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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOTERION CORPORATION, ROBERT N. JONES and R. SCOTT JONES,	)	No. 179, 2013
Plaintiff/Counterclaim Defendants Below, Appellants.	)	
v.	)	ON APPEAL FROM THE CHANCERY COURT OF THE STATE OF DELAWARE C.A. No. 6158-VCN
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.	)	

APPELLANTS' REPLY BRIEF
(Public Version)

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I. The Trial Court abused its discretion in awarding attorneys' fees and costs pursuant to the bad faith exception to the American Rule

In its Answering Brief, Soteria[1] employs overheated rhetoric and characterizations to obscure the issues on appeal.[2] A departure from the American Rule requires totally unjustified conduct. *See Weinberger v. UOP, Inc.*, 517 A.2d 653, 656 (Del. Ch. 1986). A party acting merely under an incorrect perception of its legal rights does not engage in bad faith conduct. *LeCrenier v. Central Oil Asphalt Corp.*, 2010 WL 5449838, *5 (Del. Ch. 2010). In this case, an award of fees and expenses under the bad faith exception is unwarranted. The Joneses,[3] based on legitimate concerns regarding the Soteria Board's conduct, filed suit in an attempt to protect their rights. *See, e.g. LeCrenier v. Central Oil Asphalt Corp.*, 2010 WL 5449838,

[1] "Soteria" collectively refers to Appellees Soteria Investment Holdings, Inc f/k/a Carousel-Soteria Investment Holdings, Inc. ("Carousel"), Soteria Imaging Services, LLC, and the individual Appellees.

[2] Soteria liberally uses the word "false," and other derivations thereof, exaggerates facts, and uses self-serving conclusory statements as a strategy against reason, equity and reality.

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

*5 (Del. Ch. 2010)(finding an award of fees under the bad faith exception was not warranted where Plaintiffs with legitimate concern filed suit in an attempt to protect their rights even though the "unsuccessful action was perhaps based on a misguided understanding of the DGCL.")

The Chancery Court in its Opinion of October 31, 2012, concluded that attorneys' fees and expenses were warranted under the bad faith exception to the American Rule. The Court's sole basis for doing so was its erroneous finding that "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." *Soterion Corp. v. Soteria Mezzanine Corp.*, 2012 WL 5378251, *18 (Del. Ch. 2012). Earlier in its Opinion, the Court described what it considered to be a "core allegation" stating about Plaintiff Scott Jones: "he knew that the central allegation of wrongdoing in the Complaint--that Soteria was selling facilities without appropriate Board authorization--was false." Soterion Corp. at fn. 149, p.*16. As set forth in the Opening Brief, the Complaint as a whole had a valid and justifiable

basis, even if it contained an allegation within the Complaint that was not true (at the time of filing)[4].

With respect to selling facilities and Board authorization, the Verified Complaint was more than just a matter of whether the sale of Lifescan (or other specific facility) had been voted on by the Board (as occurred at the November 9 Board Meeting with respect to Lifescan and Tennessee Imaging). The Joneses had a well-founded and good faith belief that the Board was not acting forthrightly and that, to protect the Company and their interest in the Company, legal relief in the form of declaratory and injunctive relief was needed. The record supported the Joneses position.

Scott Jones consistently testified that from his perspective proper Board authorization <u>included</u> having clear ownership of assets that were being marketed and sold. Soteria's ownership of the Lifescan facility was

[4] Those being from paragraph 23 of the Complaint: "No sale of any imaging center has been raised or voted on at any Board of Managers meeting. No valid delegation of authority to execute a plan to sell any imaging center has been voted on in any Board of Managers meeting. 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." (T. Tr. at 193-196.) The foregoing allegations became incorrect with the November 9 Board meeting.

very much in doubt as was evident by the JuJu Litigation. Consequently the Joneses believed that Soteria lacked the authorization to sell that facility. Given this lack of legal authorization, the Joneses believed it was wrong to proceed with sale due to the negative impact it could have on Soteria and the sale process. (T. Tr. at 236:13-21; 238:5-24; 247:13-19; 261:9-23; 267:22 - 268:16; 269; 281-282; 287:14-23; 488:7-17[5])

Testimony was also offered regarding the Board's questionable actions toward the Common Unit Representative, Midge Jones--e.g. the suspected secret meeting on August 27 and an overbroad Confidentiality Agreement that Midge Jones rightfully viewed as restricting her rights and duties. (T. Tr. at 517-530.) The Board's treatment of the Joneses sole Board representative (and it is important to note that the Joneses have a substantial equity interest in Soteria) was a legitimate cause for concern. Scott Jones testified:

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[5] Bob Jones testified:

> A. Well, the other problem that was a problem for me is the CEO of Lifepoint Hospital is a friend of mine who has now become president of the company, of Lifepoint. [] how can you have them buying something that I don't think that can be sold to them.
> Q. You're saying that was one of the motivations for you was that you didn't want to see Lifepoint buying an asset which you believe was in question as to who owned it.
> A. Absolutely.

