi that his discretionary bonus would be based upon all trading activity of the relevant fund other than his salary and IPO Bonus. Mr. Lerch accepted in cross examination that the target range of "*10-15% pl*" equated, financially, to 50-75% of the 20% performance fee.

356. I consider that the evidence clearly demonstrates that the IPO bonus alone was not going to be sufficient to incentivise Mr. Gagliardi and that he plainly would not accept an arrangement whereby he could be awarded a discretionary bonus of nil despite generating significant revenue for EARMF. I accordingly reject Mr. Lerch's evidence to that effect. Indeed, as explained above, Mr. Lerch was only able, personally, to benefit from Mr. Gagliardi's block trading (not from IPOs) and so he was very keen to ensure that Mr. Gagliardi made profit on non-IPO trading.

357. In short, even if resort is had to the extrinsic evidence, the dealings between the parties prior to the conclusion of the contract, the business context, the ECM internal discussions and the post-contractual conduct all support Mr. Gagliardi's construction of "*Profit*" in any event.

"The Business"

358. The last disputed element of the proper construction of the Discretionary Bonus clause concerns the meaning of "*the Business*". The third paragraph of the Discretionary Bonus clause reads follows:

> "*Your annual salary will be equal to the greater of: (i) 10% of the management fee (the "Management Fee") collected by the Company and its affiliates in their capacity as the investment managers of Evo Absolute Return Master Fund (the "Business")*"…

[88] I also accept that that was Mr. Gagliardi's understanding: see the last sentence of paragraph 5.6 of Mr. Gagliardi's fourth witness statement.

359. This definition of "*Business*" is then picked up in several places in the Discretionary Bonus clause. In particular, it provides that Mr. Gagliardi may receive a discretionary bonus based on his individual performance and the Profit generated from the Business, with "*Profit*" referring to the profit to ECM and its affiliates attributable to the Business, net of all expenses.

360. The "*Business*" is expressly defined as being the EARMF. Mr. Legg and Ms. Schumacher nonetheless submitted that the wording "*Profit generated from the Business*" is ambiguous and that:[89]

> "*It is obvious that "Business" did not mean, and the reasonable observers in the position of the parties would not think it meant, [EARMF] at the time the Contract was agreed. The paragraph in the Contract which immediately follows the DBC states that the both the New Issue and Discretionary Bonus "payable to you in 2022 for your contributions in 2021 will be based on aggregate gross income generated from New Issues and Profit, respectively produced after the date you commenced employment with the Company". Mr Gagliardi commenced his employment on 28 April 2021 and commenced trading for the A1 Share Class. He was paid the IPO Bonus, ultimately, on the IPO profit he produced for both funds, namely the A1 Share Class and the EARMF, from the date of commencement of his employment with ECM. There is no basis, then, to contend that "Business" in the DBC, limits the Profit solely to the EARF.*"

361. The difficulty in the present case arises because at the time when the employment contract was concluded, the "*Evo Absolute Return Master Fund*" was not operational. Instead, trading was conducted initially by Mr. Gagliardi via the A1 share class. It is the case that ECM expected there to be a "*short run-in period*" (as ECM puts it) before the EARMF became operational[90], but in fact it took two months longer than ECM had anticipated, as the EARMF did not become operational until 1 August 2021. The wording of the employment contract, particularly the pro-rata clause, assumes Mr. Gagliardi may start generating Profit immediately after his employment commences. And that is what

89 Written closing submissions, at paragraph 121.

90 Mr. Brindle's WhatsApp message to Mr. Lerch on 9 April 2021 referred to the fact that: "*we aim to move A1 to EARF on 1 June*". Mr. Lerch subsequently informed Mr. Gagliardi, after he had entered into the employment contract in a WhatsApp exchange on 10 May 2021 that "*we are due to start the new fund on June 1*."

happened, although between 28 April and 1 August 2021 the AUM were held within the A1 share class and that was used as the trading vehicle.

362. Mr. Legg and Ms. Schumacher accordingly submit that in these circumstances "*Profit generated from the "Business""* is ambiguous and that, taking account of all admissible evidence relating to the objective circumstances surrounding the creation of the contract, as well as the relevant post-contractual conduct of the parties, only one meaning is objectively reasonable: the "*Evo Absolute Return Master Fund*" must mean the AUM within both the A1 share class and EARMF, as these were the vehicles which held the AUM between 28 April 2021 and 31 December 2021. Mr. Legg submits that "*Evo Absolute Return Master Fund*" is effectively the parties' shorthand description of this fact. It is accordingly the profit generated by both of those funds in respect of which Mr. Gagliardi's Discretionary Bonus is to be calculated, which is consistent with the approach taken by ECM in respect of Mr. Gagliardi's IPO Bonus.

363. Whilst I consider that both parties proceeded on that assumption after the contract was concluded (which gives rise to issues of estoppel – see further below), the difficulty with Mr. Legg's submission as a matter of construction is that the "*Evo Absolute Return Master Fund*" (which is "*the Business*" as defined) is a company which had been registered in the Cayman Islands on 17 March 2021, namely some 6 weeks before Mr. Gagliardi entered into his employment contract and began trading. There is, therefore, no difficulty in identifying the "*Evo Absolute Return Master Fund*" and in identifying the Profit generated from it. It existed as an entity at the time when the employment contract was concluded.

364. Moreover, the pro-rata clause is consistent with the plain meaning of the "*Business*" as defined, in that it provides that the IPO Bonus and the Discretionary Bonus is payable for Mr. Gagliardi's revenue contributions in 2021 and is based upon the aggregate gross income generated from New Issues and Profit from the Business, namely EARMF, which is produced after the date he commences his employment with ECM. In other words, since EARMF did not commence trading until 1 August 2021, Mr. Gagliardi's Discretionary Bonus is based upon the Profit produced by EARMF from 1 August 2021. In addition, he is entitled to his annual salary (which will be either US$250,000 or 10% of the management fee collected by the investment managers of EARMF in respect of the period

after it becomes operational) and the signing bonus of US$625,000. That is the plain meaning of the contractual wording.

365. As explained above, the court will enforce the plain meaning of clear and unambiguous language. Whilst it may not have corresponded with the parties' subjective intentions, the "*Business*" is clearly defined in the employment contract as meaning EARMF, which was a company which existed as at 28 April 2021. Any background facts showing the parties' intentions accordingly cannot be used, as a matter of construction under Delaware law, to alter the clear language chosen by the parties within the four corners of the agreement.

366. That stated, by reason of the factual matters which are set out in the Factual Analysis above and which I summarise below, I agree with Mr. Legg and Ms. Schumacher that the relevant pre- and post-contractual conduct of the parties demonstrates that they intended that Mr. Gagliardi's Discretionary Bonus would be based upon the profit generated by both the A1 share class and the EARMF. The issue is then what legal effect, if any, this fact has on the parties' rights and obligations under the employment contract as a matter of Delaware law.

367. Accordingly, I consider next the parties' relevant conduct in this respect before considering its legal effect.

As at the date the employment contract was concluded

368. First, the pro-rata clause provides that the Discretionary Bonus is payable for Mr. Gagliardi's revenue contributions in 2021 and it will be based on aggregate gross income generated from New Issues and Profit produced *after he commences employment with ECM* on 28 April 2021. However, immediately prior to the commencement of his employment, the EARMF was not operational and I have found as a fact that both parties understood that Mr. Gagliardi was going to be trading via the A1 share class until the time when EARMF did become operational, and that Mr. Gagliardi was actively encouraged to do so by Mr. Lerch after he commenced employment on 28 April 2021.

369. Indeed, his salary was to be calculated on 10% of the management fee collected by the investment managers, which management fee was calculated as 2% of the AUM. The AUM were held in the A1 share class when Mr. Gagliardi commenced his employment up until 1 August 2021. It was never suggested by ECM prior to the conclusion of the employment contract that so far as his discretionary bonus is concerned the position

would be different so that he would not be remunerated by way of that bonus for any of his trading in the A1 share class before the EARMF became operational. On the contrary, Mr. Gagliardi was led to believe that he would be remunerated on his trading in the A1 share class as well as the EARMF.

After the conclusion of the employment contract

370. Secondly, and consistently with this, after Mr. Gagliardi's employment commenced, ECM exploited Mr. Gagliardi's valuable contacts and, through Mr. Lerch, actively encouraged him to trade and generate Profit (as defined) for the A1 share class up until 1 August 2021. This is readily apparent from the fact that Mr. Lerch encouraged Mr. Gagliardi to continue to trade after 28 April 2021 by approving those trades of his which exceeded risk limits.

371. The EARMF was treated both by ECM and by Mr. Gagliardi as a continuation of the A1 share class. Mr. Gagliardi was allowed to simply continue trading from 28 April 2021 up until late November/December 2021 when his trading was wound down. In cross examination Mr. Lerch agreed with the proposition that "*that's what happened, isn't it, everybody basically shifted their assets across as of 1 August from the A1 share class into the new fund*"[91].

372. Thirdly, as already mentioned, ECM paid Mr. Gagliardi the IPO Bonus on income generated in both the A1 share class and EARMF. Mr. Lerch referred to this as being "*in [Mr. Gagliardi's] contract*" in their telephone call on 21 January 2022 (paragraphs 25-29 of the transcript). Moreover, in that same telephone call (paragraphs 35-40 of the transcript) Mr. Lerch calculated the relevant Profit on trading in both the A1 share class and EARMF. It is notable that approximately US$30 million of the revenue from Mr. Gagliardi's trading was earned via the A1 share class.

373. It was not only Mr. Lerch and Mr. Gagliardi who treated the A1 share class and EARMF as effectively one fund. Consistently with the foregoing, on 4 January 2022, ECM's CFO, Mr. Brindle, emailed a major investor who was potentially interested in allocating capital to Mr. Gagliardi's strategy, stating: "*Please find attached the track record for the fund in which [Mr. Gagliardi] managed the US and European capital markets strategy. The fund's name is Evo Absolute Return Master Fund. The fund started as a share class of an*

[91] Day6/18/23 – 19/2.

existing vehicle in October 2020 and was spun out into its own fund entity on 1 August 2021. …" (emphasis added).

374. Indeed, this was also how the relationship between the A1 share class and EARMF was represented to investors. Thus, in the Private Offering Memorandum for the Evo Fund of June 2011 ECM stated as follows:

> "*Evo Absolute Return Fund (the "Fund") was incorporated in the Cayman Islands as an exempted company on January 15, 2021. The capital of the Fund is invested through a "master-feeder" structure in Evo Absolute Return Master Fund (the "Master Fund"), an exempted company incorporated under the laws of the Cayman Islands on March 17, 2021. Evo Absolute Return Fund LLC, a Delaware limited liability company, is available for United States ("U.S .") investors and also invests through the Master Fund. On or about August 1, 2021, the portfolio attributable to the Class Al Shares of Evo Fund, a Cayman Islands exempted company ("Evo Fund"), managed by the Investment Managers, was contributed to the Master Fund, by way of a redemption in kind of the shareholders of the Class A 1 Shares of Evo Fund, and a subsequent contribution in kind to the relevant feeder fund of the Master Fund. As a result, the portfolio attributable to the Class Al Shares of Evo Fund is now held by the Master Fund.*"
> (emphasis added)

375. To like effect is the email from Mr. Brindle to a potential investor dated 3 January 2022 in which he stated:

> "*Please find attached the track record for the fund in which Robert managed the us and European capital markets strategy. The fund's name is Evo Absolute Return Master Fund.*
> *The fund started as a share class of an existing vehicle in October 2020 and was spun out into its own fund entity on 1 August 2021.*
> *The first tab is the track record of the full fund for a New Issue eligible investor and includes all strategies.*
> *Robert commenced his strategy in May 2021 and the second tab shows the gross PL of all the block and IPOs in 2021.*"
> (emphasis added)

376. And as Mr. Brindle stated in paragraph 7.6 of his second witness statement, "*[t]here was always a plan for the Class A1 shares to be spun out into a new fund structure, which was why EARMF was set up*." However, at paragraphs 9.1 and 9.2:

> "*When Gags joined ECM, the EARMF was not in a position to start trading. For example, we did not yet have prime brokerage agreements in place. So, at first, Gags traded for the Evo Fund Class A1 shares. Rob Toresco was the ultimate decision-maker for trades made for the Class A1 shares, and he was always going to be the CIO for the EARMF.*
> *My initial focus was to get Gags up and running as soon as possible. This included sorting out his connectivity to the ECM systems and to Bloomberg, which allowed him to see trading information, and sorting out the lease for the office, and sorting out the furniture.*"

377. Mr. Tsai also referred in his first witness statement at paragraph 7.1 to there being "*a scramble as soon as [Mr. Gagliardi] had been hired to build the guard rails for his trading because he started trading immediately in the EVO Fund A1 share class.*"

Implied covenant of Good Faith and Fair Dealing?

