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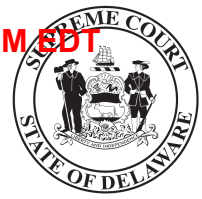

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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 COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 6158-VCN REDACTED PUBLIC VERSION FILED JULY 2, 2013

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NATURE OF PROCEEDINGS

The nature of the Joneses' proceedings is audacity.[1]

This lawsuit involves conduct that the Joneses' own counsel admits should not be "countenance[d]." Opening Brief ("Pl. Br.") at 32 n.22. The Joneses filed a verified complaint "laden with falsities" and "knew that the central allegations of the Complaint were false." *Soterion Corp. v. Soteria Mezzanine Corp.*, 2012 WL 5378251, at *16 n.149, *18 (Del. Ch. Oct. 31, 2012). They "initiated this action in an ill-conceived effort to defeat a divesture plan ... viewed as essential to the Defendants' financial survival." March 7, 2013 Opinion ("Letter Op.") (Ex. B to Pl. Br.). The Joneses forced Defendants to mount an expedited, "bet the company" defense, then, days before trial, admitted verifying a false complaint, agreed to dismiss all their claims, and consented to judgment against them on two of three counterclaims. Now, the Joneses have the audacity to challenge the fees they forced Defendants to incur to prevent collapse of their $17.7 million investment.

In February 2012, the Court of Chancery held a two-day trial, where it was able to test the Joneses' credibility on the same false assertions set forth in this appeal, concluding: "This is one of the rare instances where an award of attorneys' fees and expenses is undoubtedly warranted. By filing a lawsuit the core allegations of which they knew to be false at the time they filed it, the Joneses and [their family trust] Soterion behaved in a manner that exemplifies the sort of bad

[1] "Joneses" refers collectively to Appellants Soterion Corp., Robert N. Jones, and R. Scott Jones.

faith conduct deserving of an award of attorneys' fees." *Soterion Corp.*, 2012 WL 5378251, at *18.

The Joneses now drain further court and party resources by contesting the award and size of those fees. The proceedings below demonstrate just some of the Joneses' bad faith conduct:

- On November 1, 2010, the Joneses faxed a draft copy of this lawsuit to one of Soteria's potential purchasers, in an effort to obstruct the sale. *Id.* at *16 (describing "improper" act "to interfere with the prospective sale"). Their cover letter falsely claimed they were filing the suit that day, which they later conceded was false. *Id.* (describing "falsehood with which the Joneses began the Letter"); A741 (Tr. Trans. at 218:18-219:11).

- On November 19-22, the Joneses verified the complaint, despite knowing that the central allegations were false. A44-46; A734-736; A812-813.

- On February 1, 2011, the Joneses filed the verified complaint. After serving discovery, the Joneses failed to answer Defendants' counterclaims and disappeared for a month, not responding to phone calls or discovery until the Court intervened. B536 (Def. Pre-Trial Br.); *Soterion Corp.*, 2012 WL 5378251, at *16 ("[A]fter filing the Complaint and opposing the Defendants' motion to expedite, the [Joneses] essentially refused to participate in this litigation for a period of time."). Two sets of counsel to the Joneses have withdrawn to date.[2]

- On May 9-10, 2011, the Joneses admitted under oath at deposition that the core claims in their verified petition were false when verified and filed – and that they knew those statements were false at the time. B434, 421-22, 429 (Dep. of S. Jones, at 145:24-146:5; 146:8-23; 146:24-147:10; 96:22-97:6; 125:10-20); B386 (Dep. of R. Jones, at

[2] Defendants have no reason to believe and do not contend that the Joneses' Delaware counsel (either current Delaware counsel or former Delaware counsel) acted inappropriately in the conduct of this litigation. The same, however, cannot be said for the Joneses themselves.

106:15-107:6).

- On May 17, 2011, less than a week after admitting their core claims were false, the Joneses demanded $5.75 million from Defendants. A412; B536-37.[3]

- On May 20, 2011, four days before trial, the Joneses stipulated to dismiss all of their claims with prejudice and agreed to a judgment against them on two of three counterclaims asserted by Defendants. A756; *Soterion Corp.*, 2012 WL 5378251, at *1, *16. *Thus, as of May 24, 2011, Defendants had prevailed on all three of the Joneses' claims and on two of three counterclaims.*

- On February 7-8, 2012, the Court held a trial on Defendants' remaining counterclaim for tortious interference and Defendants' request for attorneys' fees under the bad faith exception of the American Rule. The Court found that the Joneses "sought to use the Draft Complaint as a means to interfere with the prospective sale" and that "the filing of the Complaint appears to have been just another act intended to interfere with the Divestiture Strategy," finding such conduct "improper." *Soterion Corp.*, 2012 WL 5378251, at *16-18. But the Court denied the tortious interference claim on causation grounds, finding that other factors might have precluded the sale. *Id.* The Court awarded Defendants fees incurred before May 24, 2011 for all claims and counterclaims except the tortious interference claim (*i.e.*, for five of the six claims in suit). *Id.* at *18.

- After submission of affidavits from Defense counsel, attorney time sheets, and trial testimony, the Court awarded attorneys' fees and expenses of $842,052.67, an amount which pales in comparison to what was at risk in the Joneses' false suit – which, if successful, would have put Soteria out of business and the entirety of Defendants' $17.7 million investment in Soteria at risk. *See* Letter Op.

The Joneses now appeal both the award and amount of fees, which they admittedly caused Defendants to incur.

[3] Delaware Rule of Evidence 408 prevents use of settlement demands to prove liability for or invalidity of a claim or its amount. They may be used for other purposes, like showing motive.

