IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ASB ALLEGIANCE REAL ESTATE FUND, EBREF HOLDING COMPANY, LLC, and DWIGHT LOFTS HOLDINGS, LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. 5843-VCL
SCION BRECKENRIDGE MANAGING MEMBER, LLC, SCION 2040 MANAGING MEMBER, LLC, and SCION DWIGHT MANAGING MEMBER, LLC,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: August 1, 2013
Date Decided: September 16, 2013

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LASTER, Vice Chancellor.

The plaintiffs are special purpose entities affiliated with ASB Capital Management LLC (together, "ASB"). The defendants are special purpose entities affiliated with The Scion Group LLC (together, "Scion"). ASB and Scion engaged in extensive litigation over three joint venture agreements. ASB prevailed, and in a post-trial opinion, this court reformed the joint venture agreements as ASB requested. *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 2012 WL 1869416 (Del. Ch. May 16, 2012) ("Trial Ct. Op."). The Trial Court Opinion held that ASB could recover all reasonable fees and expenses relating to the litigation under contractual fee shifting provisions in the three agreements. A subsequent opinion quantified the award. *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434 (Del. Ch. 2012) ("Fee Op.").

On appeal, the Delaware Supreme Court reversed the contractual award of fees and expenses because ASB's counsel, DLA Piper LLP, represented ASB for free to avoid a malpractice action. *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665 (Del. 2013) ("Supreme Ct. Op."). Noting that ASB had not paid DLA Piper anything, the Supreme Court held that ASB had not incurred fees or expenses for purposes of contractual fee-shifting. The high court remanded for this court to determine whether fees and expenses should be awarded on equitable grounds.

ASB now seeks an award of fees and expenses under the bad faith exception to the American Rule. In the Trial Court Opinion, this court found based on clear and convincing evidence that Eric Bronstein, one of Scion's principals, recognized a mistake in the waterfall provision of the initial joint venture agreement, but remained silent in an

effort to capture a substantial and undeserved economic benefit for Scion. Eric then remained silent on two later occasions when ASB's counsel used the erroneous agreement as a template for subsequent deals, thereby perpetuating the error. Under settled law, to remain silent under those circumstances constitutes a species of inequitable conduct in the nature of fraud. This court further found in the Trial Court Opinion that after the mistake was discovered, Eric and his brother Rob Bronstein falsely tried to justify the mistake as the intended result of the parties' negotiations.

When ASB insisted that the mistake be corrected, the Bronstein brothers caused Scion affiliates to file lawsuits immediately in three different jurisdictions. Scion launched its three-front attack to send a message to ASB and DLA Piper that any litigation would be expensive and time-consuming and result in the very public airing of the facts surrounding their negligence in entering into the erroneous agreements. In the Fee Opinion, this court found that Scion filed its three lawsuits to drive up litigation costs and extract a favorable settlement disproportionate to the merits.

At trial, Eric testified to two alternative factual accounts, one in which he negotiated the mistaken term as a specific benefit to Scion, and another in which the mistaken provision was something he was too unsophisticated to understand. In the Trial Court Opinion, this court found that neither of Eric's accounts was credible, and together they were mutually exclusive. Although problematic for any witness, Eric's testimony was particularly blameworthy because he is a lawyer who owes professional obligations that include a duty of candor to the tribunal. Scion also presented an expert at trial who

proffered opinions that conflicted with every real estate joint venture he had been involved in or heard about during his twenty-five years of industry experience.

ASB believes that a bad faith award of fees and expenses should follow as a matter of course and seeks to recover all of the fees and expenses that DLA Piper incurred. ASB's analysis, however, fails to account for determinations that the Delaware Supreme Court made on appeal. In addition, Delaware law requires that any bad faith fee award relate causally to fees and expenses incurred due to the bad faith conduct. Applying these principles, this court finds that fee-shifting is warranted, but only for amounts relating to Scion's expert and its three-front litigation strategy.

I. FACTUAL BACKGROUND

Between January 2007 and January 2008, ASB and Scion "entered into five joint ventures for the ownership, operation, and development of student housing projects." Supreme Ct. Op. at 669. "Real estate joint venture projects generally follow a basic framework: a promoter provides the bulk of the capital and a sponsor arranges the deal and manages the property." *Id.* at 670. In the five ASB-Scion projects, ASB "provid[ed] at least 99% of the capital and retain[ed] at least 99% of the equity." *Id.* "Scion served as the sponsor and invested no more than 1% of the capital." *Id.* To incentivize Scion to increase the value of the properties, ASB and Scion agreed that Scion would receive a "promote," which is a term of art in the real estate industry.

> Generally, a promote is triggered once the project generates a specified preferred return on the invested capital. Once the project achieves the specified preferred return, the promote rewards the sponsor with a greater proportion of the project's profits. Real estate professionals commonly discuss promotes

> using industry shorthand, in which they describe the economics as "an X over a Y." For example, the phrase "20% over an 8%" means the sponsor would receive 20% of incremental profits after the project generated an 8% preferred return.

Id. (footnote omitted).

Rob and Eric Bronstein are brothers who co-founded Scion and serve as its principals. Rob owned a majority of Scion's equity and took the lead on business issues. Eric, a lawyer, owned a minority of Scion's equity and took the lead on legal issues. Rob negotiated the economic terms of Scion's compensation with his business counterpart at ASB, eventually reaching agreement by email that the promote framework would be a "20% above an 8% preferred return." *Id.* After two successful deals, Rob sought greater compensation for Scion through a two-tiered promote. Rob and his counterpart at ASB agreed that that the promote framework for Scion's deals with ASB going forward would be as follows: "On an unlevered deal, 20% over an 8%, and 35% over a 12%. On a levered deal, 20% over a 9%, and 35% over a 15%." *Id.* at 671 (the "May 2007 Terms").

Rob relied on Eric to prepare the joint venture agreements. ASB relied on DLA Piper. *Id.* at 671-72. An associate at DLA Piper created the first joint venture agreement to incorporate the May 2007 Terms by using an earlier Scion-ASB agreement as a template. The DLA Piper associate revised both the operational cash flow waterfall and the capital-event waterfall to provide for a second tier of preferred return, but failed to add a second tier of promote. Eric replied the same day and identified the problem. *Id.* at 672. The DLA Piper associate then revised the waterfalls to include the second tier of promote, but she mistakenly placed the missing tier of promote after the first preferred

return provision, but before the return of capital provision. The incorrect placement altered the business terms of the joint venture because Scion would begin to earn its promote immediately after the project satisfied its first preferred return amount but before the parties recovered their initial capital investment. *Id.* Eric noticed the mistake and understood that it benefitted Scion by altering the business deal from what Rob and ASB had negotiated. He did not say anything at the time. DLA Piper and ASB did not catch the error. The parties executed the joint venture agreement with the incorrectly drafted provision. Trial Ct. Op. at *6-7.

