IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARTER COMMUNICATIONS OPERATING, LLC, Plaintiff, v. OPTYMYZE, LLC f/k/a SYNYGY, LLC, and OPTYMYZE PTE. LTD., Defendants. ________________________________ OPTYMYZE PTE. LTD., Counterclaim Plaintiff, v. CHARTER COMMUNICATIONS OPERATING, LLC, Counterclaim Defendant.	)	C.A. No. 2018-0865-JTL

MEMORANDUM OPINION

Date Submitted: October 15, 2020
Date Decided: January 4, 2021

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LASTER, V.C.

Defendants Optymyze LLC and Optymyze Pte. Ltd. are part of a group of related entities ultimately controlled by Mark Stiffler (collectively, the “Stiffler Organization”). In 2015, plaintiff Charter Communications Operating, LLC (“Charter”) contracted with Synygy LLC (“Original Synygy”), a predecessor entity in the Stiffler Organization, to provide a cloud-based platform that Charter used to calculate commission-based compensation for thousands of its employees and vendors (the “Compensation Platform”). Charter also contracted with Original Synygy to provided professional services to support the Compensation Platform (the “Services”).

Over the years, the Stiffler Organization engaged in a series of internal reorganizations and restructurings through which it claimed to transfer the rights and obligations under Charter’s contract. In 2017, the Stiffler Organization claimed that Original Synygy had merged with Optymyze LLC (“Original Optymyze”), which became the counterparty to Charter’s contract. In 2018, the Stiffler Organization claimed that Charter’s agreement had been assumed by Optymyze Pte. Ltd. (“Optymyze Singapore”), which became the counterparty to Charter’s contract.

In 2018, the Stiffler Organization asserted that Charter’s use of the Compensation Platform exceeded contractual limits and demanded additional fees as compensation. After Charter refused to pay, the Stiffler Organization threatened to block Charter’s access to the Compensation Platform.

Charter filed suit against Optymyze LLC and Optymyze Pte. Ltd. (jointly, “Optymyze”). Charter also moved for a temporary restraining order to bar Optymyze from blocking Charter’s access to the Compensation Platform.

After this court entered a TRO, the Stiffler Organization waged a campaign of litigation misconduct. On four separate occasions, this court concluded that Stiffler and Optymyze had violated the TRO, which led this court to impose more than $1 million in remedial and coercive sanctions.

In July 2019, nearly seven months after Charter had filed this action, Optymyze asserted seventeen counterclaims. Charter moved to dismiss under Rule 41(b), arguing that the counterclaims contained clearly false allegations that Stiffler had verified in violation of Court of Chancery Rule 3(aa). After holding a hearing on Charter's motion, this court concluded that Charter had presented clear and convincing evidence that the counterclaims included false allegations that warranted dismissal under Rule 41(b). But in an abundance of caution, this court elected to hold a further evidentiary hearing before ruling on the Rule 41(b) motion so that Optymyze would have a final opportunity to place Stiffler's sworn allegations in context. Because Stiffler had verified the counterclaims, the court noted that Stiffler's testimony would be necessary to rule on the Rule 41(b) motion.

The hearing was scheduled for October 2020. Rather than working collaboratively to prepare for the hearing, Stiffler and Optymyze engaged in further litigation misconduct. Optymyze first sought unnecessary discovery. Optymyze next refused to produce witnesses for deposition. Most egregiously, Optymyze prevented Charter from conducting a meaningful deposition of Stiffler. Optymyze stalled on providing Charter with dates for a deposition. Optymyze then proposed dates that were more than four months away and suggested limiting Stiffler's deposition to 2.5 hours. When Charter sought to confer, Optymyze refused to engage, forcing Charter to file a motion to compel. This court ordered

Optymyze to provide reasonable dates and instructed that the deposition would continue until completed.

After this court's order, Optymyze proposed scheduling Stiffler's deposition late at night, over a holiday weekend. The parties eventually managed to agree on a date, but at the deposition, Stiffler was evasive and non-responsive. After 2.5 hours, Stiffler abruptly announced, "I have to go," and walked out. He agreed to resume the next day, then failed to show up. He never completed the deposition, thus unilaterally enforcing the 2.5-hour time limitation that this court had rejected.

On September 16, 2020, with the evidentiary hearing looming, Optymyze filed a notice that purported to dismiss its counterclaims without prejudice (the "Notice of Dismissal"). Charter moved to strike the Notice of Dismissal. Charter maintains that Optymyze's counterclaims should be dismissed with prejudice, either under Rule 41(a)(2), Rule 41(b), or Rule 37(c). Optymyze responds that it had an absolute and unconditional right to dismiss its claims unilaterally and without prejudice under Rule 41(a)(1).

Rule 41(a)(1) limits a party's ability to dismiss its claims unilaterally and without prejudice. A claimant can no longer dismiss its claims unilaterally and without prejudice after the claimant has filed an answering brief in response to a motion dismiss. Nor can a claimant dismiss its claims unilaterally and without prejudice after the introduction of evidence at a hearing. Both limitations apply here. The Notice of Dismissal was therefore ineffective.

A consequence of granting Charter's motion to strike is that Optymyze's counterclaims remain pending. Charter has therefore renewed its motion to dismiss under

Rule 41(b). This court previously found that Charter had presented clear and convincing evidence that supported dismissal, but gave Optymyze and Stiffler a final chance to present evidence in response. Optymyze and Stiffler forfeited that opportunity. The counterclaims are therefore dismissed with prejudice under Rule 41(b). This decision does not reach Charter's arguments for dismissal under Rule 41(a)(2) or under Rule 37(c), though both likely have merit.

Charter is entitled to its reasonable attorneys' fees and expenses under the bad faith exception to the American Rule. Alternatively, Charter would be entitled to its fees and expenses under Rule 37, which empowers this court to impose sanctions when a party has engaged in discovery misconduct.

I. FACTUAL BACKGROUND

The facts are drawn from the pleadings, prior decisions in this case, the motion under consideration, and documents submitted in connection with the motion.

A. The Agreement

Effective January 1, 2015, Charter entered into a Professional Services Agreement with Original Synygy, the entity through which the Stiffler Organization conducted business at the time. Dkt. 1 Ex. A (the "Agreement" or "PSA"). Stiffler signed the Agreement in his capacity as President of Original Synygy.

The Agreement contemplated that the parties would enter into Statements of Work that would "be subject to and governed by the terms of and conditions of [the] Agreement except to the extent explicitly agreed by the Parties otherwise." *Id.* § 1.1. The Agreement further provided that "[i]n the event of a conflict between [the] Agreement and any SOW,

. . . except with regard to inspections and acceptance, the scope of services, and the services schedule the terms of this Agreement will prevail." *Id.*

Under the Agreement, Charter and Original Synygy executed a Statement of Work effective as of July 1, 2015, for "Sales Performance Management as a Service." Dkt. 1 Ex. C (the "2015 SOW"). Charter and Original Synygy subsequently entered into a Statement of Work effective as of January 1, 2017, for "Sales Performance Management Services." Dkt. 1 Ex. B (the "2017 SOW"). The 2017 SOW superseded the 2015 SOW.

The 2017 SOW divided the services into two categories: "Cloud Services" and "Professional Services." *See* 2017 SOW Exs. A, B. The SOW had an initial term of three years from its effective date, meaning that the initial term would end on December 31, 2019. The 2017 SOW provided that at the end of the initial term, the 2017 SOW would renew automatically on an annual basis for a one-year term, unless terminated by either party by written notice provided at least ninety days in advance of the renewal date. *Id.* § 4.1. Either party could terminate the 2017 SOW for cause by giving notice of a material breach, if the material breach subsequently remained uncured for thirty days. *Id.*

Exhibit A, which governed Cloud Services, identified base numbers of Charter users who would have access to the Compensation Platform. It also identified other "add-ons," such as an anticipated level of data storage that Charter would use. Exhibit A provided that "[i]f the Cloud Services requested by You exceed the scope of Cloud Services described above, then We will provide such additional Cloud Services as per the fee rates for incremental Cloud Services described in the fee adjustments section of Exhibit C."

Exhibit B, which governed Professional Services, identified a base level of product support that the Stiffler Organization would provide, framed in terms of the number of professionals on the support team and their capacity in full-time-employee-equivalent months. Exhibit B provided that "[i]f the work requested by You in a calendar year cannot be completed using the Professional Services Team Capacity for the calendar year, then We will, upon reasonable request from You and upon Your approval, provide such additional Professional Services Team Capacity as per the fee rates . . . described in the fee adjustments section of Exhibit C."

Exhibit C contemplated that Charter would pay an annual service fee of $3,663,833 in year one and $2,801,333 in years two and three. If Charter added additional users, then Charter would pay incremental fees according to the fee schedule in Exhibit C, under which the per-user cost declined as the number of additional users increased. The highest tier on the chart contemplated 50,000 users at an incremental cost of $20 per user. The exhibit also contemplated additional fees for ad hoc data storage of $5 per gigabyte per month or $25,000 per terabyte per year. Additional support services would be charged at $6,500 for each 0.25 of a full-time-equivalent employee per month or $60,000 for a year.

B. The Entity Shuffle

After Charter and Original Synygy entered into the 2017 SOW, the Stiffler Organization began shuffling the entities through which it conducted business. In July 2017, the "Optymyze Invoice Team" informed Charter by letter that "[Original Synygy] and [Original Optymyze] (which are owned by the same parent company) have merged, with [Original Optymyze] being the new surviving entity." Dkt. 1 Ex. F. Original

Optymyze was a Delaware limited liability company and is one of the defendants in this case. The letter stated that "[w]ith this merger, the Agreement between [Original Synyngy] and [Charter] will be assumed by [Original Optymyze], and the terms and conditions therein will otherwise remain unchanged." *Id.*

Approximately one year later, in June 2018, the "Optymyze Invoicing Team" informed Charter by letter that "as a result of changes to our corporate entity structure, effective as of January 1, 2018, the Agreement between [Original Optymyze] and [Charter] is assumed by [Optymyze Singapore], and the terms and conditions therein will remain unchanged." Dkt. 1 Ex. G. Optymyze Singapore was a Singapore entity and is the other defendant in this case. In a subsequent letter, the Stiffler Organization claimed that Optymyze Singapore had "acquired Synygy" in January 2018, even though Original Synygy ostensibly had merged into Original Optymyze the year before. *See* Dkt. 1 Ex. H.

C. The Shakedown Attempt

Charter relied on the Compensation Platform to conduct its business. Charter used the Compensation Platform to pay thousands of employees and vendors, and it was "the sole tool Charter use[d] to determine the commissions and incentive payment eligibility of millions of daily transactions." Dkt. 1 Ex. E ¶ 5. The Compensation Platform also fulfilled critical for back-office functions for Charter, including "auditing and compliance quality checks, budgeting, and . . . complex incentive-based compensation and performance plans." *Id.* ¶ 6.

Until mid-2018, the parties worked cooperatively under the Agreement. The Stiffler Organization provided the Compensation Platform and Services, and Charter paid the required fees, which totaled approximately $10 million from 2016 to 2018. Compl. ¶ 32.

In mid-2018, Stiffler hired an investment bank to explore a sale of the Stiffler Organization. *See* Dkts. 339–40 ("Mot.") Exs. 5, 12. To maximize the potential sale price, Stiffler looked for ways to increase revenue. To that end, Stiffler decided to "audit" his customers to identify use that allegedly exceeded their contractual limits. Stiffler planned to impose "[r]etroactive fees" and pressure his customers into settlements that would result in new long-term contracts at higher rates. Ex. 12 at ’044, ’059. In Stiffler's words, he would "shak[e] down Optymyze clients." *Id.* at ’039.