SUMMARY OF ARGUMENT

I. Denied. Far from being a clear abuse of discretion, Defendants' fee award, $842,052.67, is supported by the record and reasonable. The Joneses brought a frivolous lawsuit based on admitted falsehoods that put an entire company, and Defendants' $17.7 million investment in it, at risk. The fee award is supported by affidavits, fee statements, and client testimony. Defendants prevailed on three of three claims and two of three counterclaims (on the last, tortious interference, the Court found that the Joneses wrongfully interfered, but identified a causation issue). Defendants segregated fees based on the Court's order. It is not surprising that preparing the case generally also aided the tortious interference claim, where the Joneses' entire lawsuit was an "act intended to interfere with the Divestiture Strategy." *Soterion Corp.*, 2012 WL 5378251, at *16.

II. Denied. "This is one of the rare instances where an award of attorneys' fees and expenses is undoubtedly warranted" under the bad faith exception to the American Rule. *Id.* at *18. The Joneses verified a complaint that was false, threatened a company's existence, delayed proceedings, forced up expenses at every step, then agreed to dismiss their own claims with prejudice and concede counterclaims on the eve of trial. And they now complain that they should not pay the fees they forced Defendants to incur in the first place by their bad faith litigation. There was no clear abuse of discretion, and the fee award should be affirmed.

STATEMENT OF FACTS

A. Carousel pays the Joneses $17.7 million for control of Soteria

In 2004, the Joneses sold control of their medical imaging centers at auction to Soteria Investment Holdings, Inc. f/k/a Carousel-Soteria Investment Holdings, Inc. ("Carousel"), a subsidiary of Carousel Capital. *Soterion Corp.*, 2012 WL 5378251, at *2. In return for giving up control, Plaintiffs Robert Jones, Scott Jones, and their family trust, Soterion Corporation, received approximately $17.7 million cash, sellers' notes worth approximately $2 million, and common stock that is junior to Carousel's preferred stock, as well as minority representation on the Board of the new company, Soteria Imaging Servs., LLC ("Soteria"). *Id.* at *2-3; B198-213, B214-229 (the "Sellers' Notes"); B406-07 (Dep. of R. Jones at 33:23-35:1; 38:14; 38:22-24) *see* generally B1-197. Upon formation, Soteria issued Allied Capital Corporation a Senior Note for $9.5 million, to pay the Joneses and fund the investment. *Soterion Corp.*, 2012 WL 5378251, at *2; B1-197.

Soteria's Board "could have as many as seven Managers." *Soterion Corp.*, 2012 WL 5378251, at *3. "As the holder of a majority of the Preferred Units, Soteria Holdings had the right to designate four Managers. At all relevant times, Defendants Schwab, Grigg, Fred Burke, and Harry Nurkin were the Managers designated by Soteria Holdings." *Id.* "At all relevant times, Margaret Jones [Robert Jones's wife] served as a Manager designated by the holders of Common

Units." *Id.* "At least one Manager designated by the Common Unit holders was required to be present at a Board meeting in order for there to be a quorum." *Id.*

B. Soteria considers strategic divestiture to pay down debt in default

Following Carousel's investment, Soteria's performance suffered and fell far short of the sellers' projections. By late 2009, Soteria was in a covenant default under its senior line of credit, now held by Allied's successor, Ares Capital Corporation ("Ares"). *Id.* at *2 n.4. In addition, the senior line of credit was set to mature in November 2010, and Soteria's Board and Management were concerned that Soteria was unlikely to either (i) be able to pay off the note or (ii) refinance it due to Soteria's poor financial performance. *Id.* at *3; B230. On November 4-5, 2009, the Board held a special meeting and received presentations from various investment banks regarding the Company's options to deal with the debt. *Id.*; B231-32. Several banks suggested strategic divestiture of non-core imaging centers as a means for Soteria to maximize its value. Margaret Jones attended this meeting. *Soterion Corp.*, 2012 WL 5378251, at *3 n.17.

In early 2010, Soteria entered into discussions with Ares, about extending the Senior Note's maturity. On March 18, 2010, Ares conveyed to the Board that, despite earlier indications, they likely would not extend the maturity date. *Id.* at *3. Consistent with the investment banks' advice, on April 1, 2010, Soteria's CEO and CFO presented a plan to the Board to raise $11-13 million through the sales of non-core imaging centers to pay down the Senior Note. *Id.*; B233 at B240-43;

B253-54. After the presentation, "the Board instructed management to continue investigating the possibility of selling non-core imaging centers and then to report back to the Board for approval; Margaret Jones suggested that if Ares would not extend the maturity of the Senior Note, Soteria should seek to sell the entire company." *Soterion Corp.*, 2012 WL 5378251, at *3.

C. The Joneses oppose strategic divestiture for personal gain

The Joneses had a personal motivation to favor selling the entire company over strategic divestiture of non-core assets. The Joneses' Sellers' Notes "were subordinate to the Senior Note, and the Joneses were generally prohibited from demanding or suing for payment of any amounts owed in respect of the Sellers' Notes before the Senior Note was paid in full." *Id.*

REDACTED

Acting on its instruction from the Board, on April 29, 2010, Management informed the Board that it had contacted broker River Corporate Advisors ("RCA") to discuss selling the non-core centers. *Soterion Corp.*, 2012 WL 5378251, at *4. After this update, Margaret Jones contacted Soteria's CEO and strongly suggested that the Board had not authorized Management to sell the non-core centers. Ms. Jones also called Mr. Grigg and repeated her position that Soteria should sell the entire company. *Id.*

In response to Ms. Jones' concerns, the Board held a special meeting by teleconference on May 3, 2010 with all of its representatives present. *Id.* (citing B255 (May 3, 2010 Board minutes); A695 (Tr. Trans. at 35)). "At the May 3 Board meeting, the Divestiture Strategy was reviewed and a recap of the actions taken by management to date was provided. Margaret Jones was the only Manager who objected to the Divestiture Strategy and the actions taken by management, and she again evinced a preference for a sale of the entire company." *Id.* Except for Ms. Jones, all of the Board members reaffirmed their agreement with the strategy. *Id.* REDACTED

