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IN THE SUPREME COURT OF THE STATE OF DELAWARE

OPTIMISCORP, a Delaware corporation, ALAN MORELLI, and ANALOG VENTURES, LLC,	)	
Plaintiffs Below, Appellants/Cross-Appellees,	)	No. 523, 2015
v.	)	Case Below: Court of Chancery C.A. No. 8773-VCP
JOHN WAITE, WILLIAM ATKINS, GREGORY SMITH and WILLIAM HORNE,	)	
Defendants Below, Appellees/Cross-Appellants.	)	

APPELLEE WILLIAM HORNE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

Plaintiffs-below, Appellants are Alan Morelli ("Morelli"), the Chief Executive Officer and Chairman of the board of directors of OptimisCorp ("Optimis" or the "Company"), Analog Ventures, LLC ("Analog"), and the Company. Plaintiffs filed their complaint on August 5, 2013. A693. The complaint contained seven counts that alleged in various forms breach of fiduciary duty, breach of contract, and tortious interference against all defendants. Count VII sought declaratory relief against the Director Defendants, but not against defendant William Horne.[1]

Reduced to their essence, Plaintiffs' claims assert that defendants engaged in a wide-ranging scheme to "seize control" of the Company from Morelli. That scheme (which Plaintiffs later claimed stated a conspiracy claim, although no count for conspiracy was stated in the complaint) allegedly involved the agreement of at least twenty eight different people and involved, among other things, an agreement to either bribe or coax a Company employee to bring a false sexual harassment complaint against Morelli. A700-01 at ¶¶ 18, 20. Morelli admits that

[1] The "Director Defendants," who were referred to as the "Rancho Defendants" in the complaint, consist of defendants John Waite, William Atkins and Gregory Smith. A694.

the employee (a physical therapist employed by Optimis) performed oral sex on him during therapy sessions. Op. at 6 (citing A197, A215, A286).[2]

The penultimate event in the alleged scheme, according to Plaintiffs, was an October 20, 2012 board meeting (the "October 20 Meeting"), at which the Company's board of directors (half of whom were appointed by Morelli pursuant to a contractual right) voted to remove Morelli as CEO based on the advice of and an investigation conducted by independent counsel. At that meeting, the Board of Directors (the "Board") was advised by independent counsel that the Company's ability to defend the employee's sexual harassment claim would be enhanced if Morelli were removed as CEO. *Id.* at 12, 132-33. Horne, who was not a director, did not attend or participate in the October 20 Meeting. *Id.* at 189.

What followed the October 20 Meeting is reminiscent of Alice's trip through Wonderland. Morelli purported to remove his Board appointees who voted to remove him and replaced them with more compliant directors. *Id.* at 136. Morelli regained control of the Board and his position as CEO following settlement of a § 225 action filed by Morelli. His ability to regain control resulted at least in part from a technical defect in the notice of the October 20 Meeting. *Id.* at 126. That defect was the result of faulty advice by the Company's general counsel who was a

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[2] Citations to the "Opinion" or "Op." mean the Court of Chancery's August 26, 2015 Memorandum Opinion. The related Order is cited herein as "Ord." The Opinion and Order are attached to Appellants' Opening Brief on Appeal as Exhibits A and B.

personal friend of Morelli. *Id.* at 126, 128. Employees and consultants who had not unconditionally opposed Morelli's removal were terminated or left the Company. *Id.* at 126, 128. Those who stayed described a "litigation atmosphere" at the Company where there was a "[y]ou're with us or you're with them" mindset. *Id.* at 9, 45. Employees and potential witnesses were threatened with being made parties to this or other lawsuits or criminal complaints unless they sided with and cooperated with Morelli. *Id.* at 3, 42, 45-50. Witnesses were offered incentives to cooperate. *Id.* at 39, 43 & n.112. Plaintiffs compiled and hand delivered to the Los Angeles Police Department ("LAPD") a voluminous submission with eighty five exhibits that included declarations and statements obtained through inappropriate means. *Id.* at 39, 49; A258; B917. The Company supposedly appointed two "independent" committees to investigate defendants' conduct, but those committees issued no reports or findings. The chairman of one committee, who was also the Company's Court of Chancery Rule 30(b)(6) witness, sat through the entire trial below, but never testified. Op. at 32 n.68, 122 n.412, 139. In the end, a Company that has annual revenues of approximately $30 to $40 million spent approximately $10 million pursuing speculative claims that were the product of Morelli's paranoia, narcissism, and/or vindictiveness. *See id.* at 68 n.202; A2191.

Following a six day trial in February 2015, the Court of Chancery issued the 213 page Memorandum Opinion and related Order on August 26, 2015. In addition to six days of trial testimony, the trial record consisted of 1118 exhibits, and deposition transcripts of thirty-two witnesses, several of whom were deposed over multiple days. Op. at 54. After careful consideration of that voluminous record, the trial court entered judgment on the merits of every count in Horne's favor, finding that Plaintiffs failed to carry their burden of proof on any of their claims. *Id.* at 3. In the alternative, the lower court also dismissed Plaintiffs' conspiracy claim as a sanction for their litigation misconduct and also drew certain inferences against Plaintiffs regarding their other claims. *Id.* at 3, 52-54, 213.

Despite its findings that Plaintiffs' conduct compromised the integrity of the proceedings below, the lower court denied Horne's request to shift attorneys' fees. *Id.* at 3, 40, 50-54, 212. In his cross-appeal, Horne respectfully submits that such denial was an abuse of the lower court's discretion. As a matter of policy, a failure to award fees under the facts as found by the lower court will encourage similar conduct in the future by other plaintiffs, particularly those with weak claims.

Appellants filed their notice of appeal on September 24, 2015. Horne and the Director Defendants filed separate cross-appeals on October 8, 2015. Appellants filed their Opening Brief on Appeal ("O.B.") on November 9, 2015. This is Horne's Answering Brief on Appeal and Opening Brief on Cross-Appeal.

SUMMARY OF ARGUMENT

1. Denied. The findings of the trial court were well supported by the record, so that the trial court did not commit clear error when it held that Plaintiffs' conduct was "prejudicial to the administration of justice" and "materially impact[ed] the Court's ability reliably and accurately to find the facts." If there was any error in the trial court's rationale, it is harmless. The principal sanction for Plaintiffs' misconduct was the dismissal of Plaintiffs' conspiracy claim. However, because the trial court also dismissed that claim on the merits, Plaintiffs' failure to appeal that merits-based dismissal moots this issue on appeal.

2. Denied. Plaintiffs state that "case law holds that it is a breach of the duty of loyalty for directors to usurp control." Horne was not a director, and the argument is therefore inapplicable to him. Plaintiffs did not proffer this argument against Horne below and the trial court's ruling was therefore necessarily limited to rejecting this claim against the Director Defendants. Plaintiffs therefore have waived this claim as to Horne. If the Court determines such claim to be properly on appeal against Horne, the trial court's determinations that (i) Horne did not act for any self-interested motive and (ii) Morelli knew of the purpose of the October 20 Meeting in advance are both well-supported by the record and cannot be clearly erroneous. Therefore, Plaintiffs' argument fails on the merits and the Opinion must be affirmed.

3. Denied as inapplicable to Horne. Although not addressed in their Summary of Argument section, Plaintiffs' later argument in their brief is directed only at the Director Defendants on this claim. If applicable to Horne, the claim fails because there is no showing of deceit by Horne, or any obligation on him to provide notice of the matters to be addressed at the October 20 Meeting.

4. Denied as inapplicable to Horne because Plaintiffs appeal only from the trial court's ruling as to the "Director Defendants."

5. Denied. First, Plaintiffs have not appealed any liability determinations resolved in Horne's favor below and Plaintiffs' argument that the trial court erred in not assessing damages against Horne is therefore moot. Second, Plaintiffs' demand that defendants pay $10 million in Plaintiffs' legal fees is a repackaged request to shift fees under the bad faith exception to the American Rule. That request was denied below, and that determination was not an abuse of discretion. Third, the trial court did not abuse its discretion in determining that Plaintiffs' damages calculations were speculative and unreliable. Thus, the lower court's determination that Plaintiffs failed to carry their burden to establish damages should also be affirmed on the merits.

STATEMENT OF FACTS

I. INTRODUCTION

The trial court provided an extensive factual summary and, for purposes of this appeal, Horne submits that the lower court's factual findings are the product of a logical, deductive process and are well supported by the record. Recognizing that the trial court found against them on virtually every factual issue below, Plaintiffs do not attempt to identify specific factual findings and explain why they are clearly erroneous but instead broadly attack the entirety of the lower court's findings claiming that the Vice Chancellor suffered from an improperly "tainted lens." O.B. at 7 n.5, 31 n.22, 54. That approach, by itself, indicates the lack of merit in Plaintiffs' appeal.

II. THE PARTIES

The trial court summarized the relevant parties and witnesses at pages 4 through 9 of the Opinion and Horne refers to and will not repeat those facts here other than to note a few salient points.

Morelli is a Delaware and California lawyer (inactive in both states) who previously worked in the Wilmington office of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") and has been Optimis' CEO and Chairman of its Board since its incorporation in 2006. Op. at 13, 67-68; A164. The trial court, which was able to observe Morelli in person, made numerous factual findings regarding Morelli, including that "numerous witnesses convincingly testified that Morelli

was controlling, belittling to others, dismissive, intolerant of dissent or criticism, and had poor communication skills." Op. at 69-75; *id.* at 115 n.388 (describing Morelli's "conspiratorial mindset"); *see also id.* at 114 (the trial court stating that it "did not find credible many of Morelli's statements regarding Geller" and "Morelli's behavior during the investigation also casts doubt on his credibility") and 136 & n.466.[3]

Horne became an Optimis consultant in 2006 (the year Optimis was formed) and became its CFO in 2008. *Id.* at 67. Horne owns a small amount of stock, approximately 167,668 shares, or less than 1% of Optimis outstanding common stock. *Id.* at 5. He remained CFO until early 2013. *Id.* On March 25, 2013, the Optimis Board (including the Director Defendants) voted to remove all power and authority from Horne (*see* A2007-16); on April 16, Horne was placed on administrative leave; and on May 13, 2013, Horne was formally terminated by unanimous vote of the Optimis Board, including the Director Defendants. Op. at 139; B238-39. The stated reason for Horne's termination was "performance reasons." B238. The lower court made no findings regarding the reasons for Horne's termination, although it noted in the same sentence that Horne was terminated by Morelli and is also involved in a romantic relationship with

[3] Given his control over Optimis and Analog, the trial court concluded that "Morelli unquestionably is the driving force behind this litigation." Op. at 67, 4.

Morelli's ex-wife, Therese Doherty ("Doherty"). Op. at 1.[4] Horne's contention has always been and remains that Morelli included Horne as a defendant out of vindictiveness and as a means of obtaining leverage in the on-going property division proceedings between Morelli and Doherty. A889-91, A655. Horne sought to introduce evidence in support of that belief at trial, but the lower court ruled it was inadmissible. A68, A271-72, A654-55. Nevertheless, it is a reasonable inference that because of the Horne-Doherty relationship, Morelli would attempt to use this litigation against Horne as leverage in his property division proceedings with Doherty. The lower court made no finding regarding Horne's contention that Morelli was using this litigation as a source of leverage in his property division proceedings with Doherty.

