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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOTERION CORPORATION, ROBERT N. JONES and R. SCOTT JONES, Plaintiff/Counterclaim Defendants Below, Appellants. v. SOTERIA INVESTMENT HOLDINGS, INC. f/k/a CAROUSEL-SOTERIA INV. HOLDINGS, INC., SOTERIA IMAGING SERVS., LLC, NELSON SCHWAB III, CHARLES GRIGG, FRED BURKE and HARRY NURKIN, Defendants/Counterclaim Plaintiffs Below, Appellees.	)	No. 179, 2013 ON APPEAL FROM THE CHANCERY COURT OF THE STATE OF DELAWARE C.A. No. 6158-VCN

APPELLANTS' OPENING BRIEF
(Public Version)

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NATURE OF PROCEEDINGS

On February 1, 2011 Soterion Corporation[1], Robert Jones and Scott Jones (the "Joneses") filed a three-count complaint against Soteria Investment Holdings, Inc. ("Carousel"), and individual defendants Nelson Schwab III, Charles Grigg, Fred Burke, and Harry Nurkin ("Preferred Unit Board Managers"). Soteria Imaging LLC ("Soteria") was named a nominal defendant. (A35-47.)

Carousel was the Preferred Unit holder in Soteria while Soterion and the Joneses were Common Unit holders. The Preferred Unit Board Managers were representatives appointed by Carousel. The Common Unit holders had one representative on the Board of Managers, Margaret Jones.

The complaint alleged breach of Soteria's LLC agreement and breach of fiduciary duty. The Joneses sought a declaratory judgment "that no sale of any assets of Soteria LLC is legal and enforceable without first noticing a proper meeting of the Board of Managers and proper action by the Board of Managers" and that any sale or proposed sale that took place without proper action by the Board of Managers was void. The Joneses also sought an injunction with regard to the sale of Soteria's assets.

[1] Scott Jones is the President of Soterion.

On February 28, 2011, Carousel, the Preferred Unit Board Managers, and Soteria (together the "Defendants") filed an answer, with Soteria noting simply that it was a nominal defendant and no further response was required. At the same time and in the same pleading Carousel and Soteria ("Counterclaim Plaintiffs") asserted three counterclaims against Soterion and the Joneses. (A48-69.)

The counterclaims sought, among other things, a declaration that: (1) under the terms of the Soteria LLC Agreement, a quorum was present at all Board meetings during which any sales had been considered and voted on and the sales of medical imaging centers that were approved at these meetings were valid and binding; (2) the sales of medical imaging centers were valid and not a breach of fiduciary duty; and (3) if Margaret Jones did not attend a Board meeting the Board may nevertheless have a quorum under the Soteria LLC Agreement. In addition, Counterclaim Plaintiffs sought injunctive relief barring Soterion and the Joneses from engaging in efforts to frustrate decisions of the Board. In Count III of their counterclaim the Counterclaim Plaintiffs alleged tortious interference with an existing or prospective contract (i.e. with Lake Cumberland).

At the same time it filed its Answer/Counterclaim, the Counterclaim Plaintiffs moved to expedite resolution on Counts I and II, requesting a trial

within 30 days or a "parade of horribles" would befall Soteria. In response, Soterion and the Joneses, agreed the disputes between the parties should be resolved expeditiously but asserted that "thirty days was neither necessary nor warranted" and instead sought to set a date for trial on all claims and counterclaims in approximately 90 days. Soterion and the Joneses pointed out that

> Defendants received a draft complaint in November 2010 that was similar in form to the complaint filed by Plaintiffs in this action. Thus, by no later than November 2010, Defendants' claim for a declaratory judgment relating to their authority to sell the facilities was ripe for determination by the Court, yet Defendants chose to do nothing about it. . . .Moreover, having waited over four months to seek expedition on the issues, Defendants have not demonstrated a pressing need to have this dispute now resolved in thirty days rather than the 90 days schedule that Plaintiffs proposed. . . .Similarly, Defendants have provided no evidence that the Company's lender will take action against it if this action is not resolved within thirty days. Indeed, as Defendants admit, the Company has been in default of its loan covenants with its lender since November 2009 and has been in default of its payment obligations since November 2010. . . . (A-829-830.)

The Court set a trial date on all claims and counterclaims for May 24-25, 2011, 85 days from the filing of the Answer/Counterclaim and 112 days from the filing of the Complaint.

With respect to discovery, the Defendants/Counterclaim Plaintiffs submitted a request for documents on March 11, interrogatories on March

15, and request for admission on March 29. In the meantime, Plaintiffs voluntarily dismissed Soteria Mezzanine Corporation.