378. So what is the legal effect/consequence of the parties' conduct in this regard?

379. Mr. Legg and Ms. Schumacher submit that Mr. Gagliardi can rely upon the implied covenant of Good Faith and Fair Dealing under Delaware law[92], with the result that Mr. Gagliardi's Discretionary Bonus must be calculated by reference to the Profit generated by both the A1 share class and the EARMF. However, they did not provide the court with much in the way of analysis as to why the court should imply such a term by reference to an analysis of the principles of Delaware law referred to in paragraphs 289-292 above or as to how this implied term might work alongside the express terms in the case of the employment contract.

380. As explained above, the implied term requires, as a matter of Delaware law, a party to a contract to refrain from arbitrary or unreasonable conduct that has the effect of preventing the other party from receiving the fruits of the bargain. The courts utilise the implied covenant to infer contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated. The implied covenant is "*not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to the contract*."

381. At the time when the contract was concluded, trading was to take place via the A1 share class until EARMF became operational. It must accordingly have been anticipated by the parties that there would be some delay in setting up EARMF, since trading was to begin

[92] Pleaded by Mr. Gagliardi at paragraph 13 of the Amended Particulars of Claim.

in the A1 share class and not EARMF (it was originally anticipated by ECM that EARMF would commence operations on 1 June 2021 but in the event that was delayed until 1 August 2021). It may have been thought (by ECM at least) that this period of delay could be used to "*onboard*" Mr. Gagliardi at ECM in terms of compliance training and regulatory matters. The consequence of the delay in EARMF becoming operative is that, according to the strict terms of the employment contract, Mr. Gagliardi's Discretionary Bonus would only be calculated on (i) gross income generated from New Issues derived by EARMF *from 1 August 2021* and (ii) Profit generated from EARMF *from 1 August 2021*, together with his annual salary and signing bonus. That would adversely affect Mr. Gagliardi's economic interests, but this was something which could have been anticipated at the time when the contract was concluded.

382. Accordingly, I accept Mr. Downes KC's submission that to imply a term that Mr. Gagliardi's Discretionary Bonus must be calculated by reference to the Profit generated by both the A1 share class and the EARMF is to imply a term which is inconsistent with an express term of the employment contract[93] and that that is impermissible as a matter of Delaware law: see *Newark Shopping Center Owner LLC v Saudades Group LLC 2025, WL, 655063 (Del. Super. Feb 26, 2025 at #6).*

Estoppel

383. However, Mr. Legg and Ms. Schumacher raise a further, alternative argument in paragraph 124 of their written closing submissions. They submit that on the basis of the factors in paragraphs 368-377 above, ECM is estopped or quasi-estopped from contending that the "*Business*" on which the IPO Bonus and the Discretionary Bonus was to be calculated was limited to income/Profit generated from EARMF. They refer to paragraphs 5(d)(i), (ii) and 6(b) of Mr. Gagliardi's Amended Reply and Defence to Counterclaim in this regard.

384. In those paragraphs Mr. Gagliardi pleads as follows:

> "*Alternatively, the Defendant is estopped from contending to the contrary, whether under Delaware or English law, by equitable, promissory and/or quasi estoppel (under Delaware law) and/or by representation and/or convention (under English law), and in each case if and insofar as necessary:*

[93] Namely the fact that the relevant Profit in respect of which the Discretionary Bonus is calculated is referable only to EARMF.

> *i. an estoppel will arise under Delaware law: (1) by way of equitable estoppel, when, by conduct, a party intentionally or unintentionally leads another, in reliance on that conduct, to change position to his detriment; (2) by way of promissory estoppel, where there is a promise and reliance thereon; and (3) by way of quasi estoppel, to preclude a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken;*
> *ii. each such estoppel arises here: (1) the Defendant having promised and represented to the Claimant in particular through Mr Lerch that he would be paid by reference to his financial contribution, including IPOs and block trading, intending that the Claimant should rely on that representation; (2) the Defendant having calculated and paid the Claimant's base salary and New Issue Bonus by reference to his financial contribution; and (3) the Claimant having changed his position in reliance, by joining and/or remaining in the Defendant's employment rather than seeking alternative work, and would suffer detriment if the Defendant were permitted to resile…"*

385. Mr. Downes KC suggested in his oral closing submissions that a case in quasi-estoppel was not pleaded by Mr. Gagliardi. That can be seen to be wrong.

386. The parties both approached this question as a matter of Delaware law. The Delaware law experts agree as follows:

(1) In respect of equitable estoppel, a party must show that the other party has by his conduct intentionally or unintentionally led another, in reliance on that conduct to change position to his detriment. The party claiming estoppel must show that (i) they lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (ii) they reasonably relied on the other party's conduct; and (iii) they suffered a prejudicial change of position as a result of their reliance[94].

(2) As to promissory estoppel, the same principles apply save that the reliance is on a promise unsupported by consideration. To succeed, a claimant must show (i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance by the promisee; (iii) the promisee reasonably relied on the promise and acted to his detriment; and (iv) the promise is binding because injustice can only be avoided by enforcing it[95].

94 Hirzel, paragraph 1.6.
95 Hirzel, paragraph 1.1.

(3) Quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced or from which he accepted a benefit, and a party claiming quasi-estoppel does not need to show reliance[96]. As Mr. Hirzel explains in paragraph 1.6 of his first report:

"*Rather, "[t]o constitute this sort of estoppel the act of the party against whom estoppel is sought must have gained some advantage for himself or produced some disadvantage to another.'" Id. "Quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." Id. (quoting Pers. Decisions, Inc. v. Bus. Planning Sys., 2008 WL 1932404, at *6 … "[Q]uasi-estoppel is concerned with a person's prior position; the key issue is whether a person's prior position has given him some advantage or produced some disadvantage for someone else." Bank of New York Mellon v. Commerzbank Cap. Funding Tr. II, 2012 WL 2053299, at *1... The court found that the defendant's "self-interested 180 degree turn is graceless" and estopped the defendant from changing course. Id. at *7."*

387. A case on promissory estoppel never got off the ground as Mr. Gagliardi failed to identify a specific promise of ECM upon which he relied. In closing Mr. Legg accordingly focused his submissions on quasi-estoppel and equitable estoppel under Delaware law[97].

388. I accept Mr. Legg's and Ms. Schumacher's submission that ECM is estopped as a matter of Delaware law from contending that only the Profit generated by Mr. Gagliardi's trading from 1 August 2021 (via the EARMF), and not his trading from 28 April 2021 via the A1 share class, may be taken into account for the purpose of calculating both his IPO Bonus and any Discretionary Bonus. I consider that this is the legal consequence of those factual matters set out in paragraphs 368 – 377 above.

389. Mr. Gagliardi's case based upon quasi-estoppel is simple, namely that Mr. Lerch allowed, and indeed actively encouraged him to trade in the A1 share class from 28 April 2021, and ECM benefitted from the revenues Mr. Gagliardi generated by doing so. It would be unconscionable to allow ECM to benefit from that trading, and yet, inconsistently, deprive Mr. Gagliardi of the concomitant discretionary bonus due in respect of the PL generated

---

96 Hirzel, paragraph 1.5.

97 The parties were content to proceed upon the basis of Delaware law being the applicable law. Since ECM is a company incorporated under Delaware law and the employment contract was governed by Delaware law, I am content to proceed on the basis of the "*proper law of the estoppel*" being Delaware law (cf *The Amazonia* [1990] 1 Lloyd's Rep 236 at 247 per Staughton LJ.

by his trading. Indeed, as is pleaded at paragraph 5d(ii)(2) of the Amended Reply, ECM did indeed calculate and pay Mr. Gagliardi's base salary and New Issue Bonus by reference to his financial contribution to both the A1 share class and the EARMF.

390. Mr. Downes KC's answer to this was twofold. First, he pointed out that the employment contract contains an entire agreement clause. There was no Delaware law evidence on this point before the court but in any event the entire agreement clause only provided that the employment contract "*constitutes the entire agreement and supersedes all prior agreements and understandings, both oral and written, among the parties with respect to the subject matter hereof*" (emphasis added). The estoppel argument does not merely concern *prior* agreements and understandings of the parties but also their clear mutual understandings and conduct *after* the agreement was entered into.

391. Secondly, Mr. Downes KC submits that the matters relied upon by Mr. Gagliardi do not have the quality of a "*180 degree volte face*". He argues that Mr. Gagliardi was not allowed to continue trading and that his trading was wound down from mid-November by reason of the intended adoption of the spin-out fund[98]. But that misses the point. The point is that not only did Mr. Lerch allow Mr. Gagliardi to trade via the A1 share class from 28 April 2021 up until 1 August 2021 but he positively encouraged him to do so upon the mutual understanding that the income/profit thereby generated would be taken into account in assessing Mr. Gagliardi's bonuses.

392. ECM has taken the benefit of Mr. Gagliardi's trading from 28 April 2021 by way of it profiting through management and performance fees on the back of Mr. Gagliardi's trading via the A1 share class which it actively encouraged. The "*180 degree turn*" is refusing to take account of this profit in calculating Mr. Gagliardi's Discretionary Bonus.

393. Were it necessary to do so, I would also have found that by reason of ECM's conduct in allowing and indeed encouraging Mr. Gagliardi to trade between 28 April and 1 August 2021 in the belief that profit generated from that trading would be taken into account in calculating any IPO Bonus and Discretionary Bonus to be paid to him, upon which conduct Mr. Gagliardi reasonably relied in continuing to trade for ECM during that period and not seeking employment elsewhere, ECM is equitably estopped from refusing to take account of this profit in calculating Mr. Gagliardi's Discretionary Bonus. Mr. Gagliardi

98 Day12/114/1-14.

suffered a prejudicial change of position in that it would have been open to him to refuse to start trading until EARMF had become operational or to have left ECM and earned his bonus elsewhere, but he did not do so because he was led to believe that his remuneration would be based upon the entirety of his trading from 28 April 2021 onwards, and he did not know and could not have anticipated that Mr. Lerch and ECM would ultimately contend otherwise[99].

394. In the circumstances, I find that ECM is both quasi-estopped and equitably estopped from denying that it is obliged to take account of all income/Profit generated by Mr. Gagliardi's trading in the A1 share class and EARMF for the purpose of calculating both his IPO Bonus and any Discretionary Bonus.

(d) ECM's breach of contract

395. As explained above, the implied Trust and Confidence Term meant that ECM was obliged, in exercising its contractual discretion to award Mr. Gagliardi a Discretionary Bonus, to exercise it in good faith in accordance with its contractual purpose and not irrationally, arbitrarily, or capriciously. ECM was obliged to take account of matters which it ought rationally to take into account and not to take into account matters which it ought rationally not to take into account: see *Braganza* (*supra*) and *Clark v Nomura* (*supra*) at [40].

396. In the present case, this meant that ECM was obliged to exercise its discretion taking account only of the extent to which Mr. Gagliardi's revenue contributions in 2021 contributed to the Profit of the A1 share class and the EARMF. ECM was not entitled to refuse to pay Mr. Gagliardi any Discretionary Bonus, despite his very substantial revenue contributions to that Profit, by reason of it wrongly taking into account a host of essentially subjective complaints unrelated to his financial performance as articulated by Mr. Lerch in his second witness statement at paragraph 33.2 and as set out in paragraphs 66(c)(iv) and 71(f) of the Re-Amended Defence.