At trial, Eric offered two internally inconsistent explanations for the incorrect placement of the first-tier of promote:

> In one version, he negotiated changes to the capital-event waterfall provision as the authorized representative of Scion and obtained the disproportionately pro-Scion change, fully aware of its implications. In the other version, he lacked sophistication in real estate matters, innocently asked about the capital-event waterfall provision, and naively believed that DLA Piper accurately scrivened the deal.

Id. at *1. This court commented that "[i]t is one thing to plead claims in the alternative; it is quite another to testify in the alternative about your own role, knowledge, and intentions." *Id.*

This court rejected Eric's negotiation story, finding it inconsistent with the substance of the communications between Eric and DLA Piper, the nature of Eric's role as Scion's in-house lawyer, the absence of any contemporaneous business negotiations by Rob to elevate the priority of Scion's promote, DLA Piper's lack of authority to make changes to the business deal, and the radical change in the business terms that the

placement accomplished. *Id.* at *5-7. This court also rejected Eric's alternative account. Eric was far from naïve in real estate matters. Before co-founding Scion, he was a partner at Jaffe Raitt Heuer & Weiss, a Detroit law firm with over 100 lawyers. His practice focused on commercial real estate transactions, including the formation of a $100 million real estate joint venture and multiple real estate financings. He later served as senior group counsel for Johnson Controls, the world's largest automotive interior supplier, where he supervised $5 billion a year in business transactions. *Id.* at *2.

Once the error in the capital-event waterfall made it into the first joint venture agreement, it was perpetuated in later agreements. On each occasion, the DLA Piper associate electronically copied the precedent agreement and only made deal-specific changes. Because ASB and DLA Piper thought the precedent agreement accurately memorialized the economic terms, they did not focus on the waterfall provisions and did not catch the error. Eric never spoke up.

Between entering into the second and third erroneous joint venture agreements, Scion and ASB set up a deal for a property called Automatic Lofts. For tax reasons, the parties did not structure the deal as a joint venture, but they sought to pay Scion compensation in accordance with the May 2007 Terms. To do so, they drafted the compensation provisions to pay Scion's promote only after ASB received back its capital. Scion's compensation structure for the Automatic Lofts deal was thus consistent with ASB's position in this litigation and inconsistent with the capital-event waterfall provisions in the first two joint venture agreements. If the first two joint venture agreements were correct, then the Bronstein brothers should have objected that the

Automatic Lofts deal did not match their compensation arrangement and underpaid Scion. This court found that the Bronstein brothers accepted the compensation structure in the Automatic Lofts deal because they knew it accurately reflected Scion's agreement with ASB. *See id.* at *9.

On June 12, 2010, Scion exercised a put right in one of the joint venture agreements. ASB had contributed $47.3 million in capital to the deal; Scion had invested $479,000. The parties agreed the venture was underwater with a fair market value of $35.5 million. On August 30, Eric informed ASB that the buyout price was $1.83 million, representing a 282% gain for Scion on a deal where ASB lost 30%. Without the promote, the buyout price would have been $347,792.46, and the parties would have shared the loss proportionately. *See* Supreme Ct. Op. at 674.

ASB immediately contested Scion's calculation. In response, Eric played dumb, and Rob made stuff up. Eric relied on the structure of the capital-event waterfall, which he knew was wrong, saying "we prepared our calculation to follow the LLC Agreement precisely, so I believe it is correct." Trial Ct. Op. at *10. Rob claimed that Scion's outsized and disproportionate compensation resulted from a deal-specific arrangement:

> [T]his was the business deal we negotiated through Keyvan Arjomand in 2007. It was different than the [University Crossing] and Millennium structure, for several reasons—we brought to ASB an off-market deal, our acquisition fee was reduced, we left our proceeds in but still had to pay capital gains tax, our management fee was lowered, etc. Therefore our deal was structured with more back-end compensation.

Id. (alteration in original). As this court found after trial, virtually every statement in this email was false. *Id.* Scion's acquisition fee had not been reduced, Scion had not left any

proceeds in the prior deal and had not paid any capital gains taxes, and Scion's management fee was not lower. *Id.*

At this point, ASB reviewed the joint venture agreements in detail. After identifying the error, ASB called DLA Piper and "had a very, very tough conversation." Supreme Ct. Op. at 674. ASB put DLA Piper on notice of a malpractice claim. *Id.*

By letter dated September 20, 2010, ASB notified Scion that unless Scion agreed to correct the three erroneous joint venture agreements (the "Disputed Agreements"), ASB would file suit. The next day, Scion preemptively sued over just one of the agreements in the United States District Court for the Eastern District of Wisconsin, the site of the property owned by that joint venture. On September 22, ASB filed suit in this court. Unlike Scion, ASB placed at issue the entirety of the dispute, named all relevant parties, and sought reformation of all three Disputed Agreements. Fee Op. at 438.

Scion then filed two additional lawsuits, one in the United States District Court for the Northern District of Illinois and another in the United States District Court for the Middle District of Florida. Each lawsuit sought to enforce just one of the Disputed Agreements. Scion's three complaints each pled substantially identical counts. *Id.*

> Scion's tactics caused four courts and the parties to engage in overlapping, redundant, and otherwise unnecessary activities. Motions to stay were filed, briefed, and decided in each of the federal cases. Motions to dismiss were filed, briefed, and decided in all four cases. Motions for summary judgment were filed, briefed, and decided in all four cases. Multiple courts heard motions on discovery and pre-trial issues. As the cases proceeded, renewed motions to stay were filed, briefed, and decided.

Id. As the four cases neared trial, the parties made two emergency applications to this court for expedited decisions to help avoid "a multi-jurisdictional train wreck." *Id.* at 438-39.

