IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GARY STAFFIERI and ADRIA CHARLES: STAFFIERI,

Plaintiffs.

v.

C.A. No. 7439-VCL

HENRY BLACK, MARY LOU BLACK, RAYMOND BUCHTA, BLACKBALL PROPERTIES, LLC, PAUL MILLER, CANDY MILLER, W. SCOTT BLACK, and GAKIS PROPERTIES II, LLC,

Defendants.

CERTAIN DEFENDANTS' MOTION FOR REARGUMENT AND TO VACATE FINAL ORDER AND JUDGMENT

Certain Defendants¹, by and through their undersigned counsel, hereby move this Court for an Order pursuant to Court of Chancery Rules 59(f) and 60(b) for Reargument of, and to Vacate, the Final Order And Judgment entered January 31, 2013 awarding attorneys fees and court costs to the Plaintiffs, based upon the following:

I. PROCEDURAL BACKGROUND

- 1. The Court issued its Post-Trial Order deciding certain Claims and Counterclaims asserted by the parties in this action on October 24, 2012.²
- 2. On November 7, 2012, the Court issued two (2) Orders denying Certain Defendants' Motion For Reargument, Reconsideration And/Or New Trial, which addressed the Court's holdings regarding an "Express Easement" and the award of attorneys fees based on the

¹ Certain Defendants include Defendants Henry Black, Mary Lou Black, Raymond Buchta, W. Scott Black, and Blackball Properties, LLC.

² The Court has yet to decide Certain Defendants' Counterclaims for Abandonment and Reformation of Easement, and it did not decide whether numerous claims asserted in the Amended Verified Complaint were abandoned based upon the Plaintiffs' failure to brief or present those claims before and at trial.

Bad Faith Exception To The American Rule, and the Court's failure to decide Certain Defendants' Counterclaims for Reformation and Abandonment of Easement.

- 3. On December 5, 2012, Certain Defendants filed a Notice of Appeal of the Court's Post-Trial Order and its Orders denying the Motion for Reargument, Reconsideration And/Or New Trial. A copy of the Notice of Appeal is attached as Exhibit A and is herein incorporated by reference.
- 4. On December 21, 2012, the Court of Chancery docket was transferred to the Delaware Supreme Court at 8:59 a.m.
- 5. On December 21st at 12:32 p.m., 3½ hours later, the Plaintiffs filed a letter and four (4) Affidavits which constituted an application for attorneys fees and costs.³
- 6. On December 26, 2012, the Plaintiffs' submitted a revised Affidavit regarding attorneys fees and expenses.
- 7. Certain Defendants filed their Opening Brief on Appeal with the Delaware Supreme Court on January 22, 2013.
- 8. On January 25, 2013, the Plaintiffs filed a Supplemental Affidavit of Gary Staffieri in support of their request for fees and costs. That same day, a letter and proposed form of Order were submitted by counsel for Plaintiffs.
- 9. Six (6) days later, before Certain Defendants were provided with an opportunity to respond to Plaintiffs' fee and cost request, the Court entered a Final Order And Judgment awarding 100% of all fees and costs requested by the Plaintiffs (the "Surprise Order").
- 10. In the Surprise Order, the Court alleged that Certain Defendants had "ample time" to file an opposition to the reasonableness of the amount of fees and expenses sought by

³ Because the case was on appeal and the record had been handed up to the Supreme Court, there was no pending action to file a request for fees and costs in. Thus, all filings after 9 a.m. on December 21, 2012 were ineffective.

Plaintiffs. But the Court recognized that: a) "there is an appeal pending in this matter"; and b) if the Court "is without ongoing jurisdiction to quantify the fee award, then the Court will revisit the issue of fees and expenses, to the extent necessary, after and in compliance with the Supreme Court's mandate." A copy of the Surprise Order is attached as Exhibit B.

11. On appeal, the Plaintiffs unsuccessfully pursued a Motion to Affirm, which was denied by Order of the Delaware Supreme Court on February 6, 2013. A copy of the Order is attached as Exhibit C and is herein incorporated by reference.

II. THE RULE 59(f) STANDARD

- 12. A Motion for Reargument pursuant to Court of Chancery Rule 59(f) must be served and filed within five (5) days after the filing of the Court's opinion or the receipt of the Court's decision.
- 13. The purpose for all Rule 59 motions is to provide the trial court with an opportunity to correct errors prior to an appeal. *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, *2, Steele, JJ. (Del. Ch., May 11, 2001).
- 14. In ruling on a Rule 59(f) motion, the Court determines whether it: (1) overlooked a decision or principle of law that would have controlling effect, or (2) misapprehended the law or facts so that the outcome of the decision would be different. *Cantor Fitzgerald*, *L.P.* at *2.

III. THE RULE 60(b) STANDARD

15. Under Court of Chancery Rule 60(b)(1), (4), and (6), the Court may relieve a party from a Final Judgment or Order based upon: a) mistake, inadvertence, surprise, or excusable neglect; b) the judgment is void; or c) "any other reason justifying relief from the operation of the judgment," respectively.

- 16. In the context of a motion to open a default judgment under Rule 60(b)(1) and (6), the Courts apply a liberal construction based on the policy favoring a decision on the merits. Battaglia v. Wilmington Savings Fund Soc'y, 379 A.2d 1132, 1135 (Del. 1977). The applicable test is: a) did the movant make "some showing" that the outcome will be different i.e. cite a meritorious defense?; and b) will "substantial prejudice" be caused to the opposing party? Id.
- 17. A judgment is void where the Court lacks jurisdiction. *E.J. Hollingsworth Co. v. Cesarini*, 129 A.2d 768, 769 (Del. Super. 1957). Under those circumstances, the judgment entered is a nullity and never lawfully existed. *Id.* And lack of jurisdiction cannot be stipulated to or cured *post hoc. Id.*
- 18. In order to satisfy Rule 60(b)(6), a party must show "extreme hardship" or "manifest injustice." *CanCan Development, LLC v. Manno*, 2011 4379064, *4, Laster, V.C. (Del. Ch., Sept. 21, 2011).

IV. THE SURPRISE ORDER IS VOID; THE COURT LACKED JURISDICTION TO ENTER IT

- 19. Under Supreme Court Rule 7(a), an appeal is commenced upon the filing of a Notice of Appeal.
- 20. Article IV, § 11(4) of the Delaware Constitution expressly vests jurisdiction in the Delaware Supreme Court regarding decisions of the Court of Chancery. So generally, the Court of Chancery would be divested of jurisdiction once an appeal is effected.
- 21. Pursuant to Supreme Court Rule 9(b), the Clerk of the Trial Court submits the entire paper Record to the Supreme Court Clerk. The Record is not returned to the Trial Court Clerk until final disposition of the Appeal and issuance of the Supreme Court mandate. Supreme Court Rule 9(b).

- 22. Supreme Court Rule 9(i) indicates that the Trial Court only retains jurisdiction over issues related to the ordering of the transcript during the pendency of an Appeal.
- 23. Supreme Court 32 also grants continuing Trial Court jurisdiction to entertain any motion to stay. Specifically, Rule 32(a) provides that "[t]he trial court retains jurisdiction over the initial motion and must rule on the initial motion regardless of whether the case is on appeal to this court."
- 24. Otherwise, the Trial Court has no jurisdiction over the action post-appeal; the mandate and any other instructions or order are issued to the Trial Court once an Appeal is finally decided. Supreme Court 19. The Supreme Court does not lose exclusive jurisdiction over an action until its mandate is issued. *Atlas Sanitation Co. v. State*, 595 A.2d 380, 381 (Del. 1991).
- 25. Court of Chancery Rule 72(c) effectively acknowledges the fact that this Court may take no action until the final Supreme Court mandate is issued. It describes what this Court may do upon receipt of the mandate, impliedly confirming that this Court may not take action in the interim.
- 26. For centuries, it has been recognized that an appeal divests the Court of Chancery of jurisdiction over an action. In *Tatem v. Gilpin*, 1816 WL 194, *3, Ridgely, Ch. (Del. Ch., 1816), it was held that once an appeal is taken the Court of Chancery may not further proceed in the cause until the appellate court returns the matter to Chancery.
- 27. The Supreme Court has previously held that "a judgment on the merits is not final until an <u>outstanding</u> application for an award of attorneys fees has been decided." *Emerald Partners v. Berlin*, 811 A.2d 788, 791 (Del. 2001). But no application for fees was pending when the Notice of Appeal was filed on December 5, 2012 or as of the time the 30 day deadline

to appeal arrived on December 7, 2012. As a result, Certain Defendants properly effected an appeal and this Court had no further jurisdiction or case pending before it.