The Stiffler Organization attempted to shake down Charter beginning in October 2018. Amit Gupta, a representative of "Optymyze," claimed that Optymyze Singapore had audited Charter's use of the Compensation Platform and found that Charter was "out of compliance" with the Agreement. *See* Dkt. 1 Ex. H. Gupta threatened to "suspen[d] Charter's use of the [Compensation Platform]" unless Charter worked "to become compliant." *Id.* As the price of becoming compliant, the Stiffler Organization demanded that Charter pay $42.6 million in overage fees, enter into a new master service agreement with a seven-year term, and pay an annual fee of $30 million. *See* Mot. Ex. 7 at 29.

Charter attempted to understand the dispute and resolve it. During a series of meetings, Charter asked how the Stiffler Organization had calculated the arrearage. Charter also sought to understand why the Stiffler Organization had not identified the issue at any point during the preceding thirty-four months. The Stiffler Organization did not proceed in good faith. The Stiffler Organization would not provide information and regularly threatened to block Charter's access to the Compensation Platform. *See, e.g.*, Ex. 9 at 34–36. The Stiffler Organization also made other threats, including Gupta suggesting that if access to the Compensation Platform were cut off, then "your CEO and the CFO are likely to have concerns about complying with regulations under Sarbanes-Oxley." Dkt. 1 Ex. Q.

On November 15, 2018, the Stiffler Organization disabled the user accounts of the core team at Charter that accessed the Compensation Platform. *See* Mot. Ex. 11. A few hours later, the Stiffler Organization informed Charter that six users had been banned from using the Compensation Platform. The Stiffler Organization also revoked certain access privileges for twenty-seven other Charter employees who were responsible for using the Compensation Platform to manage sales compensation for Charter.

On November 16, 2018, Charter's General Counsel, Rick Dykhouse, asked the Stiffler Organization to restore access for all thirty-three users and confirm that it would not suspect services. Stiffler responded with a mocking email:

> Ryck (I like Y's):
>
> I couldn't stop laughing. Charter needs to realize that it has <u>no cloud services agreement</u>. It never bought what it's using from anyone. It's like stealing cable television! Charter has a professional services agreement with [Original Synygy] to deliver an outsourcing service. I'll let Christian give you the lawyer speak…

Dkt. 1 Ex. S (ellipses in original). But Charter quite obviously had a cloud services agreement in the form of the 2017 SOW.

On November 19, 2018, a representative of the Stiffler Organization, Christian Na, claimed that Charter's access to the Compensation Platform had not been affected. *See*

Dkt. 1 Ex. T. Charter responded that it intended to file a lawsuit and seek a TRO. Only after receiving that threat did Na tell Charter that its access was being restored. *See* Dkt. 1 Exs. U, V.

Over the ensuing week, the Stiffler Organization restored virtually all of Charter's access. Then, on November 27, 2018, Na sent Charter a letter claiming that "the Agreement is hereby terminated for cause." Mot. Ex. 13 at 4.

D. Charter Files Suit.

On November 29, 2018, Charter filed this action against Optymyze and sought an emergency TRO that would bar Optymyze from blocking Charter's access to the Compensation Platform while the parties litigated their dispute. Dkts. 1, 3. Put simply, Charter sought to maintain the status quo pending a hearing on a motion for a preliminary injunction.

During a hearing on November 30, 2018, this court was prepared to grant an *ex parte* TRO that would be subject to renewal within ten days. In lieu of the TRO, counsel for Optymyze represented that "we will not usurp the access to the cloud services while we're afforded an opportunity to present our position with respect to the motion for a temporary restraining order." Dkt. 24 at 15.

Having read the Agreement in preparation for the hearing, this court knew that the parties had "irrevocably agree[d] that any dispute shall be referred to and finally resolved by arbitration in accordance with the rules of the American Arbitration Association." PSA § 21. The same section stated that "[n]othing in this Section will restrict or delay either party's freedom to commence or pursue legal proceedings in the courts of Delaware to preserve any legal right or remedy, preserve a superior position with regard to other creditors of the other party or its Affiliates, or protect any Intellectual Property Rights, Confidential Information or trade secret." *Id.* This court explained that in light of this language, the most likely result of the application would be

> an order that prevents the defendants from doing anything but acting as if the contract, read broadly to include these additional services, remained in place pending resolution of the dispute by arbitration. What I would likely do is say that that order would lift as soon as people had time to get to an arbtira[tion] panel, get that panel set up[,] and seek substitute relief from that panel. Why? Because [the Agreement] said AAA. AAA has the ability to grant injunctive relief. Once they are up and running, you-all don't need me anymore.

Dkt. 24 at 19. This court encouraged the parties to enter into "some type of stipulation that preserves the status quo pending you-all initiating arbitration." *Id.* at 20.

E. Charter Obtains The TRO.

The parties were unable to agree on a form of status quo order, so the court convened a hearing on December 5, 2018. At the conclusion of the hearing, this court granted Charter's application, ruling that

> Optymyze, its officers, directors, employees and agents, and anyone acting in concert with Optymyze, are temporarily restrained from taking any action to terminate any of the services Optymyze was providing or Charter was using as of November 14, 2018.

Dkt. 31 at 21. The court explained that it was issuing the TRO "to preserve the status quo so that the parties can proceed to arbitration to resolve their disputes in accordance with their agreement" and imposed a schedule by which the parties had to file for arbitration before the status quo order would dissolve. *Id.* The court further held that the TRO would dissolve once the arbitral panel had been established and given an opportunity to consider an application for injunctive relief. *Id.* at 22.

The court asked counsel for the parties to document the TRO. In response to a question from counsel, the court confirmed that "[t]he TRO is issued. This is just to document it." *Id.* at 25.

F. The Pop-Up

Stiffler immediately sought to undermine this court's ruling. After Charter proposed a form of TRO that memorialized the court's oral ruling, Stiffler instructed his lawyers to revise the draft so that it would require that Charter users "abide by the Optymyze Terms of Service." Dkt. 29 at 2 (internal quotation marks omitted). His lawyers sent Charter's counsel three pages of comments, including the language on the Terms of Service and other provisions that endorsed Optymyze's positions in this litigation. While his lawyers were pushing to make these changes, Stiffler "rewrote [the Terms of Service] completely" to match positions that the Stiffler Organization intended to take in the litigation. Mot. Ex. 20 at 9–10; *see* Exs. 21, 22. Under Stiffler's plan, immediately after the court entered the TRO, the Stiffler Organization would roll out a pop-up window that would require Charter users to accept the Terms of Service before accessing the Compensation Platform. *See* Exs. 23, 25. By accepting the Terms of Service, Charter users would agree to the defendants' positions in this litigation.

Charter's lawyers refused to include language in the order that required Charter users to comply with the Terms of Service. Undaunted, Stiffler implemented the pop-up anyway. *See* Mot. Ex. 25 at 6–7; Ex. 28 at 2–3.

Confronted with the new pop-up, Charter's counsel informed the court about the change in the status quo. At 5:04 p.m., on May 12, 2018, this court issued an order to show cause requiring Optymyze to explain why it "should not be held in contempt" for deviating from the representation it had made to the court. Dkt. 26 ¶ 1.

Within minutes, Stiffler began manufacturing a narrative for the court. Messages sent over Slack, an instant messaging platform, reveal that Stiffler attempted to create the impression that the pop-up applied not only to Charter, but also to two other clients:

- Stiffler (5:09 pm): I need the TOS app rolled out immediately to J and J and USCC also. More to come.
- Luongo (5:12 pm): OK--just reiterating that all of this is manual and not sustainable at large numbers...
- Stiffler (5:12 pm): Yeah..... but order for my arrest is uncool
- Luongo (5:12 pm): Agreed
- Stiffler (5:13 pm): Needs to apply to "all" clients (at least to the likes of Charter)
- Stiffler (5:16 pm): Round up some people.... we've already received a copy of contempt letter to the court
- Stiffler (5:25 pm): If Charter proves Optymyze targeted them only, this Judge is known to have issued arrest warrants for execs that he thinks blatantly violated his TRO.

Mot. Ex. 25 at 8–9; *see* Ex. 29.

Implementing the pop-up was not the only action that Stiffler took. Beginning around 7:00 p.m. on December 12, 2018, every time a Charter-affiliated user submitted an email request to the Stiffler Organization seeking services, the Compensation Platform sent back an automated response, which inaccurately claimed that "Charter has exceeded the hours of professional services that it has purchased for 2018" and directed the user to "contact Tom Byrum [of Charter] for assistance." Dkt. 29 Ex. C.

In their subsequent submission to the court, Stiffler and his colleagues tried to conceal their misconduct with falsehoods. When responding to the order to show cause, Optymyze falsely represented that the pop-up was "pre-planned," "carried out by Optymyze in its normal course of business, separate and apart from the current dispute," and intended "for all Optymyze clients." Dkt. 27 ¶¶ 1–2. The Stiffler Organization's own documents show that none of that was true.

At the time, this court did not know that the defendants' representations were false. On December 13, 2018, in reliance on those representations, this court declined to hold Optymyze in contempt. This court stated plainly that Optymyze "should not have implemented [the pop-up] for the plaintiff's users" because it "conflict[ed] with the temporary restraining order." Dkt. 28 ¶ 3. And this court directed Optymyze to exclude Charter from the roll-out of the new Terms of Service to the extent reasonably feasible. *Id.* This court held that in any event, Optymyze would be barred from later arguing that Charter was bound by the altered Terms of Service or that those terms had any effect on the parties' dispute. *Id.* ¶ 2.

After the pop-up kerfuffle, Charter and Optymyze submitted competing forms of order to memorialize the TRO. On December 18, 2018, this court entered Charter's form of order, which tracked the court's earlier transcript ruling. The order stated,

> Optymyze and their directors, officers, employees, and agents, and any person or entity acting in concert with Optymyze, are hereby ENJOINED from terminating the Agreement or interfering with, withholding access to,

> preventing use of, or otherwise impairing the services Optymyze provides Charter, as those services were in use on November 14, 2018.

Dkt. 32 (“TRO”) ¶ 2 (footnote omitted). The order included the schedule that this court had designed to incentivize the parties to submit their dispute to arbitration. *See id.* ¶ 3.

G. Stiffler’s Response To The TRO

Stiffler did not take the TRO seriously. He bragged to his investment bankers that he had earned his “first TRO badge.” *See* Mot. Ex. 18 at ’037. Stiffler thought that the TRO was “good [p]ublicity” and described it as a “gold mine” that demonstrated the importance of the Compensation Platform to his clients. *Id.* at ’036–37. One of his investment bankers pointed out that it would be “especially useful for [audit] conversations with other customers.” Ex. 5 at ’029.

Under Stiffler’s direction, the Stiffler Organization began a lengthy campaign to impair Charter’s use of the Compensation Platform and defy the TRO. As Stiffler put it, “i love litigation… and i’ve got surprise after surprise lined up in the plan….” Mot. Ex. 27 at 66 (ellipses in original); *accord* Ex. 72.

H. The Professional Services

As his next avenue for interfering with Charter’s use of the Compensation Platform, Stiffler turned to Charter’s use of the Services, i.e., the individuals within the Stiffler Organization who supported Charter’s use of the Compensation Platform. On December 12, 2018, while designing the pop-up, Stiffler instructed his team to reduce Charter’s access to professional services and to institute a full “blackout” on December 25, Christmas Day, without providing any notice to Charter. *See* Mot. Ex. 24 (“and i said that we are over budget, so zero team… no more hours… end on Weds”); Ex. 27 at 7 (same); Ex. 43 (“blackout for ps team on all email to/from client domain”); Ex. 19 at 95 (same).

