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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE FIRE AND POLICE PENSION FUND, SAN ANTONIO,	)	No. 131, 2015
Plaintiff Below, Appellant/Cross Appellee,	)	CASE BELOW:
v.	)	COURT OF CHANCERY OF THE STATE OF DELAWARE,
ARRIS GROUP INC.,	)	
Nominal Defendant Below, Appellee/Cross Appellant.	)	C.A. No. 10078-VCG

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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SUMMARY OF CROSS-APPEAL ARGUMENT

1. By Plaintiff's admission, the sole benefit obtained as a result of this litigation was the removal of a Continuing Director Provision[1] from Arris' credit agreement. It is undisputed that this benefit was obtained on October 22, 2014, the date the Continuing Director Provision was deleted. Accordingly, the Vice Chancellor erred as a matter of law by incorporating into his fee award the hours expended by Plaintiff's counsel after the Continuing Director Provision was deleted on October 22, 2014. Plaintiff's sole response is to invent a new "benefit"—Arris' disclosure of the deletion of the Continuing Director Provision—that was not obtained until December 8, 2014. Plaintiff's newly-invented disclosure benefit, however, was not part of the relief sought in the Complaint and was never claimed by Plaintiff to be a benefit supporting its fee application in the Court of Chancery. Plaintiff's belated attempt to justify the inflation of the hours expended by its counsel in obtaining the deletion of the Continuing Director Provision is meritless, and the Court of Chancery's decision that 159.7 hours of compensable time were expended should be reversed.

2. Plaintiff admits (through silence) that, unless the Court of Chancery's findings of fact regarding the modest size of the benefit achieved in this action and

[1] Capitalized terms not defined herein shall have the same meaning as in Arris' Answering Brief on Appeal and Opening Brief on Cross Appeal (the "Opening Brief" or "OB").

its decision to award a *quantum meruit* fee are reversed, there is no basis to avoid a reduction of the implied hourly rate awarded from $800 to $300.

CROSS-APPEAL ARGUMENT

I. NO FEE SHOULD BE AWARDED BASED ON TIME INCURRED AFTER THE OCTOBER 22, 2014 DELETION OF THE CONTINUING DIRECTOR PROVISION.

In its Opening Brief, Arris explained that (1) Delaware law permits fee awards for only the time expended in obtaining the benefit supporting the fee application, and (2) the Court of Chancery erred by predicating its fee award on time and effort expended by Plaintiff's counsel that occurred *after* the October 22, 2014 deletion of the Continuing Director Provision, which time was not related to the time plaintiff's counsel spent in obtaining the benefit supporting the fee application. OB at 46–47. In its Cross-Appeal Answering Brief (the "Answering Brief" or "AB"), Plaintiff offers an argument that was never made to the Court of Chancery (which has therefore been waived) and that is contradicted and foreclosed by Plaintiff's Opening Brief in this Court and by Plaintiff's fee application briefs in the Court of Chancery.

Plaintiff's sole justification for its claim that time spent after the October 22, 2014 deletion of the Continuing Director Provision is compensable is that the Stipulation for Considering Dismissal (which was filed in the Court of Chancery on December 8, 2014) "publicly informed the Court about the elimination of the Dead Hand Proxy Put and it provided for prompt filing of a Form 8-K" and "[p]ublic notice was itself an important benefit to the stockholders of Arris . . . ."

AB at 26–27. This argument fails for multiple separate but equally sufficient reasons.

First, Arris argued in the Court of Chancery that Plaintiff's fee application sought credit for non-compensable time incurred after deletion of the Continuing Director Provision. *See* B42 & n.123. In its reply brief in support of the fee application, Plaintiff never addressed that argument, let alone explained why time incurred after October 22, 2014 should be compensated. *See* A170–A193. Issues not addressed in responsive briefing are deemed waived or abandoned. *See, e.g.*, *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1052 n.33 (Del. 2004); *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999). By not responding to Arris' argument regarding non-compensable time before the Court of Chancery, Plaintiff abandoned any such argument and cannot resuscitate it here.

Second, in the context of a fee application, the only time that may be compensated is time incurred in obtaining "the benefits supporting the fee application." *In re Del Monte Foods Co. S'holder Litig.*, 2011 WL 2535256, at *12 & n.3 (Del. Ch. June 27, 2011) (collecting decisions); *see also Stroud v. Milliken*, 1989 WL 120353, at *4 (Del. Ch. Oct. 6, 1989) ("[T]he reasonableness" of attorneys' fees "must be based on the time actually spent before [the benefit was obtained], on those claims which were meritorious when filed."), *aff'd*, 583 A.2d

660 (Del. 1990). Here, as is clear from Plaintiff's own submissions to both this Court and the Court of Chancery, the sole "benefit[] supporting the fee application" was the removal of the Continuing Director Provision. Plaintiff has never claimed that the subsequent disclosure of the removal of the Continuing Director Provision formed part of the benefit for which Plaintiff's counsel should be compensated.