The Company's Board supinely deferred to Morelli as to all matters. Those contentions are corroborated by (i) the representation of Morelli and Optimis by the same counsel despite the obvious risk of conflicting interests between Morelli's personal objectives and those of the Company; (ii) the absence of evidence that Horne's inclusion in this lawsuit was ever authorized by the Company's Board, although the Board did authorize this litigation against the Director Defendants (Op. at 141 & n.488 (citing B294-96)) ("[t]here is no evidence that the Company

[4] Horne and Doherty began dating in the fall of 2010. Op. at 67. According to Morelli, he and Doherty separated in 2002, stopped living together in 2008, and initiated divorce proceedings in 2010. A175-76. The divorce proceedings are on-going, and the property division could include Optimis stock. A655.

ever authorized suit against Horne"),[5] (iii) Plaintiffs' always-shifting claims against Horne (*id.* at 21 n.41, 144-45), and (iv) the fact that after full discovery and trial, Plaintiffs only documentary evidence of Horne's alleged involvement in the supposed multi-year wide-ranging conspiracy was a blank February 2012 e-mail in which Horne, the Company's CFO, forwarded a copy of an Optimis stockholders agreement to George Rohlinger, one of the Company's other officers. *Id.* at 150.

III. RELEVANT FACTS RELATING TO GELLER

Plaintiffs' factual recitation regarding Tina Geller ("Geller") merits a response because it ignores the obvious. Undisputed facts establish that the environment at Optimis was such that it would have been more surprising if Geller had not made a claim of sexual harassment against Morelli. Geller was employed by Optimis as a physical therapist. *Id.* at 6. "It is undisputed ... that Morelli received oral sex from Geller on multiple occasions while she was an employee of the Company and providing physical therapy to him, and that Morelli also fondled Geller on occasion during those sessions." *Id.* (citing A197, A215, A286). The physical therapy sessions usually occurred in Morelli's bedroom, which doubled as

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[5] The trial court had previously noted the lack of knowledge of both the Company's Court of Chancery Rule 30(b)(6) witness and its representative who verified the complaint, both of whom are directors of the Company but neither of whom testified at trial. *OptimisCorp v. Waite*, 2015 WL 357675, at *7-8 (Del. Ch. Jan. 28, 2015) (noting that Mssrs O'Shea and Wing were unprepared or could not answer relevant questions); *see* A75-659 (Mssrs. O'Shea and Wing did not testify at trial).

his Company office, because Morelli's house also served as the Company's office. *Id.* at 1, 66. Geller's husband also was employed by Optimis. *Id.* at 89 n.283. Further evidence showed that employees, including Geller, often slept at Morelli's house and Morelli was periodically in various states of partial or complete undress while at his house/office. *Id.* at 110, 178. Those facts, without more, establish an environment that was ripe for a sexual harassment claim by Geller whether or not actual harassment occurred.

The lower court then went on to make various factual findings based on its assessment of the credibility of witnesses. Geller testified that during physical therapy sessions, Morelli would suggest to Geller he wanted oral sex. *Id.* at 110. Other times, he would "make physical actions to try to get [Geller] to still go down there." A2527. On certain occasions, Geller initiated the contact because she "could tell that [Morelli] was in that kind of mood" and it was "easier to initiate and get it over with than to try and reject it and go through a whole world of trouble." Op. at 110 (quoting A2527). Such trouble included Morelli ostracizing Geller socially and threatening her and her husband's jobs at the Company. *Id.* at 111. The lower court ultimately found Geller's testimony "credible and reliable" and "cogent, credible, and consistent with the other evidence and testimony I found reliable." *Id.* at 51 & n.145, 87, 110. The lower court's findings are supported by contemporaneous evidence from Nancy Solomon's ("Solomon") investigation,

including Solomon's view that Geller's statements to her were credible and Morelli's were not. *Id.* at 114 & n.381, 118 & n.401, 177. Like Solomon, the lower court found Morelli's testimony regarding Geller unreliable. *Id.* at 114-16. Such credibility determinations were uniquely appropriate for the trial court to make and were fully supported by the record.

In September 2012, Geller reported Morelli's conduct to Waite.[6] The next steps, as found by the trial court include the facts that:

- Waite promptly reported the matter to Nancy Kreile ("Kreile"), Rancho PT's Human Resources manager;
- Kreile contacted the Company's insurer, Professional Liability Insurance Services, Inc. ("PLIS");
- PLIS contacted Leonid Zilberman ("Zilberman"), a California employment lawyer with sixteen years of experience; and
- Zilberman hired Solomon as an outside investigator. *Id.* at 112-13.[7]

There is no evidence that Horne had any involvement in any of those activities.

Solomon then investigated Geller's allegations, which included interviewing nine witnesses, some more than once (including Morelli). *Id.* Neither Solomon nor the trial court found Morelli credible as to Geller's allegations. *Id.* at 114.

[6] For detailed factual findings regarding the investigation, Horne refers the Court to pages 112-22 of the Opinion.

[7] The lower court found that "[t]here is no evidence that Defendants, or anyone at the Company, had any involvement in Solomon's retention." Op. at 113.

Record evidence also showed that Morelli (i) asked Horne and the Company's General Counsel (Laura Brys) to convince Geller to recant her accusations, (ii) made fabricated statements that Solomon claimed to feel rushed to complete her investigation, and (iii) after learning of Geller's allegations, responded that Geller (an Optimis employee making $58,000 a year) had sexually harassed him, the CEO and Chairman. *Id.* at 114-16 (citing A536-37; B1044-45, B126-29, B86-88).

Solomon prepared a report that was presented by Zilberman to Optimis' Board at the October 20 Meeting. *Id.* at 132-34. Horne did not attend or participate in that meeting. *Id.* at 189. The entirety of the evidence of Horne's "involvement" in Solomon's investigation and Morelli's subsequent removal can be summarized by the following acts:

- On October 3, 2012, at a meeting in Morelli's office-bedroom, Horne and Laura Brys told Morelli about the Geller investigation, and Morelli asked Horne to convince Geller to recant;
- Horne was interviewed twice by Solomon; and
- Before the October 20 Meeting, while speaking with the Company's counsel, Laura Brys, regarding the possibility that the Board might remove Morelli, consistent with his fiduciary duties, Horne noted that if Morelli were to be removed as CEO, the stockholders agreement should be amended so that the removal would not be futile since

Morelli would be able to replace a majority of the directors and thereby re-instate himself. *Id.* at 205-06, 114-18, 124-25.

In short, the lower court's determination that there is insufficient evidence to sustain any legal claims against Horne relating to Morelli's removal is well supported by the record below.

IV. EVENTS AFTER THE OCTOBER 20 MEETING

After the October 20 Meeting, Morelli noticed a special Board meeting for October 25, 2012. *Id.* at 136. Before that meeting, Morelli removed the directors that voted to remove him as CEO. *Id.* Morelli later filed an action under 8 *Del. C.* § 225 to invalidate the actions taken at the October 20 Meeting and restore his position as CEO. Horne was not a party to that action. *See id.*; A206. The section 225 action settled on March 21, 2013. Op. at 138. The terms of the settlement restored Morelli as CEO and recognized his replacement directors as members of the Company's Board. *Id.* at 138-39; A206, A753. Thus, Morelli's status as CEO and the composition of the Board was uncertain for five months. During most of that period, Morelli remained effectively in charge subject only to oversight by the court-appointed custodian, James Patton. Op. at 138.

On the fourth day after Morelli was reinstated as CEO and his replacement directors were in place (March 25, 2013), the Board voted to remove all authority from Horne. *Id.* at 139; *see also* A2007-16. The Director Defendants (who

Plaintiffs contended conspired with Horne to remove Morelli) also voted in favor of that removal of authority. Op. at 139; A2015. On the fifth day after Morelli was reinstated (March 26, 2013), Geller commenced sexual harassment litigation against Morelli and the Company by filing a complaint with the California Department of Fair Employment and Housing, followed by the filing of a complaint in California Superior Court on April 10, 2013. Op. at 6 & n.6, 139. Horne was administratively suspended on April 16, 2013 and formally terminated by the Board on May 10, 2013. *Id.* at 139; B238-39. Following his termination, Horne had no further involvement with Optimis, obtained employment as the CFO of another company, and as he testified at trial, would not return to Optimis "in a million years." A529, A545. Notwithstanding Horne's lack of involvement in Morelli's removal, Morelli's reassertion of control, and Horne's complete break from Optimis, Morelli named him as a defendant in this lawsuit claiming at least $50 million in damages against him.

V. PLAINTIFFS MATERIALLY UNDERMINED THE INTEGRITY OF THE PROCEEDINGS BELOW BY THEIR CONDUCT TOWARDS WITNESSES

The crux of Plaintiffs' conspiracy claim below was that the defendants bribed Geller to make false sexual harassment allegations against Morelli. Op. at 11. However, that claim was refuted by Solomon (an independent investigator) and rejected by the trial court. Indeed, as trial proved, Plaintiffs' claims were

nebulous and "border[ed] on frivolous." *Id.* at 2, 196. Plaintiffs knew this because they had access to all relevant contemporaneous records and, as found by the court below, such records did not support their claims. In an effort to compensate for the lack of documentary evidence, Plaintiffs sought to manufacture, at worst, or influence, at best, witnesses' testimony.

Plaintiffs' efforts began four months before they filed the complaint and continued through *at least* August of 2014—a year after they filed their complaint.[8] In correspondence regarding the settlement of Geller's sexual harassment claims, Plaintiffs unambiguously offered financial incentives to Geller if she would provide testimony implicating Horne, the Director Defendants, and others in wrong-doing. As described in detail in the argument section below, Plaintiffs (i) directly tied consummation of the settlement and the amount of the initial settlement payment to the *content* of Geller's declaration, (ii) repeatedly insisted that she make statements that she said she could not make, (iii) threatened her with financially ruinous litigation if she did not settle, and (iv) provided her with selected information to bolster their claims of what happened and convince her to sign on to statements about which she lacked personal knowledge, while simultaneously preventing her from communicating with defendants or their counsel. *Id.* at 30-35.

[8] The complete recitation of the pertinent trial facts can be found on pages 3-54 of the Opinion.

Plaintiffs' carrot and stick approach worked. Plaintiffs put Geller in such an untenable position that she had no rational choice but to settle. To harmonize Plaintiffs' demands that she testify to things she did not know or believe, or face potential financial ruin, Geller engaged in psychological gymnastics and signed a declaration that Plaintiffs wanted while rationalizing the most offensive statements in it through contorted logic. Geller testified as to numerous material misstatements in her declaration that so long as she did not know that a statement was false, she could sign onto it even if she did not know it to be true. *Id.* at 37. Further, she testified that the specific language was not hers, but came from Plaintiffs' counsel. A2558. Plaintiffs then used that tainted declaration in the lower court to, among other things, avoid dismissal at summary judgment.

Plaintiffs undermined the integrity of these proceedings in their conduct with other witnesses too. In May 2014 (nearly 9 months after filing this case), Plaintiffs employed a strategy similar to the one used with Geller to obtain favorable testimony from Helene Fearon ("Fearon") and Stephen Levine ("Levine"), employees of an Optimis subsidiary. Once again, Plaintiffs threatened ruinous litigation if those persons did not cooperate, and ultimately agreed to give Levine and Fearon increased salaries, back pay and full releases. Levine and Fearon thereafter provided affidavits submitted by Plaintiffs to oppose defendants' summary judgment applications. Op. at 8, 40-45. After trial, the lower court

found that those affidavits contained "deceptive" and "materially misleading" information because "the manner and circumstances" in which Plaintiffs obtained those affidavits "improperly influenced" the contents. *Id.* at 44, 52. Trial proved Plaintiffs unsuccessfully attempted to manipulate evidence from other witnesses by similar means, including a threat of criminal prosecution against an unrepresented third party in open court, at trial.[9] Considering Plaintiffs' conduct as a whole, the lower court's characterization of it as "beyond the pale" and threatening to the integrity of the lower court proceedings was well supported. *Id.* at 51.