In all four cases, DLA Piper represented ASB "free of charge." Supreme Ct. Op. at 675. The case in this court went to trial first. In a post-trial decision, this court "reformed the Disputed Agreements in favor of ASB," finding that ASB proved by clear and convincing evidence a unilateral mistake by ASB coupled with knowing silence about the mistake by Scion. *Id.* This court "awarded ASB over $3.2 million in attorneys' fees based on the contractual fee-shifting provisions" in the Disputed Agreements. *Id.*

The contractual fee-shifting provision provided as follows: "In the event that any of the parties to this Agreement undertakes any action to enforce the provisions of this Agreement against any other party, the non-prevailing party shall reimburse the prevailing party for all reasonable costs and expenses incurred in connection with such enforcement, including reasonable attorneys' fees . . . ." Trial Ct. Op. at *20 (the "Fee-Shifting Provision"). This court held that ASB satisfied the provision, even though DLA Piper represented ASB free of charge:

> The purpose of the [Fee-Shifting Provision] is to allocate the burden of contract enforcement between the breaching party and the non-breaching party. Arrangements that the non-breaching party may have made internally or with third parties to minimize or lay off its own burdens do not affect the breaching party's liability. If, for example, ASB had obtained litigation insurance such that its fees and expenses were covered by an insurer, that fact would not eliminate Scion's obligation under the fee-shifting provision. Either ASB or the insurer by subrogation could enforce the fee-shifting provision. Here, the non-breaching side of the case

> caption litigated the dispute at significant cost, albeit a cost that DLA Piper and ASB have allocated between themselves. The [Fee-Shifting Provision] obligates the breaching side of the caption to bear that cost, regardless of the allocation between DLA Piper and ASB.

Id. This court's reasoning thus placed primary emphasis on the parties' decision via the Fee-Shifting Provision to allocate responsibility for fees and expenses to the breaching party, thereby forcing the breaching party to internalize the cost of breach. This court's reasoning implicitly construed the concept of fees incurred by a "party" to include a party's agents, such as its counsel, when assessing the costs of breach.

On appeal, the Delaware Supreme Court held that the Fee-Shifting Provision did not apply "where counsel for the party seeking fees represented the party free of charge to avoid a malpractice claim." Supreme Ct. Op. at 669. Distinguishing between ASB (the party) and DLA Piper (the party's agent), the Delaware Supreme Court explained that "[t]he plain meaning of 'incurred,' combined with 'reimburse,' does not extend to this situation where ASB did not incur any payment obligation because DLA Piper agreed to represent it without charge." *Id.* at 683. Citing *Black's Law Dictionary*, the Delaware Supreme Court defined "incur" as "[t]o suffer or bring on oneself (a liability or expense)" and "reimburse" as "to repay or indemnify." *Id.* (alteration in original and internal quotation marks omitted). Because DLA Piper agreed to represent ASB free of charge, "ASB did not suffer or bring upon itself a liability or an expense," and "ASB made no payment for which it needed to be repaid or indemnified." *Id.*

As a matter of policy, ASB argued that the Delaware Supreme Court should enforce the Fee-Shifting Provision "in order to encourage law firms to do 'the right

thing.'" *Id.* at 684. The Delaware Supreme Court rejected this argument: "We disagree. We are not inclined as a policy matter to award fees to ASB, who would pass them presumably on to DLA Piper. That would effectively reward DLA Piper for successfully litigating this reformation action to correct its own mistakes." *Id.* at 684-85 (footnote omitted). Among the issues vigorously contested on appeal was whether a sophisticated party could pursue reformation when the party and its counsel could have identified the error in the agreement with reasonable diligence. *See id.* at 676-80. The Delaware Supreme Court held that such a party could pursue such a claim, rejecting Scion's contention that the law should require sophisticated parties and their counsel to protect themselves by reading agreements carefully. *See id.* at 676-77 (adopting the standard in Restatement (Second) of Contracts § 157 (1981)). Although not stated explicitly, the high court's policy conclusion on the fee award appears designed to incentivize outside counsel to review agreements closely by preventing a firm from being able to recover fees and expenses stemming from its own mistake.

After holding the Fee-Shifting Provision inapplicable, the Delaware Supreme Court noted that this court continued to have the ability to award fees and expenses as a matter of equity:

> Circumstances where a Vice Chancellor may use his equitable powers to award fees outside of an express statutory authorization or a contractual fee-shifting provision include, but are not limited to: (1) the presence of a common fund created for the benefit of others; (2) where the judge concludes a litigant brought a case in bad faith or through his bad faith conduct increased the litigation's cost; and (3) cases in which, although a defendant did not misuse the litigation process in any way, the action giving rise to the suit involved

> bad faith, fraud, conduct that was totally unjustified, or the like and attorney's fees are considered an appropriate part of damages. More generally, a Vice Chancellor may award fees in the limited circumstances of an individual case that mandate that the court, in its discretion, assess counsel fees where equity requires.

Id. at 686-87 (alterations, footnotes, and internal quotation marks omitted). This court had not reached the question of equitable fee-shifting, so there was no decision on appeal for the Delaware Supreme Court to review. The high court remanded the case for this court to consider "whether ASB is entitled to fees, as an exercise of the Vice Chancellor's inherent equitable powers, based on one of the limited exceptions to the general rule that each party pays his own fees." *Id.* at 687-88.

II. LEGAL ANALYSIS

ASB seeks to recover all of the fees and expenses that DLA Piper incurred. The Supreme Court Opinion identified three recognized equitable grounds for fee-shifting: (i) the creation of a common fund or benefit, (ii) reprehensible conduct before the litigation began, and (iii) bad faith during the litigation process. Supreme Ct. Op. at 687. The Supreme Court noted that the list was not exclusive and that this court has the power to award fees in "an individual case . . . where equity requires." *Id.* (footnote and internal quotation marks omitted). The parties agree that the common fund or benefit exception is inapplicable. Regardless of the theory presented, the party seeking fees must produce "clear evidence" of the bad faith conduct. *Arbitrium (Cayman Is.) Handels AG v. Johnston*, 705 A.2d 225, 232 (Del. Ch. 1997) (collecting cases supporting the "clear evidence" standard of proof), *aff'd*, 720 A.2d 542 (Del. 1998).

A. Reprehensible Conduct Before Litigation Began

The Supreme Court Opinion recognizes that this court may make an award of attorneys' fees when "the action giving rise to the suit involved bad faith, fraud, conduct that was totally unjustified, or the like" and therefore "attorney's fees are considered an appropriate part of damages." Supreme Ct. Op. at 687 (footnote and internal quotation marks omitted). ASB contends that this case calls for such an award because of Eric and Rob's pre-litigation conduct.