Again, from my discussions with my mother at the time when our concerns really were starting to grow, there hadn't been any specific discussions at the time we heard that they were selling Lifescan as the first center to be sold, the one that there had been so much question and cloud over the ownership and the title and everything. . . .Prior to that meeting was a board meeting where she was allowed to attend one meeting, not another, was asked to sign a confidentiality agreement and give up all kinds of rights. . . .(T.Tr. 238:5-19.)

If the company moved forward and sold a facility that they didn't have approval to sell, and that buyer that had never received a representation at all that there was any litigation, I mean, that would create huge liability for the whole company. If it was bad for the company, it would be bad for me as an owner. (T. Tr. 247:13-19.)

I had a basis to think that the company was doing a whole host of things, including preventing us from having proper representation, how facilities were going to be sold, how things were going to be distributed at that time, and so we felt like we needed to move forward and file this action. . . .Actually, I think [the lawsuit] was going to have a positive impact because it was going to clarify and prevent the company from moving forward and selling something that it didn't have the right to sell, that it hadn't let the buyer even know that there was pending litigation moving forward on, and trying to sneak it through for whatever reason, whether it was to pay Ares, or for whatever reason, it still doesn't make it right. (T. Tr. at 267:22 - 268:16.)

Q. Do you believe that. . .the spirit of what you were trying to do was what?

A. []. When you look at the rest of the issues and claims that were in there, all of those were still issues, and we still would have been bringing this lawsuit. (T. Tr. at 287:14-20.)

The evidence at trial confirmed that the concerns of the Joneses and the allegation of the Complaint were valid. At the time the Verified

Complaint was filed, the JuJu Litigation was pending calling into doubt the ownership of the very assets that Soteria was attempting to sell. (See ¶21 of complaint.) The Preferred Unit Board members, through the imposition of the Confidentiality Agreement, sought to limit participation from and preclude information being sent to the sole Common Unit Board member. (See ¶24 of the complaint; JX-102.) The Chancery Court also seemed concerned about the validity and legal authority for the Confidentiality Agreement and the Board's attempts to have all members sign it, questioning Soteria's counsel about it at trial. (Op. Br. at 14; A826.) Finally, the Joneses suspected that the Board was having secret meetings in Midge Jones' absence--it was proven at trial that, indeed, Soteria did hold a secret meeting (on August 27) without Midge Jones. (See ¶¶25, 39-41.)

From the perspective of the Joneses, there was no legal basis for Soteria selling assets the ownership of which is in question, nor did it have the right to be make sales and take action at secret meetings (i.e. in the language of the Complaint "a meeting without a quorum" and "not properly called".) (See ¶¶21, 25, 39-41.) Obviously, the Joneses could not know what was going on at any secret meeting. If action had been taken at such secret meeting(s), then such action would be void for failure to have a

quorum. Further, the fact that a secret meeting was being held at all was conduct that the Joneses felt compelled to challenge.

The Joneses believed that the only way to prevent the foregoing actions from continuing was to seek a declaration or injunction to the effect that the sale of assets (under such circumstances) was void and that a properly noticed and called meeting with a valid quorum was required to sell Soteria's assets (i.e. no secret meetings). Therefore, to conclude (as the Trial Court seems to do) that the entire complaint (or key) allegations were false or without factual basis,[6] is erroneous.

Soteria, in support of the Court shifting fees, states: "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." (Ans. Br. at 4.) Contrary to the claim of Soteria and as set forth above, the Complaint as a whole was not "false," although limited

[6] In its letter opinion respecting the amount of attorneys fees and expenses to be awarded the Court stated that it had ordered Plaintiffs to pay the Defendants' their attorneys' fees and expenses incurred in defending the initial part of this action "until the Plaintiffs, on the eve of trial, dismissed their direct claims which were without factual basis." Letter Op. at 1-2.

allegations were factually incorrect. The "false" part of the Complaint was the result of a Board meeting that occurred between the time of drafting and time of filing, making the allegation in paragraph 23 of the Complaint incorrect. Again, the Joneses had legitimate concerns based in fact and those concerns were evident in the Complaint. Litigation in general ferrets out inconsistencies and untruths. Indeed, the whole point of cross-examination is to flush out inconsistencies and untruths, yet the successful cross-examination of a party witness does not warrant the party witness paying all of the attorneys' fees and expenses of the opposing party.

[redacted]

Soteria's argument is the same as the one it made when seeking to have a trial on the matter within 30 days of the filing of the complaint.