VI. OTHER MISCONDUCT BY PLAINTIFFS

Plaintiffs filed their complaint and moved to expedite this action on August 5, 2013. *Id.* at 141. The motion to expedite was denied on August 16. Plaintiffs then did nothing to move the case forward for four months during which they were brow-beating Geller to provide the testimony they sought to substantiate their claims. The day after securing Geller's declaration, Plaintiffs served their First Request for Production of Documents. *Id.* at 35, 142. In contrast to the prior four month sabbatical, Plaintiffs suddenly sought to move the lower court proceedings

[9] Plaintiffs actually sought to have the defendants criminally prosecuted. Morelli hand-delivered a letter (with six annexes and eighty-five exhibits) to the LAPD seeking to have Horne, the Director Defendants, and others criminally prosecuted for the conduct described in the Opinion. *See* B880-931; Op. at 49-50. Skadden helped draft that LAPD submission. B1023. As described below, the submission contained at least one document that was misleadingly ascribed to an individual who had never seen the document before and disavowed key portions of it.

forward promptly, although, as explained below, Plaintiffs dragged their feet in producing the most relevant documents to Horne.

Plaintiffs produced Geller's declaration in their first document production, *but did not produce* the Geller settlement agreement or documents reflecting the negotiations that led to the settlement and declaration. As a result, Horne filed a motion to compel on April 25, 2014. B1106-10. Plaintiffs then mooted that part of the motion seeking the Geller settlement documents by producing those documents in April and May 2014.

In May 2014, Plaintiffs "settled" with Fearon and Levine. Op. at 142. However, Plaintiffs withheld relevant documents relating to Fearon and Levine until *after* Horne and the Director Defendants separately moved for summary judgment in August 2014. In response to defendants' summary judgment motions, Plaintiffs proffered affidavits from Fearon and Levine who had not previously been identified as likely witnesses. *Id.* The trial court held that Plaintiffs' conduct amounted to knowing concealment of the scope of their claims. *Id.* at 142-43 (citing *OptimisCorp*, 2015 WL 357675, at *11).

Further, Horne did not have the opportunity to depose Geller prior to filing his opening summary judgment papers because Plaintiffs' counsel was unable to make themselves available on any of the four dates offered by Geller's counsel prior to the discovery cut-off and deadline for case dispositive motions. B949-58.

Plaintiffs' counsel of record at that time was Skadden (with over 1,700 lawyers) and Ogloza Fortney LLP. Plaintiffs therefore were able to affirmatively use Geller's declaration to defeat summary judgment, but then disavowed her as a perjurer after her deposition (which occurred *after* summary judgment) for purposes of trial. Op. at 27 n.58.

Perhaps most prejudicial to Horne's ability to meaningfully seek summary judgment was Plaintiffs' delay in producing Horne's Optimis e-mail account to him. That account provided contemporaneous documents that refuted or explained many of the allegations that Plaintiffs made against Horne. After Horne was placed on administrative leave in April 2013, he had no access to his Company e-mails. Horne requested a copy of his entire e-mail account in his first document request served on December 19, 2013. In their written responses served on February 1, 2014, Plaintiffs stated that they would produce Horne's complete e-mail account to him. B1081. As a result, Horne had no reason to move to compel it. Document production began in February of 2014. However, Horne's complete Company e-mail account was not produced until *September 28, 2014*—more than thirteen months after the complaint was filed and a month after summary judgment motions had been briefed and argued. B976.[10]

[10] This belated production included Horne's Company e-mails from October 2012 through January 2013 – *i.e.* the period of time most relevant to the instant litigation.

Since Plaintiffs could not coerce Horne into providing false testimony, as they did with Geller, Fearon and Levine, they took a different tack. They misrepresented to Horne that documents did not exist and accused him of destroying them when such documents were always within their possession. At Horne's May 7, 2014 deposition, which occurred four months *before* Plaintiffs produced Horne's entire Company e-mail account, Plaintiffs' Delaware counsel berated Horne for "destroying" an e-mail that he received from former director Terrance O'Keefe. B997-1006. Plaintiffs' counsel again attempted to intimidate Horne at the second day of his deposition on July 31, 2014, by repeating his implicit accusations that Horne received the e-mail into his personal e-mail account and deleted it to imply that Horne had engaged in improper conduct. *See* B1010-12. After finally receiving Horne's Company e-mail account in September 2014, Horne and his counsel located the O'Keefe e-mail in that e-mail account. B132-84. Accordingly, Plaintiffs had it in their possession at all times but apparently never bothered to look (even after the issue came up in the first day of Horne's deposition) but instead used its absence to engage in unfair and misleading questioning.

Not only did Plaintiffs unfairly question Horne at his deposition, they cited the "absence" of the O'Keefe e-mail to the lower court to call into question Horne's credibility. At a June 25, 2014 hearing on Horne's motion to compel the

Geller settlement and Solomon investigation materials, Plaintiffs' counsel handed up a highlighted copy of Horne's deposition and used it to disparage Horne's credibility. B1113-19. Plaintiffs' counsel stated that Horne "destroyed" the e-mail "for the obvious reason that he didn't want anyone to know that he got the [Solomon] report and how he got that report." B1117. On September 8, 2014, at a hearing on defendants' motions for summary judgment, Plaintiffs' counsel again used the absence of the O'Keefe e-mail to question Horne's credibility in an effort to avoid dismissal at summary judgment. B1137 ("But that e-mail exchange and the Solomon report and everything related to it, all of that, poof, is gone because he destroyed it . . . .").

Had the O'Keefe e-mail been an isolated incident it might not merit comment. But it was not. Plaintiffs engaged in a pattern of conduct of asserting claims only to abandon them after Horne and his counsel located and identified contemporaneous documents that rebutted Plaintiffs' bald assertions. As the court below found, Plaintiffs proffered but abandoned at least nine different claims. Op. at 144-45.[11] Many of those claims were abandoned once Horne and his counsel identified and provided documents that easily explained them. *See* B1128-33

[11] In addition, Plaintiffs repeatedly utilized the term "defendants" to confuse who the claims were alleged against. *See* Op. at 57 ("Throughout their pleadings and briefing, Plaintiffs repeatedly and vaguely referred to allegedly wrongful actions by the Director Defendants or Defendants generally. At trial, it was shown that neither Defendants nor the Director Defendants were monolithic groups of actors as Plaintiffs alleged them to be.").

(discussing the disclosure-of-information-to-Doherty claim and the $2 million reserve claim, neither of which was asserted at trial). The disclosure-of-information-to-Doherty claim is a good example, because the document Plaintiffs claimed to have been improperly disclosed (a term sheet) was actually produced to Doherty's lawyers by the Company through Young Conaway Stargatt & Taylor, which acted as counsel to the Company while Mr. Patton served as custodian. The document was produced *by the Company* in response to a subpoena served by Doherty's lawyers. A542-43; B977, B225-26.

In addition to the abandoned claims identified by the lower court, Plaintiffs also alleged in their complaint that after settlement of the section 225 action, the Director Defendants "with the active involvement and support of defendant William Horne... worked assiduously ... to ... seize the Company's principal operating unit, Rancho Physical Therapy, Inc. ... including its cash flows." A694 at ¶ 3 (emphasis added). At trial, Plaintiffs presented no evidence of any post-termination activity by Horne in support of any claim. The lower court found that there was no evidence to tie Horne to the Director Defendants (Op. at 90) and, therefore, to Rancho. It is one more example of Plaintiffs' assertion of a frivolous allegation that they ultimately abandoned.

Throughout the proceedings below, Plaintiffs attempted to turn the burdens applicable to parties in litigation on their head. Plaintiffs would make baseless

accusations without reviewing the relevant information in their possession and put the burden on Horne and his counsel to go find the documents to refute that accusation, while at the same time withholding Horne's Company e-mail account, which contained most such documents. Once Horne identified the contemporaneous records that undermined Plaintiffs' claims, they simply abandoned them, and what remained as to Horne, was primarily an aiding and abetting claim which failed because, as the lower court found, there was no evidence tying Horne to the Director Defendants. *Id.* at 90, 144.

VII. THE LOWER COURT'S RESOLUTION OF THE CLAIMS AGAINST HORNE

The trial court dismissed the conspiracy claim against Horne on multiple bases. First, the trial court dismissed the conspiracy claim as a sanction for Plaintiffs' litigation misconduct. *Id.* at 53. The court further dismissed the conspiracy claim for lack of proof. *Id.* at 148-53. Finally, the court stated that the claim was likely deficient as a matter of law, as a conspiracy cannot exist among *only* fiduciaries, and the six individuals identified as "co-conspirators" were all Optimis officers or directors. *Id.* at 146-48, 153.[12] Plaintiffs do not challenge the dismissal of their conspiracy claim.

[12] The trial court's statement that it "seriously question[s] whether a cause of action exists under Delaware law for a conspiracy among fiduciaries to breach a fiduciary duty" demonstrates why the trial court's dismissal of the conspiracy claim as a sanction is no sanction at all. *See* Op. at 153.

Plaintiffs alleged that Horne breached his fiduciary duties in multiple ways. Plaintiffs claimed that Horne sabotaged the Company's strategic plan. The trial court described this as "the most nebulous wrong Plaintiffs allege" that failed at "several levels," including that (i) Plaintiffs did not prove that Horne acted in a manner that elevated his personal interest above the Company's interests and (ii) Horne proceeded in good faith and in the reasonable belief that he acted in the best interests of the Company and its stockholders. *Id.* at 155-63. Plaintiffs next asserted that Horne breached his fiduciary duties by manipulating Solomon's investigation. The trial court rejected this argument in short order for lack of proof, calling Plaintiffs' argument "illogical." *Id.* at 175-78. Plaintiffs do not challenge the dismissal of these breach of fiduciary duty claims.

Plaintiffs also proffered breach of contract and breach of the implied covenant of good faith and fair dealing claims against Horne. The trial court dismissed both claims and Plaintiffs do not challenge their dismissal. *Id.* at 189-96.

Plaintiffs asserted one tortious interference claim against Horne, which the trial court noted was generally shifting throughout litigation and bordered on frivolous. *Id.* at 196, 198. Ultimately, the court found "no evidence of tortious interference" and described Plaintiffs' evidence as falling "woefully short." *Id.* at 198. Plaintiffs do not challenge the dismissal of this claim.

The lower court next held that Horne did not aid and abet any wrong, because there was no underlying wrong that Horne knew about or was involved with. *Id.* at 204-06. Plaintiffs have not challenged the trial court's findings that Horne did not aid and abet anybody. Finally, the trial court rejected Plaintiffs' damages calculations as "speculative and unreliable" and further remarked that "the problems with Plaintiffs' damages calculations are legion." *Id.* at 206.

It was Plaintiffs' burden at trial to prove their claims against Horne, who was never an Optimis director and was unaffiliated with Rancho. *See* A734-35. As summarized by the trial court, after thirty-two depositions, thirteen live trial witnesses, six days of trial, and over 1,100 trial exhibits, "there is little, if any, evidence tying . . . Horne to any of the Director Defendants." Op. at 54, 90. The trial court's findings were the product of an extensive, orderly and logical process that are well supported by the record and should not be disturbed on appeal.

ARGUMENT

I. PLAINTIFFS UNDERMINED THE INTEGRITY OF THE PROCEEDINGS.

A. Question Presented

Did the trial court commit clear error in finding, as matters of fact, that Plaintiffs undermined the integrity of the proceedings, which "materially impact[ed] the Court's ability reliably and accurately to find facts?"

B. Standard of Review

Plaintiffs generically cite to the respective standards of review applicable to issues of law and fact without identifying which standard of review applies to this particular issue. In their argument, Plaintiffs never directly challenge the legal standards that the lower court applied. The legal standards applied by the lower court were (1) that it could address violations of the Rules of Professional Conduct if there was a showing of "prejudice to the fairness of the proceeding itself" by clear and convincing evidence and (2) that the court's determination of whether the integrity of the proceedings had been undermined should be based on "the extent to which the Court's truth-finding function has been impaired, thus throwing into question any ruling that ultimately might issue." Op. at 14 (quoting *In re Appeal of Infotechnology, Inc.*, 582 A.2d 215, 220-22 (Del. 1990)) and 19. Plaintiffs do not challenge those legal standards. Their challenge, therefore, is necessarily to the trial court's findings of fact.