1. Eric's Knowing Silence

ASB starts with Eric's knowing silence during the drafting process. This court previously found by clear and convincing evidence that after Eric received the version of the draft agreement that first contained the erroneous provision, he noted and understood the implications of the error and "intentionally remained silent in an effort to capture an undeserved benefit for Scion." Trial Ct. Op. at *15. This was not a situation in which the parties were negotiating over different versions of a provision and one side proposed language that would not actually achieve the result it claimed to want. Instead, this was a situation where Rob and his counterpart at ASB had a meeting of the minds on Scion's compensation structure, and the attorneys' task was simply to memorialize it. The DLA Piper associate put the compensation tiers in the wrong order, resulting in a significant economic benefit for Scion. It was as if the associate mistakenly inserted a price of $1,000,000 instead of the agreed-upon price of $10,000.00. "Eric recognized the scrivener's error and tried to take advantage of the mistake." *Id.*

Under the *Restatement of Contracts (Second)*, Eric had a duty to speak and correct the mistake:

> One party cannot hold the other to a writing if he knew that the other was mistaken as to its contents or as to its legal effect. *He is expected to correct such mistakes of the other party and his failure to do so is equivalent to a misrepresentation*, which may be grounds either for avoidance under § 164 or for reformation under § 166.

Restatement (Second) of Contracts § 161 cmt. e (1981) (emphasis added). This court has described such conduct as "in the nature of fraud." *Colvocoresses v. W. S. Wasserman Co.*, 28 A.2d 588, 590 (Del. Ch. 1942); *see also Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992) (defining fraud to include "silence in the face of a duty to speak"). It might be true, as Scion argues, that many in Eric's position would do the same thing and that such are the morals of the marketplace. The law, however, strives to avoid precisely the type of divisive, costly, and damaging post-performance dispute that occurred in this case by imposing on someone in Eric's position a duty to speak.

Eric did not merely engage in conduct "akin to fraud" once, when the original mistake was made, but two more times when DLA Piper prepared the additional Disputed Agreements using the erroneous model. In between the second and third Disputed Agreements, Rob and Eric agreed to the Automatic Lofts deal, which structured Scion's compensation as Rob and his ASB counterpart had agreed. Rob and Eric's agreement to the Automatic Lofts deal confirms that the Disputed Agreements were incorrect and that they knew what the real economic arrangement was.

Nevertheless, in light of the Delaware Supreme Court's decision on appeal, this court is not free to conclude that Eric's knowing silence rose to a level sufficient to support a bad faith fee award. In its opinion, the Delaware Supreme Court described Eric's conduct as follows: "The record is clear that Scion did not engage in any fraud or trickery that would have prevented ASB from discovering the drafting error." Supreme Ct. Op. at 679. The Supreme Court thus distinguished between knowing silence and "fraud or trickery," implying that the former is less culpable than the latter. The high court's comment further indicates that although Eric's knowing silence sufficed under Delaware law to establish a claim for reformation, it fell short of the type of "fraud or trickery" that would constitute bad faith conduct.

This court is obviously bound by the Delaware Supreme Court's determinations. Given the language of the high court's opinion, this court does not regard Eric's knowing silence during the negotiation process as sufficiently wrongful to support a bad faith fee award based on pre-litigation misconduct.

2. Rob's Email

ASB next zeroes in on a pre-litigation email sent by Rob. ASB only discovered the mistake in the capital-event waterfall when Scion tried to take advantage of it by exercising a put right. For Scion, the mistaken placement of the promote turned what would have been a 30% loss into a 282% gain. *See* Supreme Ct. Op. at 674. When ASB questioned the calculation, Eric played dumb, saying, "we prepared our calculation to follow the LLC Agreement precisely, so I believe it is correct." Trial Ct. Op. at *10. Rob sent an email claiming the compensation calculation resulted from a deal-specific

negotiation, which was false, and he offered a series of purported justifications, each of which was also false. *Id.*

ASB contends that by lying in his email Rob engaged in bad faith pre-litigation conduct. The record established that Rob is a salesman, and he appears to be a good one. Salesmen bluff, puff, and bluster. Sometimes they go too far and misrepresent facts. Rarely must salesmen face skilled lawyers who test their emails for accuracy through cross-examination, under oath, with the benefit of full discovery.

Rob sent his email response after ASB questioned Scion's entitlement to a big payday. Rob reacted like a salesman and tried to save his deal. Self-interest excels in a sprint; conscience gains ground over the long haul. In the race to dash off an email, self-interest won handily, and Rob offered justifications that proved false.

Although regrettable, this was not conduct which, on the facts of this case, will support a bad faith fee award for pre-litigation conduct. ASB did not take any action in reliance on Rob's email, and the email itself did not result in any harm to ASB. The damage from the drafting error already had been done, Scion had chosen to stand on the agreements as written, and litigation was inevitable. Although ASB had to take discovery into Rob's assertions, on balance the email helped ASB, because DLA Piper used Rob's false statements to undermine his credibility at trial.

3. ASB's Lack of Damages

At a broader level, ASB's current request for equitable fee-shifting suffers from the same flaw that plagued this court's contractual fee-shifting ruling: the absence of any actual harm to ASB in the form of fees and expenses that ASB incurred. Supreme Ct.

Op. at 683. As the Supreme Court Opinion recognized, a bad faith award resulting from pre-litigation conduct addresses a situation where "attorney's fees are considered an appropriate part of damages." *Id.* at 687 (internal quotation marks omitted); *accord Arbitrium*, 705 A.2d at 233 (explaining that if a suit "involved bad faith, fraud, conduct that was totally unjustified, or the like," then attorneys' fees can be awarded "as an element of damages" (footnotes and internal quotation marks omitted)); *see Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *6 (Del. Ch. May 11, 2001). ASB did not suffer any damages that fee-shifting could remedy.

ASB faced two types of harm from Scion's conduct. First, the mistaken waterfall provisions in the Disputed Agreements, if applied as written, would have forced ASB to pay Scion far greater compensation than Scion deserved. Second, once Scion refused to correct the Disputed Agreements, ASB had to retain counsel and litigate to rectify the situation. The award of reformation remedied any injury to ASB from the drafting errors, fully addressing the first category of harm. In its decision on appeal, the Delaware Supreme Court held squarely that because DLA Piper represented ASB for free to avoid a malpractice action, ASB did not suffer any injury falling into the second category of harm. When bringing suit, "ASB did not suffer or bring upon itself a liability or an expense," and "ASB made no payment for which it needed to be repaid or indemnified." Supreme Ct. Op. at 683.

The Delaware Supreme Court made these observations when analyzing the Fee-Shifting Provision, but they apply equally to an equitable award of fees-as-damages

based on Scion's pre-litigation conduct. Having not suffered any damages from Scion's pre-litigation conduct, ASB has nothing to recover through an equitable award.