By taking these actions, Stiffer cut off Charter’s access to support personnel. Whenever Charter sent an email to support personnel, Charter received no response.

Charter again sought relief from the court to restore the status quo. *See* Dkt. 45. This court held that Optymyze had violated the TRO by cutting off access to Optymyze’s support personnel, that Optymyze’s justification for imposing the blackout was “contrary to [the] plain language” of the Agreement, Dkt. 68 at 19, and that Optymyze must “provide Professional Services with the same personnel who have had material involvement on Charter’s account,” Dkt. 56 ¶ 3; *see id.* ¶ 2. The court awarded sanctions, including attorneys’ fees and costs for bringing the motion. *Id.* ¶ 4.

Having twice violated the TRO, Stiffler flouted the court-ordered sanctions. Shortly after the hearing, Stiffler messaged his CFO “to make sure that no money is paid to the Delaware quotes [sic] for the $55,000 fine what a [sic] charter for legal fees.” Mot. Ex. 71. Stiffler also instructed the lead representative on Charter’s Professional Services team to find “a small team of four low-level people for Charter (not you or anyone > 1 year or so experience, and none in the US) to work about half-time” to provide services for Charter. Ex. 27 at 38. He stressed there was “no need for the old team… that’s not what the judge ordered….lol … body’s is body’s…. hours is hours…stupid is stupid….” *Id.* at 39 (ellipses in original). He reiterated that he wanted “low to medium people…not good” ones. *Id.* at 41 (ellipsis in original).

I. The Data Cap

Stiffler had still more "surprises" in store. Soon after this court entered the written TRO, Stiffler concocted another scheme to interfere with Charter's use of the Compensation Platform. The TRO obligated the Stiffler Organization to provide services "as those services were in use on November 14, 2018." TRO ¶ 2. Adopting an absurdly literal reading of that requirement, Stiffler decided that the TRO limited Charter's use of the Compensation Platform to the exact amount of data that Charter had used on November 14, 2018, rather than the total amount of data allocated to Charter as of that date. *See* Mot. Ex. 19 at 22–26. Based on this extreme interpretation, Stiffler capped Charter's data usage, intending to force a crash while purporting to comply with the TRO.

On December 24, 2019, Stiffler engaged in a lengthy discussion via the Microsoft Teams platform with two of his subordinates, Ritu Raj and Sani Nahar. At Stiffler's request, Raj and Nahar determined that as of November 14, Charter had been allocated 15,000 gigabytes of disk space and had used 11,368 gigabytes. *See* Mot. Ex. 19 at 63–67, 128. To cap Charter at its November 14 usage level, Stiffler ordered Raj and Nahar to "pull[] back [Charter's] disk space" to "100.01% of current use." *Id.* at 71–72; Exs. 39, 40. In response, Nahar asked, "should we reduce their allocated from 15Tb to close to 11Tb on Charter production so that they just have 200-300Gb left for growth[?] As soon as that is consumed, they will be done." Ex. 19 at 72–73; Exs. 35, 37, 38. Stiffler agreed. Ex. 19 at 73. Nahar confirmed that with these changes, Charter's "processing won't work at all and U[ser] I[nterface] will become slow/sluggish." *Id.*; Ex. 36. Stiffler instructed Raj and Nahar to "go ahead and do it." Ex. 19 at 76; Ex. 42. Stiffler explained, "[W]e don't want to CAUSE a crash… but when they add something… THEY cause the crash." Ex. 19 at 90 (ellipses in original); Ex. 41.

On Christmas Eve, Raj and Nahar worked feverishly to reduce Charter's allocated storage from 15 terabytes to approximately 11.5 terabytes. They kept Stiffler informed of their progress, notifying him on Christmas Day that "the storage resize is completed." *See* Mot. Ex. 19 at 76–77, 82, 87–92.

But that was not the end of Stiffler's "surprises." He knew that Charter would remove old or unused data to free up additional space. To counteract those efforts, Stiffler instructed Raj and Nahar to "tighten up more," i.e., to continue reducing Charter's allocated disk space as Charter took steps to make more available. Mot. Ex. 50; *see* Ex. 19 at 94, 126, 132; *see also* Ex. 49 ("I understand you can't take away used space but as it frees you can go back to nov 14 level.").

As intended, the data cap slowed the Compensation Platform to a crawl. By mid-January 2019, Charter's data processing requests began to fail. On January 14, when the court heard Charter's first motion to enforce the TRO, Nahar warned Stiffler that Charter's "database usage is matching the allocated storage and their data processing is started [sic] to fail." Mot. Ex. 52. To get past the TRO hearing without a crash, Nahar suggested that "to keep it running for 5 hours, we can add 100Gb disk [sic] that should also be consumed in next a [sic] few days." Ex. 63. Stiffler responded "give them 100gb for now…. just so that they can restart the job themselves then." Ex. 58 (ellipsis in original). Moments later, Stiffler messaged Raj and Nahar: "C Hearing is at noon. So hold it together all day. Can likely go back to its regular state on weds when you come in." *See* Ex. 19 at 140; Ex. 59.[1] After the hearing, Stiffler directed them to "Revert c to its earlier state." Ex. 19 at 142; Ex. 54.[2]

That same day, Raj informed Stiffler that Charter had "opened a support ticket for failure" that "asked for R[oot] C[ause] A[nalysis] and application logs which we will work internally with you before sharing it externally." Mot. Ex. 19 at 140; Ex. 61. Stiffler responded, "They don't have a c[loud] s[ervices] agreement so they are entitled to NOTHING." Ex. 19 at 140; Ex. 56.[3]

The data cap rendered the Compensation Platform unusable. Stiffler bragged about having created the crash: "Charter has finally engaged with us . . . after their system grew to its capacity and we refused to add more storage or memory. The daily jobs . . . went from taking an hour to taking 18 hours due to system constraints." Mot. Ex. 98 at '833.

Stiffler admitted to his investment bankers that he had engineered this result:

> I am sure we will be back in court next week, because charter has increased their usage to the point where they now only have 50 GB of data base storage capacity . . . and we expect the cloud services to crash at any time.

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[1] As discussed below, Stiffler edited this message in March 2019 in an effort to conceal his conduct. The edited message read, "C Hearing is at noon. make sure everything is working perfectly." Mot. Ex. 19 at 140; Ex. 57. He later edited the message a second time to say, "Checking in with you. make sure everything is working perfectly." Ex. 19 at 140; Ex. 62.

[2] On March 14, 2019, Stiffler altered this message to say, "[A]t least try to fix it." Mot. Ex. 19 at 142; Ex. 55.

[3] Stiffler altered this message on March 16, 2019 to say, "Give them what you can." Mot. Ex. 19 at 140; Ex. 60.

> Because they are on the July 2018 version (Versus the December 2018 version as required by our cloud service update policy), they are not eligible for support. And because they owe us money, they are not eligible for an upgrade. I'm sure that will piss off the judge But unlike the black out on professional services, the crash will be caused by charter themselves. . . .
>
> Perhaps when daily processing halts, And we are willing to keep accruing fines to cause them pain, they will come to the table.

Mot. Ex. 101 at '931.

J. Optymyze Tries To Escape From The Litigation.

Charter filed its second motion to enforce the TRO on February 13, 2019. The Stiffler Organization took drastic action to try to escape from the litigation. Within twenty-four hours, Optymyze fired its outside counsel, withdrew its arbitration demand, and claimed to have assigned the Agreement to a new Singapore entity, Synygy Pte. Ltd. ("Synygy Singapore"). *See* Mot. Exs. 83, 84; Dkt. 79.

The next day, Stiffler wrote a letter to the court that contained numerous false statements. He claimed that Charter's performance issues were "self-inflicted." Dkt. 79 at 1. He took aim at the court, calling the TRO an "an outrageous abuse of the Court [sic], which is being manipulated by Charter to facilitate theft of services and software piracy, and as a mechanism of extortion of unlimited services against a small, defenseless company." *Id.* at 2. Stiffler asserted that Optymyze Singapore had ceased operations on December 31, 2018, and that Synygy Singapore was "now responsible for the Charter professional service agreement." *Id.* He claimed that "[t]hese corporate restructuring plans have been in place since prior to the actions initiated by Charter and have nothing to do with Charter specifically." *Id.*

None of this was true. As Stiffler explained internally,

> To encourage [Charter] to capitulate, we have dismissed our high-priced lawyers, we are withdrawing from arbitration (which hasn't gotten started), and we are assigning their contract to a Singapore corporation to be liquidated—thereby ending the contract and the TRO. They will have no choice but to engage. (Someday I will write a book on how to fight a billion-dollar company on a shoestring budget. Clue: you don't do it with lawyers!)

Ex. 98 at '833.

K. Stiffler Shuts Down The Compensation Platform.

On February 18, 2019, the court held a hearing on Charter's second motion to enforce the TRO. No one from the defendants' side appeared. This court rejected Stiffler's interpretation of the TRO as "childish literalism" and "clearly not what the order meant," concluding that the data cap violated the TRO. Dkt. 110 at 10, 11–12. This court accordingly imposed monetary sanctions on the defendants if their noncompliance continued for more than one week. *Id.* at 14.

Meanwhile, Stiffler directed Raj or Nahar to "redirect" any Charter users accessing the Compensation Platform so that they would be sent to Optymyze's homepage. *See* Mot. Ex. 73 at 4–5; Ex. 87. That afternoon, Raj made the change and asked a colleague, Tom Chapman, to "check its [sic] working." Ex. 73 at 6. Chapman tested the change and confirmed that it "goes directly to the Optymyze website." *Id.* Raj was pleased, explaining that the "purpose [was] to not let users see login screen and the moment they click URL they will be redirected to any website of our choice." *Id.* at 7.

Stiffler waited to deploy the shutdown until after the contempt hearing. But working hours in India (where Raj was located) ended before the hearing concluded, so Raj asked

Chapman to "ping" an associate to "make the changes and redirect to [O]ptymyze dot com" at the appropriate time. *Id.* at 7. Chapman explained to the associate that the appropriate time was "after the judge issues his ruling." Mot. Ex. 86 at 1. At 5:55 p.m., Charter emailed the court's order to Stiffler, Chapman, and others at Optymyze. *See* Mot. Ex. 90. Within 25 minutes, Chapman instructed an associate to "set the two redirection URLs." Ex. 85 at 1; Ex. 96. By 6:31 PM, the task was "[d]one." Ex. 95. The change redirected Charter users to Optymyze's home page, completely shutting off Charter's access to the Compensation Platform. *See* Exs. 94, 95.

Once again, Stiffler misrepresented the cause of the shutdown. In an email to this court, Stiffler claimed Charter's system was "<u>temporarily</u> taken offline on February 18 2019 to assess problems with system performance." Dkt. 92 at 5 (emphasis in original); *accord* Dkt. 139 ¶ 7. Defense counsel characterized the shutdown timing as "an unfortunate coincidence." Dkt. 138 at 6.

Once again, none of these representations were true. Stiffler bragged to his investment bankers two weeks later that he had shut down the Compensation Platform to defy the court:

> As for Charter, I decided the best way to beat a thief of this scale is to come out with a blog series while at the same time telling the judge to F** his TRO—by turning off the Compensation Platform 30 minutes after he ordered a $25,000 per day fine. They've been off since February 18.