On April 11, 2011, Plaintiffs Delaware counsel, Morris Nichols Arsht & Tunnel ("MNAT") moved to withdraw. During a teleconference on the motion on April 13, 2011, David Teklits, Esquire of MNAT pointed out to the Court that the Plaintiffs "a couple of weeks ago, I think, after they received some information, offer[ed] to dismiss the claims with prejudice and at least have some of the counterclaims entered with prejudice, and the defendant declined that offer." (A-77)

The next day, on April 14, 2011, the firm of Cross & Simon entered their appearance as local counsel for Plaintiffs/Counterclaim Defendants. On April 21, 2011, the Counterclaim Defendants answered the counterclaims and propounded written discovery requests--interrogatories and document requests. Defendants/Counterclaim Plaintiffs responded to the discovery on May 2. Defendants/Counterclaim Plaintiffs noticed and took the depositions of Margaret, Robert, and Scott Jones and Soterion on May 9, 10, and 11.

In a teleconference with the Court on May 19, 2011, during which the parties presented the stipulation they had reached, and in response to the Court's inquiry regarding scheduling on moving forward with the tortious

interference claim, lead counsel for Soteria stated that discovery on the tortious interference claim was nearly complete:

> All of the discovery, at least 90 percent of it, I think, is done, and I think the case is a very--it would be a very short trial, and so I don't think in terms of the conventional scheduling order we really need that because of the posture of the case and where it is. We were prepared to try those claims next week. (A-96).

On May 20, 2011, the parties stipulated to and the Court entered a Judgment and Order, which, among other things, dismissed all of the Plaintiffs' claims in the Complaint with prejudice and granted judgment in favor of Carousel and Soteria on Count I and Count II of their counterclaims.

Thereafter, a two-day trial on the tortious interference claim was rescheduled. The Counterclaim Plaintiffs supplemented their counterclaim on December 13, 2011. Trial was held on February 7-8, 2012.

In its post-trial opinion the Chancery Court found in favor of the Joneses with respect to the tortious interference counterclaim. However, with respect to the Defendants' claim for attorneys' fees and expenses incurred in defending against the Joneses' lawsuit in the 16 weeks until the May 20, 2011 Judgment and Order was entered, the Court awarded to Defendants their attorneys' fees and expenses.

Specifically, under the bad faith exception to the American Rule the Chancery Court awarded the Defendants their "attorneys' fees, costs, and

expenses incurred before May 24, 2011[2], except those fees, costs, and expenses associated with the Counterclaim Plaintiffs' pursuit of their tortious interference claim." *Soterion v. Soteria Mezzanine Corp.*, 2012 WL 5378251, *18 (Del. Ch. 2012)(Exhibit A hereto). The Court premised its award as follows: "[b]y filing a lawsuit the core allegations of which they knew to be false at the time they filed it, the Joneses and Soterion behaved in a manner that exemplifies the sort of bad faith conduct deserving of an award of attorneys' fees." *Id.*

Thereafter, by letter opinion of March 7, 2013 the Court determined that a reasonable fee amount was $842,052.67. In making its determination the Court concluded that the Defendants' made "a fair attempt to separate out" non-qualifying fees and concluded that the tortious interference counterclaim was not the focus of the proceedings. (Exhibit B hereto)

The Plaintiffs appeal the Court's determination of attorneys' fees and expenses of $842,052.67 as well as the award of attorneys' fees at all under the bad faith exception to the American Rule.

[2] It is not clear how May 24 came to be cited instead of May 20, the date the stipulated Judgment and Order was entered. Pursuant to the pretrial the attorneys' fees and expenses sought were up to May 20, 2011 the date the Judgment and Order was entered.

SUMMARY OF ARGUMENT

I. The Chancery Court awarded attorneys' fees, expenses and costs to Defendants that they incurred between February 1, 2011 (filing of Joneses lawsuit) and May 20, 2011(dismissal of claims in Joneses lawsuit), except those fees, expenses and costs associated with Defendants pursuit of their tortious interference claim. In response, the Defendants claimed that their bills during the 16 week period totaled $870,066.85, attributing just $28,013.68 (or 3.21% of the total attorneys' fees and costs) to the tortious interference counterclaim, leaving the balance of $842,052.67 (or 96.79% of the total attorneys' fees and costs) to their defense of the Joneses lawsuit. A 96.79% to 3.21% spread is not realistic and unreasonable under the circumstances. The Court's determination of attorneys' fees and expenses in the amount $842,052.67 as reasonable was an abuse of discretion.

II. It was an abuse of discretion to deviate from the American Rule. Plaintiffs' conduct under the circumstances did not warrant a shifting of fees under the bad faith exception to the American Rule. The Joneses lawsuit had a valid basis.