- 28. By the time the Plaintiffs filed their Affidavits and subsequent requests for an Order granting them a specific monetary sum for attorneys fees and court costs, this Court was wholly without jurisdiction over the action. Thus, the Surprise Order is void *ab initio*.
- 29. The Notice of Appeal transferring jurisdiction over this action to the Delaware Supreme Court was filed on December 5, 2012, sixteen (16) days before the first Affidavits were submitted in support of the request for fees and costs. Thus, the Court lacked jurisdiction over the case long before a fee and cost application was first filed.
- 30. Additionally, the docket and the "record" were handed up a few hours before the Plaintiffs ever submitted any request for a specific fee and cost award. Therefore, there was no action still pending before this Court by December 21, 2012 when Plaintiffs applied for fees and costs.
- 31. By the time the Plaintiffs filed supplemental Affidavits and a cover letter and Order requesting that the Court award them 100% of all fees and costs requested on January 25, 2013, Certain Defendants had already filed their Opening Brief on Appeal in the Supreme Court. And when the Court suddenly and swiftly entered the Surprise Order without providing Certain Defendants a chance to respond six (6) days later, the Court had no case before it to validly enter the Surprise Order in. The entire case had been in the Delaware Supreme Court for almost two (2) months, divesting this Court of jurisdiction.
- 32. The Surprise Order is void as a matter of law based on this Court's lack of jurisdiction over the action as of January 31, 2012.

V. THE COURT ERRONEOUSLY FAILED TO PERMIT CERTAIN DEFENDANTS TO RESPOND TO PLAINTIFFS' FEE & COST APPLICATION

33. At no time after the late December 2012 and late January 2013 submissions made by the Plaintiffs regarding their application for a specific monetary award of attorneys fees and costs did this Court advise Certain Defendants that they must respond by a time certain. This fact is critical, as Certain Defendants were confident that the Court would not take any action on the application due to the pendency of the Supreme Court Appeal which divested this Court of jurisdiction to render any decision on the application. In addition, Certain Defendants were confident that the Court would advise them to file a response if the Court intended to decide the application despite the pending appeal.

A. Court Rules Provide Certain Defendants' <u>The Right To File A Written Response</u>

- 34. The only Court of Chancery Rule addressing the issue of application for an award of fees and costs is Rule 88, which solely indicates what the applicant must do. Rule 88 does not indicate what the opposing party should or may do in response.
- 35. In the instant action, the Court never provided any deadline for Certain Defendants to submit a response. Instead, the Court abruptly and unexpectedly issued an Order just six (6) days after the supplemental application filing was made by the Plaintiffs. Certain Defendants were denied an opportunity to respond as a practical and legal matter.
- 36. Additionally, the application for attorneys fees and costs submitted by the Plaintiffs is properly considered to constitute a motion, which by Court of Chancery Rule 7(b)(1) cannot be decided by the Court until the non-moving party is given an opportunity to submit a written response. Indeed, Rule 7(b) expressly provides that "[a]n application to the Court for an order shall be by motion which...shall be in writing, shall state with particularity the grounds

therefor, and shall set forth clearly in the motion the relief sought." In addition, Rule 7(b)(4) provides that the parties either enter into a Stipulated Brief Schedule or apply for an Order establishing a schedule. Briefing is only waived if approved by the Court.⁴

37. No schedule for briefing was established or waived by Court Order, whether stipulated, issued *sua sponte*, or requested by motion. Accordingly, Certain Defendants were denied their right under the Court's Rules to present a written response in opposition to the amount of the fees and costs requested.

B. The Fee and Cost Award Would Be Far Less Based On Certain Defendants' Response

- 38. If an opportunity to provide a written response had been allowed, Certain Defendants would have made arguments that would have likely reduced the amount of fees and costs awarded by a significant amount. For example, the Plaintiffs' use of two (2) lawyers caused unnecessary duplication of effort. More importantly, the Plaintiffs lost on most of their claims. Time-consuming claims for business losses, damages, and multiple alternative types of easements, which chewed up 50% or more of the case, all predictably failed; the fee demand would have to be reduced by at least one-half ($\frac{1}{2}$) for that reason alone. Additionally, many of the costs requested to be paid are simply non-reimbursable as a matter of law e.g. transcripts not used at trial, expert witness fees incurred to present an unsuccessful damages claim, and other miscellaneous non-court costs are simply not awardable they are not directly related to the successful presentation of the Express Easement claim which was the sole winning cause of action asserted by Plaintiffs.
- 39. The loss of at least one-half (½) of the claims, combined with the total loss of the damages claims which constituted one (1) of the two (2) major claims asserted, goes directly to

⁴ Technically, every request for an Order must be briefed in the Court of Chancery.

the "results obtained" factor of the test for determining the reasonableness of an attorneys fees award under *Mahani v. Edix Media Group, Inc.*, 935 A.2d 242, 246 (Del. 2007). A substantial reduction in fees and costs awarded was at least possible, but more likely quite probable.

- 40. Certain Defendants would have also presented evidence establishing that the Plaintiffs unreasonably extended the litigation due to initial lack of diligent prosecution of the case, followed by their refusal to bifurcate the case, focus on the Express Easement claim, and respond to numerous settlement proposals. In addition, decisional law which establishes that Delaware follows the "New Business Rule" and requires proof of non-speculative damages in order to obtain an award for claimed business losses establishes that much of the fees and costs incurred by Plaintiffs' was for their ill-fated claims that were not reasonable to pursue. But the Plaintiffs soldiered on, spending considerable time and resources in a predictably futile pursuit of a huge damage award based upon their pie-in-the-sky "business." And so it was that the Court denied their frivolous damages claim, for which they cannot reasonably receive even \$1 of fee and cost reimbursement.
- 41. Certain Defendants incurred (and paid) approximately \$50,000 in attorneys fees in this action.⁵ It is implausible and/or unreasonable that Plaintiffs incurred more than 3 times the amount of fees incurred by Certain Defendants to litigate the same case.⁶
- 42. Further, if the Express Easement claim was indeed as clear and obvious as the Plaintiffs asserted in their ill-fated Motion to Affirm filed in the Delaware Supreme Court, then this was a simple matter requiring little time and effort in order to prevail on that claim. In light

⁵ Plaintiffs have not submitted any proof that they paid all of the allegedly incurred fees. And the fact that it took them about 2 months after the Post-Trial Order to submit bills that were supposedly already completed raises suspicions about the accuracy of at least Ms. Cherry's bills.

⁶ The Plaintiffs did not even take any depositions.

of the self-proclaimed simplicity of their claim, \$167,000 in fees and costs exceeds the bounds of reasonableness on its face.

- 43. In *Richmont Capital Partners I, L.P. v. J.R. Invs. Corp.*, 2004 WL 1152295, *3, Lamb, V.C. (Del. Ch., May 20, 2004), the Court held that reducing the fee amount awarded is appropriate for: a) time attributable to two (2) lawyers being present in a courtroom or conference when one (1) would do; and b) excessive, redundant, duplicative, or otherwise unnecessary hours.
- 44. Duplication and unnecessary, multiple attorney time abounds in the fee requests submitted by the Plaintiffs. For example, local Delaware counsel did not need to attend the 2+ day trial of this action; *pro hac vice* counsel could have been granted permission by the Court to proceed with the case herself, as she was the sole attorney that actively tried the case. In addition, significant time was spent by a second local Delaware counsel getting up to speed after the Plaintiffs improvidently utilized the services of a lawyer who was barred in this State but was not permitted to litigate the action as a matter of law by Delaware Supreme Court Rule. Thus, substantial reductions in the total fee amounts requested would almost certainly result if the Court had accorded Certain Defendants their right to present a response.
- 45. In addition, Sharon Cherry, Esquire submitted itemized task billing statements which are for excessive amounts of time and for work not directly involving the litigation.⁷ For example, she billed: a) almost 8 hours on January 24, 2012 for a site visit and meeting with the Staffieris before litigation was even contemplated; b) 8.25 hours on February 9, 2012 for "Phone call with Staffieris; draft of Complaint," which was before Certain Defendants even advised Plaintiffs of their position by letter dated February 13, 2012; c) 10+/- additional hours revising

⁷ That is why her time reached the exorbitant and unbelievable amount of 380 hours, which would equal 2+ months of full-time work.

the Complaint; d) over 7 hours to review, and draft a response to, Certain Defendants' counterclaims; e) 62+ hours for work on Pretrial Briefs; and f) more than 68 hours for "Trial preparation." Ms. Cherry also billed for numerous phone calls and meetings with Jim Smith and New Castle County unrelated to this action. And she wasted considerable time on a Motion for Summary Judgment which was not permitted by the scheduling order and was not considered by the Court.