Ex. 98 at 1. He told a colleague that "the judget [sic] said $25,000 per day fine… and i said f* u and turned the [Compensation Platform] off 30 minutes later…." Ex. 99 (ellipses in original).

L. Stiffler Tampers With Evidence.

On March 5, 2019, Charter moved to hold Optymyze, Stiffler, and several related entities and individuals in contempt of court. Dkt. 107. Charter also served discovery "into issues relating to the enforcement of the TRO." Dkt. 86 ¶ 8. The court scheduled an evidentiary hearing on Charter's motion for March 21.

To ensure that Stiffler appeared, Charter moved for a bench warrant calling for his arrest. After receiving the motion, Stiffler joked, "Arrest? Try to find me…." Mot. Ex. 101 at '924 (ellipses in original).

On March 13, 2019, new counsel entered an appearance for Optymyze, implemented a litigation hold to preserve documents, and began responding to Charter's discovery requests. *See* Dkt. 121; Mot. Ex. 108 at 2. Apparently realizing that Optymyze would have to produce internal documents that would expose his actions, Stiffler embarked on a massive campaign to rewrite internal documents so that they matched the false statements that he had made to the court. Between March 13 and 18, Stiffler edited 229 chat messages dating back to December 2018. Through this process, he sought to destroy evidence demonstrating that he ordered the blackout and data cap. *See* Dkt. 324 (Kessler Rep.) at 14–15. Unfortunately for Stiffler, the litigation hold preserved both the original and edited versions of those messages, providing unassailable evidence that Stiffler purposefully engaged in massive spoliation of evidence. *Id.* at 16–20.

For example, on March 16, 2019, Stiffler edited multiple messages that he had sent on January 8, 2019, regarding the data cap.

- In response to a message from Nahar, Stiffler suggested reducing allocated storage space further, asking "So can we tighten up more?"
    - On March 16, Stiffler edited his message completely, to say "So there is plenty of free data storage capacity?" *See* Mot. Ex. 19 at 126
- Nahar agreed to "try to squeeze project root volume like we did for database volume" to "keep only 5Gb free"—to which Stiffler responded, "I assume still above Nov 14 level overall."
    - On March 16, Stiffler edited his response to say, "I know you are just trying to apply [t]he same policy to all clients in managing data capacity, but in this case don't do anything that causes them to run out of data storage, even if they are using more data storage than on nov 14." *Id.* at 126–27.
- Nahar confirmed that he would "reduce the allocated to keep less free space." Stiffler responded, "Based on what you previously indicated can go down as low as 11368 [GB] but not lower."
    - On March 16, Stiffler edited his message to say, "Again don't do anything that causes data capacity to crash the [Compensation Platform]." *Id.* at 127.

Stiffler edited still more messages sent on January 14, 2019, that related to the data cap. *See* Part I.I, *supra*.

Stiffler also directed his employees to edit an additional 132 messages that they sent during March 2019. He also edited the employees' messages himself. *See* Dkt. 324 (Kessler Rep.) at 14–20; *see also id.* at 5. For instance, on January 6, 2020, Nahar had sent Stiffler a message noting that the data cap was about to cause problems for Charter. The original message stated:

> About Charter, they are very close to have [sic] an issue next week, i would say in next 2-3 days. Their database volume as ~ 140Gb that may work for sometime [sic] but only have 1.3Gb left for project root directory where data export, reports, etc. are published. It also hosts new FTP files that Charter send [sic] to us so running of space would cause them issues that they should report to us. As soon as issues are reported, we can inform you.

Mot. Ex. 19 at 116; Ex. 47; Dkt. 324 (Kessler Rep.) at 19–20. On March 15, 2019, over two months later, that message was edited to change the first reference to Charter to a different client, U.S. Cellular ("USCC"). *See* Ex. 19 at 116; Ex. 46. Someone noticed the failure to change the second Charter reference, and the message was edited again, later on March 15, to change both mentions of Charter to USCC. *See* Ex. 19 at 116; Ex. 48.

M. The Court Holds Optymyze And Stiffler In Contempt.

On March 15, 2019, in the midst of the campaign to rewrite internal messages, Stiffler submitted a declaration "under penalty of perjury under the laws of the State of Delaware." *See* Dkt. 139 at 1. The declaration contained a series of falsehoods. For example, as to the data cap, Stiffler swore that "[b]etween November 14, 2018 and February 18, 2019, the database servers provided by Optymyze remained constant" but "the performance declined (and periodically crashed)" because "use of those servers by Charter increased." *Id.* ¶ 6. That was not close to true. *See* Part I.I, *supra*. As to the shutdown, Stiffler declared that "Optymyze personnel in the support department made the decision to take the [Compensation Platform] offline" and that he "did not order the support personnel to take these steps." *Id*. ¶ 7. That too was untrue. *See* Part I.K, *supra*.[4]

On March 21, 2019, the court held an evidentiary hearing on Charter's motion for contempt. Optymyze did not call any witnesses, and Stiffler did not attend. Charter subpoenaed two Optymyze witnesses, who appeared and testified: Executive Vice

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[4] Stiffler's declaration also made representations about the Stiffler Organization's corporate structure, Stiffler's control over various entities, and whether the transfer of the Agreement to Synygy Singapore had been "reversed." Dkt. 139 ¶¶ 2, 15–17.

President of Operations, Amit Gupta, and General Counsel, Christian Na. Both testified that they reported to Stiffler, who was the ultimate decision-maker for the "Optymyze brand," comprising a web of interrelated companies. *See, e.g.*, Dkt. 172 at 94–98, 130–31, 136–39, 176–79, 186–87, 190–93. Because of the complex and shifting web of entities seemingly under Stiffler's control, this decision has used the term "Stiffler Organization."

This court found that Optymyze's and Stiffler violated the TRO and the court's orders by (i) "purport[ing to] cancel[] [Original Optymyze] and the reversal of position by [Optymyze Singapore] regarding its amenability to jurisdiction," (ii) "fail[ing] to provide software services to" Charter, including by imposing the data cap and orchestrating the shutdown, and (iii) "holding Charter hostage" by telling it "that the only way they could obtain services was to upgrade to new software under a new contract." Dkt. 158 ¶ 10. The court held Optymyze and Stiffler in contempt, held Stiffler jointly and severally liable for the accumulated sanctions, and ordered the defendants to restore Charter's access to the Compensation Platform. *Id.* ¶¶ 15–19.

N. The Sham Invoices

After the contempt hearing, the Stiffler Organization restored the Compensation Platform and began producing documents. Unbeknownst to Charter, the Stiffler Organization also concocted a scheme to issue fraudulent invoices.

In May 2019, the Stiffler Organization sent Charter a series of sham invoices totaling more than $30 million for Charter's alleged overuse of the Compensation Platform. *See* Ex. 105. Internal documents show that the Stiffler Organization submitted similar fraudulent invoices to other clients. Stiffler explained to a colleague that the goal was to shock clients with extremely high invoices and then negotiate a reduction in the charges. According to Stiffler, he would do "whatever works," and when clients questioned the invoices, he could just "make it up" because "they [i.e., the clients] don't know!!" *See* Ex. 77 at 4; Ex. 75, 76. He went on: "point is ... it ultimately doesn't matter!!! we will negotiate." Ex. 77 at 4 (ellipsis in original); Ex. 74. The next day, the employee explained the scheme to colleagues and noted that "the entire thing IS a scam, and we're not doing a good job of making it seem otherwise." Ex. 78.

The fraudulent invoices brazenly billed Charter for supposed "upgrades," which in reality were necessitated by the Stiffler Organization's misconduct. For instance, the Stiffler Organization claimed that Charter owed $6.4 million for alleged upgrades to the Compensation Platform after it "crash[ed]" in February 2019. *See* Ex. 104. But the Compensation Platform did not crash—Stiffler shut it down.

When Charter refused to pay the fraudulent invoices, Optymyze filed a "motion to compel Charter to pay for services." *See* Dkt. 174. Charter opposed the motion, pointing out that the invoices were fraudulent, and in any event, the defendants never actually filed any affirmative claims. Dkt. 175. That objection prompted Optymyze to answer Charter's complaint and assert counterclaims.

O. Optymyze Files Counterclaims And Charter Moves To Dismiss.

On July 9, 2019, Optymyze answered Charter's complaint and asserted seventeen counterclaims. Dkt. 188. The counterclaims principally rested on the same manufactured arguments that Optymyze had been advancing for nearly a year. For instance,

- Optymyze blamed Charter for the slowdown of the Compensation Platform in early 2019. *See, e.g.*, Dkt. 188 ¶¶ 85, 134, 174, 189. In reality, the data cap that Stiffler had imposed caused the slowdown.

- Optymyze claimed that the Compensation Platform was "taken offline" on February 18, 2019, purportedly to allow Optymyze to diagnose the issues that Charter's usage had caused. *See, e.g.*, *id.* ¶¶ 85, 134, 174, 189. In reality, Stiffler had shut down the system to defy the TRO issued by this court. Mot. Ex. 98 at 1 (Stiffler describing his plan to "tell[] the judge to F** his TRO—by turning off the system 30 minutes after he ordered a $25,000 per day fine. [Charter has] been off[line] since February 18."); *accord* Ex. 99.

Stiffler verified these and other false allegations. Dkt. 187 (Verification).

In September 2019, Charter moved to dismiss the counterclaims (i) as untimely under Rules 12 and 13, (ii) under Rule 41(b), and (iii) as to five counts, under Rule 12(b)(6). To justify dismissal under Rule 41(b), Charter relied on *Bessenyei v. Vermillion, Inc.*, 2012 WL 5830214 (Del. Ch. Nov. 16, 2012), *aff'd*, 67 A.3d 1022 (Del. 2013) (ORDER), and *Parfi Holding. AB v. Mirror Image Internet, Inc.*, 954 A.2d 911 (Del. Ch. 2008). Charter explained that these precedents make clear that a court can—and should—dismiss a party's claims if the party has engaged in misconduct that threatens or undermines the integrity of the judicial process. In support of its motion, Charter submitted twenty-two documentary exhibits, which demonstrated that Stiffler knowingly verified false allegations. *See* Dkt. 197 at 20–44.

P. Optymyze Continues To Violate The TRO.

At a scheduling conference on September 5, 2019, this court commended the parties for seemingly having reached a *modus vivendi*. This court was gratified that the situation appeared to have "stabilized such that people aren't filing TROs at each other at the moment." Dkt. 212 at 8.

Unfortunately, within four days of that conference, Optymyze and Stiffler violated the TRO by removing certain permissions for Charter's users, shutting down the Compensation Platform without warning for more than two days, and upgrading Charter's system to a new version. *See* Mot. Ex. 106 ¶¶ 12–15. When the Compensation Platform was restored, Charter's users faced a "Security Upgrade" pop-up, which required Charter users to affirm that they "read, underst[ood], and agree[d] to the Optymyze Security Upgrade" before they could access the Compensation Platform. *See* Ex. 107 ¶¶ 4–7 (internal quotation marks omitted). As this court later held, that "Security Upgrade" was a "puerile, mischievous communication[] that cast aspersions at Charter and presented Mr. Stiffler's version of the facts." *See* Dkt. 215 at 21–22. Ultimately, the court found Optymyze had violated the TRO once again in an "effort to interfere with Charter's business and thumb one's nose at the Court's processes and its order." *Id.* at 23–24.