The lower court's ultimate determination was that its "ability reliably and accurately to find the facts" was materially impacted. *Id.* at 51. That was a finding of fact that is subject to the clearly erroneous standard which is as follows.

> After a trial, findings of historical fact are subject to the deferential "clearly erroneous" standard of review. That deferential standard applies not only to historical facts that are based upon credibility determinations but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Bank of New York Mellon Trust Co. v. Liberty Media Corp., 29 A.3d 225, 236 (Del. 2011) (citation omitted). "When factual findings are based on determinations regarding the credibility of witnesses . . . the deference already required by the clearly erroneous standard is enhanced." *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000) (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985)).

> [W]here the support in the record is sufficient for a factual finding, even if there can be a reasonable difference of view, our standard of review compels us to defer to the trial court. Our function here is not to substitute our judgment for the trial court's as though we had before us an original application.

RBC Capital Markets, LLC v. Jervis, 2015 WL 7721882, at *24 (Del. Nov. 30, 2015) (citation omitted).

Plaintiffs break their issue number I into four subsections and seem to suggest different standards of review for each subpart. We address each subpart in turn.

C. Merits of the Argument

1. The Settlement Agreements Undermined the Fairness of the Proceedings Below and Impaired the Lower Court's Truth-Finding Function

Plaintiffs' argument that their conduct did not constitute witness tampering addresses an issue the lower court did not reach. O.B. at 27-28. The lower court expressly stated that "[i]t is beyond the scope of this Opinion and I do not address whether Plaintiffs committed criminal acts of bribery or witness tampering." Op. at 39. As to Geller, the lower court's holding was: "Specifically, I find that Plaintiffs' conduct was 'prejudicial to the administration of justice' and has undermined the integrity of these proceedings by materially impacting the Court's ability reliably and accurately to find facts." *Id.* at 51. The concerns as to Geller were "exacerbated" by the trial court's finding of a "theme of threaten, pay, and settle for the use of evidence favorable to Plaintiffs [which] reoccurred, to varying degrees, with other witnesses." *Id.* at 40. As to Fearon and Levine, the lower court found that Plaintiffs' conduct "improperly influenced their testimony." *Id.* at 52. Those are all factual findings by the lower court. *See, e.g., Homestore, Inc. v. Tafeen*, 888 A.2d 204, 210 (Del. 2005) (stating that whether there is prejudice is "generally determined by a fact-based inquiry"); *see also Whittington v. Dragon*

Group, L.L.C., 2008 WL 4419075, at *8 (Del. Ch. June 6, 2008) (noting that determinations of prejudice are fact-based).

Plaintiffs' argument, summarized, is that the lower court erred because Plaintiffs (i) "reasonably and in good faith" believed that Geller's declaration was true, (ii) "did not lie to the court," (iii) "did not present any false declarations or offer to pay for testimony," (iv) only required Geller and the other parties to settlements to "tell the truth", and (v) "voluntarily produced the relevant documents in discovery" so that defendants were able to cross-examine witnesses at trial. OB at 28-30 and n.20. We address those points in turn.

(i) Plaintiffs' Reasonable Belief. The relevant question is not whether Plaintiffs believed in good faith that Geller's testimony in her declaration was true. The appropriate question is whether Plaintiffs improperly influenced Geller's testimony, which the lower court found they did. Op. at 30, 37-40. Plaintiffs' belief of what happened, whether in good faith or not, is irrelevant.

Parties dealing with third party witnesses, particularly pivotal witnesses like Geller, must avoid *influencing* their testimony. *Weber v. State*, 457 A.2d. 674, 679 n.6 (Del. 1983) ("attempts to improperly influence a witness' testimony[] are fundamentally unfair and pervert the truth-seeking function at trial"). Integrity of judicial proceedings requires that a witness's testimony be their own. If parties to the proceedings, through offer of money, threats, or power of persuasion convince

a witness to adopt their version of the facts, it subverts a court's ability to find the truth. That is what occurred here. The role of parties and counsel in litigation is to gather evidence and present it in the manner most favorable to their positions. It is not and cannot be to influence or manufacture evidence. *See id.* That is why bribery statutes generally prohibit providing anything of value in exchange for any testimony, whether truthful or not. *See id.* (citing Connecticut authority noting that it is improper to pay even for truthful testimony). Other courts have similarly held that you cannot pay witnesses for either true or false testimony. *See* Op. at 38 & n.94 (citing *HomeDirect, Inc. v. H.E.P. Direct, Inc.*, 2013 WL 1815979, at *4 (N.D. Ill. Apr. 29, 2013) and *Holmes v. U.S. Bank*, 2009 WL 1542786, at *5 (S.D. Ohio May 28, 2009)).

(ii) Plaintiffs Did Not Lie. As acknowledged by the lower court, the question of whether Plaintiffs lied to the trial court has never been part of this case.

> In the present case, the argument is not that Plaintiffs have lied to the Court, but instead that Plaintiffs fundamentally have impaired the Court's ability to find facts by offering improper material inducements and employing overbearing threats of criminal and civil litigation, a combination of carrots and sticks that has corrupted the witnesses.

Id. at 17. However it did find Plaintiffs' testimony not credible. *Id.* at 114, 115, 136 n.466. That distinction is probably one of degree, but if Plaintiffs had lied to the lower court, then the relevant legal concept would be perjury and the remedies

and sanctions available for it. Neither the parties or the lower court have addressed a claim of perjury.

Plaintiffs again do not posit the relevant question. The appropriate question is whether Plaintiffs' conduct as a whole impaired the integrity of the proceedings. While lying to a court is one way by which a party could impair the integrity of judicial proceedings, it is not the only way, nor is it a prerequisite to a finding of impairment by the court. Plaintiffs cite no legal authority to the contrary.

(iii)Plaintiffs Did Not Present False Declarations. Yes, they did; or at least Plaintiffs presented misleading declarations. The trial court found that the Levine and Fearon affidavits contained both "false" and "deceptive" statements. *Id.* at 44 & n.118, 52 ("I also find that portions of the affidavits Fearon and Levine submitted in this case were materially misleading, as was revealed by their testimony at trial."). Compounding the problem at trial, "Plaintiffs repeatedly asked questions of Levine consistent with the misleading affidavits." *Id.* at 100. Likewise, the Geller declaration was false or misleading.[13] The lower court found that Geller "recanted" the language of it and "demolished the reliability" of it at her deposition. *Id.* at 50-51. Plaintiffs asked Geller to sign statements that were

[13] While not directly influencing the proceedings below, Plaintiffs also sought a false declaration from Chris Olsen ("Olsen"). Op. at 9, 50.

not true. *Id.* at 34 and n.76.[14] Further, Plaintiffs required Geller to sign statements they knew she did not agree with, justifying it by telling her that the statements would be placed in a "summary statement" and were not under oath. *Id.* at 35. And Plaintiffs relied on Geller's declaration to avoid dismissal at summary judgment before Geller had been deposed. *Id.* at 27 n.58. Further, Geller's declaration contained numerous statements about facts on which she could not have had personal knowledge. *Id.* at 28. Finally, Plaintiffs relied on an affidavit submitted by Geller's counsel, Jack Schaedel, which the lower court found to be a "questionable and highly speculative document." *Id.* at 35.

The problematic declarations and affidavits contained language that was from Plaintiffs or their counsel, not the witnesses, and that was intended to implicate Horne, even where it was apparent that the witness lacked firsthand knowledge regarding such matters. For example, in the original draft of Geller's declaration that was prepared by her counsel, Geller specifically stated that she believed Horne never told anyone about a February 2012 conversation. B255-56. That statement was not in the final declaration. *See* A2147-51. The Fearon and Levine affidavits implied that Horne engaged in correspondence with them using his personal e-mail account to hide the correspondence from Morelli (A2168,

[14] Geller testified in response to questioning by Plaintiffs' counsel: "Q. Did [Horne] ask you to lie for somebody? A. No, he didn't. Q. Did somebody else ask you to lie for somebody in October of 2013? A. Yes. Your client. Q. Which client is that? A. Alan Morelli." A2553.

A2176), but neither witness ever searched for e-mails to or from Horne's personal e-mail account and none were ever produced. A327-28, A646. Indeed, in a contemporaneous e-mail of August 21, 2012, Fearon stated that she did not have an e-mail address for Horne other than his Company e-mail. B69; A327. As to Geller, she testified that the language in her declaration was from Plaintiffs' counsel, not her, and some of which she did not understand. A624, A2564. Levine and Fearon, who were not represented by counsel, travelled to Skadden's offices in Wilmington where they reviewed affidavits drafted by Skadden. A328, A937; B1016-18. By preparing the affidavits in-person at Skadden's offices, Plaintiffs avoided having a paper trail, like the one related to Geller's declaration, showing the process that led to the final affidavit.

(iv) Plaintiffs Asked Only that Witnesses Tell the Truth. Plaintiffs may have repeated the "we only want you to tell the truth" mantra many times, but as the lower court found, it was stated with a wink and a nod (and a promise of significant financial benefits) if the "truth" was what Morelli deemed it to be. Op. at 32 (citing A264-65 and B336-37) (finding that Morelli was the arbiter of what was an acceptable truth). More important, and as found by the lower court, even if Plaintiffs actually wanted the truth, they created an environment in which Geller's testimony could be easily influenced. *Id.* at 30. The same logic applies to Fearon

and Levine, who had all their financial demands met in exchange for their affidavits. *Id.* at 43 n.112, 50, 52.

(v) Plaintiffs Voluntarily Produced the Relevant Documents in Discovery. Plaintiffs play a semantic game in their use of the word "voluntary." Plaintiffs did not produce the Geller settlement materials until after Horne had filed his motion to compel those materials and the Solomon investigation materials. B1106-10.

Plaintiffs' contention that defendants had a fair chance to cross examine witnesses, and therefore were not prejudiced, is wrong. Geller was prohibited from talking with defendants or their counsel by the terms of her settlement agreement. Op. at 33 (citing A2134). Likewise, Schaedel advised Plaintiffs' lawyers during the Geller settlement discussions that "I instructed Tina not to speak with Will [Horne] or anyone else about any of this. . . . While we are working on resolving this agreement, I am certainly not going to communicate with Will, Waite et al, or their counsel." *Id.* at 33 n.70 (quoting A2118). The lower court did not specifically reach the appropriateness of conduct that restricts or precludes witnesses from cooperating or communicating with other parties in litigation. *Id.* at 40 n.98. But such restrictions are inconsistent with Delaware Lawyers' Rule of Professional Conduct 3.4(f). *See* Jon Bauer, *Buying Witness Silence: Evidence Suppressing Settlements and Lawyers' Ethics*, 87 Or. L. Rev. 481, 496, 509-10 (2008).

Whether or not such provisions are legally permissible, the impact of them here was to prevent Horne or his counsel from communicating with Geller until after (i) briefs in support of summary judgment had been submitted and (ii) the trial court heard oral argument on defendants' motions. *See* A52-53 (showing oral argument date of September 8, 2014), A2520 & A2613 (for Geller's deposition dates of September 16 and October 6, 2014). Because of Plaintiffs' delay in producing Horne's entire Company e-mail account (B976), Horne and his counsel did not have the benefit of numerous relevant documents to cross-examine witnesses at depositions and have a complete record for summary judgment. And because Plaintiffs did not fairly identify Fearon and Levine as "co-conspirators" during discovery, Horne did not depose them until October 1 (A2685) and November 18, 2014 (A2514). *See* Op. at 8. Thus, while Horne was ultimately able to cross-examine witnesses at trial, he was not able to do so on a timely and fully informed basis so as to have a meaningful opportunity to seek summary judgment.