C. The Surprise Order Violates The Due Process Clauses Of The State And Federal Constitutions

- 46. The Court's sudden and unexpected entry of the Surprise Order granting Plaintiffs 100% of their attorneys fees and costs also violates fundamental precepts of Constitutional Due Process.
- 47. It is well settled that notice and an opportunity to be heard are required under the Due Process Clause before one can be deprived of life, liberty, or property. *East Coast Insulation Sales Co., Inc. v. Stevenson*, 1990 WL 122994, Gebelein, J. (Del. Super., Aug. 20, 1990). One standard to determine whether procedural Due Process requirements are met is to evaluate if the process complied with Court Rules. *Id.*
- 48. The United States Supreme Court has held that "[t]he essential requirements of Due Process...are notice and an opportunity to respond," which means "[t]he opportunity to present reasons, either in person or in writing, why the proposed action should not be taken...." Cleveland Bd. Of Educ. v Loudermill, 470 U.S. 532, 546 (1985).
- 49. Court of Chancery Rule 7 requires that a briefing schedule be established, and that a non-moving party be given an opportunity to be heard pursuant to the submission of a written brief. But in the case at bar, the Court did not allow Certain Defendants any opportunity to present a written response, despite the obviously excessive and unreasonable fee requests

submitted by the Plaintiffs. Consequently, the Surprise Order runs afoul of the Due Process

clauses of the United States and Delaware Constitutions.

50. The Court's lack of jurisdiction to enter the Surprise Order also constitutes a

violation of Constitutional Due Process. Since jurisdiction over the action was vested in the

Delaware Supreme Court, the Surprise Order is void and therefore Constitutionally infirm.

WHEREFORE, Certain Defendants respectfully request that this Court enter an Order in

accordance with one of the two alternative forms attached, either granting Reargument of the

matter and rescinding the Final Order And Judgment under Rule 59(f) or vacating the Final

Order And Judgment under Rule 60(b).

ABBOTT LAW FIRM

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Attorneys for Certain Defendants

Henry Black, Mary Lou Black, Raymond Buchta,

W. Scott Black and Blackball Properties, LLC

Dated: February 7, 2013

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GARY	STAFFIERI	and	ADRIA	CHARLES	:
STAFF	TERI,				•

....

Plaintiffs,

v. : C.a. No. 7439 VCL

HENRY BLACK, MARY LOU BLACK, RAYMOND BUCHTA, BLACKBALL PROPERTIES, LLC, PAUL MILLER, CANDY MILLER, W. SCOTT BLACK, and GAKIS PROPERTIES II, LLC,

Defendants.

ORDER

AND NOW this ___ day of ________, 2013, Defendants Henry Black, Mary Lou Black, Raymond Buchta, W. Scott Black and Blackball Properties, LLC ("Certain Defendants") having moved this Court for Reargument pursuant to Court of Chancery Rule 59(f) regarding this Court's Final Order And Judgment dated January 31, 2013 awarding all attorneys fees and costs requested by the Plaintiffs, and it appearing that this Court lacked jurisdiction to entertain the specific monetary award application and enter the Final Order And Judgment, and it further appearing that a reasonable opportunity for the Certain Defendants to file a written response should have been provided prior to a final determination,

IT IS ORDERED that Certain Defendants' Rule 59(e) Motion for Reargument is **GRANTED** and the Court's Order dated January 31, 2013 is hereby **STRICKEN**,

AND IT IS FURTHER ORDERED that the Register In Chancery is hereby directed to submit a copy of this Order to the Superior Court, Prothonotary's Office, Judgment Section, so

that the public record clearly establishes that	the Final Order And Judgment has no legal force or
effect.	
=	Vice Chancellor J. Travis Laster

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GARY STAFFIERI and ADRIA CHARLES	
STAFFIERI	

Plaintiffs.

v. : C.a. No. 7439 VCL

HENRY BLACK, MARY LOU BLACK, RAYMOND BUCHTA, BLACKBALL PROPERTIES, LLC, PAUL MILLER, CANDY MILLER, W. SCOTT BLACK, and GAKIS PROPERTIES II, LLC,

Defendants.

ORDER

AND NOW this __ day of _______, 2013, Defendants Henry Black, Mary Lou Black, Raymond Buchta, W. Scott Black and Blackball Properties, LLC ("Certain Defendants") having moved this Court pursuant to Rule 60(b)(1), (4), and (6) for an Order vacating this Court's Final Order And Judgment dated January 31, 2013 which granted all of the attorneys fees and costs requested in the application of the Plaintiffs, and it appearing that this Court lacked jurisdiction to enter the Order due to the pendency of the Delaware Supreme Court Appeal, and it further appearing that a reasonable opportunity for Certain Defendants to submit a written response should have been provided prior to a final determination,

IT IS ORDERED that Certain Defendants' Motion is **GRANTED**, and the January 31, 2013 Judgment and Order is **VACATED**,

AND IT IS FURTHER ORDERED that that the Register In Chancery is hereby directed to submit a copy of this Order to the Superior Court, Prothonotary's Office, Judgment Section, so

that the public record clearly establishes that	t the Final Order And Judgment has no legal force or
effect.	
	Vice Chancellor J. Travis Laster

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
CANCAN DEVELOPMENT, LLC, Plaintiff,
v.
Sandra MANNO, Defendant.

C.A. No. 6283–VCL. Submitted: Sept. 13, 2011. Decided: Sept. 21, 2011.

Robert S. Saunders, Arthur R. Bookout, Skadden, Arps, Slate, Meagher & Flom LLP, Wilmington, Delaware; Attorneys for Plaintiff.

P. Clarkson Collins, Jr., Jason C. Jowers, Morris James LLP, Wilmington, Delaware; Attorneys for Defendant.

MEMORANDUM OPINION

LASTER, Vice Chancellor.

*1 Defendant Sandra A. Manno has moved pursuant to Rule 60(b) for relief from a default judgment entered on April 12, 2011. Two features distinguish her request. First, the default judgment was not entered for a customary reason such as her failure to appear. Rather, Manno advised that she would not contest its entry on the merits, Second, and consequently, Manno does not seek to vacate the judgment in its entirety. She only seeks relief from an award of reasonable attorneys' fees and costs to plaintiff Can-Can Development, LLC ("CanCan" or the "Company"). Alternatively, Manno asks that the effectiveness of the fee award be stayed pending the outcome of a related action, suggesting that the amount currently due could be offset against whatever monetary relief she hopes to be awarded there.

Manno relies on Rule 60(b)(1), pursuant to which relief may be granted upon a showing of "[m]istake, inadvertence, surprise, or excusable neglect." But the default judgment and award of attorneys' fees did not result from any of these factors. It rather resulted from

her non-Delaware counsel's litigation strategy of attempting to moot this case by representing that Manno would not contest her removal as a manager, while at the same time continuing to litigate her removal in a later-filed New Jersey action. Manno also relies on Rule 60(b)(6), pursuant to which relief may be granted for "any other reason justifying relief from the operation of the judgment." Her current predicament, which is of her own making, does not otherwise justify relief. The Rule 60(b) motion is denied.

I. FACTUAL BACKGROUND

On March 16, 2011, CanCan filed this action pursuant to <u>6 Del. C. § 18–110</u> to obtain a summary determination that Manno had been removed as a manager of the Company. On March 21, CanCan moved to expedite. On March 23, I heard CanCan's motion. In accordance with this Court's custom, I extended Manno's Texas lawyer the courtesy of appearing on her behalf during the initial scheduling conference.

Before the conference, I reviewed CanCan's limited liability company agreement and considered CanCan's reading of the removal provisions, which appeared more than colorable and likely the only reasonable reading. During the conference, Manno's lawyer did not offer any alternative reading. Indeed, he could not identify any defense Manno might have to CanCan's complaint, other than his belief that Manno could not be served with process in a civil proceeding brought in the State of Delaware (a position contrary to 6 Del. C. § 18–109). Manno's lawyer indicated that other attorneys were reviewing those issues and that Manno would retain Delaware counsel promptly.

At the close of the conference, I scheduled the matter for an expedited merits hearing and required Manno to answer the complaint by April 1, 2011. On March 31, having not retained Delaware counsel, Manno's Texas lawyer caused a paralegal in his office to send me a copy of a letter that he sent earlier that day to CanCan. The earlier letter stated:

*2 Sandra Manno has elected not to file an answer in this case. This election is based on the transfer of membership units from Joseph Py to Robert A.

Granieri. This makes the verified complaint and proposed order a moot case since Mr. Granieri and his father now have a supermajority. We are advising Vice Chancellor J. Travis Laster of this decision.

Dkt. 19, Ex. C. Neither the lawyer's letter nor the paralegal's cover letter explained what defense Manno otherwise might have had or why Granieri and his father did not have a supermajority of CanCan's voting power when they originally removed Manno.

Despite having represented that the removal issue was resolved, the same Texas lawyer, who apparently also is admitted in New Jersey, filed a plenary action in New Jersey Superior Court on March 25, 2011. Count XI of that complaint sought to litigate Manno's removal as a manager and to recover compensatory and consequential damages on the grounds that "[t]he Defendants have used undue influence, extortion, fraud and deceit and other methods to terminate Sandra Manno as Manager of CanCan..." Dkt. 9, Ex. A, ¶ 45. The complaint noted the existence of the Delaware case but alleged that it "may be adjudicated on procedural grounds and not adjudicate the Defendant's tortuous [sic] conduct." *Id*.