At the same time it filed its Answer/Counterclaim (28 days from the date of filing), the Counterclaim Plaintiffs moved to expedite resolution, requesting a trial within 30 days or a "parade of horribles" would befall Soteria. Soterion and the Joneses did not oppose expedition but felt the 30 day timeline was unwarranted, pointing out that:

- Soteria received a draft complaint in November 2010 that was similar in form to the complaint filed by Plaintiffs on February 1, 2011. Thus, by no later than November 2010, Soteria's counterclaim for a declaratory judgment relating to their authority to sell the facilities was ripe for determination by the Court, yet Soteria chose to do nothing about it. In other words, if Soteria was so concerned that a lawsuit by the Joneses would be so detrimental to the existence of the company or the divesture process, then they would have done something about it sooner.

- [redacted] . . . . (A-829-830.)

With regard to expedited proceedings, the Chancery Court agreed with the Plaintiffs.[7] Nothing new was presented by Soteria at trial regarding imminent financial ruin due to the filing of the Complaint. Importantly, Ares (the Senior lender) did not testify as to its intentions regarding its note, nor was there any written independent documentation from Ares presented at trial as to its intentions. In fact, as observed in their Answering Brief, "[i]n response to the lawsuit, Ares actually gave a forbearance on partial repayment until mid-July 2011.[8]

Finally, as evidence of "bad faith" justifying an award of fees, Soteria points to the fact that the parties settled all but one of the claims between them, with the Joneses agreeing to dismiss their claims and agreeing to the LLC modification sought by Soteria in its counterclaim. (Ans. Br. at 3.) Parties settle matters for many different reasons. Settlement is not evidence of a lack of legitimate concern or that the claims within a complaint lacked

[7] 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.

[8] Indeed, if, as Soteria claims, the values of the Company or various imaging centers would decrease further were they to be sold through foreclosure or bankuptcy, it makes little sense that Ares would force foreclosure or bankruptcy.

merit. Indeed, it would discourage settlements and set bad precedent to conclude a party proceeded in bad faith if they agree to dismiss their claims prior to a trial on the merits.

The trial court abused its discretion in overlooking the Complaint as a whole and the legitimate concerns of the Joneses and by not factoring in Soteria's wrongdoing, which wrongdoing justified many of the concerns present in the Complaint.

II. The Trial Court abused its discretion in determining the attorneys' fees and expenses to be awarded.

A complaint was filed February 1, 2011 and an answer/counterclaim and motion to expedite was filed on February 28. Trial was set for three months later on May 24-25 on all claims and counterclaims. One set of written discovery was exchanged between the parties and three depositions were taken. [9] Soteria filed a motion for a protective order to address confidentiality and scheduling and also responded to MNAT's motion to withdraw. The parties settled all claims (including two counterclaims) except the tortious interference claim on May 19. Soteria then claimed it incurred $842,052.67 in attorneys' fees and expenses in a three month period

[9] As further example of overheated rhetoric, Soteria, in its Answering Brief, repeatedly makes conclusory characterizations to the effect that they had to respond to "voluminous discovery" and engage in "massive discovery effort". That is simply not the case. Further, and importantly, Soteria never submits for the record the discovery requests nor did the trial court make any finding regarding same. In fact, if anyone has valid basis for complaint it is the Joneses with respect to Soteria's trial by ambush tactics and submission of exhibits and documents either on the eve of trial or post trial. (Post-Trial Op. Br. at 37-47; A163-173.)

solely defending against the Joneses lawsuit.[10] It was an abuse of discretion for the Court to consider that amount reasonable.

In its Opinion the Court indicated that "substantial commitment of resources" was justified in defending against the Joneses claims because "[a] successful divesture was viewed as essential to Soteria's survival." (Letter Op. at 2-3.) Soteria contends that such a substantial amount was justified because "[t]he Joneses brought a frivolous lawsuit. . .that put an entire company, and Defendants' [Carousel's] $17.7 million investment in it, at risk."[11] The foregoing contention is based solely on Soteria counsel's conclusory statement that "[the Joneses] frivolous lawsuit threw a wrench in

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[10] Those fees and expenses included, for instance, staffing the matter with no less than 15 attorneys over three law firms with some charging as much $900/hour; stays at the Four Seasons Hotel by multiple counsel which included a $58 breakfast for one attorney and a $45 breakfast for another (A461-462, 469); and travel expenses in connection with meeting Mr. Burkland whose role was primarily to support the counterclaim. (Op. Br. at 25.)

[11] It is noteworthy that Appellees speak in terms of Carousel's investment being at risk. The Joneses were also invested in the same venture. Neither party wanted to lose their investment, but each had differing points of view on how best to go about matters. It does not mean that one or the other is acting in "bad faith."

th[e] divesture process and significantly jeopardized the Company's existence." (A410.) Soteria has provided no evidence that the filing of the Complaint actually "significantly jeopardized the Company's existence."