397. ECM's case as to the exercise of the discretion is set out in paragraphs 370 – 379 of its written closing submissions. It maintains that in January 2022 Mr. Lerch took a "*wait and see*" approach to the exercise of the discretion in the light of the SEC/DOJ investigation.

---

99 See his sixth witness statement, paragraph 3.45 as set out above: "*I had the clear understanding, which I believe was shared with Lerch, that I would start trading immediately, and that the fund I was trading for was* "*the Business*".

Mr. Lerch told Mr. Gagliardi in their telephone call on 21 January 2022 that if pushed he would have to say that the Discretionary Bonus was zero. In his oral evidence Mr. Lerch said that "*the biggest factor in making it zero*"[100] and "*the major impact on making it zero*"[101] was the DOJ investigation.

398. Mr. Lerch's oral evidence was that "*I think at that time when he was terminated, and we had no way forward, I would say that that probably represents the time that my discretion was exercised.*"[102] As outlined earlier, that was 28 February 2022: notice of termination of Mr. Gagliardi's employment was given on 28 February 2022, and it took effect on 7 March 2022.

399. I find as a fact that, in any event, aside from the SEC/DOJ investigation, none of these matters of which ECM now complains were in Mr. Lerch's mind and relied upon by him at the time when he exercised his discretion on 28 February 2022 and they are accordingly irrelevant and cannot justify the exercise of his discretion to award Mr. Gagliardi a "*zero*" Discretionary Bonus: see *Clark v Nomura* at [70] per Burton J.

400. Insofar as Mr. Lerch suggested otherwise I reject his evidence. He did not advert to any of these other factors in his telephone call with Mr. Gagliardi on 21 January 2022 which is the best evidence of what was in Mr. Lerch's (and therefore ECM's) mind at the time: see paragraph 222 above.

401. It is clear from this contemporaneous call that the only reason given by Mr. Lerch for the non-payment of a Discretionary Bonus to Mr. Gagliardi, which he says he would otherwise have paid, is because of "*the situation that they were dealing with*", which was a reference to "*the issues*" arising out of the SEC/DOJ investigation which he said "*won't be resolved*" for some time. He then goes on to say that he would "*like to have an arrangement where I get some kind of capacity to invest in what you're doing, on full fees like anyone else.*"[103] If it were truly the case that he was refusing to pay Mr. Gagliardi his Discretionary Bonus because of non-SEC/DOJ related issues of the type referred to in paragraph 33.2 of Mr. Lerch's second witness statement and paragraphs 66(c)(iv) and 71(f) of the Re-Amended Defence, then it is inconceivable that he would at the same time

---

100 Day7/96/6.
101 Day7/97/17.
102 Day9/96/25 – 97/2.
103 This is a reference to his wanting to enjoy fees generated by Mr. Gagliardi's trading from New Issues (IPO) which he did not currently enjoy at ECM.

be telling Mr. Gagliardi that he wanted to invest in Mr. Gagliardi's new spin-out fund. Rather, I find as a fact that the other supposed factors are factors which Mr. Lerch and ECM have alighted upon *ex post facto* to excuse ECM paying Mr. Gagliardi nothing by way of a Discretionary Bonus. That is illegitimate.

402. I do not consider that this factual conclusion is undermined by Mr. Lerch's telephone call with Mr. Murphy on 2 March 2022 in which he said "*I told [Mr. Gagliardi] two months ago that "under the circumstances, if you want to force me to make a decision about that today your discretionary bonus is zero because of a litany of issues that we have had. I do not want to go into them but if you are going to push me on this then the number is zero and if you want to just move on in a collaborative way we can discuss something more than zero at some point in time but this is a pretty serious fucking situation we are in.*"

403. First, this is Mr. Lerch suggesting several weeks later what he had discussed with Mr. Gagliardi in the 21 January 2022 call, but the transcript of the actual call on 21 January is the best evidence of that, and it does not support any suggestion that Mr. Lerch had in mind anything other than the SEC/DOJ investigation for refusing to pay a Discretionary Bonus. Secondly, this is later, on 2 March 2022, being shortly after Mr. Lerch had terminated Mr. Gagliardi's employment and resolved not to pay him any Discretionary Bonus, and I find that he was now seeking to justify that stance. Thirdly, it is not in any event clear what he meant by "*a litany of issues*" in this context.

404. Moreover, for the reasons set out in detail in the Factual Analysis above, I do not consider that there is sufficient merit in any of these factual complaints of ECM in any event (so far as the pleaded allegations are concerned: Mr. Gagliardi's "*abrasive attitude to authority*"; his "*resistant attitude to ECM's internal procedures and policies*"; his saying that he had lost his mobile telephone; the alleged reputational damage to ECM allegedly caused by Mr. Gagliardi; the costs of the SEC/DOJ's investigation; and the "*short*" duration of his employment[104]) which could possibly justify the refusal to pay Mr. Gagliardi a Discretionary Bonus, even were ECM's construction of the contract correct (which it is not).

[104] ECM itself chose to bring the employment to an end so this cannot possibly justify refusing to pay Mr. Gagliardi a bonus. In any event, this is precisely the situation which is catered for by the pro-rata clause.

405. Nor is there any merit in the matters raised in the numbered sub-paragraphs to paragraph 33.2 of Mr. Lerch's second witness statement: (a) Mr. Lerch excused any risk limit breaches because Mr. Gagliardi was making substantial profits on the trades and ECM recognised that they needed time to formulate and reformulate reliable, long-term risk limits. Any management time that was spent on this was more than compensated for by the profits which Mr. Gagliardi was making for ECM; (b)-(e) these are very generalised and vague complaints which it is difficult for Mr. Gagliardi to rebut, but are in any event complaints which could provide no justification for refusing Mr. Gagliardi a Discretionary Bonus for the reasons set out above; (f) I do not accept that Mr. Gagliardi threatened to resign "*on several occasions*" or at all, but in any event this simply reflects disagreements from time to time in a high-stress workplace; I do not accept the accuracy of the second sentence of (f) for the reasons set out in paragraph 258 above; (g) I do not accept this but in any event this complaint post-dates the exercise of the discretion; (h) it is likely that Mr. Gagliardi did not get clearance for a breach of the DoorDash limit but that could not justify refusing to pay him his Discretionary Bonus as it was approved by Mr. Lerch in any event. I do not accept what Mr. Lerch says about the mobile telephone for the reasons set out above; (i)-(j) I do not accept this for the reasons set out at paragraphs 409ff below; and (k) this complaint is mere assertion.

406. I accordingly accept the submission of Mr. Legg that the reasons now relied upon by ECM for not paying any Discretionary Bonus to Mr. Gagliardi are meritless *post hoc* justifications that were not genuinely considered by ECM or Mr. Lerch as being material to the decision at that time. Moreover, had they been, then I consider that ECM as the employer would have, and would have been obliged to, raise these supposed justifications with Mr. Gagliardi, the employee, as a matter of fairness, so that he could address them. But it did not.

407. I would add that these factual findings derive strong support in the evidence of the main protagonists in particular. As Mr. Lerch accepted in cross examination[105]:

> "*Q. But there wasn't any discussion with Mr Gagliardi at any point in time saying that: as a result of these tensions, any disagreements, you're at risk of not getting a bonus. There was no discussion like that at any time, was there, Mr Lerch?*
> *A. We never talked about that.*"

[105] Day6/138/10-14.

408. Mr. Gagliardi agreed with this, saying in his evidence in relation to whether he was ever told that his alleged compliance failings would affect his bonus[106]:

> "*I wasn't, because if they were serious about them, they would have stopped me trading and making money for them. They were just concerned about me trading and continuing to make money for them.*"

And:

> "*I believe nothing was ever said to me. Their behaviour suggested they were fine with everything*."

The SEC/DOJ investigation

409. Mr. Legg and Ms. Schumacher rightly accept that the SEC/DOJ investigation was the only issue of genuine concern to Mr. Lerch and ECM at the time the contractual discretion was exercised. ECM relies upon the following pleaded matters as to that factor:

(1) Paragraphs 66(c)(iv) and 71(f) of the Re-Amended Defence: ECM denies that the only rational exercise of the discretion would be to pay a Discretionary Bonus in the circumstances given: the ongoing US criminal investigation into Mr. Gagliardi's conduct and the SEC investigation, the "*emerging picture*" of Mr. Gagliardi's centrality to those investigations and the costs to ECM associated with them (71(f)(d)); the reputational damage that the criminal investigation and the SEC investigation has had on ECM's business (71(f)(e)); the potential further reputational damage that would arise if a significant bonus was paid and the results of the criminal investigation and/or SEC investigation were adverse (71(f)(f)); the imponderables which are extant regarding how the criminal investigation and or the SEC investigation will proceed and whether any further adverse consequences will result to ECM (71(f)(g)); and the fact that Weiss paid around US$7 million to settle SEC charges which rationally appeared to ECM to relate to Mr. Gagliardi's behaviour (71(f)(h)).

(2) Paragraph 71(d): "*Further and in any event any fine payable by [ECM] arising from [Mr. Gagliardi's] activities while employed by [ECM] would be a legitimate*

[106] Day6/129/22-25 and Day6/130/25 – 131/1.

consideration in determining any discretionary bonus. This factor is not yet known and is a further reason why a discretionary bonus could rationally not be paid at this stage."

410. Mr. Lerch said in his second witness statement at sub-paragraphs 33.2(i) and (j):

> "*(i) [Mr. Gagliardi] was subject to a criminal investigation by the DOJ in respect of the type of trading he had been doing with us. The SEC subpoena to which we were subject suggested that there may well be a regulatory problem not just with his trading at previous firms, but also with us. The DOJ/SEC investigation relating to Mr Gagliardi's conduct created a great deal of uncertainty for ECM and the Evo Group. No one knew what the outcome of the investigation would be. It put in jeopardy the business we had built over several years and put the livelihoods of those at ECM at risk. At that stage, there was a real prospect that any publicity about the investigation could damage ECM's reputation in any event, no matter what the outcome. It also had the potential to negatively impact our relationships with investors. This subsequently did happen, for example, JP Morgan sought an indemnity from us in respect of this investigation.*
>
> *(j) We were having to incur substantial legal costs to deal with the SEC investigation as well as paying Mr Gagliardi's legal costs for dealing with the DOJ investigation.*"

411. As a matter of fact, at the time when ECM gave notice to terminate Mr. Gagliardi's employment on 28 February 2022 the following was known:

    (i) The SEC/DOJ's broad, market-wide investigation into block trading was taking place;

    (ii) Mr. Gagliardi had received a subpoena on 15 November 2021 to provide relevant documents as custodian for Weiss, Segantii and ECM in respect of that investigation;

    (iii) Mr. Gagliardi had not been charged with any offence by the DOJ (a Wells Notice was not issued until 5 July 2023);

    (iv) ECM had received a subpoena in January 2022 from the SEC requesting trading information and other materials related to block trades conducted for certain client accounts;

    (v) ECM had agreed to pay Mr. Gagliardi's legal fees incurred in respect of the investigation; and

(vi) ECM had carried out or was carrying out its own internal investigation into Mr. Gagliardi's trading at Weiss, Segantii and ECM, conducted by the independent law firm Sher Tremonte LLP in late January 2022. That investigation, pursuant to which Mr. Gagliardi was subjected to a lengthy and wide-ranging interview conducted by Sher Tremonte LLP and Mr. Chisholm on 27 January 2022 (namely 1 month before ECM gave notice to terminate Mr. Gagliardi's employment on 28 February 2022), had not unearthed any wrongdoing on the part of Mr. Gagliardi. As Mr. Chisholm accepted in his evidence, the investigation "*did not result in any adverse findings*" against Mr. Gagliardi, and indeed Mr. Chisholm confirmed this in his email dated 10 March 2022 to Mr. Lerch. That was also the message which ECM conveyed to its investors at the time.