By motion dated April 5, 2011, CanCan moved for a default judgment. CanCan explained that it was forced to file the Section 18–110 proceeding after receiving from Manno's counsel (i) a letter dated March 8 that challenged Manno's removal as a manager and (ii) an email dated March 11 that again disputed her removal. CanCan described Manno's filing of the New Jersey action and her attempt to litigate her removal there. CanCan noted that despite purportedly conceding that Manno no longer was a manager, Manno's non-Delaware lawyer insisted on continuing to litigate her removal in New Jersey. CanCan asked for the entry of a default judgment conforming to the relief requested in the complaint, which included a prayer for attorneys' fees and costs.

On April 11, 2011, Manno's Texas lawyer, writing on his New Jersey letterhead, advised me that "Sandra Manno has no objection to the order being entered removing her as a Manager of [CanCan] since the actions of Joseph F. Py in transferring his Membership shares to Robert A. Granieri has [sic] mooted the procedural issues." Dkt. 20, Ex. J. Manno's lawyer again did not explain what defense Manno otherwise

might have had. He argued that any award of attorneys' fees would depart from the American Rule. He acknowledged the New Jersey action but did not attempt to explain how Manno justifiably could continue to dispute her removal there.

On April 12, 2011, having considered the submissions, I entered default judgment in the form requested by CanCan. In my view, the case warranted an award of attorneys' fees because Manno appeared to be attempting in bad faith to eat her cake and still have it, viz., she wanted to concede her removal for the limited purpose of escaping from Delaware while continuing to litigate her removal in New Jersey. Moreover, Manno's lawyer still had not articulated any colorable defense to what appeared to be the only reasonable reading of the removal provisions in CanCan's limited liability company agreement. Manno thus appeared to be seeking to impose litigation costs on CanCan by fighting over an issue where she did not have a defensible position.

*3 CanCan subsequently moved to quantify the amount of the fee award. I scheduled a hearing for May 17, 2011, and directed Manno to file her response within ten days. During the hearing, her out-of-state counsel again argued against the fee award. I reviewed the history of the case and noted that Manno still had not articulated any basis for defending the Delaware action or continuing to litigate in New Jersey. I determined that the attorneys' fees sought by CanCan were reasonable and granted the amount requested.

After the case was closed, Manno finally hired Delaware counsel. She first attempted to notice an appeal, which she later voluntarily dismissed. She then moved for relief from judgment pursuant to Rule 60(b).

II. LEGAL ANALYSIS

Under Court of Chancery Rule 55(c), this Court "may set aside judgment by default in accordance with Rule 60(b)." The limited grounds for granting relief from judgment in Rule 60(b) implicate two significant values: (i) "the integrity of the judicial process," and (ii) "the finality of judgments." Wolf v. Triangle Broad. Co., 2005 WL 1713071, at * 1 (Del. Ch. July 18, 2005) (quoting MCA, Inc. v. Matsushita Elec. Indus. Co., 785 A.2d 625, 634–35 (Del,2001)). When a default judgment results from a defendant's failure to respond, Delaware courts will err on the side of

granting relief to promote the policy of deciding litigation on the merits. See, e.g., <u>Battaglia v. Wilmington Sav. Fund Soc.</u>, 379 A.2d 1132, 1135 (Del.1977). When a judgment has been entered for other reasons, as here, a Rule 60(b) motion should not be easily granted. See <u>Wolf.</u> 2005 WL 1713071, at *1.

A. Relief Under Rule 60(b)(1)

Under Rule 60(b)(1), the Court may vacate a judgment "upon such terms as are just" if a defendant can show that the judgment resulted from "[m]istake, inadvertence, surprise, or excusable neglect." Ct. Ch. R. 60(b)(1). To prevail under Rule 60(b)(1), the defendant must establish (i) mistake, inadvertence or excusable neglect in the conduct that led to the default judgment; (ii) a meritorious defense to the action that would allow for a different outcome to the litigation; and (iii) that the plaintiff will not be prejudiced. See, e.g., Apt. Cmtys. Corp. v. Martinelli, 859 A.2d 67, 71–72 (Del.2004) (affirming denial of Rule 60(b)(1) motion because movant failed to establish excusable neglect); Artisans' Bank v. Chase Alexa, LLP, 2011 WL 1533429, at *2 (Del.Super,Apr.21, 2011) (denying Rule 60(b)(1) motion because movant consciously chose not to respond and instead sought to litigate in a different action).

Manno argues that she had a viable defense to the complaint based on her understanding of the allocation of voting rights at CanCan. She contends that she intended to raise and litigate her defense, but that when one of the other CanCan members transferred his interests to the Granieris after the scheduling conference, she lacked the votes to block her removal even if her understanding were correct. She says that in light of changed circumstances, she made a responsible decision not to litigate. She avers that she and her lawyer mistakenly did not realize that she had to articulate a colorable defense to avoid a fee award.

*4 If Manno had acted responsibly in light of changed circumstances to moot the dispute over her removal as a manager, then I would not have entered a default judgment that awarded fees to CanCan. But that is not what Manno did. She rather sought only to moot the issue *in Delaware* while continuing to litigate the same issue *in New Jersey*. This was the litigation equivalent of keeping her fingers crossed behind her back.

Manno's recently retained Delaware counsel ar-

gues that the summary nature of the Delaware proceeding prevented Manno from raising the issues she sought to litigate in New Jersey. Manno made no such argument at the time, and this seems to be an instance of savvy Delaware counsel trying to clean up someone else's mess. Regardless, the scope of a proceeding brought under <u>Section 18–110</u>, like its corporate analogue under <u>8 Del. C. § 225</u>, can readily encompass the issues Manno wanted to litigate in New Jersey. FNI Indeed, it is hard to imagine how this Court could have given effect to the Granieris' removal vote if they had procured the underlying interests through undue influence, extortion, fraud, and deceit, as Manno alleged (albeit in conclusory fashion) in her New Jersey complaint.

FN1. See, e.g., Levinhar v. MDG Med., Inc., 2009 WL 4263211, at *10-11 (Del. Ch. Nov. 24, 2009) (holding dismissal of a § 225 proceeding had res judicata effect on breach of fiduciary duties issues that could have been litigated in the summary proceeding); Agranoff v. Miller, 1999 WL 219650, at *17–18 (Del. Ch. Apr. 12, 1999), aff'd, 737 A.2d 530 (Del.1999) (resolving claims for breach of fiduciary duty and tortious interference in a § 225 action); Jackson v. Turnbull, 1994 WL 174668, at *2 (Del. Ch. Feb. 8, 1994), aff'd, 653 A.2d 306 (Del.1994) (noting that in a § 225 action "it is frequently the case that, in order to determine the rightful directors of a company, underlying transactions must be analyzed and resolved"); Kahn Bros. & Co. v. Fischbach Corp., 1988 WL 122517, at *5 (Del Ch. Nov. 15, 1988) (Allen, C.) (holding that directors' alleged fraud in obtaining office was not collateral to a § 225 proceeding).

In light of her tactical gambit of conceding in Delaware to litigate in New Jersey, Manno cannot claim that the default judgment and award of attorneys' fees resulted from mistake, inadvertence, or excusable neglect. It rather resulted from the litigation strategy that she and her counsel consciously adopted. Manno now claims that she and her counsel mistakenly failed to understand that a default judgment might include an award of fees and costs where the complaint requested that relief and the Court found a basis for it. But that is also the rule in Texas, where Manno's out-of-state lawyer is admitted to practice. [FN2] More-

over, by letter dated April 11, 2011, Manno's lawyer argued against any award of fees under the American Rule. He obviously understood that CanCan sought an award of attorneys' fees under the bad faith exception.

FN2. See, e.g., Paradigm Oil, Inc. v. Retamco Operating, Inc., 330 S.W.3d 342, 360 (Tex.App.2010) ("The default judgments conclusively established that, as alleged in the petitions, Paradigm is liable for Retamco's attorney's fees.") (internal quotation marks omitted); Siddiqui v. W. Bellfort Prop. Owners Ass'n, 819 S.W.2d 657, 659 (Tex.App.1991) ("[B]y failing to answer, [the defendant] legally admitted her liability for reasonable attorney's fees since the plaintiff's petition included a specific request for such an award...").

Manno also has not convinced me that she possessed a meritorious defense that would have resulted in a different outcome. In her Rule 60(b) motion, Manno finally explained her understanding of the allocation of voting rights at CanCan. That understanding is contrary to a plain reading of the limited liability company agreement. But assuming it were colorable, I do not believe it would have changed the result. At bottom, Manno wanted to end the litigation in Delaware while continuing to litigate in New Jersey. Without a fee award, Manno would have imposed costs needlessly on CanCan. As long as Manno wanted to fight on in New Jersey, I would have entered the form of order granting attorneys' fees and costs. Relief is therefore unavailable to Manno under Rule 60(b)(1).