Q. The Court Addresses Charter's Motion To Dismiss.

On March 24, 2020, the court heard argument on Charter's motion to dismiss. On April 2, 2020, the court issued an order addressing the motion to dismiss. Dkt. 262.

For purposes of Rule 41(b), this court observed that "Charter submitted evidence that it obtained through discovery during the expedited phase of the case." *Id.* ¶ 14(e). This court characterized Charter's evidence as "clear and convincing" and found that "it provides strong support for dismissing Optymyze's claims under the rationale endorsed in *Parfi* and *Bessenyei*." *Id.* "In an abundance of caution," however, this court decided to hold a further hearing in order to "give Optymyze an additional opportunity to present its evidence and place Stiffler's statements in context." *Id.* ¶ 14(g). The court made clear that "[b]ecause Stiffler's comments and actions form the foundation for Charter's motion, his testimony is necessary for the court to evaluate Optymyze's conduct." *Id.* ¶ 14(i).

R. The Ill-Fated Road To The Rule 41(b) Hearing

In the lead-up to the Rule 41(b) hearing, Optymyze took a series of positions that devolved from aggressive to sanctionable. Optymyze first sought discovery from Charter, which was a fairly litigable point. *See* Dkt. 265. The court denied the motion based on the scope of the hearing, explaining that "[t]he issues for the Rule 41(b) Hearing are . . . what Optymyze and Stiffler knew and when they knew it. Optymyze does not need discovery from Charter to address these issues or to provide context for its allegations" because that evidence "will come from Optymyze's files and witnesses, including Stiffler." Dkt. 276 ¶ 8. After receiving this ruling on the scope of the hearing, Optymyze nevertheless sought to call and question Charter witnesses during the hearing. This court denied this motion as an attempt to re-litigate the court's ruling on the scope of the hearing. *See* Dkt. 290 ¶ 3.

Optymyze next refused Charter's request for native files of Microsoft Teams messages, which Optymyze had produced as 87,000 individual emails rather than as complete conversations. As Charter prepared for the Rule 41(b) hearing, it consulted with its discovery vendor about reassembling the messages into conversations. Dkt. 280 ¶ 11. Charter's vendor explained that the messages could be reassembled into conversations, but only using native versions. *Id.*; *see also* Dkt. 324 (Kessler Rep.) at 9–10. Optymyze rejected Charter's request for native versions, forcing Charter to move to compel. This court granted Charter's motion. Dkt. 289. The native files revealed Stiffler's extensive spoliation of evidence. *See* Part I.L, *supra*; *see also* Dkt. 324 (Kessler Rep.).

Optymyze next refused to produce several individuals for deposition, claiming that they were "not employees of [Optymyze Singapore] or [Original Optymyze], or companies controlled by [Optymyze Singapore] or [Original Optymyze]" and that Optymyze did not have "the ability to make them appear for a deposition." Ex. 110 at 3. The evidence and Optymyze's prior litigation positions contradicted that assertion:

- Charter sought to depose Raj and Nahar, who instituted the data cap at Stiffler's direction and assisted with the Compensation Platform shutdown. Both had filed affidavits in this case, demonstrating that Optymyze could elicit their cooperation when it wanted. *See* Dkt. 52 (Raj Decl.); Dkt. 204 (Nahar Decl.).

- Charter sought to depose Chapman, who had supervised the shutdown of Charter's system at Stiffler's direction after the court's February 18, 2019 order. *See* Part I.K, *supra*. The record demonstrates that he worked for Stiffler and was under his control

- Charter sought to depose Katie Adkins, who oversaw Professional Services at Optymyze and was one of Charter's main contacts. *See generally* Mot. Ex. 26. Her status as a representative of Optymyze who interacted with Charter in the ordinary course of business indicates that Optymyze could produce her for deposition.

- Charter sought to depose Alina Stanciu Apetrei, who led the Professional Services team that served Charter, played a similar role to Adkins, and was in near-constant communication with Stiffler about Charter's account. *See generally* Mot. Ex. 27. As with Adkins, Apetrei's status as a representative of Optymyze who interacted with Charter in the ordinary course of business indicates that Optymyze could produce her for deposition.

- Anne Luongo oversaw the rollout of the TOS pop-up. *See* Part I.F, *supra*. The record regarding those events demonstrates that Luongo worked for Stiffler and was under his control.

Optymyze's claim that it could not produce these individuals forced Charter to move to compel. *See* Dkt. 296. This court directed Optymyze to produce these individuals for deposition or provide specific information as to why it did not control them. *See* Dkt. 302 ¶¶ 4–5. Optymyze took the latter route, with its lawyers maintaining that neither Optymyze nor Stiffler had any control over these representatives. *See* Mot. Ex. 111 at 1–5; Dkt. 312; Dkt. 332 at 17–22.

S. Stiffler's Deposition

Optymyze's litigation misconduct escalated when Charter attempted to schedule Stiffler's deposition. At that point, Optymyze's litigation positions descended into farce.

Optymyze began by refusing to provide reasonable dates. Charter first requested deposition dates in July 2020, but Optymyze did not respond substantively until August 17, when it offered Stiffler for a "2.5 hour video deposition" on August 20 or 21. *See* Ex. 110 at 7. Charter objected, both to the short notice and to the arbitrary time limit. *Id.* at 3–4. Optymyze countered on August 20 with an even more unreasonable proposal, saying that Stiffler "can make himself available over the weekend if that helps" and refusing to offer more than 2.5 hours. *See id.* at 3. Charter raised the issue with the court, which ordered Optymyze to provide at least three reasonable deposition dates and held that the deposition would continue until completed. *See* Dkt. 302 ¶¶ 3, 6.

In response, Optymyze proposed to produce Stiffler for deposition on September 4 or over Labor Day weekend on September 5 or 6—beginning at 3:00 a.m. EDT. *See* Ex. 111 at 4. When Charter objected, Optymyze made another unreasonable offer: Start the deposition at 10:00 p.m. London time, i.e., 5:00 p.m. EDT, and continue all night. *See* Ex. 112 at 1. Charter moved for relief again, which this court granted. *See* Dkt. 332.

After weeks of back-and-forth, Stiffler's deposition was slated to begin at 7:00 a.m. EDT on Labor Day, September 7. Less than two hours before the deposition, at 5:05 a.m. EDT, Optymyze's counsel served Charter with a declaration that Stiffler had signed that morning. *See* Ex. 113. As described in more detail below, the declaration recanted prior claims that Stiffler had made under oath and advanced numerous new claims about the Agreement binding certain Stiffler-owned entities and not others. *See generally* Dkt. 313. Stiffler threatened that "[a]fter the 41(b) hearing," another Stiffler-owned entity would "move to enforce its rights against Charter." *Id.* ¶ 24.

Stiffler appeared for the deposition but objected to the surroundings and room layout. It took two hours to accommodate Stiffler's demands. *See* Ex. 114 at 16–20. Once questioning began, Stiffler was evasive and refused to provide the most basic information. *Id.* at 5–8. He maintained that he would only testify "[i]n [his] role as the former Director of [Optymyze Singapore]," *id.* at 72, *see id.* at 74–77, and he refused to answer numerous questions about Optymyze and its related entities, *see id.* at 88–91, 97–98, 105–09, 112–13, 116–18, 120–21.

After 2.5 hours on the record, Stiffler abruptly stood up, announced, "I have to go," and left the room. *See id.* at 129. After 20 minutes, he returned, claimed to be "unwell," and refused to continue until the next day. *Id.* But Stiffler did not show up the next day or any other day. *See* Mot. Ex. 115 at 142–45; Ex. 116; *see generally* Dkt. 337 at 7–8.

The deposition never resumed. Optymyze's counsel later told Charter's counsel that Optymyze had "instructed that it is concerned for Mr. Stiffler and chooses to suffer the litigation consequences rather than to imperil him." Mot. Ex. 116 at 3. In essence, Stiffler limited his deposition to 2.5 hours of unproductive questioning, thereby unilaterally enforcing the time limit that this court had rejected.

T. Optymyze Attempts To Dismiss Its Counterclaims Without Prejudice.

After Stiffler refused to continue his deposition, Optymyze proposed that the parties enter into "a stipulated order dismissing the counterclaims with prejudice on R. 41(b) grounds." Mot. Ex. 116 at 3. In response, Charter explained the terms on which it would agree to a dismissal, including the waiver of claims by other Stiffler-owned entities and payment by Optymyze of Charter's fees and costs. *See id.* at 1–2; Dkt. 337. Optymyze's counsel agreed to consider those issues and respond.

Instead, on September 16, 2020, with the evidentiary hearing looming, Optymyze filed the Notice of Dismissal, which purported to dismiss its counterclaims voluntarily and without prejudice. *See* Dkt. 328. The Notice of Dismissal claims that "pursuant to Court of Chancery Rule 41(c), Counterclaim Plaintiff [Optymyze Singapore] hereby dismisses its remaining Verified Counterclaims [] without prejudice." *Id.* Charter objected and moved to strike the Notice of Dismissal, arguing that "[t]he proper judicial response is to dismiss Optymyze's claims with prejudice." Mot. (Br.) at 1.

II. LEGAL ANALYSIS

Charter's application presents numerous issues. This decision first grants Charter's request to strike the Notice of Dismissal. As a result, Optymyze's counterclaims remain pending and subject to Charter's motion to dismiss under Rule 41(b). This decision grants that motion and dismisses Optymyze's counterclaims with prejudice. Finally, this decision grants Charter's request for fee-shifting under the bad faith exception to the American Rule, or alternatively, as sanctions under Rule 37.

A. The Motion To Strike

Charter has moved to strike the Notice of Dismissal. When considering a motion to strike, a Delaware court generally applies the standard set forth in Rule 12(f), which states,

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these Rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the Court's own initiative at any time, the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

A court may find that a filing that fails to comply with applicable rule of court is redundant or immaterial.[5] Such a filing is also impertinent—in the sense of not being relevant to the proceeding. 5C Wright & Miller, *Federal Practice and Procedure* § 1382 (3d ed. 2020) ("According to the case law, 'impertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question." (collecting authorities)). Charter argues that the Notice of Dismissal did not comply with Rule 41(a), which governs a party's right to dismiss its claims voluntarily, or with Rule 41(c), which contains additional language governing the voluntary dismissal of a defendant's counterclaims.

Rule 41(a)(1)(i) states:

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[5] *See, e.g.*, *Powell v. AmGuard Ins. Co.*, 227 A.3d 140 (Del. 2020) (ORDER) (granting motion to strike an exhibit appended to a notice of appeal that failed to comport with Rule 42); *Frey v. Goshow-Harris*, 2009 WL 2963789, at *6–7 (Del. Super. Sept. 16, 2009) (granting motion to strike three alleged breaches from a pretrial stipulation because plaintiff failed to demonstrate causal relationship to plaintiff's alleged harm); *Baxter Int'l, Inc. v. Rhône-Poulenc Rorer, Inc.*, 2004 WL 2158051, at *5 (Del. Ch. Sept. 17, 2004) (granting motion to strike affidavit submitted in support of defense because plaintiff did not receive fair notice of the defense or an opportunity to take discovery relating to the defense).

> [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .
>
> However, no such dismissal pursuant to subpart (i) above shall be effective where the complaint is subject to a motion to dismiss and the plaintiff has chosen to file an answering brief rather than seeking to amend. See Rule 15(aaa).
>
> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Ct. Ch. R. 41(a)(1)(i) (formatting added).