412. This remained the position thereafter so far as ECM was concerned. As the court has already observed, it can be seen that in response to an investor questionnaire dated 19 August 2022, ECM stated as follows:

> "*In January of 2022, the firm received a subpoena from the United States Securities and Exchange Commission ("SEC") requesting trading information and other materials related to block trades conducted for certain client accounts. This was in connection with a broader market-wide inquiry into block trades… We produced the information requested by the SEC in February 2022. There has been no further written communication from the SEC. After conducting an internal examination, we do not believe there has been any wrongdoing committed by the firm or its personnel...*"

413. Indeed, consistently with ECM's own internal investigation, on 4 March 2024 the SEC wrote to Mr. Gagliardi and informed his legal representatives as follows:

> "*We have concluded the investigation as to your client, Mr. Robert Gagliardi. Based on the information we have as of this date, we do not intend to recommend an enforcement action by the Commission against Mr. Gagliardi. We are providing this notice under the guidelines set out in the final paragraph of Securities Act Release No. 5310, which states in part that the notice "must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation.*"
> (emphasis added)

414. Mr. Gagliardi was never charged with any offence by the DOJ.

415. ECM received a materially identical letter from the SEC on 24 May 2024.

416. Accordingly, I find that the SEC/DOJ investigation did not (and does not) constitute proof of any wrongdoing on the part of Mr. Gagliardi and did not provide a valid reason for non-payment of the Discretionary Bonus. Nor would the mere fact of the investigation have justified terminating Mr. Gagliardi's employment for cause and indeed ECM did not terminate his employment for cause for this or any other reason.

417. There was accordingly no breach by Mr. Gagliardi of the Trust and Confidence Term as alleged in paragraph 69E(a) and (b) of the Re-Amended Defence, and in any event the matters relied upon in paragraphs 66(c)(iv) and 71(g) of the Re-Amended Defence, which contrary to ECM's submission do not establish any disreputable conduct on the part of Mr. Gagliardi, all post-date the exercise of ECM's discretion not to award a Discretionary Bonus and cannot be relied upon by it for that purpose.

418. Nor was it open to ECM, under the terms of the employment contract, not to pay Mr. Gagliardi a Discretionary Bonus but instead to "*wait and see*" what the outcome of the SEC investigation might be. The Discretionary Bonus was payable on each fiscal year-end bonus payday if Mr. Gagliardi remained an employee on that date; if he did not, then any pro-rated bonus "*would be paid within a month following the cessation of [the employee's] employment*," which in Mr. Gagliardi's case meant payment had to be made by 2 April 2022 at the latest. Since Mr. Gagliardi's employment was not terminated until a date after 31 December 2021 but before the bonus pay-day, his Discretionary Bonus became payable by 2 April 2022 in respect of his revenue contributions up to the end of the calendar year, namely 31 December 2021.

419. ECM had a choice, and it had to make an election: either terminate Mr. Gagliardi's employment for cause in which case, if established, the Discretionary Bonus would not become payable; or pay him his bonus based upon his revenue contributions to the profit of the funds. What it could not do is precisely what Mr. Lerch told Mr. Gagliardi he was going to do, viz., not pay him his bonus and instead wait to see how the investigation panned out; and if Mr. Gagliardi pushed him for payment of his bonus in accordance with his contractual entitlement, pay him nothing in the exercise of its contractual discretion.

That is precisely what occurred and it was not a rational exercise of ECM's discretion. ECM was thereby in breach of contract.

420. The *possibility* that ECM might ultimately be subjected to a fine by the SEC or that its reputation might thereby be harmed is wholly irrelevant to the proper exercise of the discretion. In any event, ECM failed to establish a case at trial, based upon any reliable evidence, as to any damage to its reputation caused by Mr. Gagliardi *at the time when Mr. Lerch exercised his discretion* and I find as a fact that there was none (certainly there is no claim for any such loss/damage). The fact that ECM and Mr. Gagliardi had received subpoenas was not then public knowledge; the first time the subpoena against Mr. Gagliardi was made public was when *ECM itself* appended it to its lawsuit in its proceedings against him in New York in November 2022 in which ECM alleged that he had in fact violated US securities law.

421. Indeed, Mr. Lerch confirmed in the telephone call of 21 January 2022 that he remained willing to pay a Discretionary Bonus to Mr. Gagliardi (despite ECM having exhausted the relevant bonus pool for the 2021 trading year). However, after the SEC/DOJ provided their confirmation that they were not going to bring enforcement action against Mr. Gagliardi, Mr. Lerch/ECM <u>still</u> did not pay a Discretionary Bonus to Mr. Gagliardi. Instead, ECM commenced its counterclaim against Mr. Gagliardi seeking to recover his salary and IPO Bonus payments.

422. Finally, ECM relies in paragraph 71(f)(h) of its Re-Amended Defence upon the fact that, it says, "*Weiss paid around $7m to settle SEC charges which rationally appeared to [ECM] to relate to [Mr. Gagliardi's] behaviour*" as a reason not to pay Mr. Gagliardi any Discretionary Bonus. This is the same allegation as that included in the "*Verified Complaint*" against Mr. Gagliardi in the New York proceedings, commenced on 9 November 2022. The Verified Complaint was verified on that same date by Mr. Chisholm.

423. I reject this suggestion for the following reasons.

424. In cross-examination, it was put to Mr. Chisholm that: "*You were content, were you not, to make very serious allegations against Mr. Gagliardi, without any proper basis for doing so in that litigation?*" to which Mr. Chisholm responded: "*I disagree with that characterisation, my Lord. I think every statement I made in that complaint was justified*

and factually backed up."[107] At paragraph 75 of the Verified Complaint, Mr. Chisholm stated: "*[Mr.] Gagliardi's failure to disclose prior Rule 105 trading violations before he was hired by ECM constitute "Cause" under the Agreement, and thereby breached the Agreement.*" At paragraphs 57 and 58 of the complaint, Mr. Chisholm stated: "*Rule 105 is the very same regulation that ECM subsequently learned was the subject of a successful enforcement action taken against the firm that employed Gagliardi before he was hired by ECM. When ECM made Gagliardi an offer of employment, it was unaware of these non-public violations involving trades that it now believes were directed by Gagliardi.*" Mr. Chisholm further asserted in cross-examination that "*our belief was that he was responsible for those rule 105 violations.*"[108]

425. However, in cross-examination Mr. Chisholm was subsequently shown the public statements in respect of the allegations concerning Weiss which were dated 14 June 2022 (almost 5 months before the Verified Complaint was signed by Mr. Chisholm). He was specifically shown paragraph 4, which states "*[Weiss] legal personnel repeatedly miscalculated Rule 105's restricted period as commencing after the firm's short sales and therefore [Weiss]'s compliance personnel incorrectly dismissed red flags raised by the firm's Rule 105 controls. As a result, [Weiss] violated Rule 105.*" Mr. Chisholm accepted, when this paragraph was put to him, that the violation of which complaint was made by the SEC was the fault of Weiss's legal and compliance personnel and not Mr. Gagliardi: "*It does appear that way, yes.*"[109] He accepted that he had "*no definitive knowledge*" to support this allegation as against Mr. Gagliardi[110].

426. Despite having to concede this, Mr. Chisholm saw fit to speculate that the fault might still lie, at least in part, with Mr. Gagliardi, stating: "*It's certainly -- the time period overlaps with Mr Gagliardi's time there, so certainly he was involved, but it does say that compliance was at fault there*" (emphasis added)[111].

427. This is unfounded speculation on the part of Mr. Chisholm. It is a good illustration of the partisan approach of ECM's witnesses to this litigation. I do not accept that there is any

[107] Day9/131/5-10
[108] Day9/131/20-21
[109] Day9/133/1-5
[110] Day9/132/12-15.
[111] Day9/133/13-15.

substance in an allegation of wrongdoing on the part of Mr. Gagliardi whilst employed at Weiss which justified ECM's refusal to pay the Discretionary Bonus.

ECM's complaint concerning the seized iPhone / adverse inferences?

428. ECM also submits in paragraphs 86-87 of its written closing submissions that there have been "*serious breaches of [Mr. Gagliardi's] disclosure obligations*" and that "*the history regarding [ECM]'s attempts to access the data on the sized [sic] iPhone 11 [i.e. seized by the SEC/DOJ at the airport] is redolent of obfuscation and dissembling on the part of Mr Gagliardi, aggravated by his repeated changes of legal representation*".

429. ECM submits that this entire history concerning Mr. Gagliardi's iPhone 11 is only consistent with a deliberate and concerted campaign of obstruction and delay on his part, in order to prevent and subsequently delay the extraction of data from the seized phone. Mr. Downes KC argues that all of this has meant that documents were introduced into the trial very late in the day which was "*disruptive and inevitably prejudicial to [ECM's] position*".

430. ECM argues that in these circumstances the court should draw adverse inferences as to:

    a. The true nature of the relationship between Mr. Gagliardi and Mr. Passi.

    b. The extent to which Mr. Passi continued passing confidential information to Mr. Gagliardi when he was employed at ECM and Mr. Gagliardi's knowledge that the information was confidential.

    c. Mr. Gagliardi's evidence in relation to the DoorDash trade and its seriousness.

    d. Mr. Gagliardi's communications with Mr. Murphy as to Mr. Murphy's expected bonus.

    e. The real reasons for Mr. Gagliardi's rejection of the MOU (not being based on a belief that it was an erosion of his right to the Discretionary Bonus).

    f. Whether Mr. Gagliardi genuinely believed that his prior conduct would not be taken account of for the purposes of his discretionary bonus.

431. The court may draw adverse inferences from a party's failure to comply with its disclosure obligations: see *Armory v Delamirie* (1721) 1 Str 505; *Gray v Haig & Son* (1855) 20 Beav 219; *Malhotra v Dhawan* [1997] 8 Med LR 319; and *Earles v Barclays Bank* [2008] EWHC 2500.

432. In *Malhotra*, Morritt LJ explained that there are, however, limits to the application of the principle:

> "*First, if it is found that the destruction of the evidence was carried out deliberately so to as hinder the proof of the plaintiff's claim, then such finding will obviously reflect on the credibility of the destroyer. In such circumstances it would enable the court to disregard the evidence of the destroyer in the application of the principle…*
> *"Second, if the court has difficulty in deciding which party's evidence to accept, then it would be legitimate to resolve that doubt by the application of the presumption. But, thirdly, if the judge forms a clear view, having borne in mind all the difficulties which may arise from the unavailability of material documents, as to which side is telling the truth, I do not accept that the application of the presumption can require the judge to accept evidence he does not believe or to reject evidence he finds to be truthful.*"

433. It is important to appreciate however that, as Mr. Charles Hollander KC states in his highly regarded textbook *Documentary Evidence* (14th edn), at [11-27]: "*Parties say they will ask the judge to draw adverse inferences in many circumstances where such a conclusion would be entirely unjustified. Too often the use of the expression is meaningless and is simply used as a substitute for "we will ask the judge to reject your case."*" Bryan J made this very point in *Lakatamia v Su* [2021] EWHC 1907 (Comm) at [903], when he stated that an inference that "*witnesses have not been called because they would irremediably damage a party's case [would] be too generic*." An adverse inference, if drawn, is a factual inference, and is not to be regarded as a penalty imposed on a party for his failure to call evidence or disclose documents[112].

434. In considering whether or not to draw a particular adverse inference the court will have, in particular, three points in mind:

(1) "*The first step must be to identify the precise inference(s) which allegedly should [be] drawn*": *Efobi v Royal Mail Group Ltd* [2021] UKSC 33 at [43].

(2) "*There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it*": as Lord Sumption put it in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, [44]. In other words, there must be a case to answer on the relevant issue.

[112] See *Invest Bank v El-Husseini* [2024] EWHC 2976 (Comm).

(3) Even if there is a case to answer, whether an adverse inference is to be drawn turns on a factual analysis of all the relevant considerations: *Efobi* at [41].

435. In the present case, ECM only indicated in its closing submissions the alleged adverse inferences which it contends that the court should draw. I do not consider that the court should draw any of the imprecise inferences suggested.