STATEMENT OF FACTS[3]

On February 1, 2011 Soterion and the Joneses[4] filed a complaint in the Chancery Court against Carousel, the Preferred Unit Board Managers of Soteria and nominal defendant Soteria. In the complaint the Joneses sought a declaratory judgment "that no sale of any assets of Soteria LLC is legal and enforceable without first noticing a proper meeting of the Board of Managers and proper action by the Board of Managers" and that any sale or proposed sale that took place without proper action by the Board of Managers was void (e.g. that the Board not undertake decisions in "secret" without the Common Unit Board Manager being present and involved; and not undertaking to sell assets at a time when the full ownership interest of

[3] Unless otherwise indicated, the following statement of facts are taken from the Docket (A-1), the Pretrial Stipulation and Order (A100-121); Plaintiff/Counterclaim Defendants' Opening Post-trial Brief (A122-123); Plaintiff/Counterclaim Defendants' Post-Trial Reply Brief (A214-257); the Court's Memorandum Opinion dated October 31, 2012 (Exhibit A hereto); Cross & Simon's letter submission on attorneys' fees and costs dated December 17, 2012, including exhibits thereto (A258-399); Srinivas Raju Letter to Court of December 20, 2012, including exhibits thereto (A400-A566); Court's letter Decision dated March 7, 2013 (Exhibit B hereto).

[4] For ease in reference Soterion and the Joneses will be referred to collectively as "the Joneses."

same is in question.) The Joneses also sought an injunction with regard to the sale of Soteria's assets.

The basis for many of the claims in the complaint arise from the treatment that Margaret Jones--the sole Common Unit Holder representative on the Board--received from Carousel and the Preferred Unit Board representatives during a critical time for Soteria in its divesture process.

Relationship between the parties

Before 2004, the Jones family owned and operated, either directly or indirectly, a number of medical imaging centers. In 2004, Carousel sought to acquire part of the Joneses' interest in approximately twenty-four medical imaging centers. To effectuate the transaction, on or about November 2004, Soteria was formed and the Joneses transferred either all or a portion of their interest in some of the imaging centers to Soteria. Carousel invested $17.5 million in Soteria, receiving in exchange Preferred Units representing approximately 52% of Soteria's equity. For their part, the Joneses received Common Units in Soteria representing approximately 36% of Soteria's equity, $17 million in cash, and notes, which were subordinated to Allied Capital Corporation (subsequently acquired by Ares Capital Corporation)("Ares") who had provided debt financing for the transaction (the "Senior Note"). Allied, through Soteria Mezzanine Corporation, also

held Preferred Units as a result of an investment, representing 6% of Soteria's Equity.[5]

Management under Soteria's LLC Agreement

Pursuant to the LLC Agreement, Soteria is governed by a Board of Managers of up to seven representatives, with holders of Preferred Units being able to appoint up to four representatives and holders of Common Units being able to appoint up to three. Defendants Nelson Schwab III, Charles Grigg, Fred Burke and Harry Nurkin[6], at all relevant times, were managers that served as the Preferred Unit representatives. The Joneses were initially employed by Soteria[7] as well as served on the Board of Managers, being the Common Unit representatives. Bob Jones and Scott Jones eventually left the employ of Soteria. Scott left the Board in March 2006 while Bob left the Board in November 2008. Margaret Jones[8] replaced Scott on the Board and since August 2006 has served as the Common Unit representative on the Board of Managers. Accordingly, at all relevant

[5] The other equity interest holder was Matthew Smith who held Common Units.

[6] In October 2011, while this matter was pending, Harry Nurkin passed away.

[7] Robert Jones served as President and Scott Jones served as Executive Vice President.

[8] Margaret Jones is the wife of Bob Jones and the mother of Scott Jones.

times, there were five Board members, with Margaret Jones being the sole representative for the Common Unit holders.[9]

Pursuant to the LLC Agreement, in order to have a quorum for the transaction of business, a Board of Managers meeting must include a majority of the total number of representatives serving on the Board of Managers and at least one representative designated by the holders of Common Units. (A591)

Soteria's Financial Troubles

Soteria did not perform well following the transaction and fell far short of Carousel's expectations. In September 2009 Soteria defaulted on the Senior Note. The Senior Note matured in November 2010. At least as early as April 1, 2010 Soteria's Board of Managers began to discuss selling some or all of Soteria's medical imaging centers in order to pay down and satisfy the Senior Note.

Margaret Jones favored a process wherein the whole company would be sold rather than a divesture process selling individual centers because she believed that selling individual centers would communicate the wrong

[9] From 2006 through April 2009 Jeff Eckmann also served on the Board as a Common Unit representative. Upon Mr. Eckmann's resignation, Margaret Jones became the sole Common representative on the Board.

message regarding the financial strength of the company. However, she also understood the financial pressure Soteria was under due to the Senior Note. (A130-131;A619-620:A815.) At a Board Meeting on May 13, 2010, the Board of Managers unanimously voted to retain Brookwood Associates, an investment banking firm, to solicit interest for the sale of the entire company and to facilitate sales of certain centers in order to raise capital. At the same time the Board unanimously voted to retain River Corporate Advisors to assist in the sale of non-core imaging centers. At the next Board of Managers meeting on July 29, 2010, Brookwood and River Corporate made general presentations regarding the sale process of individual centers and the company as a whole.