For example, in its Opening Brief on Appeal, Plaintiff represented that it "obtained *the full relief sought* – elimination of a provision in the credit agreement of defendant . . . that entitled bank lenders to accelerate almost $1.6 billion of Arris debt if the stockholders elected a new board majority in a proxy contest." B115 (emphasis added). Similarly, in its fee application briefs before the Court of Chancery, Plaintiff characterized the benefit supporting the fee application as having caused Arris to "eliminate[e] the 'Dead Hand Proxy Put' in the Company's Credit Agreement," A13, as "[e]liminating a deterrent to a potential future proxy contest," A31, and as "obtaining removal of the Dead Hand Proxy Put." A188. The supposed disclosure-related benefit Plaintiff has concocted in an attempt to justify compensating its counsel for time incurred after October 22, 2014 was not a "benefit[] supporting the fee application" and therefore the Court of Chancery erred in awarding compensation for such time.

Third, even if Plaintiff had predicated its fee application on Arris' post-merits-litigation disclosures related to the mooting of Plaintiff's claims, the time incurred by counsel between October 22, 2014 and December 8, 2014 would remain non-compensable. Contrary to Plaintiff's implication, non-compensable time is not limited to hours spent on leadership challenges among class counsel or on the fee application itself. *See* AB at 27. As Chancellor Bouchard recently reiterated, in the context of a fee application, "counsel should differentiate between time spent on a case before an agreement-in-principle to settle has been reached (when counsel is truly at risk) and after an agreement-in-principle has been reached . . . ." *In re Jefferies Grp., Inc. S'holders Litig.*, 2015 WL 3540662, at *4 n.12 (Del. Ch. June 5, 2015) (citations omitted). That is, only time incurred while there remains a live controversy regarding the claims alleged in the complaint may be compensated through a fee application. When Arris mooted Plaintiff's sole claim in this action on October 22, 2014 by deleting the Continuing Director Provision, the meter for Plaintiff's counsel stopped running. Any other outcome would invite repeated abuse.

Fourth, Plaintiff's argument regarding "timely discovery," AB at 27, is a canard. Arris' argument regarding non-compensable time is not based on "speculation" about what Plaintiff's counsel did between October 22, 2014 and December 8, 2014. Arris' argument is based on the fact that, as a matter of law,

post-October 22, 2014 time is not compensable because Plaintiff (in its own words) already "obtained the full relief sought" as of October 22, 2014. B115. Further, it is not Arris' burden to justify a fee award lower than whatever Plaintiff's counsel happens to request. The burden is on Plaintiff to demonstrate that the amount requested in the fee application is reasonable. *See, e.g.*, *Boyer v. Wilmington Materials, Inc.*, 1999 WL 342326, at *1 (Del. Ch. May 17, 1999).

II. THE COURT OF CHANCERY ERRED IN AWARDING AN IMPLIED HOURLY RATE THAT EXCEEDED THE HOURLY RATE IN *AMYLIN II*.

Plaintiff's argument regarding the implied hourly rate is entirely predicated on the merits of Plaintiff's appeal and the proposition that "an appropriate fee award would imply a much higher hourly rate." AB at 28. Arris will not reiterate all the reasons explained in the Opening Brief regarding why the Court of Chancery was well within its discretion to determine that the benefit achieved here was modest and to award a *quantum meruit* fee. However, as the Court of Chancery explained in *Amylin II*, a decision awarding attorneys' fees for litigation that resulted in the removal of a continuing director provision that was being used to thwart an active proxy contest (and which thus, by definition, resulted in a larger, more tangible benefit than anything Plaintiff and its counsel can claim to have achieved in this action): "Where, as here, the benefit achieved is unquantifiable, a *quantum meruit* standard gives the Court [of Chancery] a more equitable means of determining a reasonable fee." 2010 WL 4273171, at *12 (internal quotation marks and footnotes omitted) (alteration in original).

Amylin II broke new ground in Delaware law and eliminated an impediment to a live proxy contest. *See* A241–A244; B26–B37, B43–B44. The benefit in *Amylin II* was far more substantial than the benefit here and the risk undertaken in *Amylin II* was far greater. By parity of reasoning, especially given that the Court

of Chancery relied on *quantum meruit* in setting the fee award in both this case and in *Amylin II*, the implied hourly rate awarded here should be lower than the implied hourly rate in *Amylin II*. Instead, the decision below erroneously awarded a higher implied hourly rate than that awarded in *Amylin II*. *See* B56–B58.

In the event the decision below is affirmed in part as to the Vice Chancellor's factual findings regarding the significance of the benefit achieved and his decision to award a *quantum meruit* fee, Plaintiff offers no argument as to why the Court of Chancery's decision on the implied hourly rate should not be reversed with instructions to award an implied hourly rate of $300, as requested by Arris in its Opening Brief.

CONCLUSION

For the foregoing reasons and for all the reasons stated in Arris' Opening Brief, this Court should remand this action to the Court of Chancery with instructions to require Plaintiff's counsel producing records to show time expended through October 22, 2014 so that the Court of Chancery may revise its fee award to reflect an implied hourly rate of $300 multiplied by those hours.

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