436. In particular:

a. The "*true nature of the Passi/Gagliardi relationship*" is much too vague. In any event, since I find below that the case concerning Mr. Gagliardi's dealings with Mr. Passi is inadequately pleaded and, in any event, there is no evidence to support the suggestion that Mr. Gagliardi's dealings with Mr. Passi were in any way improper, there is no case for Mr. Gagliardi to answer on the relevant issue and accordingly no adverse inference is to be drawn.

b. "*The extent to which Mr Passi continued passing confidential information to Mr. Gagliardi when he was employed at [ECM] and Mr Gagliardi's knowledge that the information was confidential*". The same is true of this alleged adverse inference. It is much too vague, the case concerning Mr. Gagliardi's dealings with Mr. Passi is inadequately pleaded and, in any event, there is no evidence to support the suggestion that Mr. Gagliardi had knowledge that any information passed to him was confidential. There is no case for Mr. Gagliardi to answer on the relevant issue such that no inference is to be drawn.

437. There is no basis for the court drawing any adverse inference in the terms suggested in paragraph 430, sub-paragraphs (c)-(f) above. These alleged inferences are, in any event, wholly irrelevant to any issue in the case, there is a lack of clarity and precision as to the inference which it is said should be drawn and they amount to no more than a plea of "*we will ask the court to reject Mr. Gagliardi's case as a result*".

438. In any event, even had these inferences required to be drawn, they would not have affected the outcome of the case in the light of the proper construction of the employment contract set out above and the irrelevance of these other matters.

439. Finally, I should add that, whilst it is unnecessary in view of the foregoing to set out a full analysis of all of ECM's disclosure complaints, I do not consider that ECM came

anywhere near to proving that Mr. Gagliardi had been guilty of the deliberate destruction of documents or a deliberate failure to disclose relevant documents in any event. Mr. Gagliardi takes issue with this suggestion in paragraphs 37 – 45 of his written closing submissions, explaining in particular how ECM's employees were fully aware of his technical incompetence. Moreover, as Mr. Gagliardi points out, arguably one of the most serious examples of the destruction of documents was carried out by ECM itself: in its DRD it notes that it located the hard drive used by Mr. Gagliardi, but considers it "*likely that [his] hard drive was wiped shortly after his departure for use by another employee*". As Mr. Legg and Ms. Schumacher state, this is a striking occurrence in circumstances where at the time ECM was subject to a subpoena process in respect of that data.

440. So far as the lack of probative value of the disclosure belatedly obtained from Mr. Gagliardi's iPhone is concerned, which was seized by the SEC/DOJ, I address that in a postscript at the end of this judgment (along with other complaints of late disclosure).

Proper exercise of the discretion

441. Where a breach of the obligation to exercise a contractual discretion rationally is established (as it is here), the court must place itself in the position of the decision maker and determine what conclusion the decision maker would have reached but for the breach, exercising the discretion in accordance with its contractual purpose: *Cantor Fitzgerald v Horkulak* (*supra*) and *Clark v Nomura* (*supra*) at [40].

442. The discretion ought to have been exercised by reference to Mr. Gagliardi's revenue contributions and not by reference to any of the other factors relied upon by ECM. Indeed, even had ECM's construction of the employment contract been correct (which it is not), I would have found that by far the most important factor by reference to which his Discretionary Bonus should have been assessed was his outstanding revenue contributions in respect of the Profit generated from the A1 class share and the EARMF.

443. Had the discretion been exercised by reference to Mr. Gagliardi's revenue contributions, then the relevant considerations were the following (which are based upon facts which I find to be proved; indeed I understood them to be agreed):

(1) Mr. Gagliardi generated Profit for both the A1 share class and EARMF between May 2021 and 31 December 2021 of between US$35.9 million and US$40.2 million.

(2) Mr. Gagliardi's revenue contributions to the A1 share class and EARMF were between US$63.4 million and US$64.7 million. This constituted 97% of the revenue of the two funds for the period between the beginning of May and the end of December 2021.

(3) The AUM grew substantially during the period that Mr. Gagliardi was employed by ECM from around US$100-200 million to US$300-400 million.

444. There is no question that Mr. Gagliardi made exceptional Profit for the funds and Mr. Lerch frequently praised his performance in that respect.

445. I find that in rationally exercising its discretion to award a Discretionary Bonus, ECM would have been bound to assess Mr. Gagliardi's 97% revenue contribution at the very top end of the 10-15% target range, namely at 15%, by reason of the fact that he was responsible for virtually all of the profit generated for the funds. Mr. Deetz assesses the "*Profit*" of the funds (as defined) as amounting to US$35.9 million (in Schedule 4 to his expert report) and US$40.2 million (in Schedule 5). The difference is accounted for by the fact that schedule 4 includes a loss in December 2021 after Mr. Gagliardi ceased his trading activity in November 2021.

446. I consider that the schedule 4 figure (i.e. including the December period) is the correct figure to adopt for this purpose – namely a calculation of the Profit in the period up to the end of the calendar year. If a Discretionary Bonus of 15% is calculated on that sum, that results in a Discretionary Bonus of US$5,385,000.

447. I would add that I consider the approach of Mr. Deetz to be plainly correct when he states in paragraph 83 of his expert report that in analysing the "*Profit*" of the funds:

> "*I have not further deducted the discretionary bonuses paid to others in arriving at "Profit." Deduction of a discretionary bonus to the person first paid would have a dilutive effect on the bonus pool available for all others, and in my experience there is a single bonus pool which gets simultaneously distributed, instead of reducing "Profit" sequentially for each individual discretionary bonus. Each individual participant can then be measured against a constant available bonus pool.*"

Damages for breach of contract

448. As set out above, damages for breach of contract are determined, as a matter of Delaware law, by the reasonable expectations of the parties before the breach, and they are measured by the amount of money that would put the promisee in the position it would have been in had the promisor performed its obligations under the contract.

449. In this case, had ECM properly performed the contract, Mr. Gagliardi would have received a Discretionary Bonus of US$5,385,000. That sum ought to have been paid to Mr. Gagliardi by 2 April 2022 and so interest at 5% over the Federal Reserve discount rate is payable from 3 April 2022 onwards by way of pre-judgment interest.

(e) ECM's counterclaim

450. By its counterclaim contained in the Re-Amended Defence and Counterclaim, ECM claims loss and damage in the sum of US$7,032,948 (together with interest thereon), which consists of the salary and New Issue Bonus payments made to Mr. Gagliardi by ECM.

451. This claim is based upon the plea at paragraphs 69A-E of the Re-Amended Defence and paragraph 75 of the Counterclaim.

452. In particular, at paragraph 69A of the Re-Amended Defence ECM refers to a DOJ Press Release dated 12 January 2024 together with a Statement of Facts that had been agreed by Morgan Stanley in relation to the DOJ's investigation into Morgan Stanley and Mr. Passi ("**the DOJ Statement of Facts**"). The results of that enquiry were a non-prosecution agreement between Morgan Stanley and the DOJ, and a deferred prosecution agreement between Mr. Passi and the DOJ.

453. ECM then refers at paragraph 69B to a Press Release published on the same day by the SEC in relation to its charges against Morgan Stanley and Mr. Passi together with the SEC Passi Order and the SEC Morgan Stanley Order, as outlined earlier[113].

454. Mr. Gagliardi was not subject to either of these Orders and nor was he named in them or in the DOJ Statement of Facts. However, ECM alleges and I accept that Mr. Gagliardi is

[113] See paragraph 272 above.

the person referred to as "*Investor 3*", and Mr. Passi is the person referred to as "*Head of the Desk*" in paragraph 27 of the DOJ Statement of Facts as follows:

> "*Hedge fund investors who received confidential information from the Head of the Desk and Employee-1 about upcoming blocks recognized that this information allowed them to profit in ways they otherwise would not have. For example, an investor working at a Nevada-based hedge fund ("Investor-3") told the Head of the Desk in an August 2021 call, "I know who my daddy is," referring to the assistance that the Head of the Desk had provided Investor-3 in profiting from block trades. Investor-3 stated in the same call, again referring to block trades, that the Head of the Desk had "put [3] in the fucking game," and that Investor-3 "would be at the kiddie table if it wasn't for" the Head of the Desk.*"

455. ECM further refers to paragraph 30 of the DOJ Statement of Facts in which ECM alleges and I accept Mr. Gagliardi is referred to as "*Investor 3*" as follows:

> "*To take one example of a Relevant Block, on June 20, 2018, a representative of a block seller of 10 million shares of Canada Goose ("GOOS") called a member of the Desk shortly before 2 p.m., then sent a BWIC Email to the Desk at 2:01 p.m. stating, "By opening these documents you agree to treat them as highly confidential, and neither their contents nor the existence of this potential transaction will be shared or discussed with anyone outside your firm." At 2:36 p.m., Investor-3 called Employee-1 using Investor-3's recorded desk line 1 and asked if there was anything Investor-3 "should be focusing on for, uh, tonight, tomorrow." Employee-1 responded, "How is your store of cold weather jackets," and chuckled. They continued to discuss the potential block, and Investor-3 ended the call by stating, "That will be a big focus then, you know? All right, I appreciate it, I'll go to work on it. Thanks, man." From approximately 2:42 p.m. to 4:00 p.m., Investor-3 used swaps to synthetically short 199,989 shares of GOOS. Between 2:00 p.m., when the BWIC Email was sent out, and the market close that day, the share price of GOOS declined approximately 4.25%. Investor-3 covered his short position over the next three days using an allocation from the block, which was executed by another financial institution, resulting in a total profit to Investor-3 of approximately $760,000.*"

456. ECM then refers at paragraph 69C(c) to the fact that paragraphs 36 to 40 of the SEC Passi Order stated as follows:

> "*36. During the Relevant Period, Passi disclosed non-public, potentially market-moving information received from selling shareholders or their agents about block trades to certain potential purchasers of the block,*

including a portfolio manager ("Portfolio Manager A") in the London, England office a Hong-Kong-based hedge fund ("Hedge Fund A") while the auction process was ongoing. Passi knew, or was reckless in not knowing, that such disclosures violated the terms of the auctions and the BWIC emails the Syndicate Desk received in which selling shareholders or their agents expressly requested confidentiality, representations of confidentiality made by the Syndicate Desk, and/or Morgan Stanley's policies on the treatment of Confidential Information.

37. Passi provided this information to Portfolio Manager A with the understanding that he would take large short positions in the stock in anticipation, and prior to the execution, of the block trade, and that, if Morgan Stanley won the auction, Portfolio Manager A would request and receive allocations from the block trade to cover those short positions.

38. Passi knew that providing information about block trades to buy-side investors, such as Portfolio Manager A, could cause the stock price to decline if those investors sold significant amounts of stock in advance of the block trade.

39. Portfolio Manager A's pre-positioning activities benefitted Morgan Stanley as they ensured that there would be a large buyer for at least a portion of the block trade, thereby lowering Morgan Stanley's risk on the transaction, and giving the firm comfort to offer a tighter and more competitive bid.

40. Most selling shareholders and their agents would not have included Morgan Stanley in the auction process involving BWICs if they knew or suspected Passi was disclosing information to buy-side investors during the auction process."

457. At paragraph 69C(d) ECM refers to paragraphs 41, 42, 47, 48 and 50 of the SEC Passi Order as follows:

"*41. On May 2, 2018, a United Kingdom-based private equity firm ("Selling Shareholder A") sold 3 million shares of Medpace Holdings Inc. ("Medpace") common stock ("MEDP") through a block trade with a New York investment bank ("Investment Bank A") serving as the underwriter. That block trade included a 45- day lockup on Selling Shareholder A, which precluded it from selling additional shares until June 16, 2018 unless Investment Bank A released the lockup early.*

42. As the expiration of the lock-up period approached and before Morgan Stanley received a BWIC, Passi had discussed a potential MEDP block with Portfolio Manager A. For example, in a telephone conversation with Portfolio Manager A on June 8, 2018, Passi conveyed, based on a conversation that a different Morgan Stanley employee had with Selling

Shareholder A, that Shareholder A "want[ed] to go" (i.e., sell another block of MEDP). On that call, Passi asked how big of an allocation Portfolio Manager A wanted in a potential MEDP block trade and suggested 500,000 shares. Portfolio Manager A responded that he would be interested in purchasing a minimum of 250,000 shares and maybe more. Additionally, as late as 10:38 am ET on June 11, 2018, the same day that Morgan Stanley received a BWIC, Passi informed Portfolio Manager A of his view that Selling Shareholder A couldn't sell a MEDP block until the following week because the lockup was still in effect.