Through Rule 41(c), Rule 41(a) "appl[ies] to the dismissal of any counterclaim." Rule 41(c) further provides that "[a] voluntary dismissal by the [counterclaimant] alone pursuant to [Rule 41(a)(1)] shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing." *Id.*

Rule 41(a) is patterned after the analogous federal rule and therefore warrants similar interpretation. *Pennzoil Co. v. Getty Oil Co.*, 473 A.2d 358, 360 (Del. Ch. 1984). The exception is the limitation in Rule 41(a)(1), adopted in 2004, which states, "However, no such dismissal pursuant to subpart (i) above shall be effective where the complaint is subject to a motion to dismiss and the plaintiff has chosen to file an answering brief rather than seeking to amend. See Rule 15(aaa)." *Compare* Dkt. 354 Ex. E (pre-2004 version of Chancery Rule 41), *with* Dkt. 354 Ex. F (Chancery Rule 41 after amended in 2004). Federal Rule 41(a)(1) does not contain comparable language. *See* Fed. R. Civ. P. 41(a)(1).

When a party can satisfy its requirements, Rule 41(a)(1) affords the party "[an] absolute right to dismiss his action." *Pennzoil*, 473 A.2d at 363. Until the bright-line cutoffs apply, a party can invoke its right. *See Safeguard Bus. Sys., Inc. v. Hoeffel*, 907 F.2d 861, 863 (8th Cir. 1990). After a cutoff applies, the party loses its right. *Id.*

Under these principles, a counterclaim plaintiff has an absolute right to dismiss its counterclaims without prejudice, so long as the counterclaim plaintiff notices the dismissal before (i) the opposing party serves a responsive pleading or makes a summary judgment motion, (ii) the deadline for filing an answering brief in response to the opposing party's motion to dismiss, and (iii) evidence has been introduced at the hearing or trial. If one of those events has occurred, then a counterclaim plaintiff can only obtain dismissal under Rule 41(a)(2), which states, "Except as provided in [Rule 41(a)(1)], an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper." Ct. Ch. R. 41(a)(2).

The policy rationale underlying the cutoffs in Rule 41(a) seeks "to limit the right of dismissal to an early stage of the proceedings," before the parties and the court have expended significant time and effort engaging with claims.[6] The overarching purpose of

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[6] *Nasser v. Int'l Visual Prods.*, Inc., 1979 WL 178476, at *1 (Del. Ch. Apr. 23, 1979) (citing *D.C. Elecs., Inc. v. Nartron Corp.*, 511 F.2d 294 (6th Cir. 1975)); *see, e.g.*, *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 220 (8th Cir. 1977) (Rule 41(a)(1) "fix[es] the point at which the resources of the court and the [opposing party] are so committed that dismissal without preclusive consequences can no longer be had as of right."); *Engelhardt v. Bell & Howell Co.*, 299 F.2d 480, 482 (8th Cir. 1962) (Rule 41(a)(1) "facilitate[s] the voluntary dismissal of an action, but safeguard[s] abuse of the right by

these limitations is "is to permit the plaintiff to dismiss an action voluntarily when no other party will be prejudiced." 9 Wright & Miller, *supra*, § 2632. To that end, the federal rule was amended in 1946 to bar a plaintiff from noticing a voluntary dismissal after the defendant had moved for summary judgment. The Advisory Committee's Note grounded the change in the policy of protecting the defendant against a voluntary dismissal after the defendant expended meaningful resources on the case:

> A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

Fed. R. Civ. P. 41(a) advisory committee's note to 1946 amendment.

In this case, the only potentially applicable limitations on Optymyze's right to notice a voluntary dismissal are (i) if Charter had filed a motion to dismiss and the deadline for Optymyze to file an answering brief had passed or (ii) if the parties had introduced evidence at a hearing. If either event occurred, then Optymyze could not voluntarily dismiss its claims without prejudice under Rule 41(a).

1. The Filing Of An Answering Brief

Rule 41(a)(1) provides that no dismissal "shall be effective where the [counterclaims are] subject to a motion to dismiss and the [counterclaim] plaintiff has chosen to file an answering brief rather than seeking to amend." Ct. Ch. R. 41(a)(1). Under

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limiting its application to an early stage of the proceedings." (internal quotation marks omitted)).

this aspect of the rule, "a motion for voluntary dismissal is a proper response to a motion to dismiss, so long as the Rule 41(a) motion is filed before an answering brief on the motion to dismiss is due." *E. Sussex Assocs., LLC v. W. Sussex Assocs., LLC*, 2013 WL 2389868, at *2 (Del. Ch. June 3, 2013)).

Charter moved to dismiss Optymyze's counterclaims on August 22, 2019. On October 4, Optymyze filed an answering brief. By doing so, Optymyze forfeited its ability to dismiss its claims voluntarily without prejudice under Rule 41(a)(1). Optymyze did not file the Notice of Dismissal until more than eleven months later, on September 16, 2020. The Notice of Dismissal is therefore ineffective.

Optymyze disputes this logic by noting that Rule 41(a)(1) contains a citation to Rule 15(aaa), which Optymyze says only applies to motions to dismiss under Rules 12(b)(6) and 23.1. Optymyze infers that an answering brief only cuts off a party's right to file a voluntary notice of dismissal if the answering brief responded to a motion to dismiss under Rule 12(b)(6) or 23.1. Optymyze notes that Charter moved to dismiss under Rule 41(b), not Rules 12(b)(6) or 23.1. Optymyze maintains that filing an answering brief in response to a motion to dismiss under Rule 41(b) does not trigger Rule 41(a)(1)'s limitation. Dkt. 354 at 20–21.

The plain language of Rule 41(a)(1) does not support Optymyze's argument. Rule 41(a)(1) precludes a voluntary dismissal "where the complaint is subject to a motion to dismiss and the plaintiff has chosen to file an answering brief rather than seeking to amend. See Rule 15(aaa)." Ct. Ch. R. 41(a)(1). The text of Rule 41(a)(1) refers to "a motion to dismiss." It does not refer to a motion to dismiss under Rule 12(b)(6) or Rule 23.1. If the drafters of Rule 41(a)(1) had intended to limit the rule to particular types of motions, then they would have made that clear. The proof lies in Rule 15(aaa), which refers specifically to Rules 12(b)(6) or 23.1. *Compare* Ct. Ch. R. 41(a)(1) (addressing a situation in which "the complaint is subject to *a motion to dismiss*" (emphasis added)), *with* Ct. Ch. R. 15(aaa) (addressing a situation in which a party "wishes to respond to *a motion to dismiss under Rules 12(b)(6) or 23.1* by amending" (emphasis added)). Based on the text of Rule 41(a)(1), a party loses the ability to dismiss its claims voluntarily once the deadline has passed for filing an answering brief in response to any motion to dismiss, regardless of the grounds for dismissal.

Optymyze argues that by including "See Rule 15(aaa)," Rule 41(a)(1) equates "motion to dismiss" with a motion to dismiss contemplated by Rule 15(aaa), which provides:

> [A] party that wishes to respond to a motion to dismiss under Rules 12(b)(6) or 23.1 by amending its pleading must file an amended complaint, or a motion to amend in conformity with this Rule, no later than the time such party's answering brief in response to either of the foregoing motions is due to be filed.
>
> In the event a party fails to timely file an amended complaint or motion to amend under this subsection (aaa) and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) or 23.1, such dismissal shall be with prejudice (and in the case of complaints brought pursuant to Rules 23 or 23.1 with prejudice to the named plaintiffs only) unless the Court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances.
>
> Rule[] 41(a) . . . shall be construed so as to give effect to this subsection (aaa).

Ct. Ch. R. 15(aaa) (formatting added).

When originally adopted in 2001, the express language of Rule 15(aaa) did not apply to a situation in which a claimant filed an answering brief in opposition to a motion to dismiss, and then sought to dismiss its claims without prejudice under Rule 41(a)(1). The Court of Chancery nevertheless held that the policies underlying Rule 15(aaa) governed that sequence, such that the Rule 41(a)(1) dismissal would be with prejudice absent good cause shown. *Stern v. LF Cap. P'rs, LLC*, 820 A.2d 1143, 1147 (Del. Ch. 2003). In so holding, the court expressed concern that if Rule 15(aaa) did not extend to a voluntary dismissal under Rule 41(a)(1), then a party-plaintiff could use Rule 41(a)(1) to circumvent Rule 15(aaa). *Id.* at 1147.

Effective February 1, 2006, Rule 15(aaa) was amended to provide that "Rule[] 41(a) . . . shall be construed so as to give effect to this subsection (aaa)." The amendment made clear that Rule 15(aaa) applies to notices of voluntary dismissal. *See E. Sussex*, 2013 WL 2389868, at *1. The amendment thus codified *Stern* and limited the universe of circumstances in which a party could dismiss its claims voluntarily under Rule 41(a)(1).

Contrary to Optymyze's suggestion, the cross-reference to Rule 15(aaa) does not limit the meaning of "motion to dismiss" as used in Rule 41(a)(1) to motions made under Rules 12(b)(6) and 23.1. The cross-reference requires this court to construe Rule 41(a)(1) "so as to give effect to [Rule 15](aaa)." That rule limits a claimant's ability to amend its pleadings and enforces the limitation by making any subsequent dismissal with prejudice.

This case does not implicate Rule 15(aaa) for the simple reason that Optymyze has not sought to amend its counterclaims. Optymyze has noticed a voluntary dismissal under Rule 41(a)(1). Resolving Charter's motion requires interpreting the term "a motion to dismiss" in Rule 41(a)(1). It does not require interpreting the rule to give effect to Rule 15(aaa).

When Optymyze noticed its dismissal, its counterclaims already were subject to Charter's motion to dismiss under Rule 41(b), and the deadline for Optymyze to file an answering brief already had passed. Accordingly, the Notice of Dismissal was ineffective.

2. The Introduction Of Evidence

Rule 41(c) requires that a counterclaimant notice a voluntary dismissal without prejudice "before the introduction of evidence at the trial or hearing." Ct. Ch. R. 41(c).[7] Under the plain language of this rule, "after the introduction of evidence at the trial or a hearing, the dismissal of a [counterclaim] is not a matter of right, but is subject to the court's discretion." 9 Wright & Miller, *supra* § 2374; *see Mobil Oil Corp. v. Adv. Env't Recycling Techs., Inc.*, 203 F.R.D. 156 (D. Del. 2001).

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[7] Rule 41(c) also requires that a voluntary dismissal without prejudice occur "before a responsive pleading is served." Charter only filed a motion to dismiss, which is not a responsive pleading. *Compare* Ct. Ch. R. 7(a) (defining "pleadings" as the complaint, answer, reply to counterclaim, answer to cross-claim, third-party complaint, and third-party answer; stating "[n]o other pleading shall be allowed"), *with* Ct. Ch. R. 7(b) (describing "motions and other papers"); *see, e.g.*, *3M Co. v. Neology, Inc.*, 2019 WL 2714832, at *7 (Del. Super. June 28, 2019) (holding that a motion to dismiss is not a responsive pleading and explaining that such a result is "consistent with the [Superior] Court's rules, Delaware case law, and the notion of judicial efficiency"). *Cf. Fleischman v. Huang*, 2007 WL 2410386, at *3 n.15 (Del. Ch. Aug. 22, 2007) ("Rule 12(b) is quite clear only seven enumerated defenses to a pleading may be raised by motion, and all others must be raised in responsive pleadings."); *Plummer v. Sherman*, 861 A.2d 1238, 1243–44 (Del. 2004) ("When read *in pari materia*, the provisions of Rule 12(b) and (h) require that a Rule 12 defense of lack of personal jurisdiction must be raised by a timely Rule 12 motion or, if no motion is filed, in the first responsive pleading. Otherwise, the defense is waived.").