Defendants conduct created cause for concern

This was a critical time for Soteria, and, as Charles Grigg, a Preferred Unit Board Manager, stated: "the biggest thing that we talked about in all these board meetings were the divesture process and the looming maturity of Ares debt." (A696.) Mr. Grigg in May 2010, had instructed Margaret Jones that she should keep her family informed about the divesture process. (A619.) In light of the foregoing, Carousel's and the Preferred Unit Board Managers' conduct toward Margaret Jones following the July 29, 2010

Board meeting was troublesome, and formed the basis for the claims in the complaint.

On or about August 23, Soteria's CEO, Joe McDonough, presented Margaret Jones with a "Confidentiality Agreement". (A518.) Under the Confidentiality Agreement, a signing Board member, during the period in which that member was a member of the Board and for a period of four years thereafter, was prohibited from disclosing certain confidential information, including "any information with respect to the contents, discussions, deliberations or decisions of any meetings of the Board" and was prohibited from suing the Company in any way. (A685-686.) Pursuant to this broad Confidentiality Agreement, Margaret Jones was prohibited from talking to the Common Unit holders of whom she was their representative. (A685-686.)

Importantly, the broad Confidentiality Agreement stated that if this agreement was not signed then that Board Manager would be prohibited from participating in any meetings and receive only such information as the Board deems appropriate. (Id.). Every Board member other than Margaret Jones signed the Confidentiality Agreement. When Margaret Jones told Ed Glasscock, the attorney retained by the Board, that she did not agree with the Confidentiality Agreement, and therefore, would not sign it, she was told

"Well, if you don't sign it, you will not get the information and you cannot come to any board meetings." (A134; A816-817.)

Margaret Jones believed signing the Confidentiality Agreement was inconsistent with her rights and duties as a Board member. (A133, 816.) In fact, Mr. Glasscock told Margaret Jones that "she represented [Common Unit holders]" and it was her "duty to report" information regarding default on the senior notes to "the Jones family." (A680.) Thus, on the one hand Defendants had been telling her to provide information to the Common Unit holders and now they proposed to muzzle her using a broad Confidentiality Agreement, the very validity of which was questionable. Indeed, the Chancery Court also seemed concerned about the validity and authority for such an agreement, questioning Defendants' counsel during trial as to the authority by which "the majority members of the board could get together and tell a fellow board member that unless you commit not to sue the company until four years after you leave, that they can't participate in board meetings." (A826.) Defendants' counsel was unable to respond except to say that as a general matter he believed an LLC Agreement could make such provision. (Id.) No such provision exists in the Soteria LLC Agreement. (A567-618).

The next scheduled Board meeting was August 27, 2010, which was within days of Margaret Jones receiving and rejecting the Confidentiality Agreement. Margaret Jones gave Mr. Glasscock notice of her intention to attend the August 27 Board meeting. An agenda and Board package, which is normally sent to Board members in advance of a meeting was not sent to Margaret Jones but was sent to other Board members. (A134; A712-713; A831-868.) Just prior to the 11:30 a.m. Board meeting, all of the Board members other than Margaret Jones walked in together to the Carousel offices where the scheduled meeting was to be held.

Margaret Jones described the August 27 Board meeting as being uncharacteristic and lacking substance and with no real business having been discussed. (A818; A621.) The August 27 Board minutes confirm the divesture process was not discussed (i.e. "the biggest thing" was not discussed). Although nobody on the Board told Margaret Jones that a separate meeting of Board members took place (without her) on August 27, 2010 she suspected as much. At trial Margaret Jones testified that she felt "out of the loop." (A819.)[10]

[10] Margaret also expressed concern that Unit holders were not receiving audited financials in accordance with the LLC Agreement. (A815; A593.)

In fact, a separate, secret Board meeting was indeed held ninety minutes earlier in Brookwood's offices, with Brookwood attending and the divesture process being discussed. A fact that was finally disclosed for the first time at trial. (A712-713; A722; A136-137). Margaret Jones would later refuse to approve the minutes of the August 27 Board meeting because the minutes did not mention or include information about this separate, secret meeting which she was not allowed to attend. (A678-684).

Lifescan

On September 29, 2010, Lifescan LLC and Lake Cumberland entered into a letter of intent (the "Lifescan LOI") for the purchase of the Lifescan facility.[11] The Lifescan LOI provided for a purchase price of $1.9 million (which assumed Lake Cumberland successfully completed due diligence). It also provided that the parties would execute a mutually agreeable asset purchase agreement, one of the provisions of which would be that the Lifescan facility was "free and clear of all liens, claims and encumbrances at [c]losing other than some specifically defined liabilities." Soteria and Lake

[11] Lifescan Imaging LLC is an imaging facility located in Somerset, Kentucky. According to Soteria, Lifescan LLC (of which Soteria claims a 2/3 ownership interest), owns the facility, while the medical imaging equipment is owned by Somerset Imaging. Somerset Imaging is owned in equal parts by Soteria and JuJu LLC.

