COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: May 2, 2006
Decided: August 17, 2006

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Re: *In re Grupo Dos Chiles, LLC,*
Civil Action No. 1447-N

Dear Counsel:

This was a dispute over the membership and future of Grupo Dos Chiles LLC ("Grupo"), a Delaware limited liability company. In a post-trial opinion issued March 10, 2006 (the "Opinion"), this Court concluded that Petitioner Alfred "Trip" Shriver, III, and Respondent Yolanda Martinez were the members of Grupo and that Grupo was not properly returned to good standing with the State of Delaware by Martinez's unilateral payment of its back taxes.[1] Petitioner has moved for an award of his attorneys' fees pursuant to the bad faith exception to the American Rule. For the reasons set forth below, the Court awards Petitioner 75% of his attorneys' fees.

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[1] *In re Grupo Dos Chiles LLC*, 2006 WL 668443 (Del. Ch. Mar. 10, 2006). Familiarity with the Opinion is presumed.

I. LEGAL STANDARD

This Court has broad discretion to award attorneys' fees.[2] Normally, however, parties bear their own attorneys' fees pursuant to the American Rule.[3] "An exception exists in equity . . . when it appears that a party or its counsel has proceeded in bad faith, has acted vexatiously, or has relied on misrepresentations of fact or law in connection with advancing a claim in litigation."[4] There is not a single standard of bad faith that gives rise to an award of attorneys' fees; rather, bad faith turns on the particular facts of each case.[5] For example, the Delaware courts have found bad faith where parties have changed their testimony to suit their needs or mislead the Court.[6] This Court does not invoke the bad faith exception lightly and imposes the stringent evidentiary burden of producing "clear evidence" of bad faith conduct on the party seeking an award of fees.[7]

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2 *Acierno v. Goldstein*, 2005 WL 3111993, at *2 (Del. Ch. Nov. 16, 2005) (internal citations omitted); Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 13-1 at 13-1–2.

3 *McNeil v. McNeil*, 798 A.2d 503, 514 (Del. 2002).

4 *Rice v. Herrigan-Ferro*, 2004 WL 1587563, at *1 (Del. Ch. July 12, 2004).

5 *Jacobson v. Dryson Acceptance Corp.*, 2002 WL 31521109, at *16 (Del. Ch. Nov. 1, 2002) (internal citation omitted).

6 *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005) (citing *Jacobson*, 2002 WL 31521109, at *16); *accord Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 2006 WL 1911083, at *6 (Del. July 10, 2006).

7 Wolfe & Pittenger § 13-3[b] at 13-9–12 (citing cases).

II. RESPONDENTS' BAD FAITH CONDUCT

Petitioner has met his burden of producing clear evidence that Respondents acted in bad faith in connection with their argument that Rivera was the sole member of Grupo at all relevant times. In related litigation in Virginia that began before this action, Martinez averred that she and Shriver were the only members of Grupo.[8] When deposed for purposes of this litigation in August 2005, both Respondents testified under oath that Shriver and Martinez were the only members of the LLC.[9] And, on August 31, 2005, Martinez responded to a request for admission in the Virginia action that she was a member of Grupo by admitting that request.[10] One day before, however, on August 30, Respondents denied the same request in this action.[11]

Throughout the litigation in Virginia, Martinez asserted that she and Shriver were the members of Grupo. In fact, Martinez's son, Rivera, who claimed to be the sole

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8 PX 87 ¶ 2 (Martinez's Answer in the Virginia litigation) (Jan. 18, 2005) (admitting Shriver's allegation that the only members of Grupo were he and Martinez).

9 Tr. at 139–40 (Martinez); Tr. at 227–31, 245 (Rivera). Citations in this form ("Tr.") are to the trial transcript and indicate the page and, where it is not clear from the text, the witness testifying. Because Respondents' deposition transcripts were never introduced into evidence, citations to deposition testimony are to portions of the trial transcript where the witnesses acknowledged giving the recited deposition testimony.

10 Opening Mem. in Supp. of Pet'r's Mot. for Att'ys' Fees ("POB") Ex. B (Resp't's Am. Resps. to Pet'r's Second Set of Reqs. for Admiss.) ¶ 10.