As set forth earlier, the Complaint was not frivolous. (*See* Section I *supra*) [redacted] In fact, as the Court pointed out, Soteria had fundamental problems unrelated to the Joneses.[12] *Soterion Corp.*, 2012 WL 5378251 at *18. If Soteria had been concerned that a lawsuit by the Joneses would be so detrimental to the process, then

[12] As to the Lifescan facility, Soteria--out of necessity--had to notify Lake Cumberland of the JuJu litigation and Lake Cumberland was not going to go through with the transaction as a result of the JuJu litigation. *Soterion Corp.* at *17. As to the Nebraska facility, Tenet was not going to buy that facility because of worsening market metrics. *Soterion Corp.* at *18. Moreover, Defendants themselves provided testimony that the market for imaging centers was poor. (T. Tr. 23, 25.)("The imaging sector was extremely out of favor in the [investment] community.").

Soteria would have taken measures to address the Joneses' concerns upon receiving the draft complaint in November 2010.

In its decision, the Court declined to take into consideration the fact that over a 20 month period (beginning April 14, 2011) Cross & Simon not only prepared for trial with respect to the Joneses claims and Soteria's counterclaim, but, after settlement of claims on May 19, 2012, the firm went on to successfully defend the Joneses on Soteria's tortious interference counterclaim. In all--prosecution and defense--the firm of Cross & Simon billed a total of 571.6 hours amounting to a bill of $158,648.03; whereas, Vinson & Elkins alone in a period of less than one month (May 2011) billed a total of 539.75 hours ($278,430.00).

The Court erroneously considered the foregoing comparison of little help, making the general statement that it takes more effort to defend against a series of specious allegations than it is simply to lob such allegations into the fray. (Letter Op. at 3.) In its brief, Soteria cites to the trial court in asserting the same argument. Both miss the point.

While it may be true that, generally, fees and expenses of a defendant in defending claims might be more than a plaintiff would spend in prosecuting those claims, the respective amounts in this instance, when put

into perspective, certainly are unrealistic and unreasonable. For instance, it is essentially claimed that "it is more time-consuming to clean-up the pizza thrown at the wall than it is to throw it."[13] Soteria, however, spent $1,179,224.37 [14] slinging pizza at the Joneses [tortious interference counterclaim] and the Joneses successfully cleaned it up for less than $158,648.03. Soteria's alleged attorneys' fees and expenses in the amount $842,052.67 to defend the Joneses lawsuit is simply unreasonable no matter how you look at it.

Further, the trial court did not award to Soteria fees and expenses in connection with its pursuit of the tortious interference claim. Consequently, Soteria attributes 96.79% ($842,052.67) to defending the Joneses lawsuit and 3.21% ($28,013.68) of its total fees and costs to pursuing the tortious interference counterclaim. Soteria's contention defies logic and reason.

Trial was set to start on May 24 on all claims, including the tortious interference counterclaim. It stands to reason that Soteria prepared for and

[13] *Danenberg v. Fitracks*, 58 A.3d 991,998 (Del. Ch. 2012)(citing *Auriga Capital Corp. v. Gatz Prop. LLC*, 40 A.3d 839 (Del. Ch. 2012); *See* Letter Op. at 3; Ans. Br. at 30-31.

[14] In its Opinion the Court stated: Fees charged by the three firms representing the Defendants totaled $2,021,276.90, or $1,179,224.37 more than the fees which they ask to be awarded to them.

was preparing to present its tortious interference claim at that time, doing substantial work in connection therewith. This reasonable inference was supported by Soteria's own counsel who stated in a May 19 teleconference that the majority of discovery in connection with the counterclaim was complete. (Op. Br. at 5.) Yet in allocating fees and expenses lead counsel attributed nothing to discovery or pre-trial briefings in connection with the tortious interference counterclaim.[15] (A416-418.) As further evidence of the lack of a good faith allocation by Soteria in connection with fees and expenses, the Joneses, in their Opening Brief, pointed out some of the numerous inconsistencies between billing statements and adjustment summaries. (Op. Br. at 24-25; A258-261.)

For all of the foregoing reasons, the trial court abused its discretion in determining that $842,052.67 was reasonable and within the scope of its Opinion.

CONCLUSION

The Chancery Court abused its discretion in awarding attorneys' fees and expenses pursuant to the bad faith exception to the American Rule. The

[15] In fact, a review of the statements reflects that lead counsel (Vinson & Elkins) spent no less than 120 hours in drafting and editing a pretrial brief.

Joneses had legitimate concerns that formed the basis of Complaint--concerns that were factually based on the wrongdoing of Soteria. Even if an award of fees and expenses were warranted, the Court abused its discretion in determining that the amount of $842,052.67 was reasonable. Appellant respectfully submits that, as supported by the facts and circumstances, a 96.79% (defense) to 3.21% (counterclaim) spread is unrealistic.

Dated: July 17, 2013

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