Ms. Jones then stated that she wanted to hear from the investment advisers regarding potential sale of the entire company. On May 13, 2010, the Board invited Margaret Jones' favored investment advisers, Brookwood Associates ("Brookwood"), to a full Board meeting to discuss its recommendations for a potential sale of the entire Company. *Soterion Corp.*, 2012 WL 5378251, at *4; B258-60. Brookwood recommended a parallel path strategy that sought to divest non-core centers while also seeking offers from bidders interested in purchasing the whole Company. *Id.*

After Brookwood's presentation, the Board unanimously agreed to retain Brookwood to serve as its primary investment adviser during the sale process. *Id.*

The Board also unanimously agreed to retain RCA to sell the non-core centers. *Id.* In June 2010, Brookwood contacted Lake Cumberland to see if it was interested in acquiring Soteria's Lifescan center. *Soterion Corp.*, 2012 WL 5378251, at *6 (citing B261 at B270). "Details of the discussions between Brookwood and Lake Cumberland were included in the Divestiture Strategy update emails sent to the Board." *Id.* (citing B261, B282).

At the July 29, 2010 Board meeting, Brookwood and RCA provided the Board with a detailed update of their progress in the divestiture process. *Id.* at *4 (citing B309 (July 29, 2010 Board minutes)). RCA informed the Board that it had contacted 47 prospective purchasers, and received nine bids totaling approximately $10-12 million for six non-core centers. B309. Brookwood informed the Board that it had contacted nearly 200 prospective buyers for the entire company, but no buyers had shown any interest in acquiring the entire company, and that any such sale likely could not be completed within Ares' deadlines. *Soterion Corp.*, 2012 WL 5378251, at *4. "By this time, Ares was requesting that Soteria raise $10 million from sales of non-core facilities by September 30, 2010." *Id.* at *4 n.33.

REDACTED

D. The Joneses' bad-faith litigation

The Joneses could not prevent the Board from acting in the company's best interests through normal channels, so they attempted another approach: threatened, then actual, litigation, premised on "a complaint laden with falsities." *Id.* at *18.

1. The Joneses threaten suit with false claims

On November 1, 2010, the Joneses faxed a draft version of this lawsuit to the CEO of the parent of Lake Cumberland, Lifepoint Hospitals, Inc., in an effort to obstruct the sale. *Id.* at *6-7. This fax contained two major sources of falsity. First, the cover letter warned the potential purchaser that "the attached Complaint . . . is being filed in Delaware today, November 1, 2010." A622. The Joneses later conceded that this was false when stated. A741 (Tr. Trans. at 218:18-219:11); *see also Soterion Corp.*, 2012 WL 5378251, at *16 (describing the "falsehood with which the Joneses began the Letter").

The draft Complaint itself was also based on blatant falsehoods. The Court of Chancery did not formally reach this issue but made its observations known: "Although the Court harbors serious doubts about whether the Joneses had a good faith belief in the key allegations of the Draft Complaint at the time it was faxed, the Court does not need to resolve this issue. . . ." *Soterion Corp.*, 2012 WL 5378251, at *16. The record amply supports the falsity of the draft complaint when sent on November 1, 2010. For example, the draft complaint alleged:

- "Defendants are engaging in these 'sales' [of imaging centers] without authority." A624, ¶ 21.
- "No sale of any imaging center has been raised or voted on at any Board of Managers meeting." *Id*.
- "No valid delegation of authority to execute a plan to sell any imaging center has been voted on in any Board of Manager meeting." *Id*.

- "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." *Id.*

- "No transaction as described above has ever been raised or voted on in any meeting." *Id.* ¶ 22.

Having attended repeated Board meetings where the divestiture process was raised, considered, discussed, and approved, having received the periodic updates on the divestiture process by email, and having attended the Board meetings where the Board was updated on the progress of the sales, Margaret Jones clearly knew these allegations were false. B353-58; *see supra* at pp. 6 - 10. Her husband, Robert Jones, testified at trial that she had informed him of board meetings discussing "the divesture process," in which the Board was "considering either a sale of the whole company or a sale of certain facilities," in April-July 2010, well before the draft complaint was faxed in November 2010. A811-12 (Tr. Test. at 498:16-500:19). Scott Jones and Robert Jones received and reviewed copies of Board minutes from Margaret Jones and from the Company prior to their transmittal of the fax to Lake Cumberland. B383 (Dep. of R. Jones, at 95:5-13); B425 (Dep. of S. Jones, at 109). These minutes also demonstrated that the various allegations in the fax to Lake Cumberland were false. B424 (Dep. of S. Jones, at 108:6-10).

As the Court concluded, "[t]he falsehood with which the Joneses began the Letter reveals that they sought to use the Draft Complaint as a means to interfere

with the prospective sale of the Lifescan facility without having their claims—which also turned out to be false—adjudicated by this Court." *Soterion Corp.*, 2012 WL 5378251, at *16. Within hours of receiving the fax, Lake Cumberland wrote to Soteria's investment banker from Brookwood: "We received notice of a lawsuit by Robert Jones against Soteria today that seeks injunctive relief from the sale of the centers. Clearly this [is] a big problem." B313-14.

