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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BIOLASE, INC., a Delaware corporation, *Defendant, Counterclaim-Plaintiff Below, Appellant/Cross-Appellee,* v. ORACLE PARTNERS, L.P., a Delaware limited partnership, *Plaintiff, Counterclaim-Defendant Below, Appellee/Cross-Appellant.*	**No. 270, 2014** On appeal from the Court of Chancery of the State of Delaware, C.A. No. 9438-VCN

APPELLEE'S REPLY BRIEF IN SUPPORT OF ITS CROSS-APPEAL

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INTRODUCTION

Oracle Partners ("Oracle") seeks an award of attorneys' fees based upon the corporate benefit achieved as a result of the trial court's decision which, if upheld, establishes a majority of independent directors on the Board of Directors of Biolase, Inc. ("Biolase" or the "Company"), and will end the efforts of Biolase's Chairman and CEO, Federico Pignatelli ("Pignatelli") to entrench himself in his position as CEO. This benefit was not achieved until the trial court rendered its Memorandum Opinion. However, simultaneously with the Memorandum Opinion, the trial court issued its final order (the "Final Order") entering judgment in favor of Oracle on the substantive claims in the case but denying Oracle's request for attorneys' fees. Oracle never had the opportunity to apply for such fees, as any potential application based upon the corporate benefit achieved became ripe only when the Memorandum Opinion was issued, but simultaneously with that decision, the Final Order denied Oracle any ability to seek fees. Oracle seeks to vacate the part of the Final Order denying it attorneys' fees, and seeks to have the matter remanded to the trial court so that Oracle can apply for attorneys' fees, and the trial court can make an appropriate determination of Oracle's entitlement to such fees.

Biolase opposes any such remand on the grounds that the application comes too late, was waived and is without merit. RB at 1, 17-24.[1] As shown herein, Biolase's claims are without merit. The cases it relies on are readily distinguishable, as they involved claims for attorneys' fees based upon bad faith conduct in the litigation, claims that were ripe ***before*** any final decision. In contrast, it is standard practice in cases such as this (where attorneys' fees are sought on the basis of creating a fund or conferring of a corporate benefit) for a fee application to be made after a final judgment on the merits. Indeed, until then, an application for attorneys' fees is not ripe.

Biolase's claims addressing the merits of a fee application are not appropriate for consideration by this Court – that matter should be addressed by the trial court in the first instance. If this Court is inclined to consider the merits, however, we note that, as shown herein, Biolase's contentions are directly contrary to the factual findings of the trial court, which are entitled to deference on this appeal.

[1] "RB" refers to Appellant's Reply Brief on Appeal and Answering Brief on Cross-Appeal.

ARGUMENT

I. THIS COURT SHOULD VACATE THE FINAL JUDGMENT INSOFAR AS IT DENIES AN AWARD OF ATTORNEYS FEES, AND SHOULD REMAND THE MATTER TO THE TRIAL COURT FOR A DETERMINATION IN THE FIRST INSTANCE.

A. Oracle's Fee Application Is Timely, and Was Not Waived.

Biolase asserts that, even though Oracle sought attorneys' fees in its Complaint, because it did not seek an award of attorneys' fees at trial, any application for such fees is untimely and was waived. RB at 2, 18-19. As shown below, neither the facts nor the relevant case law supports this argument.

Oracle seeks attorneys' fees based upon the corporate benefit that it achieved by prevailing in the litigation – specifically, getting clarity as to the composition of Biolase's Board of Directors, ensuring that a majority of the Board is comprised of independent directors, and overcoming Pignatelli's efforts to entrench himself as CEO of Biolase. These benefits were not achieved until the trial court issued its Memorandum Opinion. Accordingly, any application for attorneys' fees prior to the issuance of the Memorandum Opinion would have been unripe, premature and speculative.

Biolase asserts that "Delaware trial courts consistently hold that a party waives its ability to recover attorneys' fees when it fails to assert the basis for its claim in pre- or post-trial briefing or at trial." RB at 18, citing *Kosachuk v. Harper*, 2002 WL 1767542, at *8 n. 51 (Del. Ch. July 25, 2002); *Case Fin., v.*

Alden, 2011 WL 1849126, at *28 (Del. Ch. May 11, 2011); *SinoMab Bioscience Ltd. v. Immunomedics, Inc.*, 2009 WL 1707891, at *21 n. 123 (Del. Ch. June 26, 2009); and *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003). Each of these cases is readily distinguishable. *Kosachuk*, *Case* and *SinoMab* each involved applications for attorneys' fees based upon alleged wrongful conduct during the course of the litigation. The matter giving rise to the claim for fees (the opposing party's inappropriate conduct during the litigation) had already occurred, and such claims were therefore ripe at the time of trial.[2] Claims for attorneys' fees based upon the "corporate benefit" doctrine stand on a different footing. Such claims cannot properly be made until a corporate benefit is achieved, which happens only when the plaintiff prevails after trial.[3]

In cases where litigation creates a corporate fund or a corporate benefit, it is customary for fee applications to be made ***after the plaintiff receives a successful result at trial***. In *In re Southern Peru Copper Corp. Shareholder Deriv.*

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[2] We note that where the basis for a claim of "vexatious litigation" becomes apparent at trial, a claim for attorneys' fees may be made after trial. *E.g.*, *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 109-110 (Del. Ch. 2014) (holding in its post-trial opinion that, although the parties have "not thoroughly briefed the question of fee shifting," at a "later stage of the case the plaintiffs may make a formal motion jointly with any application they wish to make for a fee award based on the creation of a common fund.").