4. The Supreme Court's Policy Determination

ASB's current request for equitable fee-shifting further founders because ASB will pass along any award to DLA Piper. The Delaware Supreme Court held that such a result would not be good policy because "[t]hat would effectively reward DLA Piper for successfully litigating this reformation action to correct its own mistakes." Supreme Ct. Op. at 685. It would undermine the Delaware Supreme Court's policy determination for this court to deploy equity to grant an equivalent reward.

At a minimum, to reach a different conclusion, this court would need to be able to rely on additional facts for its equitable ruling beyond what the Delaware Supreme Court considered for its policy analysis. In the current case, this would mean that ASB would need to show bad faith pre-litigation conduct by Scion that went beyond what ASB proved to achieve the victory that triggered the Fee-Shifting Provision. Otherwise ASB only has established the same circumstances under which the Delaware Supreme Court held that rewarding DLA Piper would not be sound policy.

On remand, ASB did not identify any additional evidence of pre-litigation bad faith beyond the facts that resulted in reformation. Awarding fees-as-damages therefore remains inappropriate in light of the Delaware Supreme Court's policy determination.

5. The Implications Of A Fee Award

Finally, granting fees in equity to ASB based largely on Eric's knowing silence would imply that if a plaintiff obtained reformation on grounds of unilateral mistake then

the plaintiff also would have established a *prima facie* entitlement to fee-shifting under the bad faith exception to the American Rule. A claim for reformation on grounds of unilateral mistake requires proof by clear and convincing evidence that the defendant knowingly remained silent. Supreme Ct. Op. at 679-80. Because knowingly remaining silent in the face of a duty to speak amounts to constructive fraud, the same findings that support reformation would satisfy the "clear evidence" standard required for fee-shifting. According to ASB, this proposition makes sense and should not trouble a court because it is so difficult to obtain reformation by unilateral mistake.

Contrary to ASB's position, Delaware courts have eschewed adopting bright-line rules for bad faith fee-shifting.[1] Delaware cases likewise have declined to equate success on the merits with entitlement to fees and consistently have required something more to support a bad faith fee award, even when fraud is present.[2] As noted above, the Delaware

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[1] *See, e.g.*, *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005) ("There is no single standard of bad faith that warrants an award of attorneys' fees in such situations; rather, bad faith is assessed on the basis of the facts presented in the case."); *Jacobson v. Dryson Acceptance Corp.*, 2002 WL 31521109, at *16 (Del. Ch. Nov. 1, 2002) ("[T]here is no single definition for bad faith giving rise to an award of attorneys' fees. Rather, bad faith turns on the special facts of the particular case."), *aff'd*, 826 A.2d 298 (Del. 2003); *Cantor Fitzgerald*, 2001 WL 536911, at *4 ("No single definition for 'bad faith' in [the fee-shifting] context exists and each determination will turn on the special facts of the particular case.").

[2] *See, e.g.*, *VGS, Inc. v. Castiel*, 2001 WL 1154430, at *2 (Del. Ch. Sept. 25, 2001) ("[M]erely being adjudicated a wrongdoer under [Delaware's] corporate law is not enough to justify fee shifting."); *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 706 (Del. Ch. 1996) ("That a fiduciary is found to have breached his duty cannot, without more, justify a fee-shifting award of attorney's fees against the fiduciary or the corporation."), *aff'd*, 693 A.2d 1082 (Del. 1997); *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 124 (Del. Ch. 1999) ("The mere fact that a corporate director has breached his duty of loyalty to the

Supreme Court's analysis on appeal appears to recognize gradations of misconduct by distinguishing between knowing silence and "fraud or trickery that would have prevented ASB from discovering the drafting error." Supreme Ct. Op. at 679. This comment suggests that the Delaware Supreme Court did not believe that a bad faith award should follow ineluctably from success on a claim for reformation because of unilateral mistake.

6. No Award For Pre-Litigation Conduct

The court does not condone Scion's pre-litigation conduct. Nevertheless, for the foregoing reasons, the court concludes that Scion's pre-litigation conduct does not support equitable fee-shifting under the bad faith exception to the American Rule.

B. Bad Faith Litigation Conduct

The Delaware Supreme Court's decision on appeal noted that fees can be shifted "where the judge concludes a litigant brought a case in bad faith." Supreme Ct. Op. at 687. This includes situations when "the defendant in bad faith has forced the plaintiff to bring the lawsuit to enforce a legal claim that the defendant knew was valid." *Arbitrium*, 705 A.2d at 231. It also includes situations where a plaintiff files "a lawsuit the core allegations of which they knew to be false at the time they filed it." *Soterion Corp. v. Soteria Mezzanine Corp.*, 2012 WL 5378251, at *18 (Del. Ch. Oct. 31, 2012). "[A] party

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corporation does not justify an award of attorneys' fees and expenses under the [egregious pre-litigation conduct] exception."); *Barrows v. Bowen*, 1994 WL 514868, at *2 (Del. Ch. Sept. 7, 1994) (Allen, C.) ("While this court can imagine situations which may be so egregious as to warrant an award of attorney's fees on the basis of fraud, the American Rule would be eviscerated if every decision holding defendants liable for fraud or the like also awarded attorney's fees.").

[who] has 'some evidence' to support his claims, may still be found to have acted in bad faith where that evidence is trivial in comparison to the evidence against him." *Jacobson*, 2002 WL 31521109, at *16 (footnote omitted). A court also may award attorneys' fees when a litigant "through his bad faith conduct increased the litigation's cost." Supreme Ct. Op. at 687. "Courts have found bad faith conduct where parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims." *Beck*, 868 A.2d at 851.

1. ASB's Lack Of Damages Redux

In considering whether to grant an equitable fee-shifting for litigation misconduct, this court must again take into account the Delaware Supreme Court's determination that ASB did not suffer any harm from the expense of bringing suit. *See* Supreme Ct. Op. at 683. Decisions from this court have held that a party only can recover fees for bad faith conduct during litigation to the extent that the party actually incurred fees as a result. *See PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 4390726, at *44 (Del. Ch. Sept. 22, 2011) (holding under bad faith exception to the American Rule that "PharmAthene is entitled to only a portion of the attorneys' fees and expenses it actually incurred."); *Loretto Literary & Benevolent Inst. v. Blue Diamond Coal Co.*, 444 A.2d 256, 261 (Del. Ch. 1982) ("counsel fees to be awarded . . . must be limited to the reimbursement of reasonable fees actually incurred"). The Delaware Supreme Court held that because DLA Piper represented ASB for free to avoid a malpractice action, ASB did not actually incur any fees or expenses. Supreme Ct. Op. at 683. As with an award of fees-as-

damages based on Scion's conduct before the litigation, this holding could be deemed to prevent a fee award to ASB based on conduct during the litigation.