Cumberland targeted November 1, 2010 as the closing date for the sale. (A775; A137.) The Joneses had questions about Soteria's claim to own a majority interest in Lifescan, which questions and concerns Bob Jones tried to get Soteria and its Board of Managers to look at and address in as early as 2008. (A138; A806.) Up through this time, there had been no Board authorization (at least for any known Board meetings) which authorized a sale of the Lifescan facility.

The Joneses Letter and Draft Complaint

On November 1, 2010, Sydow & Associates PLLC, acting as counsel for the Joneses, faxed to Lake Cumberland's parent company, Lifepoint Hospitals, a letter and enclosed therewith a draft complaint that it claimed was being filed in Delaware on that date. (A622-623; A624-630.) Attached to the letter was a complaint that would, as amended, later be filed in the Chancery Court. (A631-677.) Also attached was the copy of a complaint as amended on September 7, 2010 that had been filed earlier that year, which lawsuit concerned the Lifescan facility that Soteria was seeking to sell ("JuJu Litigation"). In the JuJu Litigation, Juju claims that Somerset Imaging has a more substantial ownership interest in the Lifescan facility

than what the Counterclaim Plaintiffs acknowledge.[12] *Soterion Corp. v. Soteria Mezzanine Corp.* 2012 WL 5378251, *6. The draft complaint alleged that the Board had not authorized the sale of any property, including the Lifescan facility. (A624-630.)

At the November 9, 2012 Board meeting a quorum of the Board was present and the Board (with Margaret Jones attending but abstaining) voted to approve the sale of two imaging centers--Lifescan and Tennessee Imaging Alliance. Scott Jones was also in attendance at this Board meeting and raised the issue as to the ownership interests in the assets being sold and was told Soteria intended to transfer the assets. (A678-684.)

Attorneys' Fees and Expenses

Defendants sought attorneys' fees and expenses incurred defending against the Joneses lawsuit (i.e. between February 1, 2011 when the lawsuit was filed and May 20, 2011 when the Judgment and Order was entered). In that three and half month time period Defendants--Carousel, Preferred Unit

[12] See, paragraph 21 of the Verified Complaint which states: "Upon information and belief, Defendants are even purporting to sell the assets of those medical imaging centers for which Plaintiffs did not transfer a majority interest and, therefore, in which Soteria LLC only has a minority ownership interest. Defendants are attempting to cause Soteria LLC to sell those centers in whole, or sell the assets of those centers, even though Stoeria LLC does not own a majority interest in them."

Board Members, and nominal Defendant Soteria--assert that $842,052.67 was incurred in defending the Joneses lawsuit. (A400-566.)

Vinson and Elkins, lead counsel for all Defendants, submitted total fees and expenses through May 24 of $710,175.53, which they adjusted by $15,097.68 (as being attributed to the counterclaim) for an award amount of $695,077.85. Young Conaway Stargatt & Taylor, counsel for nominal Defendant Soteria, submitted total fees and expenses of $83,819.50[13], which they adjusted by $6,184 (as being attributed to the counterclaim) for an award amount of $77,668.50. Richards Layton & Finger, counsel for Carousel and the Preferred Unit Board Members, submitted total fees and expenses through May 24 of $76,038.32, which they adjusted by $6,732 (as being attributed to the counterclaim) for an award of $69,306.32.

In summary, Defendants bills for the three and half month period totaled $870,066.85. Defendants attributed just $28,013.68 (or 3.21% of the total attorneys' fees and expenses) to prosecuting the tortious interference counterclaim, claiming the balance of $842,052.67 (or 96.79% of the total attorneys' fees and expenses) to their defense of the Joneses lawsuit.

By comparison, in a 20-month period (beginning April 14, 2011 through discovery, trial and post-trial hearing) Cross & Simon, LLC billed a

[13] Plus an additional $33.50 in costs.

total of 571.6 hours for a total of $158,648.03 whereas Vinson & Elkins alone in a period of less than one month (between May 1 and May 24, 2011) billed a total of 539.75 hours for $278,430.00.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THE ATTORNEYS' FEES AND EXPENSES TO BE AWARDED

Question presented

Whether the Chancery Court abused its discretion in fixing the amount of reasonable attorneys' fees and expenses to be awarded at $842,052.67. (A32-A34.)

Scope of review

The Court reviews the determination of reasonable attorneys' fees for abuse of discretion. *See Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546-547 (Del. 1998).