Rule 41 does not define the term "hearing." "Because dictionaries are routine reference sources that reasonable persons use to determine the ordinary meaning of words," Delaware courts "often rely on them for assistance in determining the plain meaning of undefined terms." *Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 227–28 (Del. 2010).

Black's Law Dictionary defines a hearing as "[a] judicial session, usu[ally] open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying." Hearing, *Black's Law Dictionary* (11th ed. 2019). The entry notes that the term "hearing" is "[a]lso termed judicial hearing," which *Black's Law Dictionary* defines by referring back to the entry for "hearing." *Black's Law Dictionary* distinguishes between a "hearing" or "judicial hearing" and an "evidentiary hearing," which it defines as "[a] hearing at which evidence is presented, as opposed to a hearing at which only legal argument is presented." Notably, Rule 41(c) does not limit its effect to the introduction of evidence at an *evidentiary hearing*. Rather, it applies to the introduction of evidence at a *hearing*, which *Black's Law Dictionary* defines to include any "judicial session" that the court holds "for the purpose of deciding issues of fact or law."

Consistent with the plain meaning of the term "hearing," this court's rules demonstrate that a court can receive evidence and conduct a hearing on a motion. Rule 43(e) states,

> **Evidence on Motions.** When a motion is based on facts not appearing of record the Court may hear the matter on affidavits presented by the respective parties, but the Court may direct that the matter be heard wholly or partly on oral testimony or depositions.

The introduction of evidence is thus not limited to trials or other occasions involving live testimony; evidence may also be introduced in connection with a motion.

When moving to dismiss under Rule 41(b), Charter supported its motion with evidence. Charter submitted this evidence via an Affidavit of Daniel T. Menken that identified and attached twenty-two documentary exhibits. Dkt. 197. Under Rule 43(e), Charter properly submitted this evidence for consideration in connection with its motion.

The exhibits to the Menken affidavit comprised emails and instant messages, which Charter introduced to prove that Optymyze and Stiffler had engaged in misconduct warranting dismissal under Rule 41(b). Relying on this evidence, Charter argued in its briefs that "Optymyze's counterclaims should be dismissed under Rule 41(b) for Optymyze's failure to comply with the Court's rules and orders," including by "perpetuating false allegations" and "refus[ing] to pay stipulated penalties and fees." Dkt. 197 at 20; *see* Dkt. 217 at 4–5. Charter repeatedly cited to the exhibits to support its arguments. *See* Dkt. 197 at 20–47 (opening brief); Dkt. 217 at 4–20 (reply brief).

In its answering brief, Optymyze chose not to address the evidence. Instead, Optymyze argued only that this court could not grant a Rule 41(b) motion at the pleading stage. *See* Dkt. 262 ¶ 14. The fact that Optymyze chose not to introduce evidence of its own and to rely instead on a legal argument does not alter the fact that Charter introduced evidence.

On March 24, 2020, this court held a hearing on Charter's motion. That hearing lasted for more than three hours. *See* Dkts. 261, 264. During the hearing, Charter's counsel discussed the emails and instant messages as evidence of Optymyze's and Stiffler's misconduct. Dkt. 264 at 8–12. During the hearing, Optymyze's counsel did not attempt to explain the emails and instant messages or present any evidence to rebut Charter's showing. Once again, the fact that Optymyze made a tactical choice not to introduce evidence of its own and to rely instead on a legal argument does not alter the fact that Charter introduced evidence.

Based on the parties' briefing, Charter's evidence, and the presentations during the hearing, this court found that that "Charter's evidence is clear and convincing, and it provides strong support for dismissing Optymyze's claims under" Rule 41(b). Dkt. 262 ¶ 14(e). "[I]n an abundance of caution," however, this court decided to hold an additional hearing to "give Optymyze an additional opportunity to present its evidence and place Stiffler's statements in context." *Id.* ¶ 14(g). But as previously discussed, Optymyze waived this additional opportunity by refusing to produce Stiffler for deposition, leaving unrebutted this court's preliminary findings based on Charter's "clear and convincing" evidence.

Charter's submission of the Menken affidavit, its repeated references to the twenty-two exhibits in briefing and during the hearing, and its reliance on those exhibits to establish facts constituted the "introduction of evidence at . . . hearing." Ct. Ch. R. 41(c). After the hearing on March 24, 2020, Optymyze no longer could notice a voluntary dismissal of its counterclaims.

Optymyze argues that the hearing on the March 24, 2020, could not have been a "hearing" within the meaning of Rule 41(c). According to Optymyze, "The parties and Court know the difference between an oral argument and an evidentiary hearing—where, among other things, evidence is offered into the record, subject to objections." Dkt. 354 at 19. As demonstrated by the plain language of the term "hearing," and as supported by Rule 43(e), Optymyze's position is incorrect. The hearing on Charter's Rule 41(b) motion was a "hearing" at which Charter introduced evidence.

The scant authority that touches on Rule 41(c) supports this interpretation. A federal district court has held that the submission of an affidavit in support of a motion for summary judgment did not, by itself, constitute the introduction of evidence at a hearing for purposes of Rule 41(c). *Tar Asphalt Trucking Co. v. Fidelity & Cas. Co.*, 1 F.R.D. 330, 331 (S.D.N.Y. 1940). The court explained that "a pending motion for summary judgment unargued or not submitted to the court for decision, subject to withdrawal by the moving party at any time prior to argument or submission to the court, clearly cannot be considered as 'introducing evidence at a hearing.'" *Id.* There, the only event was the submission of the affidavit. An actual hearing never took place.

Unlike in *Tar Asphalt*, this court conducted a hearing on Charter's motion under Rule 41(b), considered the evidence, and issued a ruling. That hearing constituted a "hearing" for purposes of Rule 41(c). This outcome also comports with the policy underlying the limitations on voluntary dismissals, which seeks to prevent a party from dismissing its claims voluntarily after its opponents and the court have expended significant effort to address the claims. Optymyze forced Charter and the court to expend significant effort addressing its counterclaims during the period leading up to and during the hearing on March 24, 2020. Recognizing that the March 24 hearing cut off Optymyze's ability to dismiss its claims voluntarily serves this policy interest and protects against abuse of the judicial process.

Because Optymyze did not notice its dismissal until after Charter introduced evidence at the March 24 hearing, Optymyze's notice of dismissal was ineffective.

3. The Outcome Of The Motion To Strike

The Notice of Dismissal was ineffective, both because the deadline had passed for Optymyze to file an answering brief in response to Charter's motion to dismiss Optymyze's counterclaims, and because the court already had conducted a hearing at which Charter introduced evidence. The Notice of Dismissal is therefore redundant, immaterial, and impertinent, and the Motion to Strike is granted.[8]

B. Dismissal Under Rule 41(b).

Because the counterclaims remain pending, Charter has asked the court to grant its motion to dismiss under Rule 41(b). Charter is entitled to this relief because Optymyze abandoned its opposition to the Rule 41(b) motion.

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[8] Rather than moving to strike, Charter could have moved to vacate the Notice of Dismissal. Numerous federal cases have analyzed challenges to voluntary notices of dismissal under the framework of a motion to vacate. *See, e.g.*, *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel*, 2 F.3d 544, 544 (4th Cir. 1993); *Armstrong v. Frostie Co.*, 453 F.2d 914, 916 (4th Cir. 1971); *Dickie v. Cannondale Corp.*, 2003 WL 134990, at *1 (N.D. Ill. 2003). Had Charter instead moved to vacate the Notice of Dismissal, the form of the analysis would have been different, because the motion would not have implicated Rule 12(f). The outcome would have been the same, because addressing a motion to vacate would have required this court to determine whether Optymyze properly noticed its dismissal under Rule 41(a)(1) and 41(c). As this decision already has concluded, it did not. *See* Part II.A.1 & 2.

Rule 41(b) states, in pertinent part, "For failure of the plaintiff to prosecute or to comply with these Rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." Ct. Ch. R. 41(b). Writing as a Vice Chancellor, former Chief Justice Strine explained that a party's persistent or egregious failure to comply with the court's rules and orders is misconduct that "implicates this court's inherent authority to police the litigation process, to ensure that acts that undermine the integrity of that process are sanctioned," potentially warranting the application of Rule 41(b). *Parfi*, 954 A.2d at 932 (citing *Gebhart v. Ernest DiSabatino & Sons, Inc.*, 264 A.2d 157, 159 (Del. 1970)).

As a general rule, Rule 41(b) is not available at the pleading stage. *See Stone & Paper Inv'rs, LLC v. Blanch*, 2019 WL 2374005, at *9 (Del. Ch. May 31, 2019). In extreme cases, however, this court has dismissed claims under Rule 41(b), before trial and based on a limited record.

The leading decision is *Parfi*. There, former Chief Justice Strine initially stayed the Delaware proceedings pending the completion of a foreign arbitration. 954 A.2d at 922. In a status report, the plaintiffs represented to the court that they would commence the damages phase of the foreign arbitration, but never did. Months later, the defendants moved to dismiss the plaintiffs' claims for failure to prosecute. *Id.* at 924–25. In response, the plaintiffs moved to lift the stay, representing in an affidavit that commencement of the damages phase of the arbitration had become financially impossible. *Id.* at 925. Based on concerns about the veracity of the affidavit, the court *sua sponte* ordered discovery "into the question of whether the plaintiffs had engaged in sanctionable delay or made misrepresentations to the court." *Id.* at 926. After reviewing the record, the court found that the plaintiffs had "concocted an affidavit designed to give the court a false impression that dire and unexpected financial circumstances precluded [the plaintiff] from proceeding" with the arbitration and "to get the court to lift the Stay Order." *Id.* at 931. The court dismissed the plaintiffs' claims under Rule 41(b) and its inherent authority to police the litigation process, noting that "the most compelling evidence consist[ed] of [the controller's] own admissions and statements." *Id.* at 932.

Vice Chancellor Noble applied *Parfi* in *Bessenyei*, 2012 WL 5830214. There, the defendants introduced evidence showing that the verifications for the plaintiffs' complaint, amended complaint, and initial discovery responses had been notarized improperly. *See Bessenyei*, 2012 WL 5830214, at *1–2. One plaintiff had been "down in the islands and didn't know where he could get anything notarized." *Id.* at *4 (internal quotation marks omitted). After conferring with his co-plaintiff, a Pennsylvania lawyer, the plaintiffs jointly decided that they both would submit verifications that falsely represented that they had been signed under oath before a Philadelphia notary public, who was a legal assistant in the Pennsylvania lawyer's office. *Id.* at *4–6. When the defendants learned of these issues, they moved for dismissal pursuant to Rule 41(b). *Id.* at *1. After finding that the plaintiff had falsely verified the documents, and that his co-plaintiff had directed his actions, Vice Chancellor Noble held that "[n]o sanction short of dismissal is appropriate under these circumstances." *Id.* at *9. On appeal, Delaware Supreme Court affirmed that holding. *See* 67 A.3d 1022.

For purposes of its motion to dismiss Optymyze's counterclaims under Rule 41(b), Charter relied on *Parfi* and *Bessenyei*. Charter argued that the counterclaims should be dismissed under Rule 41(b) because they contained clearly false allegations, which Stiffler verified as true in violation of Court of Chancery Rule 3(aa). Charter also argued that dismissal was warranted because Optymyze consistently had flouted this court's orders, including both the TRO and a stipulated order requiring Optymyze to pay a monetary sanction of $1.5 million. The parties briefed the motions, and the court conducted a hearing. *See* Dkts. 197, 213, 217, 264.