Plaintiffs also contend that the lower court erred when it found that Fearon and Levine's trial testimony was inconsistent with their affidavits. O.B. at 31. As a matter of fact, the trial court found "[u]pon close examination . . . their trial testimony . . . differed in important ways from the affidavits . . . ." Op. at 52. Plaintiffs do not meaningfully dispute the point. Instead, Plaintiffs provide an

"example" of purportedly consistent testimony. *See* O.B. at 31-32. The trial court did not state Fearon's and Levine's trial testimony and affidavits were *entirely inconsistent*; it instead found that they diverged in "important ways."[15] Plaintiffs' failure to identify clearly erroneous findings of fact demonstrates that the court below did not err.

All of the justifications contained in pages 29 through 33 of Plaintiffs' Opening Brief were proffered below and rejected by the trial court. *See* A852-56 (proffering identical factual arguments asserted here). Plaintiffs do not contend that the trial court misunderstood their proffered evidence or failed to consider it. Instead, they attack its conclusions. However, all of the relevant conclusions are factual findings, and most are based on credibility determinations. As such, they cannot be set aside by this Court because they are not clearly erroneous.

This Court has already remarked that conduct far less egregious than that described above is inappropriate. In *Weber*, 457 A.2d at 678, a victim's grandmother provided witnesses with eighty-five dollars for a new suit and haircut to appear more presentable at trial. There was "no evidence that the cash payments influenced their testimony," and as such, the trial court did not allow defense counsel to present evidence of these eighty-five dollar payments. *Id.* at 678-79.

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[15] Op. at 52. The trial court described one obvious difference: though the affidavits describe "taking control of Optimis away from Morelli," the trial testimony demonstrated their real gripe was resource allocation. *Id.* at 44-45.

This Court concluded that the trial court committed reversible error, and in doing so, clearly explained its expectations of counsel in dealing with witnesses:

> Their actions, if not falling within the ambit of the criminal proscriptions against bribing a witness (11 *Del. C.* § 1261), certainly violate the spirit of the law and ***cast doubt into the integrity of the proceedings*** in this case.
>
> * * * *
>
> Similar conduct by an attorney would violate the Code of Professional Responsibility.

Id. at 679 n.6 (emphasis added). The Court characterized the payments as "disgraceful" and expressly noted that because the proposed testimony had been reviewed "before the cash was paid, we approach the matter with deep concern for the proper administration of justice in Delaware." *Id.* at 679. On the record as found by the trial court, Plaintiffs' actions go far beyond *Weber*.[16]

2. Plaintiffs' Argument That Litigation Threats Do Not Violate Delaware Law is Not Relevant

Once again, Plaintiffs misapprehend the relevant question. The question is not whether threatening civil or criminal litigation is a *per se* violation of Delaware law. *See* O.B. at 33-34. It is not. The relevant question is whether Plaintiffs' conduct here as a whole, including their threats of civil and criminal litigation

[16] The Superior Court's *Devonshire* decision does nothing to alter this Court's admonition against the paying of witnesses. *See* O.B. at 29. In *State v. Devonshire*, 2004 WL 1588324, at *2 (Del. Super. Ct. June 15, 2004), the Superior Court was analyzing the ability to cross examine witnesses. *Devonshire* said nothing about this Court's disdain for the payment of money to witnesses.

against financially vulnerable people such as Geller and Levine, was intended to and did influence the substance of those witnesses' testimony. The trial court found that it did because it was part of "a persistent and troubling course of conduct by Plaintiffs." Op. at 30, 50, 52.

The case Plaintiffs cite, *Edge of the Woods v. Wilmington Sav. Fund Soc'y, FSB*, 2001 WL 946521 (Del. Super. Aug. 16, 2001), is not relevant. That case involved a commercial relationship between equals: sophisticated, commercial parties. *Id.* at *1. That is very different than the situation here where the relevant parties are an independently-wealthy CEO represented by Skadden and other firms on the one hand, and a physical-therapist employee making $58,000 a year and unrepresented consultants, one of whom was on the verge of personal bankruptcy, on the other.

Plaintiffs also ignore the trial court's finding that Plaintiffs threatened litigation and criminal charges against Olsen, in private and in open court, and in doing so also found that "[n]o evidence in the voluminous record in this case implicates Olsen in any purported wrongdoing." *Id.* at 46-47. Thus, the lower court determined as a matter of fact that Plaintiffs did threaten at least one witness with litigation where they had no good faith basis to believe they had viable claims. All of these findings constitute findings of fact that cannot be set aside because they are not clearly erroneous.

3. The Trial Court's Fact Finding Function was Impaired

The trial court did not commit clear error in determining that *its own* ability to find facts was impacted. Plaintiffs assert that the trial judge "fails to provide any explanation at all" as to how its ability to find facts was impaired. O.B. at 34. First, the trial court's factual finding that it was impaired is sufficient on its own. The lower court lacked confidence in its ability to assess the credibility of certain witnesses' testimony because of Plaintiffs' conduct which might be influencing that testimony. There is no better evidence of that than the court's own statement.

Second, the trial court did explain how its ability to find facts was impacted. As to Geller, the trial court concluded that "Geller's credibility is of paramount importance in this case and Plaintiffs' conduct has cast into doubt any finding based on her testimony." Op. at 39; *see also id.* at 51 (describing the crucial allegation of Plaintiffs' breach of loyalty claim to be their assertion that "Defendants used Geller as a pretext to take over the Company").

As to Fearon and Levine, the trial court found that Plaintiffs did not fairly disclose their existence as alleged "co-conspirators" during discovery. *Id.* at 44. The corollary of that finding is that Horne was prejudiced in his ability to completely investigate and respond to Fearon and Levine, because the information was disclosed during summary judgment and on the eve of trial. The lower court's function was also impaired by an incomplete record at the summary judgment

stage. In May 2014, Plaintiffs "settled" with Fearon and Levine and were permitted to review Fearon's and Levine's e-mails. While Plaintiffs did disclose the "cooperation and release agreements" in May 2014, Plaintiffs delayed production of the harvested Fearon and Levine documents. Moreover, Plaintiffs failed to supplement their discovery responses to fairly identify Fearon or Levine. *See OptimisCorp*, 2015 WL 357675, at *11. Then, in response to defendants' motions for summary judgment, Plaintiffs produced Fearon's and Levine's deceptive affidavits on August 23, 2014. *See id.* at *1. Four days earlier, Plaintiffs produced 4,701 pages of documents, many of which were from Fearon and Levine. At that time, trial was scheduled for October 20, 2014. Although not explicitly stated, it is a reasonable inference that notwithstanding the trial court's determination that Fearon and Levine's testimony at trial was largely credible and their affidavits were not, the court's finding that they were provided significant economic consideration for their cooperation creates questions regarding the motivation behind and validity of any of their testimony. *See* Op. at 43 n.112.

4. Public Policy Settlements Do Not Trump Integrity in Judicial Proceedings

The short response to Plaintiffs' public policy argument is that while the law may favor voluntary settlements, it does not do so at the expense of policies intended to preserve the integrity of judicial proceedings. None of the cases cited by Plaintiffs suggest that the policy favoring settlement trumps integrity in judicial

proceedings or the policies and statutes that prohibit activities that improperly influence witness testimony.

Plaintiffs also suggest that the settlements and cooperation provisions at issue here are of a type that have been routine. O.B. at 36. There is no evidence in the record regarding what "routine" releases and cooperation provisions look like. Horne respectfully suggests that the provision of the Geller settlement agreement that prohibited her from communication with any of the defendants (*see* A2134) is not a routine provision, as such prohibitions that prevent one side to litigation from having access to a witness are not permissible. *See* Delaware Lawyers' Rule of Professional Conduct 3.4(f). Regardless, it is the conduct that led to the settlement agreements that is the focus of the inquiry here, not the terms of the agreements themselves.

5. Any Error Is Harmless

As a sanction for the above conduct, the trial court dismissed Plaintiffs' conspiracy claim and resolved certain inferences against Plaintiffs. Op. at 53. The trial court further dismissed the conspiracy claim for lack of proof. *Id.* at 148-53. Because Plaintiffs do not appeal the dismissal on the merits, their complaints about the findings of litigation misconduct and the related sanctions are essentially moot. See *William H. Porter, Inc. v. Edwards*, 616 A.2d 838, 840 (Del. 1992) (declining to address arguments "on grounds of mootness or, at best, harmless error" where

plaintiff failed to appeal issues that would form the basis of the same relief granted below).

II. THE TRIAL COURT'S HOLDING THAT PLAINTIFFS FAILED TO SHOW ANY BREACH OF FIDUCIARY DUTY BY HORNE SHOULD BE AFFIRMED.

A. Question Presented

Did the trial court err in ruling that Horne, the Company's CFO who was not a director and whom was not responsible for sending notice of Board meetings, had no fiduciary obligation to disclose matters to be considered at a Board meeting to Morelli, a director? Plaintiffs did not proffer this argument against Horne below and as a result, the trial court limited its holding to the Director Defendants. Op. at 175 ("Thus I hold that none of the Director Defendants breached their duty of loyalty by not advising Morelli in advance of his potential termination.") (emphasis added).

B. Standard of Review

Appellants have waived this argument, as "[o]nly questions fairly presented to the trial court may be presented for review." Supr. Ct. R. 8. If the Court determines that Plaintiffs have preserved this claim against Horne, the Court should affirm because (1) there is no evidence that Horne had any role in the provision of notice of the topics to be considered at the October 20 meeting, and (2) the trial court did not commit clear error in finding that Morelli *did* know in advance about the matters to be addressed at the meeting. *See supra* pp. 27-28 (for the recitation of the standard of review for historical findings of post-trial facts). Further the lower court also correctly applied Delaware law.

C. Merits of the Argument

1. Plaintiffs Waived this Argument

At pages 37 to 46 of their opening brief, Plaintiffs appeal the question of whether "defendants breached their duty of loyalty by failing to provide proper notice before [*sic*] October 20 special meeting." O.B. at 42. Plaintiffs did not make this argument against Horne below. The record citations provided by Plaintiffs as preserving this argument on appeal (A827-29, A1033-34, A1050-51, A1103-09) omit any specific reference to Horne as a party to this argument in the trial court. In their Post-Trial Opening Brief (A768-863), Plaintiffs' breach of fiduciary duty arguments appear between pages A819-39. One such allegation was that defendants attempted to gain control of Optimis by ambush. A824. Horne's purported role in the "ambush" was allegedly manipulating Solomon's investigation into Geller's allegations. A824-27. As against Horne, the trial court rejected that argument as illogical. Op. at 176. Where Plaintiffs claim to have preserved their "*Adlerstein* argument" related to the October 20 Meeting (A827-29), Horne is noticeably absent. In Plaintiffs' Post-Trial Reply Brief (A1025-98), Plaintiffs' breach of fiduciary duty arguments appear between pages A1042-56. Once again, Horne is referenced in the "ambush" argument (A1047-51), but again related only to Solomon's investigation. A1048. Where Plaintiffs specifically discuss the October 20 Meeting, they direct the argument only at the Director Defendants. A1051. These were distinct breach of fiduciary duty arguments that

cannot now be lumped together for appeal. *See* Op. at 175 (analyzing each as a distinct breach of fiduciary duty argument).

In Plaintiffs' opening brief section addressing inadequate notice, Horne is mentioned *only* in passing on page 38 in connection with Amendment No. 2. There is no suggestion that Horne, who was the CFO and not a director, had any responsibility for providing notice of the October 20 Meeting. It is undisputed that Horne did not attend or participate in that meeting. *Id.* at 189. Plaintiffs' summary of argument section makes clear that the argument does not relate to Horne when it states that: "Established Delaware case law holds that it is a breach of the duty of loyalty *for directors* to usurp control through transactions that were not fully and fairly disclosed in advance." O.B. at 6 (emphasis added). Horne was not a director.

Plaintiffs claim in their Opening Brief to have preserved this argument, but the record citations they provide do not identify Horne. O.B. at 37. Plaintiffs attempt, as they did below, to imprecisely use the term "defendants," even where the discussion does not implicate Horne.[17] A brief summary of the record citations provided by Plaintiffs is provided here:

[17] Horne complained about and the lower court commented on Plaintiffs' indiscriminate use of the term "defendants" below without explaining how particular matters related to Horne. Op. at 57; A877-78.