2. The Joneses verify and file the false claims

The Joneses indisputably knew their claims were false when they verified them in late November and filed them in February 2011. On October 29, 2010, Soteria emailed its Board members, including Ms. Jones, reminding them that a Board meeting was going to be held on November 9, 2010 and noting that the Board meeting would include a '"[r]eview of [the] facility Divestiture Process and related actions requiring Board approval (as applicable)."' *Soterion Corp.*, 2012 WL 5378251, at *6 (quoting B312); B491 (Dep. of M. Jones, at 193). On November 4, 2010, Soteria provided another notice of the November 9, 2010 Board meeting, this time delivered to Ms. Jones both by email and at her residence. B315. That notice informed Ms. Jones, the Joneses' Representative to the Board, that "Management requested the Board to authorize… [the] [s]ale of substantially all the assets of Lifescan Imaging ("LSI") to Lake Cumberland Regional Hospitals (owned by Lifepoint Hospitals, Inc.)." *Id.* at CAR0000706. The notice also informed Ms. Jones of all the essential terms of the deal, including the $1.9 million

purchase price and the November 15, 2010 expected closing date. *Id.*

Margaret Jones and Scott Jones both attended the November 9, 2010 meeting, even though only Margaret Jones was a Board member. "Nevertheless, Scott Jones was permitted to attend the Board meeting as an observer, and he did, in fact, participate in the meeting, though he did not vote on any matters." *Soterion Corp.*, 2012 WL 5378251, at *8. "Ultimately, the Board approved the terms of a proposed sale of the Lifescan facility to Lake Cumberland at the November 9, 2010 Board meeting, with only Margaret Jones voting in opposition." *Id.* at *6.

Thus, when the Joneses verified their complaint two weeks later, and filed their Verified Complaint three months later on February 1, 2011, they indisputably knew that key allegations were false. Numerous key claims in Verified Complaint were patently false:

- "Defendants are engaging in these 'sales' [of imaging centers] without authority. . . ." A40, ¶ 23.
- "No sale of any imaging center has been raised or voted on at any Board of Managers meeting." *Id*.
- "No valid delegation of authority to execute a plan to sell any imaging center has been voted on in any Board of Managers meeting." *Id*.
- "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." *Id.*
- "No transaction as described above has ever been raised or voted on in any meeting." *Id.* ¶ 24.

- "[T]he '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." *Id.* ¶ 25.

- "Defendants … breached the Soteria LLC Agreement by taking steps to sell the assets of Soteria LLC without first obtaining a majority vote of the Board of Managers at a properly called meeting." A41, ¶ 31.[4]

As the Court of Chancery noted: "After Scott Jones attended the November 9, 2010 Board meeting at which the Board approved the sale of the Lifescan facility to Lake Cumberland and approved the sale of another imaging center, *he knew that the central allegation of wrongdoing in the Complaint*—that Soteria was selling facilities without appropriate Board authorization—was false." *Soterion Corp.*, 2012 WL 5378251, at *16 n.149 (citing A752 (Tr. Trans. 261–63)) (emphasis added). Similarly, "[a]fter the November 9 Board meeting, [Robert] Bob Jones was informed by Scott Jones that the Board voted to approve the sales of these two facilities; he was also aware that there was a quorum at this Board meeting. Therefore, *Bob Jones also knew that the central allegations of the Complaint were false*." *Id.* (emphasis added). "Furthermore, Scott Jones directly admitted that at the time the Complaint was filed he knew some of the allegations were false." *Id.* (citing A752 (Tr. Trans. 261–63)).

The Verified Complaint sought as relief a declaration that voided all of the completed sales of the imaging centers and assets. A42, ¶ 42. The Verified

[4] The Joneses concede that the differences between the draft and filed complaint are "minimal." Pl. Br. at 29 n.17.

Complaint also sought temporary, preliminary and permanent injunctions to enjoin Soteria from selling or negotiating the sale of any imaging center or asset, executing any agreement for a sale, or transferring title to any imaging center or asset. A43, at ¶ 42.

The Joneses have since admitted that they knew that a number of material allegations in the Verified Complaint were false on the dates they were verified (November 19 and 22, 2010) and filed (February 1, 2011). For instance, the Joneses admit that their allegation that "no sale of any imaging center had ever been raised or voted on at any Board of Managers' meeting" is false:

> Q: …So if you'll turn on Page 6, Paragraph 23-- Paragraph 23, second sentence: "No sale of any…imaging center has been raised or voted on at any board of managers meeting." Do you see that sentence?
>
> A. I do.
>
> Q. That was false when it was filed, wasn't it? When this complaint was filed, that statement was false?
>
> A. Yes. I think we covered this earlier….
>
> Q. Right. But I want to know as of the date this was filed with the Court of Chancery in Delaware,… if you agree with me that, on the date it was filed, it was a false statement? You agree with that, don't you?
>
> A. Yes.

B434 (Dep. of S. Jones, at 146:8-23); *see also* B386 (Dep. of R. Jones, at 106:15-107:6) (admitting that Margaret Jones informed him of the Board's discussions to

sell individual imaging centers on several occasions).

The Joneses also admit that their allegations that "no meeting to which any Class A Common Manager has ever been invited or given notice of has ever raised or addressed the approval of any sale of a center" are also false:

> Q. Okay. Last sentence of that paragraph: "No meeting to which any Class A common manager has ever been invited or given notice has ever raised, addressed or approved any such action." Same thing. That wasn't accurate when this complaint was filed in the Court of Chancery, was it?
>
> A. No.
>
> Q. Yeah. When you said, "No," you meant "no," it wasn't accurate; right?
>
> A. Yes.

B434 (Dep. of S. Jones, at 146:24-147:10). Indeed, Scott Jones was at the November 9, 2010 meeting where the Board discussed the sale of two imaging centers while he sat next to his mother, Margaret Jones, the "Class A Common Manager." *Id.* at 96:22-97:6; 125:10-20. Robert Jones also admits that he knew this allegation was false before the Complaint was verified and filed. B386 (Dep. of R. Jones, at 106:15-107:6). Finally, Scott Jones testified that he signed the verification despite understanding he was under oath and that the Complaint contained several material falsehoods. B434 (Dep. of S. Jones, at 145:24-146:5).