By order dated April 2, 2020, this court resolved the aspects of the motion to dismiss that were based on Charter's arguments that the counterclaims (i) were untimely under Rules 12 and 13 and (ii) failed to state a claim under Rule 12(b)(6). Dkt. 262 ¶¶ 6–13. On the Rule 41(b) motion, this court found that Charter had presented "clear and convincing evidence" sufficient to "[t]o demonstrate the falsity of the allegations in the Counterclaims" and concluded that it would be appropriate to "dismiss[] Optymyze's claims under" Rule 41(b). Dkt. 262 ¶ 14(f), (e).

"[I]n an abundance of caution," however, this court elected to hold a further evidentiary hearing to give Optymyze a chance "to present its evidence and place Stiffler's statements in context." Dkt. 262 ¶ 14(g). This court noted that "[b]ecause Stiffler's comments and actions form the foundation for Charter's motion, his testimony [would be] necessary for the court to evaluate Optymyze's conduct." *Id.* ¶ 14(i). The Rule 41(b) hearing never took place because of Optymyze and Stiffler's discovery misconduct. Optymyze elected to forego the hearing because it was "concerned for Mr. Stiffler and chooses to suffer the litigation consequences rather than to imperil him." Mot. Ex. 116 at 3. Optymyze thus waved its opportunity to present evidence on the Rule 41(b) motion.

Because the Rule 41(b) hearing never took place, Charter's evidence is unrebutted. Optymyze's own documents establish that the counterclaims contained false allegations that Stiffler verified as true in violation of Court of Chancery Rule 3(aa). The misconduct in which Optymyze and Stiffler have engaged goes beyond what supported the dismissals in *Bessenyei* and *Parfi*.

In addition to filing counterclaims that contained false assertions, Optymyze and Stiffler have engaged in severe and pervasive misconduct from the outset of this litigation.

- On December 12, 2018, Optymyze implemented a pop-up in violation of the TRO. *See* Part I.F, *supra*.

- When Charter sought to enforce the TRO. Optymyze falsely represented that the pop-up was "pre-planned," "carried out [in the] normal course of business," and intended "for all Optymyze clients." *See* Part I.F, *supra*.

- On December 24, 2018, Optymyze instituted a full "blackout" of the services in violation of the TRO. *See* Part I.H, *supra*.

- Stiffler instructed his CFO not to pay the sanctions that this court ordered in response to Charter's application to enforce the TRO. *See* Part I.H, *supra*.

- After the court imposed sanctions, Stiffler violated the TRO by directing Optymyze employees to modify the Compensation Platform so that it automatically redirected Charter users to Optymyze's home page, shutting off Charter's access to the Compensation Platform. *See* Part I.J, *supra*.

- In March 2019, Stiffler engaged in spoliation of evidence by editing 229 chat messages dating back to December 2018, in an effort to hide his instructions to Optymyze employees to take actions that violated this court's orders. *See* Part I.L, *supra*.

- In anticipation of the Rule 41(b) hearing, Optymyze refused Charter's reasonable discovery requests, including a request for native files of messages exchanged via Microsoft Teams. *See* Part I.R, *supra*.

- In anticipation of the Rule 41(b) hearing, Optymyze refused to produce numerous individuals for depositions. Optymyze argued that it did not employ those individuals and lacked "the ability to make them appear for a deposition," Mot. Ex. 110 at 3, but Optymyze had taken positions in this litigation based on the opposite contention. *See* Part I.R, *supra*.

- In anticipation of the Rule 41(b) hearing, Optymyze engaged in egregious litigation misconduct surrounding Stiffler's deposition. When the deposition eventually took place, Stiffler was evasive and non-responsive. After 2.5 hours, he abruptly walked out, refused to continue, and then failed to appear at the rescheduled deposition. Optymyze stated that it would not produce Stiffler for a further deposition and suffer the litigation consequences. *See* Part I.S, *supra*.

This level of misconduct far exceeds the conduct deemed sufficed to justify dismissal under Rule 41(b) in *Parfi* and *Bessenyei*.

At this point, Optymyze has forfeited its opportunity to oppose the Rule 41(b) motion. Optymyze has had numerous opportunities to respond to Charter's contentions with evidence. Optymyze could have submitted evidence with the answering brief. Optymyze could have addressed the evidence and proffered alternative explanations during the hearing on March 24, 2020. Or Optymyze could have litigated in good faith and presented its case at the Rule 41(b) hearing. Optymyze turned down each of these opportunities and thus forfeited its right to oppose the Rule 41(b) motion.

The unrebutted record evidence clearly and convincingly establishes that Optymyze and Stiffler have engaged in misconduct that is egregious enough to warrant dismissal of Optymyze's counterclaims under Rule 41(b). The counterclaims are dismissed with prejudice.

C. The Terms And Conditions Of Dismissal

Charter has requested two additional terms for the dismissal. Neither is warranted. First, Charter asks that the dismissal order "find that Optymyze (including both [Original Optymyze] and [Optymyze Singapore]) is the counterparty to the Agreement with Charter." Mot. (Br.) at 38. A factual finding to that effect is not necessary to dismiss the counterclaims with prejudice, so this decision does not reach it.

Second, Charter asks that the dismissal order "preclud[e] Stiffler [and] any other Stiffler-affiliated entity from bringing a lawsuit against Charter based on the Agreement or allegations similar to those in the counterclaims." Mot. (Br.) at 42. Charter argues that the court can grant this relief (i) under the doctrine of *res judicata*, (ii) by piercing the corporate veil, or (iii) by granting an antisuit injunction.

This court cannot determine the *res judicata* effect of the dismissal. "[A] court conducting an action cannot predetermine the *res judicata* effect of the judgment; that effect can be tested only in a subsequent action[.]" *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1147 (Del. 2008) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 396 (1996)). The doctrine of *res judicata* thus is not a means to Charter's end.

The court also will not address the request for veil piercing, which is an "extraordinary equitable remedy." *Base Optics Inc. v. Liu*, 2015 WL 3491495, at *23 (Del. Ch. May 29, 2015). "Persuading a Delaware court to disregard the corporate entity is a difficult task." *Wallace v. Wood*, 752 A.2d 1175, 1183 (Del. Ch. 1999) (internal quotation marks omitted). "Whether to pierce the corporate veil is a fact-intensive inquiry that requires the court to evaluate whether the owners of the entity unjustly misused the corporate form." *E.g.*, *CLP Toxicology, Inc. v. Casla Bio Hldgs. LLC*, 2020 WL 3564622, at *23 (Del. Ch. June 29, 2020). Ruling on veil piecing is not necessary to dismiss the counterclaims with prejudice, so the court does not reach that issue.

It would be premature at this point to issue a forward-looking antisuit injunction. Delaware courts will not "issue [an injunction] by reason of mere apprehension of uncertain speculative damage at an indefinite time in the future." *Weldin Farms, Inc. v. Glassman*, 414 A.2d 500, 505 (Del. 1980). Stiffler did threaten previously that "[a]fter the 41(b) hearing," another Stiffler-owned entity would "move to enforce its rights against Charter." Dkt. 313 ¶ 24. That comment, without more, is too insubstantial to support injunctive relief.

D. An Award Of Attorneys' Fees And Expenses

Finally, Charter seeks an award of attorneys' fees and expenses, citing three bases: (i) a fee-shifting provision in the Agreement, (ii) the bad faith exception to the American Rule, and (iii) Rule 37.

Charter contends that it is entitled to recover its costs and fees under the Agreement. *See* Mot. (Br.) at 56–57. The Agreement contains a fee-shifting provision, which states,

> In any action or proceeding, at law or in equity, to enforce any of the provisions of this Agreement, the unsuccessful party in such litigation, as determined by the court in *a final judgment* or decree, will pay the reasonable costs, expenses and attorneys' fees incurred therein by the successful party.

Compl. Ex. A § 22 (emphasis added). "[A] final judgment is one that determines all the claims as to all the parties." *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 579 (Del. 2002) (defining "final judgment" in order to determine whether "an order is final and therefore ripe for appeal"). This court has not yet rendered a "final judgment" in this case because Charter's claims against Optymyze remain pending. Accordingly, it would be premature to award fees under the fee-shifting provision at this stage of the case.

Charter next invokes the bad faith exception to the American Rule on fee recovery. The American Rule generally requires that, "regardless of the outcome of litigation, each party is responsible for paying his or her own attorneys' fees." *In re SS & C Techs., Inc. S'holders Litig.*, 948 A.2d 1140, 1149 (Del. Ch. 2008). "The bad faith exception to the American Rule applies in cases where the court finds litigation to have been brought in bad faith or finds that a party conducted the litigation process itself in bad faith, thereby unjustifiably increasing the costs of litigation." *Beck v. Atl. Coast PLC*, 868 A.2d 840, 850–51 (Del. Ch. 2005). "Although there is no single definition of bad faith conduct, courts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims." *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998) (footnotes omitted).

Optymyze's and Stiffler's misconduct warrants fee shifting under the bad faith exception to the American Rule. Charter has presented clear and convincing evidence establishing that Optymyze's counterclaims included false allegations that Stiffler verified in violation of Court of Chancery Rule 3(aa). Charter also has established that Optymyze engaged in bad faith litigation conduct by repeatedly violating this court's orders, spoliating evidence, and engaging in abusive discovery tactics. As with the other awards of attorneys' fees and expenses that this court has entered, Optymyze and Stiffler are jointly and severally liable to Charter for its fees and expenses.

Finally, Charter relies on Rule 37, which provides an independent basis to award attorneys' fees and expenses to Charter. Rule 37 "provides an 'arsenal' of possible sanctions that a trial court can impose for discovery violations," including taking facts as "established for the purposes of the action," "refusing to allow the disobedient party to support or oppose designated claims or defenses," and "dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr.*, 2018 WL 6331622, at *10 (Del. Ch. Dec. 4, 2018) (internal quotation marks omitted) (collecting authorities). Here, Rule 37 provides a basis to award costs to Charter because Optymyze and Stiffler repeatedly violated this court's orders, and when Charter sought to depose Stiffler in advance of the Rule 41(b) hearing, Stiffler abruptly left the deposition, failed to appear at the rescheduled deposition, and refused to resume the deposition at any point.

Charter asks the court to impose various other sanctions on Optymyze and Stiffler, including "(1) [entering a] default judgment against Optymyze [on Charter's claims and] (2) an adverse inference regarding Stiffler's control of the [forty-three] companies" listed in Appendix A to Charter's opening brief. Mot. (Br). at 53. Whether and to what extent to impose sanctions is a matter entrusted to the discretion of the trial court. *See Shawe v. Elting*, 159 A.3d 142, 149 (Del. 2017). This court already has imposed increasingly severe sanctions on Optymyze and Stiffler in response to some of the misconduct in which they engaged. The unaddressed misconduct includes Stiffler's spoliation of evidence, the verification of false allegations in the counterclaims, and the events surrounding Stiffler's deposition. Given that all of the unaddressed misconduct relates to Optymyze's counterclaims, dismissing those counterclaims with prejudice and awarding Charter all of the fees and expenses that it incurred in connection with those counterclaims provides an adequate remedy. Further sanctions would be disproportionate.

III. CONCLUSION

Optymyze's counterclaims are dismissed with prejudice. Charter is entitled to recover the reasonable attorneys' fees and expenses incurred defending against the counterclaims. The parties shall confer and submit an order implementing this decision.