A827-29: Horne is never mentioned in the relevant portion of these pages of Plaintiffs' Post-Trial Opening Brief; Plaintiffs instead vaguely mention "defendants" in the concluding paragraph on page A829.[18]

A1033-34: Plaintiffs criticize defendants for not responding to the argument made in their Post-Trial Opening Brief, described above. However, that was addressed at oral argument by Horne's counsel who stated:

> [P]laintiffs point out in the reply brief that we didn't respond to [*Adlerstein* and *VGS*] in our answering brief, which is true, because those cases involve directors doing things in connection with a directors' meeting. Mr. Horne is not a director and did not attend the October 20 directors' meeting.

A1210. Horne's counsel, however, went on to explain why those cases should not apply here. A1210-14.

A1050-51: The only relevant discussion on these two pages is on A1051, which is directed solely to the Director Defendants. The unrelated issue that Horne failed to disclose "material conflicts" was addressed and rejected by the trial court as "illogical." *See* Op. at 164, 176. Plaintiffs have not taken an appeal as to that claim.

A1103-09: Plaintiffs' counsel once again used the generic term "defendants" without identifying a single action taken by Horne.

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[18] Perhaps recognizing this flaw, when Plaintiffs recycled footnote 90 from A828 to use on appeal, they changed "Director Defendants" to simply Defendants. *Compare* A828 n.90 to O.B. at 46 n.40.

Thus, Plaintiffs have never made a specific argument that Horne had a fiduciary obligation to disclose the topics to be addressed at the October 20 Meeting to Morelli. The trial court understood this claim to be limited to the Director Defendants. Op. at 172 ("Plaintiffs rely on this line of cases, including primarily *Adlerstein* and *VGS*, for the proposition that it was a breach of the duty of loyalty for the Director Defendants not to provide Morelli fair notice of their intent to remove him and allow him to exercise his rights under the Stockholders Agreement.") (emphasis added) and 175 (holding that "none of the Director Defendants breached their duty of loyalty by not advising Morelli in advance of his potential termination").

Moreover, Plaintiffs' Opening Brief further illustrates that this claim is not intended to be directed at Horne. In their argument (O.B. at 37-46), Horne is mentioned only on page 38. In a footnote, Plaintiffs *say nothing* about any fiduciary obligation Horne had to disclose anything to Morelli. Instead, they assert that "Amendment No. 2 was Horne's idea" (O.B. at 38 n.33), without explaining how that relates to their claim that Horne had a duty to advise Morelli of the topics to be considered at the October 20 Meeting. The argument that Horne's identification of a potential issue under the Stockholders Agreement constituted a wrong was rejected by the trial court:

> [It] is not surprising that Horne, as Optimis' CFO, knew about the provision in the Stockholders Agreement effectively giving Morelli

> the ability to appoint a majority of Optimis' Board until early 2015. Similarly, once Brys told Horne that it might be necessary to remove Morelli as CEO, *it would have been consistent with Horne's duties as an officer of Optimis to advise her of the provision in the Stockholders Agreement* that would enable Morelli to reverse any such action.

Op. at 205-06 (emphasis added). Plaintiffs have not challenged that finding on appeal and the point is irrelevant to Plaintiffs' argument that Horne had a fiduciary obligation to disclose the agenda for the October 20 Meeting to Morelli. Because this argument was not made against Horne below, it is not appropriately considered on appeal.[19]

2. The Argument Is Factually Defective

Even if Plaintiffs have perfected this appeal point as to Horne, it fails. Plaintiffs identify no conduct that would form a cognizable breach of the duty of loyalty claim against Horne. "Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer, or controlling shareholder *and not shared by the stockholders generally*." *Id.* at 154 (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), *modified in irrelevant part*, 636 A.2d 956 (Del. 1994)) (emphasis in Opinion). The court below found that there was no plan

[19] Horne understands that the Director Defendants are responding to Plaintiffs' legal arguments regarding the *Koch* line of cases. *See* O.B. 38-46. If the Court determines that Plaintiffs have not waived these arguments as to Horne, to eliminate duplicative briefing, Horne respectfully incorporates the Director Defendants' response to the legal arguments presented by Plaintiffs regarding the *Koch* line of cases.

or conspiracy to oust Morelli, and that no evidence linked Horne to the Director Defendants. *Id.* at 90, 153. Thus, those findings conclusively demonstrate that Horne did not "act" for any self-interested reason and there is no cognizable breach of fiduciary duty claim.

Moreover, Plaintiffs' assertion that Horne "failed to provide proper notice before the October 20 Special Meeting" lacks any good faith factual basis in the lower court Opinion or Plaintiffs' Opening Brief. *See* O.B. at 42. Plaintiffs identify "Waite's notice" on page 45, and identify nothing that would suggest that Horne had any material involvement in decisions regarding the substance or form of the notice to be given for the October 20 Meeting.

Finally, the trial court determined as fact that Morelli did know about the October 20 Meeting and its purpose in advance. Op. at 130 & n.438 (citing B84-85, B131). Therefore, Plaintiffs' argument fails for lack of factual support as to Horne and the other defendants.[20]

[20] Plaintiffs' Argument II, subsection 3 is not asserted against Horne. To the extent Plaintiffs' Argument II, subsection 3 is preserved on appeal against Horne (O.B. at 46-48), Horne incorporates the Director Defendants' arguments in response.

III. THE TRIAL COURT'S HOLDING THAT PLAINTIFFS FAILED TO ESTABLISH DAMAGES SHOULD BE AFFIRMED.[21]

A. Question Presented

Is the trial court's determination that Plaintiffs failed to prove damages moot because Plaintiffs cannot establish liability against Horne? Alternatively, is the lower court's holding that Plaintiffs failed to prove any damages within the trial court's discretion?

B. Standard of Review

The Court of Chancery has broad discretion to craft an appropriate remedy. *Berger v. Pubco Corp.*, 976 A.2d 132, 139 (Del. 2009). Thus, the propriety of a court-ordered remedy is reviewed for abuse of discretion. *Id.*

C. Merits of the Argument

1. Delaware Law Does Not Support Any Damages Award

The court below held that Plaintiffs failed to prove a single claim against Horne. Ord. at 2. Moreover, the *single* liability issue on appeal as to Horne was not proffered below but should, in any event, be rejected. Because Plaintiffs cannot establish any liability of Horne, the Court need not address damages. If the

[21] This argument corresponds to Argument IV in Plaintiffs' Opening Brief, because Plaintiffs' Argument III is not asserted against Horne. To the extent Plaintiffs' Argument III is preserved on appeal against Horne (O.B. at 49-51), Horne incorporates the Director Defendants' arguments in response.

Court determines that a review of the trial court's damages analysis is appropriate, the Court should affirm, as the trial court did not abuse its discretion.[22]

Plaintiffs argue that the Director Defendants should be liable for $10 million in "incidental damages" incurred by Plaintiffs for prosecuting this case. O.B. at 53. Though the argument is focused on a technical breach allegedly committed by the Director Defendants, Plaintiffs *again* lump in Horne via the word "Defendants" in the very next sentence. *See id.* Accordingly, Horne responds to note that this is a repackaged request that Plaintiffs be awarded their attorneys' fees and costs under the bad faith exception to the American Rule. *See* A846-48, A1071-77 (omitting any argument that "defendants" are liable for Plaintiffs' $10 million in "incidental damages"). The trial court did not abuse its discretion in rejecting Plaintiffs' request for attorneys' fees and costs "based on [its] rulings on the merits." Op. at 212; Ord. at 2. Plaintiffs' assertion that defendants should reimburse Plaintiffs—the parties found to have undermined the integrity of the proceedings below —for their legal fees and costs is frivolous. The trial court's rejection of Plaintiffs' request for fees and costs was not an abuse of discretion and must be affirmed.

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[22] Appellants' Opening Brief asserts five separate arguments. Arguments 3 and 4 (O.B 46-51) are inapplicable to Horne. However, Plaintiffs generically reference "defendants" to confuse the issues. *See* O.B. at 46 n.40, 47 n.42, 48, 49. The only reference to Horne specifically between pages 46-51 is in footnote 43, and Appellants cannot proffer legal argument in a footnote. Supr. Ct. R. 14(b)(vi)(3).

2. Plaintiffs' Damages Calculations Were Properly Rejected

Plaintiffs assert that the trial court abused its discretion despite remarking that "[w]ith respect to money damages, Plaintiffs' showing in this regard was inadequate to support any form of monetary relief" and that "the problems with Plaintiffs' damages calculations are legion." Op. at 206. Moreover, despite extensive briefing below from defendants on this issue, Plaintiffs "failed to address the majority of those concerns." *Id.*

The fundamental flaw with Plaintiffs' damages calculations was their expert's reliance on "unreliable and highly speculative" projections. *Id.* Plaintiffs argue the trial court's assessment was erroneous for two reasons: (i) defendants should have been estopped from arguing the projections were unreliable and (ii) even if defendants were not estopped, the trial court abused its discretion in finding that management's projections were speculative. O.B. at 54. Neither argument has merit.

First, Plaintiffs' estoppel argument was not proffered below and is therefore waived. *See* Supr. Ct. R. 8. Plaintiffs argued below that the court should "reject [Horne's] attempt" to disclaim the reliability of the projections (A1075 at n.118), but Plaintiffs never presented any estoppel defense. Nevertheless, Plaintiffs' new estoppel argument has no legal merit. Plaintiffs recycle their citation to *Kessler* for the proposition that the trial court should have "regarded with rightful suspicion

attempts by . . . parties who produced such projections to later disclaim their reliability, when that denial serves their litigation objective." O.B. at 54-55 (citing *Del. Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 332 (Del. Ch. 2006)). *Kessler* does not say anything about estoppel, nor does it create any estoppel defense as a matter of law.

Second, the trial court's rejection of the projections as speculative and unreliable was well within its discretion. As the trial court explained, Plaintiffs' damages calculations were developed by comparing the Company's actual performance against projections created in 2012 and new Optimis projections. Op. at 206-07.[23] The trial court explained that the 2012 projections were unreliably optimistic because *inter alia* (i) no one invested in the Company based on the projections, (ii) the overall projected growth was questionable, (iii) the Company's assumed growth in the clinical services division was based on clinical acquisitions that never occurred, and (iv) the Company historically failed to meet forecasts. *Id.* at 207-09. Those are all factual determinations.

The Company's projections contemplated rapid growth from software revenue from two programs, OptimisPT and Optimis*Sport*. However, there was "no reliable basis in the record whatsoever for the predicted explosion in revenue" from those products. *Id.* at 207. Significant revenue growth contemplated in 2012

[23] Generally speaking, the Company projected performance based on revenues from clinical services (physical therapy treatments) and software. *See* Op. at 207.

was attributable to OptimisPT, which is *still underdeveloped.* *Id.* at 208-09 and n.629 (citing A636). As to Optimis*Sport*, the trial court concluded that the revenue figures "border on fantasy" and are "mere speculation." *Id.* at 208 n.630. In short, the trial court discussed at length the unreliability of the projections and its findings do not constitute an abuse of discretion. *Id.* at 206-11.

Plaintiffs' failure to apportion damages among the Plaintiffs is also fatal. *Id.* at 210. The trial court did not rule on this issue, and this Court therefore need not address it. *See id.* However, the trial court's concern was valid: "[E]ach Plaintiff has to prove that he or it is entitled to damages." *Id.* The case cited by Plaintiffs (O.B. at 57), *Beard Research*, is not inconsistent with the lower court's comments. *See Beard Research, Inc. v. Kates*, 8 A.3d 573, 614 (Del. Ch. 2010). *Beard Research* discussed apportionment *among claims*, not *among plaintiffs*, which was the trial court's concern below. Since Plaintiffs' conspiracy claim failed, it must show a causal connection between the actions of each defendant and the damages each Plaintiff sustained. They did not and cannot do so.