3. The Joneses file their lawsuit as part of a scheme

As the Court found, the Joneses' "filing of a complaint laden with falsities

was part of an ill-conceived strategy intended to interfere with Soteria's sales efforts." *Soterion Corp.*, 2012 WL 5378251, at *18. "Although the Counterclaim Defendants' objective in interfering with the Divestiture Strategy is not entirely clear, the best inference to be drawn from the facts is that they hoped to use their control over the prospective sale of the Lifescan facility, which was obtained through their interfering acts, as leverage to receive early payment of the Sellers' Notes." *Id.* at *16 n.150.

Indeed, after the Board voted 4-1 (with Ms. Jones dissenting) to approve multiple divestitures at the November 9, 2010 meeting, the Joneses sent Soteria a November 12, 2010 letter making a spurious demand for accelerated payment of $1 million under their seller's note. B351-52. Then, in a final gasp of their "ill-conceived" gambit, the Joneses demanded $5.75 million from Defendants on May 17, 2011 – less than a week after admitting to knowingly verifying a false claim, and three days before stipulating to dismiss all of their claims with prejudice and agreeing to judgment against them on two of three counterclaims. A412.

4. The Joneses improperly delay, stall, and increase the expense of their false lawsuit

After being served with the Joneses' lawsuit, Defendants knew that the allegations in the Verified Complaint were false and filed counterclaims seeking declarations that the sales were properly authorized and for tortious interference with the sales. Defendants also filed a motion to expedite the proceedings, which the Joneses opposed. *Soterion Corp.*, 2012 WL 5378251, at *16. Expedition was

critical. The Joneses' lawsuit severely crippled Soteria's divestiture strategy and placed it in grave danger of a default. In response to the lawsuit, Soteria's lender gave a forbearance on partial repayment until mid-July 2011. Time was of the essence.

The Joneses' Verified Complaint implicated each of Soteria's completed or contemplated imaging center sales. A42-43. Likewise, their document requests and interrogatories broadly sought discovery related to each of the imaging center sales. B560 (Def. Pre-Trial Br.). As a result, Defendants undertook a massive discovery effort to collect and review documents related to all six of the sales conducted up to that date. Eventually, Defendants expended several hundred thousand dollars to produce more than 130,000 pages of documents. *Id.* Yet, two weeks after their requests, at their depositions on May 9 and 10, 2011, the Joneses disclaimed their challenge to all but one of the sales. Less than two weeks after that, the Joneses consented to a judgment in favor of Defendants with respect to the remaining sale they were contesting.

After the Court granted expedition, the Joneses essentially disappeared. Their Texas counsel did not respond to telephone calls or email correspondence from Defendants' counsel. They refused to file an answer to Defendants' Counterclaims, and ignored Defendants' requests for comments on proposed scheduling and protective orders. As the Court observed: "[T]he filing of the Complaint appears to have been just another act intended to interfere with the

Divestiture Strategy. It comes as little surprise then that, after filing the Complaint and opposing the Defendants' motion to expedite, *the Counterclaim Defendants essentially refused to participate in this litigation for a period of time*," until the Court intervened. *Soterion Corp.*, 2012 WL 5378251, at *16 (emphasis added).

Thereafter, the Joneses' behavior improved from unresponsive to uncooperative. They failed to respond timely to telephone calls and correspondence, and sought to delay scheduled depositions. Despite the expedited schedule, they served late discovery responses or none at all (the Joneses never responded to Defendants' Interrogatories). B536-37 (Def. Pre-Trial Br.). On May 9-10, 2011, the Joneses appeared at their depositions and admitted to the falsehoods in their fax and Verified Complaint. Nevertheless, on May 17, the Joneses issued a settlement demand of full payment on the sellers' notes and a stock buyout, totaling around $5.75 million, which Soteria rejected the same day. A412; B-536.[5]

Three days later, on May 20, 2011, the Joneses consented to the Court's entry of a Judgment and Order, which, among other things, dismissed all of their claims with prejudice. The Court granted judgment in favor of Defendants on Count I of their Counterclaims, declaring that all completed sales were properly approved by the Board and valid, and Count II, recognizing the Joneses

[5] Rule of Evidence 408 permits the use of settlement offers to show motive. The Joneses' $5.75 million demand, two days before abandoning their claims, shows their vexatious motive.

wrongdoing and enjoining them from further wrongful acts to frustrate the decisions of the Board. *Soterion Corp.*, 2012 WL 5378251, at *1, *16; B537-38 (Def. Pre-Trial Br.).

5. Trial

On February 7-8, 2012, the Court held a two-day trial on Defendants' remaining counterclaim for tortious interference and their request for attorneys' fees under the bad faith exception of the American Rule. The Court found that the Joneses "improper" conduct was an "ill-conceived strategy intended to interfere with Soteria's sales efforts." *Soterion Corp.*, 2012 WL 5378251, at *16-18. But the Court denied the tortious interference claim on causation grounds. *Id.* Defendants had thus prevailed on all three of the Joneses' claims and on two of their three counterclaims.

The Court awarded Defendants fees incurred before May 24, 2011 for all claims and counterclaims except the tortious interference claim. *Id.* at *18. After submission of affidavit evidence from Defense counsel, attorney time sheets, and trial testimony from Defendants, the Court awarded fees and expenses of $842,052.67, an amount which pales in comparison to what was at risk in the Joneses' false suit – which, if successful, would have put Soteria out of business and the entirety of Defendants' $17.7 million investment in Soteria at risk. *See* March 7, 2013 Letter Opinion ("Letter Op.") and March 7, 2013 Final Judgment.