…

47. At 1:12 pm ET on June 11, 2018, Portfolio Manager A called Passi for approximately nine minutes. During that call, they discussed the impending MEDP block trade.

48. At 1:17 pm ET, while Portfolio Manager A's phone call with Passi was ongoing, Hedge Fund A resumed shorting MEDP shares. Between 1:17 pm ET and 3:59 pm ET, Hedge Fund A synthetically sold short 87,000 shares or approximately $3.8 million of MEDP using equity swaps. During that same time period, the price of MEDP declined from $43.79 to close at $43.39. Hedge Fund A's trading during that time period represented 88.9% of the trading in MEDP.

…

50. Hedge Fund A received an allocation of 350,000 MEDP shares from Morgan Stanley, more than 11% of the shares in the block trade, at $42.25. Morgan Stanley generated approximately $1.88 million in profits from this MEDP block trade."

ECM maintains and I accept that Mr. Gagliardi is "*Portfolio Manager A*".

458. At paragraph 69C(e) ECM refers to paragraphs 55, 57-59 and 62 of the SEC Passi Order as follows:

"*55. At 1:02 pm ET on August 7, 2018, Broker A sent members of the Syndicate Desk, including Passi, a BWIC email requesting a bid on 4.5 million shares of MEDP. The BWIC stated "[b]y opening these documents you are agreeing to treat them as confidential." At 1:11 pm ET on August 7, 2018, Passi responded to Broker A's 1:02 pm ET BWIC email confirming his receipt.*

…

57. At 1:19 pm ET on August 7, 2018, Passi called Portfolio Manager A at Hedge Fund A. That call lasted approximately three minutes. During that call, they discussed the impending MEDP block trade.

58. At 1:23 pm ET on August 7, 2018, Hedge Fund A resumed short selling MEDP shares synthetically using equity swaps. Specifically, between 1:23

> *pm ET and 4:00 pm ET, Hedge Fund A synthetically sold short 93,096 MEDP shares for approximately $5.2 million. Hedge Fund A's trading during that time period represented 26.2% of the trading in MEDP.*
> *59. At 1:26 pm ET, Passi sent an email to other Morgan Stanley employees stating that MEDP was "down $1 already."*
> …
> *62. Hedge Fund A was allocated 550,000 MEDP shares from Morgan Stanley, approximately 12% of the block trade, at a price of $55 per share. Morgan Stanley generated approximately $3.1 million in profits from this block trade." ("Extract E")*

ECM maintains and I accept that Mr. Gagliardi was "*Portfolio Manager A*".

459. At paragraph 69C(f) ECM refers to paragraphs 65-69 of the SEC Passi Order as follows:

> *"65. At 1:35 pm ET on March 19, 2019, a Senior Managing Director at Selling Shareholder B sent Passi and other Morgan Stanley employees a BWIC email. The email began "Passi — As we just discussed, we appreciate your protecting the confidentiality of this discussion from the marketplace, as well as your consideration and thoughts." It continued by asking for Morgan Stanley to submit bids on a block trade of two different sizes: 36 million shares and 43 million shares.*
> *66. Also at 1:35 pm ET on March 19, 2019, Passi called Portfolio Manager A for less than one minute. Portfolio Manager A called Passi back at 1:35 pm ET, and that call lasted for approximately four minutes. During that call, they discussed the impending INVH block trade.*
> *67. Between 2:10 pm ET and 4:03 pm ET, Hedge Fund A synthetically sold short 950,000 shares or approximately $22.2 million of INVH using equity swaps, representing 45.6% of the total volume traded during that period. INVH closed at $23.30, down $0.30, or 1.3%, from its price at 2:10 pm ET.*
> *68. At 4:18 pm ET, Morgan Stanley submitted a bid of $23.22 for 43 million shares, which was accepted by Selling Shareholder B.*
> *69. Hedge Fund A was allocated 2.5 million INVH shares from Morgan Stanley, approximately 5.8% of the block trade, at a total cost of $58.25 million. Morgan Stanley generated approximately $3.4 million in profits from this block trade.*"

ECM maintains and I accept that Mr. Gagliardi was "*Portfolio Manager A*".

460. After pleading these extracts, ECM's "*conclusion*" is as follows at paragraph 69D:

> "*The impression given by the statements made in [the extracts]of the DOJ Statement of Facts and the SEC Passi Order was that the Claimant (referred*

> *to as Investor 3 and Portfolio Manager A) was engaged in regular conduct during the SEC/DOJ Relevant Period which was or which involved at the very least using confidential information to enter trades and thus generate profits so as to give him an unfair advantage over other market participants.*"
> (emphasis added)

461. And at paragraph 69E:

> "*In the premises [Mr. Gagliardi] was in breach of the Trust and Confidence Term as follows:*
> *a. Failing to disclose to [ECM] at the start of his employment or at any time subsequently that his relationship with Mr Passi was or had been inappropriate in that he had habitually received from Mr Passi confidential information for the purposes of entering trades and generating profits which he would not otherwise have been able to do.*
> *b. Maintaining a relationship with Mr Passi, when [Mr. Gagliardi] was employed by [ECM], in circumstances where he had previously received confidential information from Mr Passi, for the purposes of entering trades and generating profits which he would not otherwise have been able to do. This was also inappropriate given that [Mr. Gagliardi]'s relationships with key individuals at investment banks, including Mr Passi at Morgan Stanley, was central to his role at and employment with [ECM]; and where any association between [ECM] and Mr Passi, and/or anyone else who had engaged in conduct that was disreputable and/or which was or which might reasonably be believed or suspected as a breach or potential breach of SEC Rule 10b-5, posed a serious regulatory and reputational risk to [ECM].*"

462. Mr. Legg and Ms. Schumacher submit that this counterclaim is inadequately pleaded and abusive and accordingly should be struck out. I accept that submission (although I see no need formally to strike it out). ECM has failed to particularise any case that Mr. Gagliardi (i) received specific information which was confidential; (ii) knew that the identified information was confidential; and (iii) unlawfully misused that confidential information. It is not appropriate or sufficient to recite extracts from a third party's statement of facts/orders and then simply to plead that the "*impression*" given by those extracts is that a person who is not the subject of those statements of fact/orders was, in general terms, using "*confidential information*" to enter trades so as to give himself an advantage, without (i) specifically identifying the confidential information relied upon, (ii) pleading

that he *knew* that it was confidential (and how he knew it to be so) and (iii) pleading the way in which it is alleged that he misused it.

463. Worse still, the plea in paragraph 69E(a) that Mr. Gagliardi's relationship with Mr. Passi "*was or had been inappropriate*" in that he had "*habitually received*" from Mr. Passi unspecified "*confidential information*" is embarrassing, being hopelessly vague, inadequately particularised, and it fails to plead any viable cause of action. For example, it fails even to plead that Mr. Gagliardi *knew* that the unspecified information, said to have been habitually supplied, was confidential, and nor does it adequately plead what is meant by Mr. Gagliardi gaining an "*unfair advantage*" over other market participants.

464. The plea in paragraph 69E(b) suffers from the same defects as 69E(a) and if anything is even more objectionable by reason of the unparticularised and generalised plea that Mr. Gagliardi's conduct was "*inappropriate*" where *any* association between him and *anyone else* who had engaged in conduct which was *disreputable* (without saying who or what is referred to) and/or which was or which might reasonably be believed or suspected as a breach or potential breach of SEC Rule 10b-5, posed a serious regulatory and reputational risk to ECM (without identifying what conduct might be so believed or suspected and to whom ECM is referring, or identifying what regulatory and reputational risk is here referred to).

465. The inadequacy of the plea in the counterclaim is even more stark in circumstances where the SEC and the DOJ determined not to bring any charges against Mr. Gagliardi after their investigation.

466. On any view ECM is seeking to advance very serious allegations of wrongdoing or disreputable conduct against Mr. Gagliardi in these paragraphs. That requires a clear pleading of a sufficiently cogent case[114]: see *Invest Bank v El Hussein* [2024] EWHC 2976 at [23]-[37]. ECM has failed to comply with this requirement. As was stated in *Three Rivers District Council v Governor and Company of Bank of England (No 3)* [2003] 2 AC 1 at [186]:

> "*This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But*

[114] And a clear pleading of primary facts insofar as the serious wrongdoing alleged is predicated on an inference, namely that it is to be inferred that Mr. Gagliardi is guilty of wrongdoing by reason of his association with Mr. Passi.

> *since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the Court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the Court to infer dishonesty from facts that have not been pleaded, or from facts which have been pleaded but are consistent with honesty. … This is a case of inference, and inference from disreputable conduct. The primary facts relied on must be alleged. That means in the present case the claimant will be confined to its pleading, and it is legitimate to scrutinise its pleaded case with care.*" (emphasis added)

467. There is a further fundamental objection to the way in which the counterclaim is advanced by ECM, which is that it cannot rely on the DOJ Statement of Facts, the SEC Order against Mr. Passi and the SEC Morgan Stanley Order as being binding on anyone other than the SEC and Mr. Passi/Morgan Stanley. These statements and orders are not probative of the matters referred to in them for any other purpose. They cannot be relied upon in these proceedings to prove the truth of their contents as against Mr. Gagliardi, because of the rule in *Hollington v Hewthorn & Co*.[115]

468. As Sales J (as he then was) put it in *Seven Arts Entertainment Limited v Content Media Corporation Plc* [2013] EWHC 588 (Ch) at [73]:

> "*…the basic rule is that, before a person is to be bound by a judgment of a court, fairness requires that he should be joined as a party in the proceedings, and so have the procedural protections that carries with it. This includes the opportunity to call any evidence he can to defend himself, to challenge any evidence called by the claimant and to make any submissions of law he thinks may assist his case. Although there are examples of cases in which a person may be found to be bound by the judgment of a court in litigation in relation to which he stood by without intervening, in my judgment those cases are illustrations of a very narrow exception to the general rule. The importance of the general rule and fundamental importance of the principle of fair treatment to which it gives expression indicate the narrowness of the exception to that rule.*"

469. Yet ECM called no relevant witnesses to prove (by way of direct evidence) any case of wrongdoing against Mr. Gagliardi in these respects, and there was no relevant disclosure by reason of the inadequate way in which the counterclaim was pleaded. In the interests

[115] *Hollington v Hewthorn & Co* [1943] KC 586; and see also *Ward v Savill* [2021] EWCA Civ 1368.

of expedition in view of the very tight trial timetable, I allowed Mr. Downes KC, *de bene esse*, to put some questions to Mr. Gagliardi concerning the extracts relied upon in the counterclaim, despite expressing my reservations in allowing him to do so. Whilst I do not consider that a sufficient case of wrongdoing on the part of Mr. Gagliardi was pleaded or advanced evidentially by ECM so as to justify those questions and require Mr. Gagliardi to respond to them, I make clear that I do not consider that Mr. Gagliardi's answers to Mr. Downes KC's questions established any case of wrongdoing on the part of Mr. Gagliardi (which he denied[116]). As he explained in his Wells Submission, Mr. Gagliardi's pre-positioning was entirely consistent with a legitimate course of conduct which was not predicated on the use of any confidential information, and there is no basis for this court to conclude that Mr. Gagliardi ever *knew* that any information conveyed to him might have been confidential.

470. Mr. Legg and Ms. Schumacher also submitted that no duty of disclosure existed in any event; that there was no breach of any such duty; and ECM had not suffered any loss as a result. Whilst I see the force of each of those submissions, in view of my firm conclusions above there is no need to lengthen this judgment further by addressing those additional points.

471. It is then pleaded, in paragraph 75 of the Counterclaim, that by reason of Mr. Gagliardi's breaches of the Trust and Confidence Term identified at paragraph 69E(a) and 69E(b) of the Re-Amended Defence, ECM has suffered loss and damage in that:

> "*a. Had [Mr. Gagliardi] disclosed his disreputable conduct [ECM] would have immediately dismissed him for Cause.*
> *b. Had Mr. Gagliardi disclosed his disreputable conduct [ECM] would have ceased paying him any salary and would not have paid him any New Issue Bonus.*"

472. I do not accept these contentions either. First, ECM have not established any "*disreputable conduct*" and there was no breach of the Trust and Confidence Term identified at paragraph 69E(a) and 69E(b) of the Re-Amended Defence. Secondly, Mr. Gagliardi did disclose to ECM, during ECM's internal investigation, the nature of his dealings with Mr.