This court of course must give full effect to the Delaware Supreme Court's determination, but as I read the Delaware Supreme Court's jurisprudence in this area, the cases differentiate between pre-litigation conduct, where a party can recover fees and expenses as an element of the party's compensable damages, and litigation misconduct, where the award is not only compensatory but also serves a public policy function. When a party or its counsel engages in litigation misconduct to a degree sufficient to support fee shifting, the consequences go beyond monetary harm to the opposing party. The misconduct affects the court, which must devote resources to address the resulting problems, thereby depriving other litigants of the court's attention. More broadly, misuse of the litigation process undermines the public's confidence in the legal system. Consequently, the Delaware Supreme Court has authorized bad faith fee awards in part "to deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process." *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005) (internal quotations omitted); *accord Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005); *Brice v. State, Dep't of Correction*, 704 A.2d 1176, 1179 (Del. 1998); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 72 (1991) (affirming trial court award of attorney fees for bad faith conduct where the trial court "did not attempt to sanction petitioner for breach of contract, but rather imposed sanctions for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of the litigation"). On rare occasions, this court has

addressed bad faith litigation conduct both by shifting fees and by requiring a payment to the court. *See, e.g.*, *Beck*, 868 A.2d at 857.

In this case, to the extent Scion engaged in bad faith litigation tactics, those tactics inflicted injury that went beyond ASB. Indeed, to the extent DLA Piper's adversaries engaged in bad faith tactics, DLA Piper itself suffered harm. When DLA Piper agreed to litigate "free of charge to avoid a malpractice claim," 68 A.3d at 669, DLA Piper legitimately could expect that its adversaries would not engage in bad faith tactics. To the extent its opponents resorted to bad faith tactics, their actions forced DLA Piper to incur costs that the firm was not obligated to anticipate. Unlike an award of fees-as-damages for bad faith pre-litigation conduct, such an award does not risk compensating DLA Piper for its own mistakes in preparing the Disputed Agreements. It rather compensates DLA Piper for the additional, incremental cost of confronting bad faith tactics that the firm should not have to absorb. A fee-shifting award under these circumstances also serves to protect the integrity of the judicial process by ensuring that overly aggressive litigants do not gain from their misconduct.

The Delaware Supreme Court's ruling on appeal that ASB suffered no harm because DLA Piper represented ASB for free does not, in my view, prevent this court from shifting fees and expenses based on bad faith litigation conduct. For similar reasons, it does not undermine the Delaware Supreme Court's policy determination that DLA Piper should not be rewarded for its own negligence.

2. The Overall Handling Of The Litigation In This Court

Viewed as a whole, Scion's litigation conduct in this court did not approach the level of egregiousness necessary for a finding of bad faith. Scion retained an experienced and respected Delaware firm, and counsel handled the case in a professional manner. There were no delays occasioned by Scion's actions. The parties appear either not to have had or, more likely, to have resolved the inevitable disputes over discovery requests, discovery responses, the noticing and conduct of depositions, and other aspects of the pre-trial process. The degree of motion practice was not excessive. Scion filed a motion to dismiss, which raised well-founded arguments regarding the availability of reformation. Scion also filed a motion for summary judgment, which this court again believed presented fair questions about whether ASB could obtain reformation. Scion filed only two other motions: a Motion to Strike/Exclude Portions of Leo J. Pircher's Expert Report, which this court granted in part, and a Motion to Strike or Exclude Expert Witnesses, which, given other developments in the case, ultimately was not pursued. Although Scion's witnesses did not fare well at trial, the litigation as a whole was not conducted in bad faith.

3. Eric and Rob's Testimony

In challenging more specific aspects of the litigation record, ASB stresses Eric's and Rob's testimony, which this court discredited. ASB particularly criticizes Eric, who

has ethical obligations as an attorney that go beyond those of a lay witness.[3] Adverse credibility determinations can contribute to an overall finding of bad faith litigation conduct, but fee-shifting does not automatically follow from the fact that a court discredits a witness. *See General Video Corp. v. Kertesz*, 2009 WL 106509, at *1 (Del. Ch. Jan. 13, 2009) (declining to award fees despite prior findings that the plaintiff's "version of events is a fabrication" and that a key document "is . . . not authentic"). A trial court must necessarily decide whom to believe and what evidence to credit. The professional obligation to make those difficult determinations is quite different than the ability to peer into the heart and soul of a witness and divine ultimate truth. *See Allen v. Encore Energy Partners, L.P.*, — A.3d —, —, 2013 WL 3803977, at *8 (Del. July 22, 2013) ("Despite their expertise, the members of the Court of Chancery cannot peer into the 'hearts and souls of directors' . . . .").

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[3] *See* Del. Lawyers' Rules of Prof'l Conduct R. 3.3 ("Candor Toward the Tribunal"); R. 4.1 ("Truthfulness in Statements to Others"); R. 8.4(c) (misconduct includes "conduct involving dishonesty, fraud, deceit, or misrepresentation"); R. 8.4(d) (misconduct includes "conduct that is prejudicial to the administration of justice"). These citations illustrate the additional professional obligations that a lawyer has, but in this case, in at least two senses, the referenced rules are merely indicative. First, Eric is not a Delaware lawyer and was not admitted *pro hac vice*, so the Delaware Rules of Professional Conduct do not govern his conduct. Second, this court has not made any determination and expresses no view regarding any potential ethical violation, which is a matter reserved for the appropriate supervisory authorities to address, and only if they deem warranted. *See Crumplar v. Superior Court ex rel. New Castle Cnty.*, 56 A.3d 1000, 1009 (Del. 2012) ("Absent conduct that prejudicially disrupts the proceeding, trial judges have no independent jurisdiction to enforce the Rules of Professional Conduct."); *In re Infotechnology, Inc.*, 582 A.2d 215, 216-17 (Del. 1990) (explaining that absent conduct prejudicial to the proceeding, enforcement of Rules of Professional Conduct must be left to authorities who oversee the bar).