B. Relief Under Rule 60(b)(6)

Rule 60(b)(6) is a catch-all, allowing the Court to vacate a judgment if the movant can sufficiently show "any other reason justifying relief." Ct. Ch. R. 60(b)(6). Rule 60(b)(6) "only encompasses circumstances that could not have been addressed using other procedural methods, [that] constitute an 'extreme hardship,' or [when] 'manifest injustice' would occur if relief were not granted." Wolf, 2005 WL 1713071, at *1 (footnote omitted). Manno has not shown "extreme hardship" or "manifest injustice." She merely suffered the consequences of an ill-advised litigation strategy. She could have filed a timely appeal. Parties who wish to avoid similar outcomes would be well advised to retain Delaware counsel promptly, and in

any event before the conclusion of a case.

*5 Under the circumstances, it would be unjust to relieve Manno of her fee obligation and force CanCan to bear the expense of pursuing and obtaining a default judgment. Delaware courts have held that a plaintiff may be awarded attorneys' fee and costs as a condition for vacating a default judgment. FN3 Were I to grant Manno's motion, these authorities would support conditioning the relief on Manno paying the fees she currently seeks to avoid. I will simply leave the original order in place.

FN3. See Battaglia v. Wilmington Sav, Fund Soc., 379 A.2d 1132, 1136 (Del.1977) (remanding with direction to the trial court "to award plaintiff counsel fees, court costs and any other expenses, including those incurred by this appeal, to which the Court, in its discretion, deems her entitled, as a result of defendant's failure to act before the default judgment was taken"); Williams v. DelCollo Elec., Inc., 576 A.2d 683, 688 n. 5 (Del.Super.1989) ("The court costs of all proceedings reasonably connected with the entry and the reopening of the judgment will be borne by defendant"); see also Pinkett ex rel. Britt v. Nationwide Mut. Ins. Co., 832 A.2d 747, 751 (Del.Super.Ct.2003) (denying motion for default judgment but requiring defendant to pay attorney's fees incurred by plaintiff in pursuing it).

C. Set-Off

To the extent her Rule 60(b) motion is denied, Manno asks that execution of the judgment be stayed pending resolution of Civil Action No. 6429–VCL, a plenary action in which the parties have asserted various claims against one another. She anticipates being able to offset the fee award against a recovery in the plenary action.

"A set-off is a counterdemand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of plaintiffs cause of action." 80 C.J.S. Set-Off and Counterclaim § 3 (2011). "A claim for set-off is an independent action which may be raised as a counterclaim. It is a claim for affirmative relief, rather than a defense." Id. (footnote omitted). "A contingent or unmatured obligation which is not presently enforceable cannot be the subject of set-off."

Id. "[T]here is no right to set-off of a possible unliquidated liability against a liquidated claim that is due and payable." 80 C.J.S. Set-Off and Counterclaim § 58 (2011).

Under these hornbook principles, Manno cannot use the default judgment as a setoff. First, Manno has it backwards. The right to invoke the default judgment as a set-off belongs to CanCan and could be pled by CanCan as a defense to Manno's offensive claim in the plenary action. Second, Manno's attempt at set-off is premature. Her claim against CanCan is contingent and unmatured; she has no right to set-off CanCan's unliquidated potential liability in the plenary action against CanCan's liquidated, due, and payable claim from this case.

III. CONCLUSION

Manno's motion for relief from judgment is DE-NIED. IT IS SO ORDERED.

Del.Ch.,2011. CanCan Development, LLC v. Manno Not Reported in A.3d, 2011 WL 4379064 (Del.Ch.)

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C

Court of Chancery of Delaware. Charles Tatem and James Canby. v. Joshua Gilpin and Thomas Gilpin.

June Term, 1816.

*1 Practice as to the admission of ex parte affidavits in support of the bill, upon motion for a preliminary injunction.

Affidavits are admissible to support the bill, though it be denied by the answer, in cases where the injunction may be necessary to prevent irreparable mischief.

An order for an injunction *pendente lite* cannot be appealed from, if it be such an order for an injunction as a court of equity, according to its established rules, can issue.

An injunction must be suspensive only, and must not operate so as to alter or affect the pre-existing situation of the parties. An order for an injunction having the latter effect may be appealed from.

After an appeal prayed and allowed in the Court of Chancery, the cause is out of the Court of Chancery, and cannot be further proceeded in until its return from the Court of Appeal.

Injunction Bill.—The complainants were the owners of a mill site on the South side of the Brandywine Creek, on which they were about to erect a mill, above a mill site owned by the defendants. The bill charged, among other things, that the defendants had by a new dam constructed across the creek, below the mill site of the complainants, penned the water back upon the complainants to the height of two feet and three quarters of an inch above its usual and proper level, thereby depriving the complainants of a sufficient fall of water for their contemplated mill, and preventing the erection of it. The prayer was for an injunction, to restrain the defendants from using or drawing off the water from the dam for the use of their

mill, until it should be reduced two feet and three quarters of an inch to its proper level, so as not to interfere with the water rights of the complainants.

The Chancellor refused to order an injunction upon an *ex parte* application, and directed notice to be served upon the defendants, with sufficient time to appear and answer. Accordingly, the defendants appeared and filed their answer. The answer denied that the defendants had, by their dam, penned the water back upon the complainants' land to the height of two feet and three quarters of an inch, as in the bill was alleged, or that the water was raised above the ordinary and usual level; and the defendants claimed the right to hold and use the dam in its then present condition. The answer denied at large the equity of the bill. It is not material to the points decided, to set forth the title of the respective parties, as alleged in the bill and answer respectively.

At the hearing of the motion for a preliminary injunction upon the bill and answer (August 26, 1816). McLane, for the complainants, offered to read, in support of the bill, certain affidavits taken ex parte before Justices of the Peace, and, upon objection made, he insisted upon the regularity of such a course, on the ground that the application here made was in order to prevent irreparable injury. Gibbs v. Cole, 3 P. W. 255. Isaac v. Humpage: 1 Ves. Jr. 427: 3 Bro. Ch. Rep. 463. In Robinson v. Lord Byron, 1 Bro. Ch. Rep. 588, where the bill was to restrain Lord Byron from letting an unusual quantity of water flow upon the complainant's mill, affidavits were read against the answer. In Strathmore v. Bowes, 2 Bro. Ch. Rep. 89, affidavits in a case of waste were read in reply to an answer.

West Headnotes

Appeal and Error 30 5 68

30 Appeal and Error
 30III Decisions Reviewable
 30III(D) Finality of Determination
 30k67 Interlocutory and Intermediate Decisions

30k68 k. In general. Most Cited Cases

An order made upon a point whereby some right or principle is established in the cause on which a final decree depends, or which determines or directs some matter or thing which is necessary to the making of the final order or decree, is an interlocutory order, from which no appeal lies.

Appeal and Error 30 \$\infty\$100(1)

30 Appeal and Error
30III Decisions Reviewable
30III(E) Nature, Scope, and Effect of Decision
30k96 Relating to Provisional Remedies
30k100 Injunction
30k100(1) k. In general. Most Cited

Cases

An order granting an injunction pendente lite cannot be reviewed or appealed, if it is such an order for an injunction as a court of equity, according to its established rules, can issue, since such appeal would destroy the necessary power of the court, the security taken upon an appeal affording no adequate remedy for certain injuries.

Injunction 212 21565

212 Injunction
 212V Actions and Proceedings
 212V(E) Evidence
 212k1564 Admissibility
 212k1565 k. In general. Most Cited

Cases (Formerly 212k145)

In cases where an injunction may be necessary to prevent irreparable mischief, affidavits are admissible to support the bill, though it is denied by the answer.

Broom and Read, for defendants.

*2 It is a general principle that the answer is to be taken as true, and that it cannot be impeached by affidavits—especially when the object is to disprove title. We do not say that the rule is universal; but if this case is an exception, the complainants' counsel must show it.

The complainants have never had any use or en-

joyment, but they seek to prevent the enjoyment of a long established property in the defendants. Even treating this as a case of doubtful title, a Court of Chancery will not now interfere by injunction. The right must be first established at law.

Ridgely, Chancellor.-

This is a case which comes within the exceptions to the rule, and in principle is the same as the case of *Robinson v. Lord Byron* cited in argument. By the overflowing of the land the complainants are deprived of the use and enjoyment of it. They cannot build on it while it is covered with water. It may possibly go to the irreparable destruction of it. At any rate, it obstructs all the alleged motives of the complainants in purchasing, by preventing them from building. Let the affidavits be read.

Before the case had proceeded further the defendants applied for leave to produce counter affidavits; whereupon, at the Chancellor's suggestion, it was agreed to postpone the hearing, with leave to take affidavits on both sides.