[116] Mr. Gagliardi having denied the allegations of wrongdoing, in view of the inadequately pleaded counterclaim Mr. Downes KC had to accept that denial and could not legitimately take the matter further.

Passi and Morgan Stanley, and ECM nonetheless chose not to terminate his employment for cause and it paid him his New Issue Bonus in early February 2022[117].

CONCLUSION

473. In all the circumstances, Mr. Gagliardi's claim succeeds to the extent stated and ECM's counterclaim fails.

[117] See Mr. Lerch's second witness statement, at paragraphs 30.3 and 30.4

POSTSCRIPT

Supplementary submissions after the trial concluded

474. Mr. Gagliardi provided some further disclosure of documents during the trial. ECM summarised this further disclosure as follows ("**the late disclosure**"):

Tranche 8: 38 new documents formally produced[118] on 21 October 2025;
Tranche 9: 18 new documents formally produced[119] on 23 October 2025;
Tranche 10: 54 new documents formally produced[120] on 24 October 2025; and
Tranche 11: 25 new documents formally produced[121] on 28 October 2025 (last day of the trial).

475. As a result, ECM sought:

(1) Permission to include these documents in the trial bundle. I granted that application.
(2) An order dispensing the need for ECM to apply to re-re-amend its Defence to plead further breaches of contract alleged in Hogan Lovell's letter of 31 October 2025, alternatively permission to re-re-amend the Defence and Counterclaim, which would also lead, it was said, to consequential pleadings;
(3) Permission to ECM to make written submissions on the documents including as to any adverse inferences to be drawn from them;
(4) Disclosure and production of yet further documents, namely WhatsApp messages and iMessages passing between (i) Mr. Gagliardi and Mr. Murphy between 1 April 2021 and 7 March 2022; and (ii) Mr. Gagliardi and Mr. Passi between 1 April 2021 and 7 March 2022; and
(5) An order that all reasonable steps be taken to access Mr. Gagliardi's @evofund iCloud account and disclosure and production of any relevant documents identified on that account.

476. Having considered the nature of the further documents relied upon by ECM together with their initial written submissions in respect of the same (contained in Hogan Lovells' letter), it appeared to me that the late disclosure was of no relevance to the issues before the court and in any event was of no evidential weight. In view of the apparent irrelevance

[118] Informally produced on 20 October.
[119] Informally produced on 22 October.
[120] Informally produced on 22 October.
[121] Informally produced on Saturday 25 October and (in the case of just 4 documents) on Monday 27 October.

of the documents, I also refused to allow ECM to make fresh amendments to its pleaded case (which would have led to a further round of consequential pleadings) and I refused to order yet further disclosure of documents and inspection of the iCloud account. To have allowed such a speculative fishing application for likely irrelevant documents would have been unfair to Mr. Gagliardi, as well as needlessly delaying further the court's judgment.

477. Accordingly, by an email to the parties dated 10 November 2025, I only granted permission to both parties to make short supplementary written submissions on the relevance of the late disclosure to the currently pleaded causes of action and I did not grant any of the other relief sought by ECM.

478. Those supplementary written submissions only served to confirm my views.

479. First, ECM invited the court to draw various adverse inferences against Mr. Gagliardi by reason of his alleged disclosure failings. Indeed, ECM went so far as to allege that Mr. Gagliardi deliberately set out to conceal evidence held on his mobile phones. I reject this suggestion. ECM failed to establish that Mr. Gagliardi was guilty of concealing any evidence at all on the mobile phones that he used over the relevant period. I do not accept the submission of Mr. Downes KC that Mr. Gagliardi sought to avoid the return of his iPhone which was seized by the DOJ; indeed, the material retrieved provides no relevant support for ECM's case in this litigation and so there was no incentive for Mr. Gagliardi to act dishonestly in this respect (see further below).

480. Resisting disclosure applications and changing solicitors afford no ground for drawing any adverse inference as to document destruction; nor does the fact that ECM disclosed more documents in the litigation than Mr. Gagliardi.

481. Mr. Passi's alleged use of "*disappearing messages*" on his mobile phone affords no ground whatsoever to "*infer that [Mr. Gagliardi] used similar means to conceal relevant communications*".

482. None of the matters referred to in paragraphs 7 – 11 of ECM's supplementary written submissions come anywhere near justifying the very serious conclusions in paragraph 13 thereof, which ECM suggests the court can reach by way of adverse inferences, namely that:

a. Mr. Gagliardi and Mr. Passi were communicating confidential information about forthcoming block sales of shares, whilst Mr. Gagliardi was employed by [ECM], to facilitate Mr. Gagliardi's trading. Mr. Gagliardi knew this information to be confidential and knew that this was unlawful (else why conceal the communications from the court).

b. There were several telephone calls between Mr. Gagliardi and Mr. Passi leading up to the search and seizure warrant of 15 November 2021 whereby Mr. Passi tipped off Mr. Gagliardi about the investigation.

483. I accordingly reject this suggestion which is not supported by the documentary record and nor is there any suggestion in the documentary record (or elsewhere) that there might be other undisclosed or destroyed documents which would evidence either of these matters.

484. I consider the late disclosure to be irrelevant to the issues in the case.

485. First, and fundamentally, the late disclosure has no bearing upon the issue of the proper exercise of the contractual discretion nor upon ECM's pleaded case in its counterclaim. Nor does the late disclosure give rise to any arguable further cause of action on ECM's part.

486. Secondly, none of the eight additional complaints ((a)-(h)) which ECM now raise in paragraph 14 of its supplementary written submissions, even if they were contractually relevant, would have justified refusing to pay Mr. Gagliardi a Discretionary Bonus, or supported ECM's counterclaim. I shall take each of them in turn.

487. In paragraph 14(a), ECM suggest that, in relation to Mr. Gagliardi's first trades, he knew that he did not have authority to trade. ECM rely on a WhatsApp exchange between Mr. Varga and Mr. Gagliardi on 29 April 2021 in which the following exchange took place:

> "*Mr Gagliardi, 15:46:27: "At 1:00pm"*
> *Mr Gagliardi, 15:46:30: "MS called me"*
> *Mr Gagliardi, 15:46:38: "I said I am on boarding"*
> *Mr Varga, 15:46:42: "why? You slacking off already?"*
> *Mr Gagliardi, 15:46:44: "They found EVO 75k"*
> *Mr Gagliardi, 15:46:49: "65k …""*

488. ECM contend that if Mr. Gagliardi had believed he was authorised to trade, he would not have said to Morgan Stanley "*I am on boarding*", but that he would instead simply have traded. I do not accept this argument: see in particular paragraphs 75-80 above. In any event, the message does not show that Mr. Gagliardi did not have authority to trade or that he knew that he did not have authority to trade. Indeed, the message sent by Mr. Gagliardi is consistent with Mr. Lerch having led Mr. Gagliardi to believe that he could trade during his integration with a basic set of risk limit rules. It is also consistent with Mr. Varga's expectation, demonstrated within this exchange, that Mr. Gagliardi should be trading, and Mr. Gagliardi's belief that he had authority to engage with his counterparties.

489. In paragraph 14(b) ECM argue that Mr. Gagliardi allowed Mr. Murphy to complete his compliance certificates and dishonestly withhold material information from ECM. ECM specifically rely on two WhatsApp exchanges between Mr. Gagliardi and Mr. Murphy, first on 29 July 2021, in which Mr. Murphy said "*Give me your login I'll fill out the compliance certificates … I'll deal with it*"; and second on 1 August 2021 in which Mr. Murphy said, "*I changed the password im in it now, theres a bunch of stuff I can do, do you want me to register your fidelity accounts and shit*"[122], to which Mr. Gagliardi responded "*Nah*". Several hours later, Mr. Murphy said "*youre good on the certifications*".

490. It is clear from these exchanges only that Mr. Murphy completed the certifications on behalf of Mr. Gagliardi. The certification which ECM specifically rely upon is the "*Review and Certification Form*", which states: "*…I hereby certify that I have: (i) received a copy of ECM's Compliance and Supervisory Procedures Manual ("the Compliance Manual"); and (ii) read all provisions of the Compliance Manual including the Code of Ethics.*" In other words, all that the certification confirms (which Mr. Murphy filled out on Mr. Gagliardi's behalf) is that Mr. Gagliardi received and read the Compliance Manual (it is unclear whether he took this manual with him when he met Mr. Tsai).

491. In any event, I do not accept that had Mr. Lerch been aware of the precise mechanics of Mr. Gagliardi's certification, that it would have had any adverse impact at all on the exercise of his discretion concerning the Discretionary Bonus. Similarly, I do not accept

[122] Fidelity Investments is a savings and pensions specialist.

ECM's complaint that Mr. Gagliardi "*dishonestly withheld material information*", including his "*fidelity accounts*". The exchanges which ECM rely upon are insufficient to suggest that this alleged information was (i) dishonestly withheld, or (ii) material. In any event, I accept the evidence of Mr. Gagliardi that he made his accountant available to ECM to provide details of his personal holdings[123]. Again, I do not accept in any event that had Mr. Lerch been aware of the alleged fact that Mr. Gagliardi withheld information concerning his fidelity accounts that it would have had any adverse impact at all on the exercise of his discretion concerning the Discretionary Bonus.

492. In paragraph 14(c) ECM argue that Mr. Gagliardi actively sought to sabotage ECM's team working ethic and collaborative culture. They rely on the following extract between Mr. Gagliardi and Mr. Murphy on 16 August 2021:

> "*Mr Murphy, 18:14:30: "I shut off that stupid chat btw with them"*
> *Mr Gagliardi, 18:14:50: "Where were they all summer"*
> *Mr Murphy, 18:15:13: "richie playing slap dick, fuck toresco, and fuck sumner/aaron"*
> *Mr Murphy, 18:16:31: "i talk to u and lerch thats it from now on"*
> …
> *Mr Murphy, 18:32:14: "and i aint talking to Richie anymore hes a waste of time"*
> *Mr Gagliardi, 18:33:14: "Dude"*
> *Mr Gagliardi, 18:33:39: "Do what u want"*
> *Mr Gagliardi, 18:33:44: "Your protected"*
> …
> *Mr Murphy, 19:06:37: "i want to be pm under you and a partner in this"*
> *Mr Gagliardi, 19:07:10: "Sumner a partner"*
> *Mr Murphy, 19:07:39: "makes me want to throw up in the morning"*
> *Mr Gagliardi, 19:08:37: "They think he is a great risk mind"*
> *Mr Murphy, 19:10:05: "hes really shown balls"*
> *Mr Murphy, 19:10:52: "hes a fucking pussy surfer, no use"*
> *Mr Gagliardi, 19:11:10: "Loser"*
> …
> *Mr Murphy, 19:12:42: "im also hiring a PI to see what sumner/aaron./Richie have clipped over the years as well on the side"*
> …
> *Mr Murphy, 20:20:16: [Mr. Murphy sent a link to Mr. Gagliardi, or possibly a screenshot of another communication]*
> *Mr Murphy, 20:20:24, "wont tolerate it"*

[123] See his first witness statement, paragraph 23 and see the email exchanges between Mr. Chisholm and Mr. Gagliardi and his accountant Mr. D'Angelo on 11 August 2021, 16 August 2021 and 1 September 2021.

> *Mr Murphy, 20:20:31: "ill be a plumber"*
> *Mr Murphy 20:21:16: "he hasn't replied see where that lands"*
> *Mr Murphy, 20:21:26: "i am not tolerating it"*
> *Mr Murphy, 20:24:13: "i spoke honestly"*
> *Mr Gagliardi, 20:26:29: "That's the only way"*
> *Mr Murphy, 20:26:39: "see what he says"*
> *Mr Murphy, 20:27:06: "im no ones nigger but my pops and urs for the time being learning"*
> *Mr Murphy, 20:27:51: "this upst pissing me off"*
> …
> *Mr Murphy, 20:34:27: "help me with lerch"*
> *Mr Murphy, 20:34:33: "I want to go to war with everyone""*
>
> (ECM's emphasis added)

493. According to ECM, this exchange demonstrates that Mr. Gagliardi was encouraging or endorsing Mr. Murphy's proposal that he could do what he wanted, including not speaking to anyone but Mr. Lerch at ECM. I do not accept that these messages from Mr. Gagliardi can be construed as such a positive encouragement or endorsement. Rather, when Mr. Murphy said that he "*spoke honestly*" in the context of his employers, Mr. Gagliardi positively endorsed that approach: "*That's the only way*".