[3] *Emerald Partners* did not involve an application for fees at all, but instead involved an argument as to liability made for the first time in an answering brief on remand from the Supreme Court. 2003 WL 21993437, at *43.

Litig., 30 A.3d 60 (Del. Ch. 2011), *aff'd sub nom.*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012), for example, the Court of Chancery issued a decision after trial in favor of plaintiffs, awarding damages (before interest) of $1.347 billion. The Court noted that "the plaintiff has not sought to have the defendants pay his fees," but that fee would be paid out of the award, and "[t]he parties shall confer regarding whether they can reach agreement on a reasonable fee that the Court can consider awarding. . . ." *Id.* at *120 n. 206. The trial court subsequently heard a contested fee application, and awarded attorneys' fees of $304,742,604.45. *In re Southern Peru Copper Corp. Shareholder Deriv. Litig.*, 2011 WL 6382006 (Del. Ch. Dec. 20, 2011), *aff'd sub nom.*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

Numerous other cases involving corporate benefit or common fund fee recoveries have endorsed a similar procedure, where fee applications were made ***after*** the post-trial opinion establishing the benefit. *E.g.*, *Rural Metro*, 88 A.3d at 109-110 (fee application to be made); *Zimmerman v. Crothall*, 2013 WL 56330992, at *9 (Del. Ch. Oct. 14, 2013); *Julian v. Eastern States Construction Serv.*, Inc., 2009 WL 154432, at *1 (Del. Ch. Jan. 14, 2009); *Boyer v. Wilmington Materials, Inc.*, 1999 WL 342326, at *1 (Del. Ch. May 17, 1999).

Plainly, had Plaintiff been given an opportunity to comment on the form of order to be entered, it would have requested, and the trial court likely

would have entered, an Order permitting Plaintiff the opportunity to make a fee application. Because the trial court entered the Final Order simultaneously with its Opinion, without consulting the parties, Plaintiff was denied any opportunity to make an appropriate fee application. Nor was Plaintiff able to move for reargument on this narrow ground. Biolase filed its Notice of Appeal within two business hours after the Memorandum Opinion and Final Order were issued, divesting the trial court of further jurisdiction. *E.g.*, *Radulski v. Del. State Hosp.*, 541 A.2d 562, 567 (Del. 1988) (recognizing that "the proper perfection of an appeal to this Court generally divests the trial court of its jurisdiction over the cause of action," and holding that trial court lacked jurisdiction to amend an order subject to a pending appeal); *Biggs Boiler Works, Co. v. Smith*, 82 A.2d 919, 920 (Del. 1951) ("[C]onfusion ... would result if, during the pendency of an appeal, the decree sought to be reviewed could be amended without leave of the appellate court.").

Oracle never had an opportunity to make an application for attorneys' fees. Accordingly, the Final Order should be reversed to the extent that it denies attorneys' fees, and the matter should be remanded to the trial court so that Oracle can have a fair opportunity to make an application for attorneys' fees.

B. Oracle's Entitlement to Attorneys' Fees Should Be Decided by the Trial Court on Remand, Not by this Court.

Biolase spends several pages of its reply brief arguing that "Oracle has conferred no 'corporate benefit' on Biolase." RB at 20-24. We do not believe that this matter is properly before this Court. It was not raised in the trial court (because Oracle had no opportunity to raise it), and it should not be addressed for the first time by this Court. If the Court disagrees, however, we note that Biolase's argument – that Oracle was acting for itself because it was "an unsuccessful hostile bidder[]" which was trying to "control Biolase" through "the appointment of a hand selected ally" (RB at 22-24) – is directly contrary to the factual findings of the trial court, which note that Oracle was ***not*** trying to control Biolase (Op. at 8, 17 n. 87, 43), that the directors that it agreed with Biolase would be appointed to the Board were independent directors (Op. at 15, 16, 17, 18), and that those nominees did not have any agreements whatsoever with Oracle (Op. at 15, 45). Accordingly, if the Court is inclined to address the merits of Plaintiff's petition for a fee award, it must reject Biolase's arguments, as they are directly contrary to the well-supported facts found by the Vice Chancellor after a full trial.

CONCLUSION

For the reasons stated herein, the Final Order should be reversed to the extent it denies Oracle's attorneys' fees, and the matter should be remanded to the trial court with the instruction that it hear and determine an application by Oracle for attorneys' fees.

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June 6, 2014

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of June, 2014, the foregoing APPELLEE'S REPLY BRIEF IN SUPPORT OF ITS CROSS-APPEAL was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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