Afterwards, on the 30th August, 1816, the motion for an injunction came again before the Chancellor, upon the bill and answer, and upon affidavits exhibited on both sides: whereupon the following order was made, viz: "It is ordered by the Court, that a writ of injunction be issued to restrain the defendants, their agents, &c., from damming up or penning back the waters of the Brandywine creek, above the natural or ordinary level of the said creek, at the line dividing the land of the complainants from the land of the defendants, by the dam lately erected by the defendants, or by any other obstructions to be made or erected, so as to overflow the land of the complainants, until this Court shall make further order to the contrary."

From the above order an appeal was taken, pending which, at the April Term 1817, the complainants filed an affidavit showing that the defendants had, since the last Term, dammed up the waters of the Brandywine above the natural level of the creek, and had overflown the land of the complainants, contrary to the order of the Chancellor heretofore made; and thereupon *McLane*, for the complainants, moved for an attachment, notwithstanding that an appeal had been prayed and allowed. No writ of injunction had as yet been issued.

McLane and Van Dyke, for the complainants.

The question is whether the appeal suspends the order, made in the cause, for a writ of injunction. That depends upon the construction to be given to Art. VII. of the Constitution, touching appeals. (1 Vol. Delaware Laws, p. xliv, Digest of 1829, p. 27.) Jurisdiction is there given to the High Court of Errors and Appeals, "to receive and determine appeals from interlocutory or final orders or decrees of the Chancellor." An interlocutory order is one which ascertains some right, or determines some matter or thing, on which the final decree depends,-something essential to the determination of the cause; such as an order for an account. An injunction is not an interlocutory order within the meaning of the constitution. It decides no fact, fixes no right, and is not at all necessary to the final determination of the cause. It is mere process of the Court, issued to hold in statu quo the subject matter upon which the decree is to operate, until the Court shall be enabled to ascertain and adjudge the rights of the parties. It is a process collateral to the suit, and is often issued upon petition before any bill filed. To give to an appeal the effect of suspending orders of this nature would practically annihilate chancery jurisdiction for many of its most important ends; as, upon an injunction to stay waste or to prevent other irreparable mischief, the defendants would need only to appeal and then utterly destroy the timber, or commit the very mischief which it was the object of the suit to prevent. So, upon a bill to perpetuate testimony, if the order to take the testimony can be suspended by an appeal, the witness may die before his evidence can be secured. So in the case of a writ of ne exeat regno: upon taking an appeal the party would be left free to go away and thus defeat the jurisdiction. The security taken upon an appeal affords no adequate remedy for injuries of this nature, but only for cases of debt or damages. Further, it may be noticed that to hold all proceedings between the commencement of a suit and the final decree subject to be suspended by an appeal would render a chancery suit perpetual. The clause of the Constitution giving an appeal must receive such a construction as will preserve and not destroy the necessary powers of a court of equity. The Constitution and laws of this State, (1 Vol. Delaware Laws, 130, Digest of 1829, p. 102-3) defining equity jurisdiction, meant to give the power to award injunctions as it is exercised in England. Under the English practice, an appeal lies only from a final decree, or, from an interlocutory order made for some purpose necessary to a final decree, 3 Blk. Com. 454: 1 Harrison's Ch. Pr. 454; not from

orders of this nature. An appeal was disallowed in the case of an order to show cause only. 1 Brown's P. C., 439-40: so from an order for a commission of lunacy. 1 Brown's P. C. 450. In Young v. Grundy, 6 Cranch 51, an appeal was held not to lie from an interlocutory order or decree dissolving an injunction. The present is the first attempt in this State to suspend the order for an injunction by appeal. The practice heretofore shows the sense in which the Constitution has been understood.

Read, Broom and Wales, for the defendants.

- *3 Upon two grounds, we insist that the Court cannot now interfere.
- 1. Whether this be an interlocutory order or common process, is not now to be questioned. The appeal has been allowed and security given. The case is taken from this jurisdiction. If the appeal is irregular, application must be made to the Court above. But,
- 2. This is an interlocutory order. An injunction never issues but by special order of the Court. It is collateral to the cause, and it is interlocutory or it is nothing: and the Constitution gives an appeal from all interlocutory orders. The right of appeal in this State is constitutional, and different from that to the House of Lords; therefore no decisions in England can control this right. With respect to the case in this country, cited from 6 Cranch 51, the laws of the United States forbid an appeal except from final decrees. Hence, that case does not apply here.

Ridgely, Chancellor.-

My only doubt is, as to the power of this Court to act after appeal prayed and allowed. I have no idea that this order is an interlocutory order. It has been frequently intimated to me that appeals would be taken from orders for writs of injunction made at the time of filing bills. I have often considered the subject, and never supposed such an order to be an interlocutory order, from which the party could appeal. An interlocutory order is an order made upon a point whereby some right or principle is established in the cause, on which a final decree depends; or, it determines or directs some matter or thing which is necessary to the making of the final order or decree. Such is an order to account on a bill filed by one partner against another; as in a case from Sussex County, where an appeal was properly taken from such interlocutory order. For the

order to account settled the principle; the rest was mere matter of fact and calculation.

This is not an interlocutory order; it is an original process. By an Act of Assembly injunctions to stay waste and suits at law may be awarded and issued before the bill is filed. This is in the nature of an injunction to stay waste. It determines nothing; it only saves the complainant from injury until the matter is finally heard and decided.

However, as the appeal has been allowed, the case is out of this Court, and now I cannot proceed in the cause in any manner until it returns from the High Court of Errors and Appeals.

The motion for an attachment is denied.

This cause came before the High Court of Errors and Appeals, at the June Term 1817, and the question whether, an appeal lies from an order of the Chancellor directing an injunction to be issued, came before that Court, upon a rule to show cause why the injunction should not be dismissed.

McLane, Van Dyke and Rodney, for the appellees.

Read, for the appellants.

The motion to dismiss was very fully argued, but upon no new points, except that on behalf of the appellant the further ground was taken that the Chancellor's order went beyond the purpose of holding the matter in statu quo; that it was retrospective in depriving the defendants of the use of their dam, as it already stood and had long before been enjoyed, and was rather in the nature of an execution than a suspensive order; that for this reason, in addition to those before urged, an appeal should lie.

Johns, Chief Justice, announced the following as the conclusions of the Court upon the points argued:

4 1st. That the words "interlocutory order or decree" in the Constitution must be taken in a technical sense, and that the right of appeal is not enlarged but secured by the Constitution. FN

<u>FN*</u>. This point was decided upon the construction of the Constitution of 1792, which gives the right of appeal "from interlocutory

or final orders or decrees of the Chancellor." The Court, in this case, held that these words were to be taken in their technical sense, and that the right of appeal was not enlarged but secured by the Constitution. Under the Constitution of 1831, now in force, the jurisdiction of the Court of Errors and Appeals is to determine "all matters of appeal in the interlocutory or final decrees and proceedings in Chancery." This clause has not yet received a judicial construction upon the point raised in the present case.

2nd. That an order for an injunction *pendente lite* cannot be appealed from, if it be such an order for an injunction as a court of equity, according to its established rules, can issue.

3rd. But, if in an order for an injunction, the equity jurisdiction, in its direction, which is a part of the order, defines the nature of the injunction to be issued. and if in so doing, though the order is called an order for an injunction, it makes an order for issuing a writ to restrain the respondents from doing an act which a court of equity, by any known, established rules, never attempted to restrain; as, if an ejectment should be brought against A. B. by C. D. for a house which A. B. had been in the possession of more than twenty years, and C. D. should file a bill against A. B. and a court of equity should order an injunction to prevent A. B. from residing in the house, this would be such an order,-such a deciding or affecting the rights of one of the parties,-as ought to be reviewed by this Court; and an appeal ought to be used and does lie.

4th. The order in the present case is to restrain, alter, or prevent acts done or not to be done; and it does not describe what is not to be done or to remain, so as to mean anything, unless it is to be understood to refer to the natural or ordinary level of the water at the dividing line, without regard to the right or possession. And that is the great point of controversy in this case,—a something not to be ascertained till the right be decided. The order, if it is to be understood and used as to the respondents here avow, is, in the opinion of this Court, an order of such a nature that it is not to be considered simply an order for process of injunction, but is such an act of the Court below as will entitle the appellants to relief by an appeal to this Court.

The Court are of opinion that the rule to show

cause be discharged.

The cause then came before the Court upon sundry causes of appeal filed, among which were these:

7th. That if the Chancellor could, upon any principle of equity, have made an order that a writ of injunction should issue upon the bill at the prayer of complainants, "then it could only have issued upon the principle, and so to operate, as to prevent and enjoin the appellants from erecting or putting up any further or other obstructions, and not so as to alter or change the state and condition of the said dam at the time of exhibiting and filing the said bill in the Court of Chancery; wherefore the order is excepted to."