Viewed in the context of the case as a whole, the Bronstein brothers' testimony did not alter how the litigation unfolded. To obtain reformation, ASB had the burden to prove by clear and convincing evidence either (i) a mutual mistake or (ii) a unilateral mistake by ASB coupled with knowing silence on the part of Scion. ASB needed to gather evidence to support its affirmative case. Eric and Rob were essential witnesses whom ASB would depose in any event. ASB has not pointed to anything that it would have done differently during discovery. The same is true for trial. Imagine an alternative universe in which Eric had no recollection of the drafting of the Disputed Agreements. ASB still would have presented the same evidence to support its affirmative case, Scion still would have cross examined ASB's witnesses, and ASB still would have cross examined Eric and Rob. Perhaps Eric's deposition and trial testimony would have been slightly shorter, but that type of frictional loss does not warrant fee-shifting.

If there had been other problematic evidence, recalcitrance during discovery, or a larger pattern of litigation misconduct, then the court might view the totality of the circumstances differently. On the facts presented, Eric and Rob's poor performances at trial will not support fee-shifting on grounds of litigation misconduct.

4. Scion's Expert

ASB next criticizes Scion's expert, whose testimony this court rejected. In *Montgomery Cellular*, the defendant, among other things, introduced and relied on an expert report and expert testimony that were clearly and obviously flawed. 880 A.2d at 229. The Delaware Supreme Court observed that the expert had established a valuation figure and developed his expert testimony to fit into that figure. *Id.* The Delaware

Supreme Court held that this court abused its discretion by denying fees under the bad faith exception and reversed, holding that fee-shifting was warranted. *Id.*

Scion's expert ventured farther out of bounds than the expert in *Montgomery Cellular*. At trial, he made three basic claims: (i) the term "promote" is not a term of art and does not have a well-understood meaning in the context of real estate joint ventures, (ii) "[e]very real estate deal is unique" such that a "promote" can mean any old thing the parties want, and (iii) in the context of a capital-event waterfall, the concept of a "promote" does not refer to incentive compensation paid after the return of capital. Tr. 711. Scion's expert took these positions despite admitting the following:

- He always used a template for his deals, the template was "fairly standardized," and "a lot of the deals have similar structures and components." Tr. 716-18.
- In every deal he had done during his twenty-five year career, the promote was paid after the return of capital in the capital-event waterfall. Tr. 752-55.
- Before serving as an expert for Scion, he had never heard of a structure where the promote came before the return of capital in a capital-event waterfall. Tr. 753.
- He would expect a joint venture deal to be structured to have the promote paid after the return of capital in a capital-event waterfall. Tr. 756.
- He had used the promote shorthand of "an X over a Y" (Supreme Ct. Op. at 670) to propose compensation structures for his deals, and no one ever asked him whether the promote might come before the return of capital in a capital-event waterfall. Tr. 736.
- His counterparties had used the promote shorthand of "an X over a Y" to propose compensation structures to him, and he never asked whether the promote might come before the return of capital in the capital-event waterfall. Tr. 736-37.
- In his experience, a promote in a capital-event meant incentive compensation paid in a capital-event waterfall only after the return of capital. Tr. 759.
- He had never seen anyone define "promote" differently or use the term differently in any joint venture. Tr. 759.

- He had not seen any contemporaneous documents that suggested Scion bargained for its promote to come before the return of capital in the capital-event waterfall. Tr. 728.

- Because Rob and his ASB counterpart were negotiating Scion's upside when using the shorthand of "an X over a Y," Scion's expert understood them to be talking about a disproportionate share of profits that comes from a capital event. Tr. 761.

- Scion's expert's understanding of the emails exchanged between Rob and his ASB counterpart in which they used the shorthand "an X over a Y" was consistent with every capital-event waterfall in every deal he had ever been involved with. Tr. 762.

- If Rob had meant for the promote to come before return of capital, Scion's expert would have expected to see a mention of that. Tr. 764-65.

Ultimately, Scion's expert admitted that he was not claiming that the parties to the Disputed Agreements actually negotiated for the promote to come before the return of capital. Tr. 767. He conceded that he was "simply looking back in hindsight and speculating and trying to come up with some argument that supports some consideration that would justify putting the first level of promote ahead of return of capital." Tr. 767-68. He "could not offer any plausible justification for the mistakenly drafted capital-event waterfall provision." Trial Ct. Op. at *2.

Like Rob in his email, Scion's expert made stuff up. For fee-shifting purposes, I can overlook Rob's quick and incautious response. Rob reacted when ASB questioned Scion's entitlement to a big payday, and he dashed off statements in an email that he thought would get him the money. By contrast, with ample time for deliberation and reflection, Scion's expert made stuff up for this court's consideration both in his report and on the stand. What he made up conflicted directly with every real estate joint venture he had been involved in or heard about during twenty-five years of industry experience.

So unfounded were the views expressed under oath by Scion's expert, and so directly contrary to his own personal experience over a twenty-five year career, that Scion acted in bad faith by presenting and relying on his testimony.

As a remedy, ASB may recover from Scion the fees and expenses that relate to Scion's expert, including fees and expenses incurred by DLA Piper and ASB's expert to review and respond to the report that Scion's expert prepared and to depose Scion's expert (including deposition preparation). *See Arbitrium*, 705 A.2d at 238 (awarding plaintiffs' expert witness fees under bad faith exception). ASB also may recover from Scion an amount equal to six percent of the fees and expenses incurred for pre-trial briefing, trial, post-trial briefing, and post-trial argument. The court adopts this percentage because out of 1,200 pages of trial transcript, the parties devoted approximately 70 pages (six percent) to Scion's expert. The resulting percentage serves as an admittedly rough and likely conservative proxy for the portion of total trial-related fees and expenses that DLA Piper devoted to Scion's expert. While it might be possible for ASB to drill into DLA Piper's billing statements to generate a more particularized figure, the time and expense required for ASB to develop a better number, for Scion to oppose it, and for the court to make a determination would dwarf the incremental value of greater specificity. At this point, the game is not worth the candle. ASB is not otherwise entitled to recover fees and expenses relating to its own expert on promotes, because his testimony would have been part of ASB's affirmative case in any event.

DLA Piper shall submit an affidavit setting forth the amounts that fall into these categories. Scion shall pay those amounts to ASB with the understanding that the funds will be passed along to DLA Piper.

5. Scion's Three-Front Strategy

The final aspect of Scion's litigation conduct is Eric and Rob's decision to go on offense in three jurisdictions. After ASB sent Eric and Rob a detailed letter explaining that the Disputed Agreements had been drafted incorrectly and did not represent the business deal that Rob negotiated, the Bronstein brothers had a last clear chance to live up to what they knew were the real terms of their bargain. They chose instead to seek to enforce contract provisions that they knew were wrong, and they chose to pursue enforcement by filing three lawsuits virtually simultaneously.