3. There Is No Viable Measure of Damages

Plaintiffs' final argument is that the "trial court erred in wholly ignoring Plaintiffs' alternative measure of damages in the amount of the diminution in the Company's equity value between June 2012 and trial." O.B. at 58. This argument fails on multiple levels. Plaintiffs' argument begins from an illogical premise, that

is, that defendants are the *sole cause* of everything that has gone wrong at Optimis over the past three years. *See* Op. at 145 ("With only the slightest risk of oversimplification, a fair summary of Plaintiffs' position is that everything that has gone wrong at Optimis since at least 2012 is Defendants' fault."). There is no evidence that ties the Company's diminished value to acts of Horne.

Plaintiffs blame the drop in economic value on the "flood of litigation." O.B. at 58. However, as to Horne, there is no evidence the Board ever authorized litigation against him. *See* Op. at 141 & n.488 (citing B294-96). It is therefore hard to understand how any waste of corporate assets is attributable to Horne.

Finally, the core of Plaintiffs' argument—that everything that has gone wrong is defendants' fault—is factually ridiculous. Plaintiffs' expert did not apportion any Company harm to Morelli. A400. Thus, Plaintiffs ask this Court to disregard the fact that it was the conduct of the Company's CEO and Chairman of the Board in creating an atmosphere ripe for a sexual harassment claim and subsequent retaliatory behavior that triggered the flood. The trial court did not abuse its discretion in rejecting that position and this Court should affirm.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. The Court of Chancery erred in denying Horne's request to award Horne's attorneys' fees and expenses under the bad faith exception to the American Rule. Now knowing the trial court's determinations of fact and conclusion that Plaintiffs' materially undermined the integrity of the proceedings below, Horne respectfully submits that the Vice Chancellor abused his discretion by not awarding fees. Plaintiffs' conduct prejudiced Horne's ability to have a meaningful opportunity to resolve the claims against him without the burdens of a trial. The policy behind fee shifting, to deter future such behavior, required the lower court to award Horne his legal fees. The trial court's failure to shift fees will encourage plaintiffs, particularly those who have weak claims, to engage in such conduct in the future, because the only consequence of such conduct is that their claims will ultimately fail. Since that outcome is already likely for a plaintiff with weak claims, there is little or no down-side to fabricating or manipulating evidence to bolster its claims and to avoid dismissal or summary judgment at an early stage of the proceedings.

ARGUMENT ON CROSS-APPEAL

I. THE COURT OF CHANCERY ERRED IN DENYING HORNE'S REQUEST FOR ATTORNEYS' FEES AND EXPENSES UNDER THE BAD FAITH EXCEPTION TO THE AMERICAN RULE.

A. Question Presented

Did the Court of Chancery err in declining to award Horne's attorneys' fees and expenses despite finding that Plaintiffs engaged in "serious and highly prejudicial" misconduct. This issue was preserved for appeal. Op. at 212-13; Ord. at 2; A755-56, A921-39, A943.

B. Standard of Review

The standard of review is abuse of discretion. *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

C. Merits of Argument

1. Delaware Law on Fee Shifting

Delaware courts will shift attorneys' fees with clear evidence that a party's litigation conduct has been in bad faith, including fraudulent, frivolous, vexatious, wanton, or oppressive conduct. *See Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005). "There is no single standard of bad faith . . . rather, bad faith is assessed on the basis of the facts presented in the case." *Beck v. Atlantic Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005). Examples of bad-faith conduct that could result in an award of attorneys' fees include unnecessarily prolonging or delaying litigation, falsifying records, knowingly asserting frivolous claims,

misleading the court, altering testimony, or changing position on an issue. *Id.*; *Kaung*, 884 A.2d at 506; Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* §13.03[d] at 13-16 (2015). The purpose of the bad-faith exception to the American Rule is to "deter abusive litigation *in the future*, thereby avoiding harassment and protecting the integrity of the judicial process." *Kaung*, 884 A.2d at 506 (internal quotation marks and citation omitted) (emphasis added); *accord Montgomery Cellular*, 880 A.2d at 227 (same). The lower court's ultimate findings demonstrate that Horne bore the burden below of proving bad faith by "clear evidence." *Beck*, 868 A.2d at 851. The court's rationale for not shifting fees was based, in part, on findings of fact that were unrelated to Horne.

2. Fee Shifting Is Warranted Under the Bad Faith Exception

Plaintiffs' and Plaintiffs' counsels' litigation misconduct was documented across two opinions, spanning 248 pages. That misconduct, as found by the trial court, included improperly influencing witness testimony and the knowing concealment of information during discovery. Op. at 3-54, 142-43 (citing *OptimisCorp*, 2015 WL 357675, at *11). The lower court found the conduct to be "beyond the pale" and held that Plaintiffs' misconduct was prejudicial to the administration of justice and threatened the integrity of the proceedings below. *Id.* at 3, 51. The most egregious facts are summarized below.

a. Plaintiffs' Conduct Towards Geller

> Plaintiffs threatened and paid Geller, eventually breaking her down over the course of six months, to acquire the language they wanted to use in this proceeding . . . .
> - Opinion at 50.

The lynchpin of Plaintiffs' complaint was the allegation that defendants bribed and coaxed Geller into making false sexual harassment allegations against Morelli. *Id.* at 19. Geller was therefore "an important witness" whose "credibility [was] a key issue in this case." *Id.* at 19-20, 51. In the months that preceded this litigation, Plaintiffs tentatively settled with Geller, who had agreed to provide a one-and-a-half-page, eight-paragraph statement, but that settlement was never consummated. *Id.* at 25-26. Then, as Plaintiffs verified and filed the complaint,[24] Plaintiffs simultaneously began a six-month campaign during which they alternately offered over a half million dollars and threatened financially ruinous litigation in order to manipulate testimony of Geller. Summarized below is the most egregious evidence of Plaintiffs' inappropriate conduct:

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[24] "There is no evidence that the Company ever authorized suit against Horne." Op. at 141 & n.488. As the "driving force behind this litigation," Horne submits that Morelli, in bad faith, caused the Company to sue Horne out of vindictiveness and to further Morelli's own cause in the divorce proceedings. *See id.* at 67. *See Kaung v. Cole Nat'l Corp.*, 2004 WL 1921249, at *6 (Del. Ch. Aug. 27, 2004) (awarding attorneys' fees where plaintiff had an improper motive in filing the action); *see also RGC Int'l Investors v. Greka Energy Corp., LDC*, 2001 WL 984689, at *19 (Del. Ch. Aug. 22, 2001) (awarding attorneys' fees because the defendant had forced the plaintiff to engage in litigation that would not have been necessary if the defendants had acted with even minimal responsibility).

- Morelli's willingness to fund the Geller settlement was dependent on the acceptability *to him* of the *contents* of Geller's sworn declaration. Op. at 31-32 (citing A264; B323, B336); *see also* A266.
- "Plaintiffs supplied documents to Geller to support the language they had drafted for and were seeking from her." Op. at 32-33 (citing A2118; B360, B474, B500).
- At the same time, Plaintiffs precluded Geller from talking to Horne or other parties so that she could obtain complete information, which communication ban was included as a final condition in the Geller settlement. Op. at 32-33, 40 n.98 (citing A2118, A2134-35).[25]
- "[P]ayments [to Geller] were tied directly to the *content* of Geller's declaration, which was to be sworn and used in this proceeding." Op. at 33; *see also* B366-67, B403, B432, B488.
- "In Plaintiffs' own words and formatting, there was a '**Correlation Between Payments and Declarations**: The usefulness and truthful transparency of the Geller declaration correlates to the amount of the initial payment.'" Op. at 33-34 (citing B488).

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[25] The lower court described the "non-cooperation provisions" as "troubling." Op. at 40 n.98 (referencing A2134-35). The provision meant that Geller, the most important third-party witness in the litigation, was completely unavailable to defendants outside of compulsory process. Delaware Lawyers' Rule of Professional Conduct 3.4(f) bars such restrictions.

- Plaintiffs (i) repeatedly re-inserted language that Geller had already rejected as false and (ii) asked Geller to swear to statements that were not true. Op. at 34 (citing B461, B1028-39).
- Plaintiffs threatened Geller with expensive litigation if she did not cooperate. Op. at 34 (citing B487); *see also* B521, B526.[26]
- Geller's declaration included language that Geller did not understand, which language she attributed instead to Plaintiffs' counsel. A624, A2564.
- The statements that Geller would not swear to under oath were put in a "summary statement" that Plaintiffs asked Geller to sign to appear as if coming from her. Op. at 29, 35, 39 (citing B797; A2142).
- Plaintiffs also required Geller's counsel to execute a "highly speculative" declaration implicating Horne in wrong-doing in order to consummate the Geller settlement. Op. at 35 (citing B487); *see also* A2143-46.

After six months of Plaintiffs' brow-beating, Geller settled in early December 2013.[27] The next day, Plaintiffs (who had initially moved for expedition

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[26] According to Geller, this was a common tactic for Morelli, who "'uses the law to come after people even when he's in the wrong.'" Op. at 36-37 (quoting A2534).

[27] Plaintiffs thereafter took Geller's declaration and summary statement and sought to have the LAPD prosecute defendants and others with that "evidence." Op. at 49-50 (citing B880-931). Another document submitted to the LAPD was an unsigned, undated document titled "Kevin Owens Statement," which appears to be

in August) served their First Request for Production of Documents. *Id.*[28] In Plaintiffs' first document production made in February 2014, Geller's declaration and summary statement were produced but not the settlement agreement and other related documents. Plaintiffs produced the settlement agreement and other ancillary documents regarding negotiations with Geller only after Horne filed a motion to compel in April of 2014. B1110.

Geller was contractually-barred from speaking with Horne, so Horne was prevented from informally discussing the inaccuracies contained in her declaration. Op. at 32-33, 40 n.98 (citing A2118, A2134-35). Plaintiffs then claimed unavailability to attend Geller's deposition, forcing Horne to file for summary judgment without the benefit of Geller's deposition. B949-58. Plaintiffs, however, affirmatively relied upon Geller's declaration *to defeat* summary judgment. Op. at 27 n.58.

b. Misconduct Related to Other Witnesses

Plaintiffs' wrongful conduct was not limited to Geller. As the lower court found: "[t]he troubling actions taken as to Geller's testimony are exacerbated by

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a statement from Kevin Owens. B1, B904 (citing the Owens statement). Mr. Owens testified at trial that he did not draft it, he does not know who drafted it, and there are inaccuracies in the document. A108.

[28] Plaintiffs' misconduct related to Geller also included (i) Plaintiffs threatening criminal proceedings against her, (ii) Morelli actually filing a criminal complaint against her, and (iii) Morelli filing a retaliatory sexual harassment complaint against her. Op. at 47-49, 116 (citing A2547, A287-88; B86-88, B187-89, B192).

the fact that . . . this theme of threaten, pay, and settle for the use of evidence favorable to Plaintiffs reoccurred, to varying degrees, with other witnesses." *Id.* at 40. Morelli "sought . . . assistance in this litigation" from Fearon and Levine, who faced financial pressures of their own. *Id.* at 41-43 & nn.111 & 112 (citing A642; B447). At an April 17, 2014 meeting, Plaintiffs coerced Fearon and Levine into becoming friendly witnesses by (i) showing Fearon and Levine a large stack of e-mails attributed to them as evidencing wrongdoing, which they were not permitted to review (except for a single document) and (ii) having Skadden "manhandle" Fearon and Levine and threaten litigation against them. *Id.* at 42 (citing B947; A644, A651); *see also* B944 (noting that Fearon and Levine were "manhandled").