*5 11th. That the order of the Chancellor directs a writ of injunction to be issued to enjoin and restrain the appellants, their agents, laborers and workmen, from damming up, or penning back the waters of the Brandywine Creek above the natural or ordinary level of the said creek at the line dividing the land of the said appellants from the land of the said respondents. by the dam lately erected by the said appellants or by any other obstructions to be made or erected, so as to overflow the land of the said respondents, until the Court of Chancery should make further order to the contrary; whereby the Chancellor not only orders an injunction to issue to enjoin and restrain the said appellants from placing obstructions in the bed and waters of the said Creek, but in effect, by restraining and enjoining the appellants by an injunction to be issued as aforesaid, would authorize and require the removing or reducing so much or such part of the said dam as in its existing condition and structure would be supposed to produce or occasion the damming or penning back the waters of the said Creek as aforesaid,—thereby divesting the appellants of their property and freehold, and so in fact altering the existing state of the said dam at and before the filing of the said bill.

The case was submitted, without argument; and the High Court of Errors and Appeals, upon consideration, sustained the appeal upon the two causes of appeal above stated, and directed the following order to be entered:

"And now, to wit, this 10th of June, 1817, this cause coming on to be heard,—It is thereupon ordered by the Court, that the order for the injunction be modified. And it is further ordered, that a writ of in-

junction be issued by the Court of Chancery to enjoin and restrain the said Joshua Gilpin and Thomas Gilpin, their agents, workmen and laborers, from damming up or penning back the waters of the Brandvwine Creek upon the lands of the said Charles Tatem and James Canby, which adjoin the lands of the said Joshua Gilpin and Thomas Gilpin, to a greater extent or in a greater degree than the said Joshua Gilpin and Thomas Gilpin, or those from whom they derive title, had ordinarily or usually done, or had been in the enjoyment or exercise of, antecedently to the 15th day of July, 1815, by any erections or obstructions already erected or made, or that may be erected or made, by the said Joshua Gilpin and Thomas Gilpin, so as to overflow as aforesaid the said lands of the said Charles Tatem and James Canby, until the said Court of Chancery make further or other order therein. And it is ordered that the record be remanded to the court below; and that the costs in this court be equally divided."

Del.Ch. 1816.
Tatem v. Gilpin
2 Del.Cas. 363, 2 Del.Cas. 344, 2 Del.Cas. 316, 1
Del.Ch. 13, 1816 WL 194 (Del.Ch.)

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION, CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
RICHMONT CAPITAL PARTNERS I, L.P.,
Richmont Capital Partners II, L.P., New Arrow
Corporation, New Arrow II Corporation, and Richard
R. Rogers, Plaintiffs,

v.

J.R. INVESTMENTS CORP. (a/k/a Texas J.R. Investments Corp.) and J.R. Investments Corp. II (a/k/a Texas J.R. Investments Corp. II), Defendants. RICHMONT CAPITAL PARTNERS I, L.P., New Arrow Corporation, and Richard R. Rogers, Plaintiffs,

NU-KOTE ACQUISITION CORP., Defendant,

No. Civ.A. 20281, Civ.A. 20285. Submitted March 1, 2004. Decided May 20, 2004.

Allen M. Terreil, Jr., Brock E. Czeschin, Richards, Layton & Finger, Wilmington, Delaware; R. Laurence Macon, Tonya P. Johannsen, Eric Gambrell, Jeffrey Goldfarb, Akin Gump Strauss Hauer & Feld LLP, Dallas, Texas, for the Plaintiffs.

Jay Eisenhofer, Grant & Eisenhofer, P.A., Wilmington, Delaware; William A. Brewer III, John W. Bickel II, Michael S. Gardner, Bickel & Brewer, Dallas, Texas, for the Defendants.

MEMORANDUM OPINION

LAMB, Vice Chancellor.

I.

*1 The defendants seek an award of attorneys' fees and costs amounting to \$238,094, paid to two law firms-Bickel & Brewer and Grant & Eisenhofer-as a result of two short-lived Delaware litigations. The plaintiffs filed both those actions in this court but then moved to voluntarily dismiss them when it became apparent that the scope of the litigation in Delaware might expand to mirror that of already pending litigation in Texas.

The court granted the motions to dismiss over the defendants' objection, but conditioned dismissal, in accordance with Court of Chancery Rule 41(a)(2), on the payment of the defendants' reasonable attorneys' fees and expenses actually and necessarily incurred in these actions. The court instructed the parties that it would consider awarding fees and expenses roughly as follows: (1) those incurred by the defendants' Delaware counsel, Grant & Eisenhofer; (2) those incurred in answering the complaints; and (3) those incurred in responding to the motions to dismiss. FN1 The record was unclear at the time of the hearing as to whether the defendants should be entitled to the fees and expenses incurred in formulating the counterclaims in the Delaware actions. FN2 However, the court told the parties that claims asserted in Delaware as counterclaims would be excluded if they were already asserted or likely to be asserted in the Texas litigation. FN3

FN1. Trial Tr. at 8-9

FN2. Id. at 9.

FN3. Id.

The plaintiffs challenge a portion of the attorneys' fees sought by the defendants as excessive and/or duplicative of work done in connection with the Texas litigation. Also, the plaintiffs argue that the defendants have failed to provide sufficient explanation for many of the fees charged by Bickel & Brewer in the Delaware litigation.

For the reasons set forth herein, the court grants the defendants' request for attorneys' fees in the amount of \$85,476 (as billed by Bickel & Brewer) and \$41,181 (as billed by Grant & Eisenhofer).

II.

In April 2003, the plaintiffs filed Richmont Capital Partners I, L.P., et al. v. J.R. Investments Corp. et al., C.A. No. 20281, and Richmont Capital Partners I, L.P. et al. v. Nu-kote Acquisition Corporation, C.A. No. 20285 (the "Nu-kote action"), FN4 seeking a legal decision on certain narrow issues involving the inter-

pretation of a Delaware partnership agreement. The issues were related to litigation already in progress in Texas. Acting for the defendants and related parties, Bickel & Brewer prepared and submitted a complaint in intervention in the *Nu-kote* action on July 2, 2003, asserting claims similar to those that were or would be made in the Texas action. FN5 Fearing the expansion of the scope of the actions in Delaware, the plaintiffs promptly moved to voluntarily dismiss. The defendants objected, asserting that dismissal would cause them plain legal prejudice.

<u>FN4.</u> The two suits were not consolidated, but for sake of simplicity will be referred to hereinafter as the "Delaware actions."

<u>FN5.</u> On October 24, 2003, Bickel & Brewer filed on behalf of its clients the original petition in *Richmont Financial Services, Ltd. et al. v. Mary Kay Inc., et al.*, No. 03-11398, in the 44th Judicial District Court of Dallas County, Texas. Goldfarb Aff. Ex. L.

At the hearing, the court granted the motion to dismiss without prejudice, and required the plaintiffs to reimburse the defendants' reasonable attorneys' fees and expenses actually and necessarily incurred in connection with the Delaware actions. The defendants in the Delaware actions now seek to recover \$184,360 in attorneys' fees and \$6,153 in costs for services provided by Bickel & Brewer, FN6 and \$47,581 for legal fees and costs incurred by their Delaware co-counsel, Grant & Eisenhofer. The Bickel & Brewer fee request is supported by the affidavit of Michael S. Gardner, Esquire, a partner in that firm, accompanied by a one-page overview of the charges made by the attorneys working on the case. FN7 A declaration of Jay W. Eisenhofer, Esquire, provides support for his firm's fee request.

FN6. Michael S. Gardner Aff. ¶ 4.

FN7. Id., Ex. A.

*2 The overview of charges lists a total of 454 billable hours charged at \$240 to \$850 by Bickel & Brewer attorneys in connection with the Delaware actions, broken down as follows: \$21,745 for answering of the Delaware complaint, preparing motions for admission *pro hac vice* and supporting declarations, and conducting related Delaware procedural

research: \$92,075 for preparing responses in opposition to motions to dismiss, conducting related research and presenting argument; \$3,975 for work done on the counterclaim in the Nu-kote action, pursuing related strategies, and conducting related Delaware procedural research; \$40,215 for preparing the motion to join necessary parties, motion to intervene, and conducting related research; \$52,700 for William A. Brewer and John W. Bickel's supervision of the above-listed activities; and \$6,153 for the travel and lodging expenses for court appearances at the motions to dismiss argument and fees for admissions pro hac vice in Delaware actions. FNS The total Bickel & Brewer fees and expenses are \$216,863. FNO In his affidavit, Gardner states that certain adjustments were made to the fee to reflect his firm's reasonable billing judgment.^{FN10}

<u>FN8.</u> *Id*.

FN9. Id.

<u>FN10</u>. *Id*. at ¶ 23.