This court already addressed Scion's three-front strategy. After ruling erroneously that ASB and DLA Piper were entitled to fees and expenses under the Fee-Shifting Provisions, this court conducted further proceedings to quantify the award. ASB and DLA Piper sought to recover fees and expenses incurred not only in this action, but also in the federal litigations that Scion commenced. This court found as follows:

> By letter dated September 20, 2010, ASB notified Scion that unless Scion agreed to correct the [Disputed Agreements] by close of business on September 21, ASB would file suit. Each joint venture was a Delaware limited liability company. Each of the [Disputed Agreements] was governed by Delaware law. Any fiduciary duty or implied covenant claims would be governed by Delaware law. The three joint ventures were factually interconnected: ASB and Scion used the earliest of the three LLC Agreements as a template for the subsequent deals. Given these facts, logic and efficiency

> cried out for a single forum, preferably with a decision-maker knowledgeable about Delaware law.
>
> Scion eschewed the efficient course. The next day, Scion preemptively filed suit over just one of the disputed joint ventures in the United States District Court for the Eastern District of Wisconsin, the site of the property Scion managed for that entity. On September 22, 2010, ASB filed this case. Unlike Scion, ASB placed at issue the entirety of the dispute, named all relevant parties, and sought reformation of all three [Disputed Agreements]. Neither ASB nor Scion has operations in Delaware, so ASB could not be accused of picking its home forum.
>
> Scion then filed two additional complaints in two other federal courts: the United States District Court for the Northern District of Illinois and the United States District Court for the Middle District of Florida. Each complaint sought to enforce a single [Disputed Agreement]. In each case, Scion filed in the local federal court where the subject property was located. Each of Scion's three complaints pled substantially identical counts.
>
> Scion now insists it had "a right to a federal forum" to resolve the questions of Delaware law posed by the litigation and contends that three federal actions were necessary because no single federal forum could exercise personal jurisdiction over the ASB parties. If Scion truly wanted a *single* federal forum, then the Illinois district court could have provided it . . . . And if Scion truly wanted a *federal* forum, Scion could have tried the case in Florida district court in February 2012; instead, Scion agreed to stay the Florida action so that trial could proceed here in March 2012.

Fee Op. at 438 (emphasis in the original) (citations omitted).

Given this series of events, this court found that "Scion filed multiple lawsuits to make the litigation as difficult and expensive as possible for ASB, hoping to create leverage that would force a settlement more favorable to Scion than the merits of its position warranted." *Id.* Put differently, Eric and Rob correctly anticipated that the

litigation would be professionally and personally embarrassing for ASB and DLA Piper. *See* Trial Ct. Op. at *1 (noting that "[e]ach of the ASB witnesses testified candidly and credibly" and did so "[d]espite obvious personal and professional embarrassment" arising from "his or her role in contributing to the scrivener's error in the capital-event waterfall provision"). Through their initial barrage of litigation, Eric and Rob tried to send a message to ASB and DLA Piper that the litigation would not be small, discrete, or easily resolved. It would be sprawling, contentious, and very public. Eric and Rob expected that ASB and DLA Piper would cave, even though Scion's factual position was incorrect.

Scion did not file the three federal actions for a legitimate purpose. At the time they made the decision to litigate in three places, Eric and Rob knew the true facts about their economic deal with Scion, yet they chose to allege in three jurisdictions that the Disputed Agreements correctly memorialized the underlying business arrangement. By contrast, Scion had legitimate defenses to ASB's suit in Delaware. The Disputed Agreements were signed contracts, negotiated by a sophisticated counterparty with the benefit of advice from an international law firm. Scion had strong legal and policy-based reasons for believing that Delaware law would call for enforcing the agreements as written. On appeal, the Delaware Supreme Court recognized that prior "case law in this area has been unclear." Supreme Ct. Op. at 676. Scion likewise had the right to insist ASB prove its affirmative case by clear and convincing evidence. Scion could readily defend against ASB's Delaware lawsuit. Scion acted in bad faith by electing to go on offense in three different jurisdictions in an effort to intimidate ASB and DLA Piper and despite knowing that the core allegations about Scion's compensation structure were

false. *See Soterion*, 2012 WL 5378251, at *18 (holding that plaintiffs acted in bad faith by filing "a lawsuit the core allegations of which they knew to be false at the time they filed it").

This fact-specific holding does not imply that Delaware courts will penalize litigants for filing competing actions outside of Delaware. After initially learning of the parallel actions early in the case, the court commented during the hearing on Scion's motion to dismiss the Delaware action that they did not appear to present any issues:

> I will say that I have no concern either way about these other litigations. If the judges there do something, that's fine. My plan is just to proceed deliberately with this case. I'm not in a race with those folks. I don't plan to do anything expedited here. We're just going to move forward in a normal track, and whatever happens will happen.

Dkt. 29 at 55. The court reached a different conclusion about the federal actions in the Fee Opinion only after hearing the evidence at trial, after making factual determinations on points such as Eric's knowing silence and Rob's fictitious business justifications, after considering the accuracy of the factual theory on which Scion sought to litigate, and with a full understanding of the course of events that led to the three lawsuits.

This court previously determined that DLA Piper's fees and expenses were reasonable. Out of $2,592,290.15 in fees, this court found that 87% was "incurred exclusively in [the Delaware case] or on work (such as discovery) used in both [the Delaware case] and in at least one of the federal cases." Fee Op. at 445. This leaves $336,997.72 in fees attributable to the incremental burden of the federal court actions. *Id.* Although DLA Piper agreed to represent Scion for free, DLA Piper should not have had

to shoulder this additional burden. The court therefore awards $336,998 in fees to ASB with the understanding that this amount will be passed along to DLA Piper.

DLA Piper also incurred $529,176.86 in expenses. *Id.* at 438. In the Fee Opinion, this court allocated expenses proportionately to fees, such that 13% would be attributable to the federal actions. The court therefore awards $68,793 in expenses to ASB with the understanding that this amount will be passed along to DLA Piper.

C. Whether Equity Otherwise Demands An Award

Citing the Delaware Supreme Court's observation that the grounds for equitable fee-shifting recognized to date are not exclusive, ASB contends that equity otherwise demands a full award of fees and expenses in this case. ASB's arguments amount to reiterating the factual and procedural history of the litigation. This recitation does not supply a coherent justification for a new equitable doctrine of fee-shifting. For present purposes, the court need not go beyond the established principles discussed above.

III. CONCLUSION

ASB's application for an equitable award of fees and expenses is granted to the extent set forth herein. Once ASB has quantified the fees and expenses that relate to Scion's expert, the parties shall submit an implementing order.