

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

LEO E. STRINE, JR.
CHANCELLOR

New Castle County Courthouse
Wilmington, Delaware 19801

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RE: Senior Housing Capital, LLC, et al. v. SHP Senior Housing Fund, LLC, et al., Civil Action No. 4586-CS

Dear Counsel:

The parties have been unable to agree on the form of a final order to implement my decision in the above-captioned matter. I resolve their four points of dispute now.

1. *Pre-judgment interest.* As the opinion stated, the rate shall be the legal rate, fixed as of the time that payment was due, *i.e.* December 8, 2008. This is the Federal Reserve discount rate of 1.25%, plus 5%, for a total of 6.25%.¹ The rate shall be compounded quarterly.

CalPERS objects to this rate because, shortly after December 8, 2008, the discount rate dropped from 1.25% to 0.5%. This does not make the fixed 6.25% interest rate

¹ See 6 Del. C. § 2301(a).

inequitable. The rate remains well less than what SHP could have earned by putting the money in the stock market for that period.² Therefore, the 6.25% rate stands.

2. *The value of the Membership Interests.* In an argument it never made at the proper time, SHP now claims that the \$5.6 million insurance payout from Hurricane Charley in 2004 should be included in the valuation of the Membership Interests as of the October 9, 2008, valuation date, even though this asset was not included in the balance sheet as of that date. SHP claims that this payout was an “off balance sheet asset” and that it was “fully anticipated” by October 9, 2008, even though the money was only paid in 2010.³ No argument or evidence addressing this issue was presented at trial or in the accompanying briefs.⁴ SHP was in control of the Fund’s books and records until it ceased to manage the Fund, and it presented no evidence as to how it was accounting for this supposedly certain asset. Its new argument comes too late.

Rather, during the trial process, the parties relied on the financial statements that SHP prepared to calculate the payouts that SHP is due.⁵ SHP has not explained why, under accounting principles, the “fully anticipated” insurance payout would be considered an off balance sheet asset. Nor has SHP explained why the insurance payout,

² The S&P 500 closed at 909.7 on December 8, 2008. By May 13, 2013, the date that the Opinion was issued, it had risen to 1,633.77. This approximates to an annual rate of return of 13.4%, compounded quarterly. *See S&P 500 – Historical Prices*, Yahoo! Finance, <http://finance.yahoo.com/q/hp?s=%5EGSPC+Historical+Prices> (last visited June 11, 2013).

³ Pls.’ Reply Submission ¶ 5.

⁴ *See* JX 1293, at 21 (Project audited financials, YE 2008 (Sept. 24, 2010)) (stating only that \$4.2 million was paid to the Fund in 2010 in respect of Hurricane Charley, and not indicating that this money had been “anticipated” or in any way accounted for earlier).

⁵ *E.g.*, Pls.’ Post-Tr. Ans. Br. 46 n.260 (calculating the Membership Interests).

which relates to a 2004 event, was not “fully anticipated” by the end of 2007, such that it was not included in the calculation of the Incentive Distribution, but was “fully anticipated” by the autumn of 2008.⁶ Complex and important issues of this kind are not properly raised for the first time in a brief letter sent to help settle the terms of a final judgment. Therefore, I adhere to the parties’ established practice of relying on the financial statements, and rule that SHP is not to include the insurance proceeds in its calculation of the Membership Interests.

3. *CalPERS’ offset.* SHP advocates in favor of an offset of \$1,544,164, based on what was due to CalPERS as of the October 9, 2008, valuation date. CalPERS argues for a round figure of \$1.7 million, based on the Opinion’s two references to the “\$1.7 million that CalPERS acknowledges it owes to SHP.”⁷

The offset is \$1,711,327.⁸ This is the amount that SHP conceded it owed CalPERS in its briefing, before I decided the correct valuation date. It is unfair for SHP now to go back and argue for a different amount.

In any case, SHP’s argument is wrong. SHP claims that the offset should be determined as of the October 9, 2008, valuation date, because this is the date when “SHP and SHC’s economic interests in the Fund were fixed and finalized.”⁹ But the offset has nothing to do with the value of SHP’s economic interest in the Fund, and, until now, SHP

⁶ See Pls.’ Pre-Tr. Ans. Br. 13 n.49.

⁷ Op. 19 n.50, 107.

⁸ Pls.’ Pre-Tr. Op. Br. 19 n.36.

⁹ Pls.’ Submission in Supp. of Final Order & J. ¶ 12.

has never suggested that it does. Rather, the offset represents SHP's, and its affiliate SHC's, 4.58% share of capital contributions that CalPERS made on SHP's and SHC's behalf. If the parties had not adopted the "Due To/Due From" mechanism, SHP would have had to make capital contributions between October 9, 2008, and December 8, 2008, even though the Fund's value for valuation purposes was fixed as of October 9. SHP must pay its fair share of the capital contributions, as it agreed with CalPERS when it set up the "Due To/Due From" mechanism.¹⁰

CalPERS' request for a round offset of \$1.7 million is slightly surprising.¹¹ It is true that I used the round figure of \$1.7 million in the Opinion, but I rounded every figure, for the convenience of the reader. I did not intend to determine that CalPERS was entitled to \$1,700,000, rather than the amount that SHP conceded of \$1,711,327. Because I presume that CalPERS was simply misled by the literal words I used in the Opinion, I do not consider CalPERS bound by its request for an offset of \$1,700,000. The final order the parties submit is to calculate the offset as \$1,711,327.