ARGUMENT

This is an exemplary case for fee-shifting under the bad faith exception to the American Rule. And the amount of fees is supported by the record and reasonable: Defendants had no choice but to mount an expedited, vigorous defense where failure meant the collapse of Soteria and Defendants' $17.7 million investment. The Joneses have shown nothing close to a clear abuse of discretion, and the Court of Chancery's March 7, 2013 Final Judgment should be affirmed.

A. Fee Award

1. Question Presented

Was the Court of Chancery's award of attorneys' fees and costs under the bad faith exception to the American Rule warranted by the adjudicated bad-faith litigation conduct of the Joneses? A32, A34.

2. Scope of Review

This Court reviews an award of attorneys' fees for "clear abuse of discretion. . . ." *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005). The reviewing court will not substitute its "own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *William Penn P'ship v. Saliba*, 13 A.3d 749, 758 (Del. 2011) (citing *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006)); *cf.* Pl. Br. at 26, 22 n.14 (same).

3. Merits of Argument

It is somewhat stunning that the Joneses continue to paint their litigation conduct as "good faith," *see, e.g.*, Pl. Br. at 31, when the Court of Chancery held: "This is one of the rare instances where an award of attorneys' fees and expenses is undoubtedly warranted." *Soterion Corp.*, 2012 WL 5378251, at *18. The Court of Chancery made this fact-bound determination of bad faith after viewing extensive live testimony from the Joneses and assessing their credibility. *See, e.g.*, *id.* at *16 n.153 ("The Court is not persuaded by Scott Jones's testimony to the contrary."). Assessing conceded untruths, inescapable facts, and unconvincing justifications, the Court concluded: "By 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.* at *18.

Fee-shifting is justified under the bad faith exception to the American Rule "where a losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Dover Historical Soc'y, Inc.*, 902 A.2d at 1093 (citation and internal quotation marks omitted). "There is no single standard of bad faith that warrants an award of attorneys' fees . . .; rather, bad faith is assessed on the basis of the facts presented in the case." *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005).

Delaware courts have found bad faith "where parties have unnecessarily

prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims." *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 546 (Del. 1998) (per curiam). Courts have also found bad-faith litigation conduct justifying an award of fees where a plaintiff "used litigation and the threat of litigation merely to obtain quick settlement payments from third parties, and not to bring its claims to definitive adjudication." *Universal City Studios, Inc. v. Nintendo Co.*, 797 F.2d 70, 76 (2d Cir. 1986).

Here, the Court of Chancery noted that such cases are rare, and then, applying that proper understanding, found the Joneses' conduct in this matter more than sufficient. The Joneses "knowingly asserted frivolous claims." *Johnston*, 720 A.2d at 546. They "unnecessarily prolonged or delayed litigation" through opposing expedition and refusing to answer pleadings or discovery. *Id.* They had no interest in bringing the claims to definitive adjudication. *Universal City Studios, Inc.*, 797 F.2d at 76; *cf. Soterion Corp.*, 2012 WL 5378251, at *16 ("In sum, the Court finds that the [Joneses] never intended to bring their claims to definitive adjudication. . . .").

Defendants are plainly entitled to recover attorneys' fees and expenses under the bad faith exception to the American Rule when the Joneses' admitted that they knowingly verified and filed a false complaint; opposed efforts to expedite the case; forced costly discovery; refused to answer counterclaims, return calls, or respond to discovery without court intervention; then – four days before trial –

agreed to dismiss all of their claims with prejudice and concede liability on two of three counterclaims.

Even now, the Joneses fail to own up to the full extent of their conduct. Their Opening Brief disputes the award of fees based on three slim arguments: that not every allegation in their complaint was known to be false at the time; that the allegations were purportedly not false when drafted (though they were *admittedly* false when verified and filed); and that the Joneses conceded the falsity of these positions once confronted with incontrovertible evidence of their knowledge of the falsity. For obvious reasons, each of these positions fails:

(1) The false statements were core allegations

The Joneses attempt to minimize their false claims by accusing Defendants of "[c]ompletely ignoring" the "overarching concern of the Joneses" and instead "focus[ing]" on ostensibly minor claims in the Complaint. Pl. Br. at 27, 29, 31. The Court of Chancery disagreed: "[B]y the time the Complaint was filed, the Joneses knew that ***key allegations*** in the Complaint were demonstrably false," and they acted in bad faith by filing "a lawsuit the ***core allegations*** of which they knew to be false at the time they filed it. . . ." *Soterion Corp.*, 2012 WL 5378251, at *16, *18 (emphasis added). Indeed, there is nothing ancillary about the following false statements:

- "Defendants are engaging in these 'sales' [of imaging centers] without authority. . . ." A40, ¶ 23.

- "No sale of any imaging center has been raised or voted on at any Board of Managers meeting." *Id*.

- "No valid delegation of authority to execute a plan to sell any imaging center has been voted on in any Board of Managers meeting." *Id*.

- "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." *Id.*

- "No transaction as described above has ever been raised or voted on in any meeting." *Id.* ¶ 24.

- "[T]he '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." *Id.* ¶ 25.

- "Defendants, therefore, have breached the Soteria LLC Agreement by taking steps to sell the assets of Soteria LLC without first obtaining a majority vote of the Board of Managers at a properly called meeting." A41, ¶ 31.

As the Court properly noted: "After Scott Jones attended the November 9, 2010 Board meeting at which the Board approved the sale of the Lifescan facility to Lake Cumberland and approved the sale of another imaging center, *he knew that the* ***central allegation*** *of wrongdoing in the Complaint*—that Soteria was selling facilities without appropriate Board authorization—was false." *Soterion Corp.*, 2012 WL 5378251, at *16 n.149 (citing A752 (Tr. Trans. 261–63)) (emphasis added) (holding same for Robert Jones).