Soon after, Fearon and Levine "settled" and executed mutual releases with the Company, despite the fact that (i) they were not represented by counsel and (ii) there is no evidence that either understood what claims the Company potentially had against them. Op. at 42-43 (citing A644). Around the same time, Fearon and Levine received substantial back pay *and* raises to $150,000 each (an increase from around $65,000). *Id.* at 44 (citing A325, A642-43). The trial court found that the mutual releases and the salary increases were "a package deal." *Id.* at 43 n.112. Stated alternatively, Plaintiffs paid Fearon and Levine for their cooperation and "favorable" testimony. *Id.* at 50 ("Plaintiffs met all of Fearon and Levine's financial demands in return for favorable testimony in this case.").

After paying for Fearon's and Levine's cooperation, Plaintiffs withheld relevant documents relating to Fearon and Levine until *after* Horne and the Director Defendants separately moved for summary judgment in August 2014. *See id.* at 44 & n.117. Then, in August 2014, Fearon and Levine came to Plaintiffs' counsel's offices in Delaware and executed "nearly identical affidavits" that were aimed at defeating defendants' already-filed summary judgment motions. *Id.* at 52; *see also* A328; B1016-18. Because Fearon and Levine traveled to Delaware and prepared the affidavits in person with Plaintiffs' counsel, there is no e-mail trail or other record of the evolution of the affidavits as exists with Geller's declaration. The trial court held that "the manner and circumstances in which Plaintiffs" obtained Fearon's and Levine's sworn affidavits "improperly influenced their testimony." Op. at 52. Indeed, the trial court was troubled by the affidavits, describing the sworn contents as "deceptive[]" and "materially misleading." *Id.* at 44, 52.

Plaintiffs also attempted to obtain cooperation from Chris Olsen in the same way. The trial court described Plaintiffs' conduct relating to Olsen as "disturbing," including "Morelli's bogus lawsuit threats and request for a favorable affidavit." *Id.* at 52 n.146. Plaintiffs arranged for a meeting and told Olsen that they "knew" he was complicit in some wrongdoing, despite, as the trial court remarked, "[n]o evidence in the voluminous record in this case implicate[d] Olsen in any purported

wrongdoing." *Id.* at 45-46 (citing A504). Nevertheless, with the promise of a "cooperation agreement," Plaintiffs asked Olsen to sign a declaration that contained false statements. *Id.* (citing A504). Olsen was then threatened in open court with criminal prosecution by Plaintiffs' counsel at trial. *Id.* at 46-47 (citing A507).

The trial court's conclusion regarding Plaintiffs' conduct was:

> The record includes evidence that supports a finding that the plaintiffs paid witnesses for the content of their testimony, threatened witnesses with criminal charges, attempted to open criminal investigations, and generally engaged in threats of civil litigation based on questionable or baseless claims, *all in an effort to secure 'evidence' that would aid the plaintiffs in this case.*

Id. at 3 (emphasis added); *see also id.* at 50 ("The foregoing review reveals a persistent and troubling course of conduct by Plaintiffs to gain an advantage in this proceeding.").

Because the lower court made those factual findings, the trial court abused its discretion in declining to shift Horne's attorneys' fees and expenses to Plaintiffs. *See Montgomery Cellular*, 880 A.2d at 228 (holding that a party's conduct was in bad faith where it "interfered with the Court's performance of its duty"). Plaintiffs' bad faith litigation conduct falls within multiple rubrics that support the shifting of fees, including (i) unnecessarily prolonging or delaying litigation, (ii) knowingly asserting frivolous claims (iii) misleading the court, (iv) altering testimony, and (v) changing position on an issue. *See, e.g.*, *Beck*, 868

A.2d at 851; *see also Montgomery Cellular*, 880 A.2d at 228 ("When juxtaposed against the conduct found to constitute bad faith under those precedents [the party's] conduct must similarly be regarded as demonstrative of bad faith.").

The purpose of the bad faith exception is to "'deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.'" *Kaung*, 884 A.2d at 506 (citations omitted). The pattern of conduct by Plaintiffs (particularly considering that Morelli is a Delaware lawyer) and their counsel "requires a sanction that incorporates punishment and deterrence in equal measures." *Fharmacy Records v. Nassar*, 248 F.R.D. 507, 528 (E.D. Mich. 2008); *accord Holmes v. U.S. Bank*, 2009 WL 1542786, at *9 (S.D. Ohio May 28, 2009). Here, as in *Beck*, Plaintiffs' conduct mandates both the shifting of fees and dismissal. *See* 868 A.2d at 851-52, 856.

3. The Trial Court Relied on Incorrect Facts in Declining to Shift Fees

In declining to award Horne's attorneys' fees and expenses, the trial court justified its ruling on two statements: (i) that defendants only prevailed on "most' issues and (ii) Plaintiffs' legal position regarding *Adlerstein v. Wertheimer*, 2002 WL 205684 (Del. Ch. Jan. 25, 2002) was reasonable. Op. at 212. However, as neither applies to Horne, the trial court erred. *See Dover Historical Soc'y, Inc. v. City of Dover Planning Commission*, 902 A.2d 1084, 1089 (Del. 2006) (a trial court may abuse its discretion if it acts in a capricious or arbitrary manner).

First, while the Director Defendants prevailed on only "most" issues, Horne prevailed on *all* issues. Ord. at 2. Accordingly, the trial court erred by declining to award fees, in part, on a finding of liability against the *other*, *differently-situated* Director Defendants.[29]

Second, the *Adlerstein* case, and the trial court's discussion surrounding that opinion, has *nothing* to do with Horne. The trial court's discussion of *Adlerstein* and the corresponding progeny of cases spans pages 163-75 of the Opinion, and specifically deals with a "super-director" theory. Horne was CFO, not a director. The court below fairly summarized both that Plaintiffs were only proffering this argument against the Director Defendants (Op. at 172) and that it specifically declined to hold the Director Defendants liable (without discussing Horne). *Id.* at 175. Accordingly, the trial court's rationale for declining to shift fees to Horne, in part based on Plaintiffs' legal arguments unrelated to Horne, was in error.

4. Fee Shifting is Appropriate as a Matter of Public Policy

As a matter of public policy, it was an abuse of discretion for the Court of Chancery not to award fees to Horne under the facts of this case. Absent an award of fees, there is no down-side, and arguably there is a benefit, to plaintiffs who engage in conduct similar to that of Plaintiffs here. Consider two hypothetical

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[29] The trial court stated that "there is little, *if any*, evidence . . . tying Horne to any of the Director Defendants." Op. at 90 (emphasis added); *accord id.* at 57 ("[N]either Defendants nor the Director Defendants were monolithic groups of actors as Plaintiffs alleged them to be.").

plaintiffs, P1 and P2. Both have identical claims. Their claims are colorable but weak and they have been advised that the chances of succeeding on those claims in litigation are slim. P1 files suit and litigates in good faith. Because of the weakness of his claims, they are dismissed on summary judgment. P2 files suit but also engages in conduct similar to that of Plaintiffs here. P2 obtains affidavits by improper means and thereby creates a record that suggests the existence of factual disputes. As a result, P2 avoids dismissal at summary judgment and gets to take his case to trial, thereby increasing the burden, expense and risk to the defendant, and increasing the likelihood that defendant will settle simply to avoid the cost, disruption and risk of trial. If fees are not awarded against P2, the result is that P1 and P2 end up in the same position after trial: judgment is entered against them. There is no additional consequence to P2 for his improper conduct. Arguably, there is a benefit to P2, since P2 increases his chances of achieving a settlement from defendant and P2 also imposes additional burden and expense on defendant because his case goes to trial. If P2's motivation for the suit is vindictiveness and P2 is financially able to bear the cost of his own lawyers (or better yet, have his company pay for his lawyers), P2 likely would believe he achieved some level of success even though he did not win after trial.

Awarding fees in this instance would be particularly appropriate because if the lower court's ruling is affirmed, Optimis will be obligated to pay Horne's legal

fees and expenses under 8 *Del. C.* § 145(c), which mandates indemnification by a Delaware corporation where an officer or director successfully defends claims brought against him in that capacity. An award of fees against the Company, as one of the Plaintiffs here, represents an award of an obligation it already has. The substantive effect of an award of fees would be to make Morelli and Analog, which Morelli controls, jointly liable for Horne's fees and expenses. In light of: the Court of Chancery's finding that Morelli was the engine driving this litigation; the lack of any evidence that the Board ever authorized suit against Horne; the failure of Morelli to cause the Company to obtain separate counsel to represent its interests when they so clearly diverge from Morelli's personal interests in certain ways; Morelli's status as a Delaware lawyer; and the extensive record of misconduct undermining the integrity of the proceedings below, a judgment making Morelli and Analog jointly and severally liable with the Company for Horne's fees and expenses would be appropriate, without being draconian, since the Company has such an obligation separately. It also would be proportionately fair to Horne who, because of Plaintiffs' conduct, did not have a meaningful opportunity to seek summary judgment, and would likely be spared the burden and expense of having to institute further litigation to now recover indemnification from the Company.

5. Recent Delaware Opinions on Fee Shifting

Two recent opinions have addressed fee shifting under the bad faith exception and merit comment. In *Choupak v. Rivkin*, 2015 WL 1589610, at *21 (Del. Ch. Apr. 6, 2015), *aff'd sub nom.*, *Rivkin v. Choupak*, Case No. 292, 2015 (Del. Dec. 4, 2015) (Order), the Court of Chancery awarded fees under the bad faith exception to the American Rule and this Court affirmed. In its holding, the Court of Chancery articulated that conduct that appears criminal on its face is *prima facie* evidence of bad faith. *Id.* ("[T]he fact that a party engaged in conduct which, on its face, would establish a *prima facie* case for violating a criminal statute provides powerful evidence that the party acted in bad faith."). Although the lower court here did not reach the question of whether Plaintiffs' conduct constituted criminal acts of bribery or witness tampering, its factual findings discussed above establish a *prima facie* case that it did, thereby justifying fees consistent with the analysis in *Rivkin.*

In *RBC Capital,* 2015 WL 7721882, this Court affirmed the denial of a request to shift fees, finding that it was not an abuse of the lower court's discretion to determine that the conduct at issue was not "glaringly egregious." *Id.* at *45. This case is different from *RBC* and merits a finding that the lower court did abuse its discretion, because the *RBC* trial court cited to only "several instances" of what it believed to be "potentially demonstrative of RBC's bad faith litigation conduct

arising throughout the proceeding below." *Id.* Here, the Court of Chancery found a "persistent and troubling course of conduct" that undermined the integrity of the proceedings and conduct that was "prejudicial to the administration of justice" and that "materially impact[ed] the Court's ability reliably and accurately to find the facts." Op. at 40, 50-51. Plaintiffs' conduct below did not consist of several instances of misconduct, but rather a pervasive and continuous pattern that materially impacted the trial court's ability to accurately determine facts. Therefore, such conduct was glaringly egregious.

Additionally, the conduct in *RBC* related solely to testimony of the party itself. Here, Plaintiffs' conduct affected the reliability of testimony from third party witnesses. The distinction is important because a court knows that parties come in with pre-existing biases. Third party witnesses are often the only source of independent information regarding the events at issue and therefore serve a pivotal role in any court's ability to accurately and reliably find facts. Such third party witnesses are often beyond the subpoena power of the court and cannot be compelled live at trial. Therefore, actions that interfere with the trustworthiness and reliability of third party witness testimony, or limit both sides' access to such witnesses, disparately impact the court's truth-seeking function and are more egregious than inaccurate or false testimony by the parties themselves.

CONCLUSION

For the foregoing reasons, Horne respectfully requests that the Court affirm the Opinion below dismissing all claims against Horne, and reverse the portion of the Opinion denying Horne's request for attorneys' fees and expenses, and enter judgment against the Plaintiffs, jointly and severally, awarding Horne his attorneys fees and expenses incurred in the lower court and these proceedings. Because fees and expenses relating to this appeal are beyond the scope of the lower court proceedings, Horne intends to file a separate motion as to those fees.

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