11 POB Ex. A (Answers to Pet'r's First Set of Reqs. for Admiss. Directed to Yolanda Martinez) ¶ 10.

member of Grupo in this litigation, never entered an appearance in the Virginia litigation.[12] Only just before trial in this action did Respondents squarely begin to rely on the Certificate of Formation for the proposition that Rivera was the only member of Grupo.[13] Respondents supplemented their changed story with their own trial testimony, but were impeached by their deposition testimony.[14]

Although there are very few cases addressing limited liability company law and there was no controlling precedent on the question of who was a member of Grupo under this set of facts, Respondents' position that Rivera was the only member of Grupo was taken in bad faith. The operative reality of Grupo belied their position,[15] as did Respondents' need to change their testimony to assert that Rivera was the sole member.

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12 Tr. at 232–33 (Rivera).

13 *See* Pretrial Br. of Resp'ts [Martinez and Rivera] at 5.

14 *See supra* n.9.

15 *See, e.g.*, DX 4 (Grupo's LLC Agreement naming Martinez and Shriver "managing partners"); PX 28 (loan agreement between Advanceme, Inc., and Grupo identifying Martinez and Shriver as owners of Grupo); PX 29 (loan agreement between Advanceme, Inc., and Grupo identifying Shriver as an owner of Grupo; both Shriver and Martinez personally guaranteed the debt); PX 77 (letter from Martinez and Shriver identifying themselves as the members of Grupo); *see also Grupo*, 2006 WL 668443, at *3 n.29 (citing further documents that identify Martinez or Shriver as members of Grupo).

Further, as the Court observed in the Opinion, Rivera's testimony was "marked by inconsistencies and defied common sense."[16]

There are two components to Respondents' bad faith. First, Respondents' position was so strained and wholly at odds with the operative reality that it fell outside the bounds of good faith advocacy.[17] Second, Respondents could not in good faith aver, under oath, facts directly opposite to those they averred in the Virginia litigation or change their testimony to suit their needs in this litigation. Respondents' violations of these fundamental tenets rise to the level of intentional bad faith conduct that justifies an award of attorneys' fees under the bad faith exception to the American Rule.

III. RESPONDENTS' OTHER CONDUCT

Petitioner also argues that Respondents' assertion that Martinez unilaterally could return Grupo to good standing with the State of Delaware was made in bad faith. Petitioner has not met his burden as to that argument.

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16 *Grupo*, 2006 WL 668443, at *3 n.32.

17 *Cf.* Court of Chancery Rule 11 ("By presenting to the Court . . . a pleading, written motion, or other paper, an attorney or unrepresented party is certifying to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . (2) the claims, defenses and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions *have evidentiary support* . . . .") (emphasis added).

First, an award of fees for bad faith conduct must derive from either the commencement of an action in bad faith or bad faith conduct taken during litigation, and not from conduct that gave rise to the underlying cause of action.[18] Second, the reinstatement question presented was extremely narrow and factually sensitive; there was no controlling precedent on this question. Further, Respondents did not take inconsistent positions or change their testimony on this issue. Awarding attorneys' fees on the reinstatement issue would punish Respondents merely for making an ultimately unsuccessful argument. As such, the Court concludes that their conduct in connection with this argument does not rise to the level of bad faith sufficient to justify an award of attorneys' fees.

* * * *

In deciding Petitioner's motion for attorneys' fees, the Court has not considered the alleged instance of burglary and Martinez's conduct related thereto[19] because that incident occurred after the trial on the merits of this matter had concluded. Thus, the alleged conduct is not litigation conduct relevant to the motion for attorneys' fees.

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[18] *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 546 (Del. 1998) ("[B]ad faith exception does not apply to conduct that gives rise to substantive claim itself.").

[19] *See* POB Ex. C.

IV. CONCLUSION

Petitioner has met his burden of producing clear evidence of Respondents' bad faith conduct in connection with the major portion of this litigation, but not in connection with the secondary reinstatement issue. The latter issue remained in dispute throughout the litigation and the time spent on it is not readily segregable from time spent on other issues. Accordingly, the Court awards Petitioner 75% of the attorneys' fees he incurred in prosecuting this action, or $38,446.50.[20] Petitioner is also entitled to costs in the requested amount of $2,233.73 as the prevailing party pursuant to Rule 54(d). Respondents therefore shall pay Petitioner the sum of $40,680.23 and, pursuant to 10 *Del. C.* § 4734, this order shall be entered in the same manner and form and in the same books and indexes as judgments and orders entered in the Superior Court.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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[20] Since this matter did not proceed on an expedited basis, the Court has disallowed that portion of any entry for an individual timekeeper reflecting more than 12 hours in a single day.