Merits of Argument

The Chancery Court awarded Defendants their attorneys' fees, costs and expenses incurred before May 24, 2011, except those fees, expenses and costs associated with Defendants' prosecution of its tortious interference claim. In response, Defendants claimed their bills for the 16 week period of February 1, 2011 to May 24, 2011 totaled $870,066.85. Defendants attributed just $28,014.18 (or 3.21% of the total attorneys' fees and costs up to May 24, 2011) to the tortious interference counterclaim, leaving the balance of $842,052.67 to their defense of the Joneses lawsuit.

The Chancery Court concluded that the attorneys' fees sought by Defendants were reasonable and within the scope of the Court's prior opinion and accepted counsel's allocation of fees and costs. Appellant's respectfully submit that the foregoing was an abuse of discretion.[14]

Vinson & Elkins claimed they did "very little work" advocating the tortious interference claim. (A410.) The Court concluded that Defendants made "a fair attempt to separate out" non-qualifying fees, and stated that "the [tortious interference] counterclaim was not the focus of these proceedings until after the Plaintiffs dismissed their direct claims." (Ex. B hereto at p. 3.) Appellant submits that this determination is contrary to the invoice statements and inconsistent with the record.

For instance, in a teleconference with the Court on May 19, 2011 during which the parties presented the settlement agreement they had reached to dismiss certain claims, and in response to the Court's inquiry regarding scheduling on moving forward with the tortious interference

[14] When an act of judicial discretion is under review, the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness. *Dover Historical Society v. City of Dover Planning Commission*, 902 A.2d 1084, 1089 (Del. 2006).

claim, lead counsel for Defendants stated that discovery on the tortious interference claims was nearly complete:

> All of the discovery, at least 90 percent of it, I think, is done, and I think the case is a very--it would be a very short trial, and so I don't think in terms of the conventional scheduling order we really need that because of the posture of the case and where it is. We were prepared to try those claims next week. (A96.)

In other words, according to Defendants, they had conducted the vast majority of discovery on the counterclaim and were fully prepared to present their tortious inference claim on May 24, 2011. This is completely contrary to the statement later, in December 2012, that they had done "very little work" on the tortious interference counterclaim as of May 2011. Nevertheless, in the calculations presented post-trial, Defendants attributed none of the time spent on discovery prior to May 24, 2011 to the counterclaim. On that basis alone, Appellant submits it is incongruent to assert (or conclude) that 96.79% of fees and expenses were related to defense of the Joneses' lawsuit, while only 3.21% were related to work on the counterclaim.

A closer review of the bills lends further support to the conclusion that Defendants failed to properly allocate time on the tortious interference counterclaim from the balance of their work. For instance, with the exception of minimal adjustments for work on February 24, 26, and 28

2011,[15] Vinson & Elkins attributes all time and expenses from February 1 through March 30, 2011 to the defense of the complaint. But descriptions in their timesheets show repeated entries during this time that expressly state: "work on counterclaim" (2/23/11); "draft counterclaim" (2/23/11); "work on answer, counterclaim" (2/25/11); "revise answer and counterclaim" (2/25/11); "revise ... verified counterclaim, email correspondence Charles Grigg; compile and scan all exhibits for counterclaim" (2/27/11); "telephone conference with Srini Raju regarding plaintiff's answer to defendants' counterclaim" (3/24/11). (A415-430.)

Moreover, by looking at Defendants' counsels' bills just for the February 2011 time period (time was only billed from February 14 through February 28, 2011), there appears to be a clear failure of apportionment. During just this short period, the attorneys for the counterclaim plaintiffs collectively billed 151.35 hours preparing an answer

[15] Defendants counsel had provided Plaintiffs' counsel with their invoices and adjustment summaries under draft affidavits in connections with the parties' attempts to reach agreement on an implementing order. (See A262-A399.) After Plaintiffs' counsel filed their letter of December 17, 2012, noting the lack of adjustment for any time by lead counsel in connection with the counterclaims prior to April 16, Vinson & Elkins adjusted their original figure by $525 by the inclusion of these entries. (Compare A295-296 with A415-416.)

to the complaint and counterclaim. Of the 151.35 hours billed in the two weeks, 143.65 are being attributed to analyzing and answering the complaint while just 8.7 hours are attributed to preparing the counterclaim. However, comparing the time spent to the work product produced suggests a fair apportionment was not done. The answer to the complaint was done in 8 pages – generally with short, concise answers admitting or denying the allegations (for which they apportion 143.65 hours). Meanwhile, the counterclaim was 14 pages containing three counts and extensive facts and allegations (for which they attribute just 8.7 hours). (A-48-69)

As another example of possible error, Defendants seek fees by one attorney for 16 hours of work on a single day in preparing John Burkland as a witness. Mr. Burkland's role was primarily to support the counterclaim. (A459 at 5/18/11.)