Even the Joneses concede elsewhere that these false claims go to the core of their lawsuit. Indeed, on page one of their opening brief to this Court, the Joneses affirm that they "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." Pl. Br. at 1 (emphasis added).

The Joneses try to excuse these bad faith claims by arguing that not *every* statement in the Verified Complaint was knowingly false when verified. *See* Pl. Br. at 31 ("In other words, striking the allegations of ¶ 21 out, the Joneses still had good faith allegations and claims with an underlying true factual basis."). That is some standard indeed. While the Joneses' focus on paragraph 21 is myopic and misplaced (indeed, it is the Joneses who here try to ignore the "overarching" falsities of the complaint), it defies common-sense to claim that a statement was made in good faith because only some of it was composed of overt lies.

(2) False when drafted, false when verified, false when filed

The Joneses next look for error by suggesting that their allegations were not false when drafted: "Appellants concede that they verified certain facts that, while true when the complaint was drafted, were not true when the Verified Complaint was filed." Pl. Br. at 32. This is artful phrasing that again evades full responsibility: as the Joneses concede elsewhere in their brief, the Complaint was not only false when filed, *but false when verified*. *See id.* at 29-30.

As shown, the complaint was demonstrably false when drafted. *See* pp. 10-17, *supra; see also Soterion Corp.*, 2012 WL 5378251, at *16 ("[T]he Court

harbors serious doubts about whether the Joneses had a good faith belief in the key allegations of the Draft Complaint at the time it was faxed. . . .”). But no matter: it is indisputable that the Complaint was false *when verified.* Scott Jones verified the complaint on November 22, 2010. *See* A44 (verifying for Soterion); A45 (verifying in his individual capacity). As he admitted at trial, Scott Jones knew several critical facts in the draft complaint were false no later than November 9, 2010. *See, e.g.*, A735 (Tr. Trans. 194:10-16) (“Q. That allegation became untrue on November 9; right? A. That’s correct. Q. And you knew that on November 9; right? A. Obviously, I knew that on November 9, yes.”); *see also* A734-736 *generally* (listing false facts as of November 9, 2010). Similarly, Robert Jones signed the verification on November 19, 2010. A46. He too knew several critical facts were false no later than November 9, 2010. A812-813.

At trial, the Joneses had differing explanations for why they verified a false complaint. Scott Jones testified that he was “sure” he would have reviewed the complaint before verifying, and conceded that it contained sections “that couldn’t possibly be true, and that was obviously an error, an oversight on my part one way or another.” A751. Robert Jones testified, by contrast, “I already said that I didn’t read this when I signed it, which was a mistake,” despite averring in the complaint, “I, Robert B. Jones, having been duly sworn, do hereby depose and say that I have reviewed the foregoing Verified Complaint.” A813, A812, respectively. The Court of Chancery assessed the credibility of this live testimony. It found “the

Joneses and Soterion behaved in a manner that exemplifies the sort of bad faith conduct deserving of an award of attorneys' fees," and that fees and expenses were "undoubtedly warranted." *Soterion Corp.*, 2012 WL 5378251, at *18.

(3) Truth as a last resort

Finally, the Joneses try to avoid the fee award by claiming: "[I]n 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. . . ." Pl. Br. at 31. This claim is contrary to the record. The entire litigation was a process of proving up the real facts in the face of "a complaint laden with falsities. . . ." *Soterion Corp.*, 2012 WL 5378251, at *18. The Joneses opposed expedition, disappeared during litigation, refused to answer counterclaims, never answered interrogatories, and only admitted falsity at the eleventh hour, when faced under oath with inescapable facts.

All of the Joneses' attempts to evade the consequences of their actions fail. The Joneses have shown nothing even remotely approaching a clear abuse of discretion. The Court's March 7, 2013 Final Judgment should be affirmed.

B. Fee Amount

1. Question Presented

Did the Court of Chancery abuse its discretion by awarding $842,052.67 in attorneys' fees and costs? A32-34.

2. Scope of Review

"The Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded. Absent a clear abuse of discretion, [this Court] will not reverse the Court of Chancery's award." *Kaung*, 884 A.2d at 506.

3. Merits of Argument

The Court of Chancery's award of fees and costs totaling $842,052.67 was not a clear abuse of discretion, when the amount was supported by attorney affidavits, fee statements, and client testimony; when the Joneses forced Defendants to mount a "bet the company" defense to prevent total liquidation of Soteria; when the tortious interference claim was part and parcel of litigating against the Joneses' claims; and when the size of fees spent was dwarfed by the potential loss of Defendants' $17.7 million investment if the Joneses prevailed. The Joneses now challenge both the size and apportionment of fees, which the Court of Chancery carefully reviewed and determined. *See* Letter Op. Both complaints fail.

(1) The size of fees was reasonable

As the Court of Chancery found, Defendants' fees "are substantial, but they

are reasonable" in light of the amounts and issues at stake. *See* March 7, 2013 Letter Op. at 2. The Joneses' litigation created a "bet the company" emergency, seeking to enjoin Soteria from fulfilling its forbearance plan. As the Court held: "A successful divesture was viewed as essential to the Defendants' financial survival. With the Plaintiffs' interference, that effort was in jeopardy, but, given its significance, it justified a substantial commitment of resources." *Id.* at 2-3. Defendants' $842,052.67 in fees was a fraction of their potential loss, where they had invested over $17.7 million in Soteria. Indeed, the Joneses' motive in challenging the amount of fees is suspect when they themselves demanded payment of $5.75 million on the claims, shadowing the $842,052.67 spent to defeat those claims. A412.

The Court had before it ample evidence to make the factual determination of reasonability. *See* A400-566 (Defendants' Letter Brief on Fees, Attorney Affidavits, and time sheets from all firms). And the Court considered and rejected the very arguments the Joneses raise here. *See* Letter Op. The Court rejected a comparison between the Joneses' and Defendants' fees, noting: "The Plaintiffs' conduct, for little immediate cost to them, caused a great deal of consternation for the Defendants. It takes much more effort to disprove a falsehood than it does to make a false accusation." *Id.* at 3; *cf.* Pl. Br. at 20.