494. Further, ECM suggested that this exchange "*contradicts Mr. Gagliardi's oral evidence that Mr. Murphy was trying to be "collaborative" with the other traders such as Mr. Garber, and that Mr. Murphy felt he was being bullied by the other traders*". I have already rejected Mr. Gagliardi's evidence that Mr. Murphy was trying to be collaborative in his exchanges with Mr. Garber on 19 August 2021, but I do not accept that this exchange shows that Mr. Murphy did not feel that he was being bullied. These messages clearly indicate that Mr. Murphy was extremely upset with ECM personnel in respect of his US trading. I further do not accept ECM's submission that this exchange demonstrates that Mr. Gagliardi was being a "*terrible teammate*". But in any event, I do not consider that this exchange if known to Mr. Lerch (which it would not have been) would have had any adverse impact at all on the exercise of his discretion concerning the Discretionary Bonus.

495. In paragraph 14(d) ECM argue that Mr. Gagliardi was acting so as to cause damage to ECM's reputation and business. ECM rely on the following WhatsApp exchange between

Mr. Gagliardi and Mr. Murphy on 26 October 2021, the day before the "*refocus slide deck*" was sent to Mr. Gagliardi:

> "*Mr Gagliardi, 06:05:01: "U read this nonsense ?"*
> *Mr Murphy, 06:05:30: "Briefly sometimes"*
> *Mr Gagliardi, 06:05:55: "Makes it seem like whole return Asia"*
> *Mr Gagliardi, 06:06:11: "Will destroy him to the UBS guy in a hr""*
> (ECM's emphasis added)

496. Prior to this exchange at approximately 5:59, Mr. Gagliardi sent to Mr. Murphy an "*EARF_Update_Sep_2021 2*", which appears to be a summary of the EARMF performance in September 2021. Following this exchange, Mr. Gagliardi spoke with a potential investor at UBS, as he mentioned in a WhatsApp message sent to Mr. Lerch on the same day at 10:40: "*Also the investor call with UBS went very well this morning.*"

497. ECM argue that Mr. Gagliardi's message at 6:06 above suggests that he was "*planning to be disparaging, probably about Mr. Toresco, in [his] call with UBS*", and that this would be damaging to ECM's reputation and business. I do not accept this speculation which appears to be false in any event. I do not accept that Mr. Gagliardi's message discloses a "*plan*" to disparage Mr. Toresco or ECM, nor is there any evidence that indicates this is in fact what happened during the call. In any event, insofar as Mr. Gagliardi's message does disclose a plan, that plan is simply to correct the misconception generated by misleading documents about where trading revenue was generated, which does not constitute disparagement. I consider this exchange to be irrelevant to the issues in the case.

498. In paragraph 14(e) ECM argue that Mr. Gagliardi knew that Mr. Murphy had been actively dishonest in his dealings with ECM and that, rather than disclosing this, Mr. Gagliardi acted to conceal this fact. ECM specifically rely on the following WhatsApp exchange between Mr. Gagliardi and Mr. Murphy (which continues from the above extracted exchange) on 26 October 2021:

> "*Mr Gagliardi, 18:13:45: "They think your a liar"*
> *Mr Gagliardi, 18:13:51: "And make shit up"*
> *Mr Gagliardi, 18:13:57: "U do sometimes"*

> *Mr Gagliardi, 18:14:02: "But I protected you"*
>
> *Mr Gagliardi, 18:14:27: "Toresco thinks he is Soros"*
>
> *Mr Murphy, 18:14:40: "listen i don't make up anything, i tell you everything.""*
>
> (ECM's emphasis added)

499. According to ECM, this exchange indicates that Mr. Gagliardi knew or believed that Mr. Murphy had been untruthful in his dealings with ECM and that he acted to conceal the position and to prevent ECM from learning the truth. Instead, ECM argues, Mr. Gagliardi should have reported his dishonesty. I do not accept this submission. On the contrary, this exchange suggests that Mr. Gagliardi openly discussed with ECM personnel the view that Mr. Murphy does "*make shit up*" and he defended him. Insofar as it is alleged that Mr. Murphy had been dishonest, there is no indication from this exchange that anything "*made up*" by Mr. Murphy was material or relevant to ECM or the issues in this case. In any event, Mr. Murphy rejected Mr. Gagliardi's characterisation, saying that he "*[does not] make up anything*" and "*i tell you everything*". Again, this exchange is wholly irrelevant to the issues in the case.

500. In paragraph 14(f) ECM argues that Mr. Gagliardi knew that Mr. Lerch was avoiding contacting him in early November 2021, before the search and seizure warrant was served and thirteen days after the "*Project Gags is Over*" email was sent, which ECM argue supports their case that this was the final straw in a cumulative course of unacceptable conduct and not a short-lived loss of temper. ECM specifically rely on the following WhatsApp exchange between Mr. Gagliardi and Mr. Varga on 8 November 2021, which refers to the spin-out fund:

> "*Mr Gagliardi, 20:37:57: "Highly unlikely ready for Dec 1"*
>
> *Mr Varga, 20:35:09: "what u talking about?"*
>
> *Mr Varga, 20:35:17: "says who?"*
>
> *Mr Gagliardi, 20:35:18: "It's Nov 9th"*
>
> *Mr Gagliardi, 20:35:57: "Communication with Lerch is almost zero and we could be on 2 different planets at this point"*
>
> *Mr Gagliardi, 20:36:28: "Also blocks coming tonight and want to protect and can't do anything … extremely frustrating"*
>
> *Mr Gagliardi, 20:36:43: "And Rivian coming tomorrow night"*

Mr Gagliardi, 20:36:56: "And have to say no on blocks that I want to prepare for"

Mr Gagliardi, 20:37:01: "Whole thing is absurd""

(ECM's emphasis added)

501. This exchange clearly acknowledges that communication between Mr. Gagliardi and Mr. Lerch was slow, to the frustration of Mr. Gagliardi. It does not say that little or no progress was being made in respect of the spin-out fund. Indeed, it is clear from the factual background discussed earlier in this judgment that progress was indeed being made and critically, Mr. Varga assures Mr. Gagliardi in this same exchange at approximately 20:37 that "*we are working on it!*" "*as we speak!*". Indeed, only a day or two later on 9 or 10 November 2021, Mr. Tsai emailed Mr. Lerch and others a draft shareholder letter and amended PPM in order to establish an offshore fund for the spin-out fund.[124] It is evident that the spin-out fund was progressing, contrary to ECM's submission. It follows that I reject ECM's submission, and this exchange therefore does not undermine Mr. Gagliardi's estoppel case.

502. In paragraph 14(g) ECM argues that contrary to Mr. Gagliardi's evidence that he was unaware of the DOJ's contact with his lawyers and contrary to his assertion that he believed his connection with the SEC/DOJ investigation was peripheral, Mr. Gagliardi felt in December that there was "*so much heat on him*". ECM specifically relies on a WhatsApp exchange between Mr. Gagliardi and Mr. Murphy dated 21 December 2021:[125]

"*Mr Gagliardi, 19:13:04: "we have to get away"*

Mr Gagliardi, 19:13:10: "from all these people"

Mr Gagliardi, 19:13:16: "in time"

Mr Murphy, 19:13:22: "how"

Mr Gagliardi, 19:13:27: "they don't bring anything"

Mr Murphy, 19:13:32: "you need to figure out a name"

Mr Murphy, 19:13:37: "of the fund"

Mr Gagliardi, 19:13:37: "i have so much heat on me"

Mr Gagliardi, 19:13:41: "when that passes"

[124] See paragraph 178 above.

[125] In the original document the words are randomly arranged. The extract I have included is ECM's interpretation of those messages, which I accept is likely to be correct.

Mr Gagliardi, 19:13:47: "we ditch them all"

Mr Gagliardi, 19:14:04: "aren't they dogs"

Mr Gagliardi, 19:14:18: "not wired like us"

Mr Murphy, 19:14:24: "nope"

Mr Murphy, 19:14:33: "but you need to figure out a name"

Mr Murphy, 19:14:38: "use them for the time being"

Mr Murphy, 19:14:48: "we get the Ip"

Mr Murphy, 19:14:56: "and then cancel them out"

Mr Gagliardi, 19:15:50: "right now I have blinders for 1 person"

Mr Gagliardi, 19:16:21: "he will get hit"

Mr Murphy, 19:25:13: "i'm so fucking bored i want to trade""

(ECM's emphasis added)

503. ECM argues that the line "*I have so much heat on me*" is evidence that Mr. Gagliardi knew that he was much more central to the DOJ investigation than he had led ECM to believe and that he was aware of a recording that had been played to his US criminal lawyers by the DOJ on 22 November 2021. Accordingly, ECM suggested that this message is further evidence that Mr. Gagliardi was not telling Mr. Lerch the truth when on 21 January 2022 he said in the recorded phone call that "*My guys haven't heard from the DOJ since, I guess, that first time … the last time I saw you in LA*".

504. I do not accept this submission. This exchange does not confirm that Mr. Gagliardi withheld anything relevant from ECM, nor that Mr. Gagliardi was involved in the SEC/DOJ investigation in anything more than a "*peripheral*" way. Indeed, the exchange shows that Mr. Gagliardi considered that the "*heat*" would "*pass*", which is ultimately what happened. I consider this exchange to be irrelevant to the issues in the case.

505. Finally, in paragraph 14(h) ECM argues, based upon this part of the WhatsApp messages set out above:

"*Mr Murphy, 19:14:38: "use them for the time being"*

Mr Murphy, 19:14:48: "we get the Ip"

Mr Murphy, 19:14:56: "and then cancel them out"

Mr Gagliardi, 19:15:50: "right now I have blinders for 1 person"

Mr Gagliardi, 19:16:21: "he will get hit"

Mr Murphy, 19:25:13: "i'm so fucking bored i want to trade""

that Mr. Gagliardi and Mr. Murphy were conspiring together to cause damage to ECM's business and to misappropriate ECM's intellectual property ("*ip*"). This is a surprising submission to make and there is no sound evidential basis for it.

506. Mr. Legg and Ms. Schumacher suggest that in fact the extract says "*LP*" – "*Limited Partnership*" (and not "*IP*" – intellectual property) - i.e. it is a reference to the spin-out fund which was obviously in ECM's contemplation at the time.[126] Indeed, ECM itself notes that the 'I' and 'l' in the type face used in the extract are identical.

507. In response ECM contend that even if 'ip' is to be read as 'lp', the intent is still nefarious as it suggests that Mr. Gagliardi and Mr. Murphy were going to use ECM's infrastructure to set up their own business and then sideline ECM from this new project altogether.

508. This is highly speculative and I reject this submission. I do not accept that this exchange discloses a "*nefarious*" intention. It was always the plan for the new US fund to start within the Evo Group after US trading in EARMF was wound up, before spinning out into an independent entity into which ECM could invest. Indeed, a key motivator for the spin-out fund was that it would "*eliminate friction*" within ECM, i.e. it would involve Mr. Gagliardi and Mr. Murphy working away from some of the ECM personnel.

509. In any event, I consider this entire process of extracting a line or two from numerous and lengthy (and frequently jocular) WhatsApp exchanges which took place between Mr. Gagliardi and Mr. Murphy over a lengthy period of time, and then seeking to draw reliable conclusions from the same to be flawed and I reject it. No reliable conclusions of the sort suggested can be drawn.

510. In all the circumstances, I do not consider that the late disclosure affects any of my conclusions contained in the body of the judgment above.

[126] It is noted that the rest of Mr. Murphy's messages are typed in lowercase. It is very unlikely that Mr. Murphy would capitalise just one letter, i.e. "I" in "Ip" when he has otherwise exclusively typed in lowercase.