While it might be easy to conclude that defense fees and expenses up to May 20, 2011 amounted to more than the expenses related to the counterclaim, Appellant respectfully submits that a 96.79% to 3.21% spread is not realistic and unreasonable under the circumstances. For the foregoing reasons, the determination of attorneys' fees of $842,052.67 as reasonable was an abuse of discretion.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEYS' FEES AND EXPENSES

Question presented

Whether fee shifting was warranted under the bad faith exception to the American Rule under the circumstances of this case. (A32, A34.)

Scope of review

The Court reviews the award of attorneys' fees under exceptions to the American Rule for abuse of discretion. *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

Merits of Argument

To depart from the traditional rules with respect to attorneys' fees, there must be a showing of bad faith, conduct which was totally unjustified, or the like. *Weinberger v. UOP, Inc.*, 517 A.2d 653, 656 (Del. Ch. 1986). Only rarely do Delaware courts deviate from the American Rule. *LeCrenier v. Cent. Oil Asphalt Corp.*, 2010 WL 5449838, *5 (Del. Ch. 2010).

Defendants contend that the Jones acted in bad faith in filing the Verified Complaint in this case because (according to Defendants) the material allegations were baseless and knowingly false.[16] Appellant submits

[16] The Chancery Court also appeared to accept Defendants contention in this regard, stating: "[b]y filing a lawsuit the core allegations of which they knew to be false at the time they filed it, the Joneses and Soterion behaved in a manner that exemplifies the sort of bad faith conduct deserving of an award of attorneys' fees." *Soterion v. Soteria*

that the overall record does not support such position. The overarching concern of the Joneses and goal of the complaint was protecting their interests by ensuring that the Board employed a proper process and acted appropriately, concern justified by the fact that the Board, in fact, had conducted a secret Board meeting and was expressly seeking to exclude Margaret Jones from Board meetings.

The Joneses had a good faith basis that the Board was not conducting itself in a forthright manner and believed legal intervention was needed to either rectify the Board's past sins and/or prevent future sins. Margaret Jones--the Common Unit Holder's lone representative on the Board--was presented with a broad restrictive "Confidentiality Agreement" that she felt conflicted with her rights and duties and was informed that if she did not sign then she would not get information or be permitted at Board meetings. Shortly thereafter at an August 27 Board Meeting, the circumstances lead Margaret to suspect that the Preferred Unit Board Members had met separately and discussed the divesture process. And in fact, Margaret's suspicions proved true. The Board took measures to conduct a separate meeting to discuss the divesture process without Margaret, the Common

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Mezzanine Corp., 2012 WL 5378251, *18 (Del. Ch. 2012). Present counsel for the Joneses did not file the initial complaint.

Unit Manager representative. (A136-137; A722). Moreover, there was the pending JuJu Litigation bearing upon ownership issues of assets that Defendants were attempting to sell. The foregoing is reflected in the following paragraphs in the complaint:

> 21. Upon information and belief, Defendants are even purporting to sell the assets of those medical imaging centers for which Plaintiffs did not transfer a majority interest and, therefore, in which Soteria LLC only has a minority ownership interest. Defendants are attempting to cause Soteria LLC to sell those centers in whole, or sell the assets of those centers, even though Stoeria LLC does not own a majority interest in them. [JuJu Litigation]
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> ***
>
> 24. Defendants have specifically told Plaintiffs' appointed managers not to attend meetings because they "would not be permitted to participate." . . . [Confidentiality Agreement]
>
> ***
>
> 25. . . . Further, the "sales" are void *ab initio* because they are acts either: (1) taken with no Board meeting or (2) taken at a "meeting" at which there was no valid quorum."
> [the Separate Secret August 27 meeting]
>
> 39-41: As set forth above, Defendants have taken and continue to take steps to sell the assets of Soteria LLC without the vote of a majority of the Board of Managers at a properly notice and called meeting. Plaintiffs, therefore, seek a declaration that no sale of any assets of Soteria LLC is legal and enforceable without first noticing a proper meeting of the Board of Managers and proper action by the Board of Managers. Plaintiffs also seek a declaration that any sale or proposed sale, as described above, of any assets of Soteria LLC is void *ab initio.*(emphasis added.)

Completely ignoring the foregoing, the Defendants focus on the allegations in paragraph 21, and declare the entire lawsuit frivolous and baseless as result. In particular, the allegations in paragraph 21 are that: "No sale of any imaging center has been raised or voted on at any Board of Managers meeting" and that "No meeting to which any Class A Common manager has ever been invited or given notice of has ever raised, addressed, or approved any such action." These allegations were true when the complaint was drafted and sent to Defendants on November 1 but should have been amended after the November 9, 2010 Board Meeting.[17] Scott Jones explained:

> When I signed these verifications, I had clearly been to a board meeting. I had received information. I contested the sale of two facilities, specifically one, the Lifescan facility, and came away from there absolutely even more concerned that the company was moving forward with going ahead and selling stuff that it didn't have the authorization to sell.