Indeed, as one Delaware court aptly put it: "The record . . . strongly suggests that [plaintiff] adopted a litigation strategy designed to overwhelm

[defendant] by forcing him to incur significant expenses defending a wide-ranging, unfocused action. Given this context, it is not at all surprising that [defendant] incurred greater fees defending than [plaintiff] did attacking." *Danenberg v. Fitracks, Inc.*, 58 A.3d 991, 999 (Del. Ch. 2012).

The same is true here. The Joneses engaged in asymmetric litigation, lobbing meritless claims that nonetheless, if not vigorously defeated, put the entire company at risk of failure. The Joneses served voluminous discovery then shirked their own discovery obligations. The Joneses knew full well that their litigation put the entire company at risk (indeed, they stood to benefit personally from a liquidation, which would purportedly trigger payment on their Seller's Notes). *See* B423 (Dep. of S. Jones, at 102:23-104:16). Expedition was expensive – Defendants had to mount a "bet the company" defense and respond to massive discovery requests in a significantly shortened, three-month timeframe. Yet expedition was essential. Delay (and thus default) was as bad as a loss.

While the Joneses may now wish that Defendants had expended less effort in defending Soteria's survival in this litigation, the Joneses could have easily avoided this situation altogether by not verifying, filing, and then litigating knowingly false allegations.

(2) The apportionment was reasonable

The Court of Chancery also considered, and rejected, the Joneses' apportionment argument. As the Court noted, after a fact-bound review:

"Allocation of attorneys' fees between qualifying work and non-qualifying work is not easy and certainly does not resemble a precise scientific effort. The Court is satisfied, however, that the allocation made by the Defendants and their counsel was in good faith and reasonable." Letter Op. at 4.

Again, the Court had before it ample evidence to make its determination. *See* A400-566. Lead defense counsel specifically addressed the Joneses' apportionment arguments in affidavit testimony, averring that the vast majority of work before May 24, 2011 was focused on winning the injunctive/declaratory claims; that Defendants had in fact asked to bifurcate out the tortious interference claim for later trial; that most of the work benefiting the tortious interference claim would have been done anyway; and that he had deducted the time specifically attributable to the tortious interference claim. A411. The Court found the Defendants' apportionment reasonable, concluding "a fair attempt was made to separate out the fees that did not qualify." Letter Op. at 3.

Once again, the Joneses attempt to contradict a fact-bound determination deserving "clear abuse of discretion" deference with assertions that are slight at best. The Joneses first argue that a statement by Defense counsel to the Court of Chancery – that the discovery needed for the tortious interference claim was "90 percent" done in advance of the May 2011 trial setting – shows that more fees must be allotted to the tortious interference counterclaim (and thus excluded from the fee award). Pl. Br. at 23. But this is a non-sequitur. The tortious interference

claim turned on the same facts as every other claim in the case, since, as the Court of Chancery aptly noted, the Joneses' entire litigation was an act of "interference." *See* Letter Op. at 2 ("The Plaintiffs initiated this action in an ill-conceived effort to defeat a divesture plan developed by the Defendants and their sponsors."); *Soterion Corp.*, 2012 WL 5378251, at *18 (entire litigation was "part of an ill-conceived strategy intended to interfere with Soteria's sales efforts."). To prove interference, Defendants had to prove the same facts as for the declaratory/injunctive claims and counterclaims.

Thus, there is no surprise that by working up a defense to the Joneses' claims, a tortious interference case was also largely supported in the process. While Defendants here *did* apportion their fees, carefully and reasonably, it is well-settled that "if the services performed in litigating both successful and unsuccessful claims have a common core of facts and the services relating to each cannot be easily allocated, then the plaintiff should recover a full compensatory fee." *Mattera v. Blum (In re Mattera)*, 128 B.R. 107, 113 (Bankr. E.D. Pa. 1991) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)); *see also Tekstrom, Inc. v. Savla*, 2005 WL 3589401, at *3 (Del. Com. Pl. Nov. 22, 2005) (rejecting plaintiff's assertion that the fee shifting should be narrowly applied to a single issue and finding "[a]lthough there were different legal theories, there was one common set of facts" and reasoning that "[i]t was necessary for [defendant] to defend [plaintiff's] claim against him in order for him to prevail on his [successful] claim").

The Joneses next try to single out specific attorney time entries to quibble with Defendants' (and the Court's) apportionment. These selections fail on their face. The Joneses complain of time entries concerning "work on answer, counterclaim," "draft counterclaim," and "revise answer and counterclaim." Pl. Br. at 23-24; *cf.* A418. This is unmoving, since two of the three counterclaims were Defendants' successful claims for injunctive/declaratory relief, which they won in May 2011 and were expressly part of the fee award. A review of the "answer and counterclaim" in question reveals that the section on tortious interference constitutes about 3 paragraphs (one of which only incorporates preceding paragraphs) out of 90. A48-69. Ironically, this apportionment comes out to around the precise 3.21% spread the Joneses decry. And this was their best evidence for an alleged pre-May 24 focus on tortious interference.

There is simply no clear abuse of discretion, or anything close. The Court of Chancery's reasoned, fact-bound determination should be affirmed, bringing closure to the Joneses' conceded bad faith litigation.

CONCLUSION

For the reasons set forth above, Appellees 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, respectfully request this Court AFFIRM the Court of Chancery's March 7, 2013 Final Order and Judgment, and grant them any such other and further relief, including fees, costs, and expenses, to which they may show themselves justly entitled.

Respectfully submitted,

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