4. *Litigation expenses.* I awarded SHP its "attorneys' fees and costs" under the fee-shifting provision of the LLC Agreement, which provides that the prevailing party shall be entitled to "reasonable attorneys' fees and court costs."¹² SHP interprets this to mean that CalPERS must reimburse it all its litigation expenses, including attorneys' fees, witness fees, and all the other costs it has incurred in the course of the litigation.

¹⁰ See Op. 81-88.

¹¹ Defs.' Opp'n to Pls.' Proposed Final Order & J. ¶¶ 6-7.

¹² Op. 108; LLC Agreement § 9.2.

CalPERS does not dispute the attorneys' fees. But, even though it declined to address this issue in its pre-trial briefing, and did not file a timely motion for reargument under Rule 59(f), CalPERS now tries to raise a new argument in order to avoid paying the remainder of SHP's litigation expenses in full.¹³ Because the fee-shifting provision provides for "attorneys' fees and court costs," CalPERS argues that any expenses of SHP that do not fall within the definition of "costs" and "court costs," as that term is used in Delaware case law, fall outside the fee-shifting provision, irrespective of whether they were reasonably incurred.¹⁴ In particular, CalPERS seeks to avoid paying for any reasonable expenses SHP incurred in hiring experts, except for their in-court time, which, according to Delaware case law interpreting the expert witness cost statute, 10 *Del. C.* § 8906, is considered a court cost.¹⁵

Although I suppose it is understandable why the parties may have not fought over this issue previously, given the number of issues they chose to battle over, CalPERS ignores certain key related points. First, the fee-shifting provision is a contract that does not specifically cite our cost statute, and so the case law on the cost statute is not

¹³ Defs.' Post-Tr. Ans. Br. 45 n.43; *see* Del. Ct. Ch. R. 59(f) (providing that a party may move for reargument of a decision within 5 days).

¹⁴ *See, e.g., Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 723 (Del. 1976) ("Costs are allowances in the nature of incidental damages awarded by law to reimburse the prevailing party for expenses necessarily incurred in the assertion of his rights in court." (quotation marks and citation omitted)); *see generally* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 13.02(b) (2013) (discussing cost allowances).

¹⁵ *See, e.g., Miles, Inc. v. Cookson Am., Inc.*, 1995 WL 214397, at *1 (Del. Mar. 24, 1995) (ruling that expert witness fees awarded under 10 *Del. C.* § 8906 should compensate the experts for "time necessarily spent in attendance upon the court" (citations omitted)).

necessarily controlling. Rather, the question is what the parties to the contract intended the term “court costs” to mean.¹⁶ Although the contract has a Delaware choice of law provision, it contains no choice of forum provision, and this litigation could have occurred in different forums that may use the term “court costs” in different ways. Second, the term “court costs” used in a commercial contract could sensibly be read in context to mean that the losing party had to pay all of the winning party’s reasonable attorneys’ fees and costs in connection with the litigation, with the term “court costs” being used as a broad catch-all to cover all the reasonable expenses of the prevailing party not captured by the phrase “attorneys’ fees” alone. In other words, the contractual provision is ambiguous.¹⁷ Finally, CalPERS is poorly positioned to ask now for its newly preferred contractual interpretation, because it previously interpreted the provision in the same manner as SHP. In the pre-trial stipulation, CalPERS itself sought “attorneys’ fees, expenses, and costs pursuant to a fee-shifting provision in the LLC Agreement” if it prevailed.¹⁸ Thus, CalPERS sought to be reimbursed to the same extent as SHP now seeks. CalPERS’ reversal of position is understandable, given that it did not prevail, but that does not excuse its untimely presentation of an argument inconsistent with its own previous take on the contract. I thus adhere to my original decision and therefore also

¹⁶ See, e.g., *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232-33 (Del. 1997).

¹⁷ See, e.g., *Gen. Refractories Co. v. Fed. Ins. Co.*, 2001 WL 1580173 (E.D. Pa. Dec. 6, 2001) (discussing the meaning of “court costs” in a contract, and ruling it ambiguous).

¹⁸ Pre-Tr. Stip. 3 (emphasis added).

refuse SHP's invitation to me to determine that CalPERS should have to pay the expenses in any event under the bad faith exception to the American Rule.

With this guidance, the parties are now to agree on the final form of order, and SHP is to submit it within five days.

Very truly yours,

Leo E. Strine, Jr.

Chancellor