[17] The differences between the draft complaint faxed on November 1, 2010 and the Verified Complaint filed on February 1, 2011 are minimal – the allegations and claims are essentially the same. Robert Jones verified the Verified Complaint on November 19, 2010 and Scott Jones signed a verification on November 22, 2010. However, Scott Jones attended the November 9, 2010 Board meeting where Margaret Jones was present and where the sale of two facilities was raised, voted on and approved, making these particular allegations incorrect.

> So I was absolutely signing the verification to move forward with the lawsuit. Clearly, there are provisions in here, as I've said, that either I overlooked, or the only other thing I can think of is that I signed that verification and assumed that the facts hadn't changed without looking carefully enough at each specific one. (A752, A229.)

Robert Jones, when asked whether he had the Verified Complaint in front of him when he signed the verification stated, "I did not." (A812; A229.)

In support of their position that the Plaintiffs conduct should constitute bad faith warranting fee-shifting the Defendants cited to *Beck v. Atlantic Coast PLC*[18]. In that case, Beck filed a breach of warranty and fraud class action case based on his purchase of a software product over the internet. In the complaint, Beck sought to be appointed a class representative, a role requiring fidelity to class members. *Beck v. Atlantic Coast PLC*, 868 A.2d 840 (Del. Ch. 2005). The problem was, he never actually purchased the product and far from being an "innocent rube" as painted in the complaint he was an "Internet Vigilante". *Beck v. Atlantic Coast PLC*, 868 A.2d 840, 853 (Del. Ch. 2005). The *Beck* plaintiff and his counsel then undertook measures in discovery to conceal those facts, among other things. *Id.* In finding such conduct constituted bad faith the Court stated: "Had the complaint pled the real truth, Atlantic Coast would not have

[18] *Beck v. Atlantic Coast PLC*, 868 A.2d 840 (Del. Ch. 2005).

wasted time in discovery ferreting out the real facts. There is simply no justification for this misrepresentation...." *Id.*

By contrast, in this case, Appellant respectfully submits that there was justification for the lawsuit, notwithstanding the allegations Defendants focus upon. In other words, striking the allegations of ¶21 out, the Joneses still had good faith allegations and claims with an underlying true factual basis. Moreover, in the *Beck* case the Court considered that the Defendants had to waste time in discovery ferreting out the real facts. The opposite is true here. The Joneses never concealed the truth (compare to the Court finding that the Defendants concealed the JuJu litigation from Lake Cumberland, a prospective buyer).[19] In fact, Defendants denied immediately (as reflected in their Answer) the allegations.

This is not a case where the Joneses brought an entirely unfounded and baseless lawsuit[20] or "repeatedly acted in bad faith" to obstruct and

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[19] Once it was revealed that Defendants had not disclosed the JuJu Litigation, as they should have, Defendants argued that they planned the disclosure in the ordinary course. But such an argument was insincere. As the Court stated: by [November 1, 2010] they had waited so long that trying to describe their dilatory conduct as in the 'ordinary course' is truly a reach."

[20] *See e.g. Beck v. Atlantic Coast PLC*, 868 A.2d 840 (Del. Ch. 2005).

delay fair resolution.[21] Appellants concede that they verified certain facts that, while true when the complaint was drafted, were not true when the Verified Complaint was filed.[22] Further, the fact that these claims may not have proved a "winning" one is not evidence of bad faith. *See P.J. Bale, Inc. v. Pantano Real Estate Inc.*, 888 A.2d 232 (Del. 2005)(stating: "The claims that the defendants seek to assert may not have been a winning claim. . .but I am satisfied that the position was not taken and asserted with the type of bad faith that entitles the shifting of attorneys' fees."). As set forth above, the Joneses had a good faith basis for the lawsuit. Ultimately, the parties stipulated to dismissal of the lawsuit but just because a party agrees to dismiss a suit should not mean the opposing party is entitled to their attorneys' fees.

In fact, Defendants did not disclose the secret August 27 Board meeting until trial, a fact, which if properly disclosed, may have altered the course of the initial complaint.

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[21] *See e.g., Kaung v. Cole Nat'l Corp.*, 884 A.2d 500 (Del. 2005).

[22] The Joneses do not mean to imply that verification is not an important step in the filing of a complaint in this Court or any Court, and counsel does not countenance such conduct.

The circumstances do not rise to that unjustifiable, egregious conduct warranting fee shifting. For all the foregoing reasons, it was an abuse of discretion to depart from the American Rule and award attorneys' fees.

CONCLUSION

The Court abused its discretion in fixing reasonable attorneys' fees in the amount of $842,052.67. Moreover, deviation from the American Rule was an abuse of discretion under the facts and circumstances of this case.

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