The plaintiffs make no objection to Grant & Eisenhofer's billings, except for \$6,200 charged in connection with the *Nu-kote* counterclaim, discussed in section III(B)(2) herein. FNII The plaintiffs do object vigorously to Bickel & Brewer's billings as excessive and unsupported by the record. FNI2

FN11. Pls.' Objections to Defs.' Req. for Conditional Att'ys' Fees, at 2.

FN12. Id. at 5-15.

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A. Standard

Rule 41(a)(2) governs motions for the voluntary dismissal of a civil action, other than by stipulation of the parties, after an answer or a motion for summary judgment has been filed. Such an action may only be dismissed upon order of the court, which has the power to condition its order upon "such terms and conditions as [it] deems proper." FN13 The standard for assessing a request for attorneys' fees is well established. "The Court of Chancery shall make such order concerning costs in every case as is agreeable to equity." FN14 "[I]n equity the allowance of costs is largely a matter of discretion." FN15 "This discretion is, how-

ever, a legal discretion to be exercised, not capriciously or arbitrarily, but in the furtherance of justice." FNI6

FN13. Ch. Ct. R. 41(a)(2).

FN14. 10 Del. C. § 5106.

FN15. Bodley v. Jones, 65 A.2d 484, 487 (Del. Ch.1948).

FN16. Kennedy v. Emerald Coal & Coke Co., 30 A.2d 269 (Del. Ch.1943).

B. Attorneys' Fees

The court's decision to condition its order granting a voluntary dismissal of the Delaware actions on the payment of defendants' reasonable attorneys' fees and expenses was based on the fact that the plaintiffs filed their actions in this court only after they were becoming enmeshed in litigation in Texas involving aspects of the same complex business dispute. Presumably, they did so because they foresaw an advantage in having an issue of Delaware partnership law decided quickly and in isolation from the rest of the factual and legal issues involved in the case. Moving an aspect of the Texas litigation to Delaware would necessarily impose additional costs on the defendants. The court recognized at the hearing that the filing and later dismissal of the Delaware actions required the defendants to incur certain expenses that would be of no benefit in the prosecution of the related litigation in Texas, and conditioned dismissal of the Delaware actions on the reimbursement of those fees and expenses that were reasonably and necessarily incurred.

*3 At the same time, the court recognized that a substantial portion of the fees and expenses incurred by the defendants in connection with the Delaware actions was the result of a tactical decision made not necessitated by the plaintiffs' actions. Most significantly, the defendants chose to "defend" these actions by trying to draw into Delaware all of the parties and issues already before the Texas courts. Fees and expenses in this aspect of the Delaware actions were not necessarily incurred and will not be awarded.

1. The Answer To The Complaints And Responses To The Motions To Dismiss

The total of Bickel & Brewer's fees for answering the Delaware complaint and preparing motions for admission *pro hac vice* and supporting declarations, as well as for preparing responses in opposition to motions to dismiss and presenting the argument to the court, is \$113,820. The plaintiffs' objection to these fees focuses on Bickel & Brewer's high hourly rate structure and the large number of attorneys assigned to work on both the answers and the response to the motion to dismiss. FN17

FN17. Pls.' Objections to Defs.' Req. for Conditional Att'ys' Fees, at 5-8.

In accordance with the court's earlier ruling, reasonable fees incurred answering the complaints and responding to the motions to dismiss are eligible for compensation. FNIS The award of fees and costs must reflect the reasonable value of services and not the amount that was actually billed. FN19 The reasonableness of the fees is evaluated under Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct. Factors include, but are not limited to, the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal services properly, the fee customarily charged in the locality for similar legal services, the nature and length of the professional relationship with the client, and the experience, reputation, and ability of the lawyer or lawyers performing the services. When considering attorneys' fees, a "court should greet with 'healthy skepticism' 'a claim that several lawyers were required to perform a single set of tasks and may discount the time for two or three lawyers in courtroom or conference when one would do.", FN20 Courts generally exclude excessive, redundant, duplicative or otherwise unnecessary hours. FN21

FN18. Trial Tr., at 9.

FN19. Great Am. Indemn. Co. v. State ex. rel. Mills. 88 A.2d 426, 431 (Del.1952) ("[T]he amount of the fees allowed shall be fixed according to the reasonable worth of the attorneys' services) (emphasis added); see also PVI. Inc. v. Ratiopharm GmbH, 253 F.3d 320, 329-30 (8th Cir.2001) (interpreting Delaware law and rejecting claim that party may recover everything paid to attorneys).

FN20, Van Dorn Retail Mgmt, Inc. v. Jim's

<u>Oxford Shop, Inc.</u>, 874 F.Supp. 476, 489 (D.N.H.1994) (citations omitted).

FN21. Am. Civil Liberties Union v. Barnes, 168 F.3d 423, 428 (11th Cir.1999); Judge v. City of Rehoboth Beach, 1994 WL 198700, at *7 (Del. Ch. Apr. 29, 1994) (excluding hours that appeared duplicative).

Here, Bickel & Brewer assigned three attorneys to answer the Delaware complaints and prepare motions for admissions *pro hac vice*. The three Bickel & Brewer attorneys worked a total of 59 hours on these tasks. FN22 Two of these attorneys and two others worked a total of 223 hours drafting responses to the motions to dismiss-motions that raised no novel issues of law or fact.

FN22. Michael S. Gardner Aff., Ex. A.

Giving full consideration Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct, the court finds that an award of the full amount of the fees and expenses requested is not warranted. It is not unusual that cases such as these should require the attention of more than one attorney. Nevertheless, an award of fees and costs pursuant to Rule 41(a)(2) should reflect the reasonable value of services. Taking into account the work done for the four documents and the oral argument, the court will award a blended rate of \$403 for 150 hours, for a total of \$60,450 for this aspect of the fee request. FN23

FN23. The hourly rate used is the weighted average rate of the Bickel & Brewer lawyers, other than Messers. Bickel and Brewer, who billed time for work associated with answering the complaints and responding to the motions to dismiss.

2. Preparation Of The Counterclaim

*4 The defendants also request compensation for the preparation of a counterclaim in the *Nu-kote* action. The defendants request \$3,975 for work done by Bickel & Brewer and \$6,200 for work done by Grant & Eisenhofer. FN24 The court agrees with the plaintiffs that these amounts should not be allowed. The counterclaims were voluntary in nature and were not necessarily incurred in defense of the Delaware actions.

<u>FN24.</u> Pls.' Objections to Defs.' Req. for Conditional Att'ys' Fees, at 14.

3. Preparation Of The Motion To Join And Intervene

The defendants request \$40,215 for work done by Bickel & Brewer in preparation of the motion to join necessary parties and the motion to intervene, and in conducting related research. The plaintiffs claim that the work performed in Delaware will be duplicated in the Texas litigation and that the hours billed were excessive. For the reasons discussed above, the court will not include these fees in the amount awarded. The motions to join parties and to intervene were made for largely strategic purposes and were not necessarily incurred in defense of the complaints.

4. Supervision Of The Activities By Two Partners

The defendants seek to recover \$52,700 in attorneys' fees attributed to the supervision of the Delaware litigation by William A. Brewer III and John W. Bickel II of Bickel & Brewer (62 hours at \$850). FN25 The plaintiffs argue that the request is excessive and duplicative because there were two other partners, James Renard and Michael Gardner, that billed 167 hours for performing services in this case.

FN25. Michael S. Gardner Aff., Ex. A.

The court will allow these fees in proportion to the other fees allowed. Since the court has determined to award approximately 38% of the balance of the defendants' fee request, it will also allow \$20,026 for the supervisory work of Messrs. Bickel and Brewer.

5. Expenses

The defendants request reimbursement for expenses incurred and charged to the defendants by Bickel & Brewer in the amount of \$6,153. The plaintiffs argue that the expense of two partners to travel from Dallas to Delaware for the October 15 hearing was unnecessary and excessive. The court agrees that it is unreasonable to require the plaintiffs to pay for this extra travel expenses. The plaintiffs seek a reduction in the expenses requested by the defendants to \$5,000, which will be allowed.

TX7

The court stated at the hearing the reasons why the plaintiffs' motion to dismiss should be granted pursuant to <u>Rule 41(a)(2)</u>. For the additional reasons discussed in this memorandum opinion, that dismissal

will be conditioned on the plaintiffs' payment to the defendants of \$85,476 for the fees and expenses billed by Bickel & Brewer and \$41,181 for the fees and expenses billed by Grant & Eisenhofer. The plaintiffs' counsel are directed to submit a form of order within 10 days of the date of this opinion, on notice to the defendants.

Del.Ch.,2004.

Richmont Capital Partners I, L.P. v. J.R. Investments Corp.

Not Reported in A.2d, 2004 WL 1152295 (Del.Ch.)

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Not Reported in A.2d, 1990 WL 122994 (Del.Super.) (Cite as: 1990 WL 122994 (Del.Super.))

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware, New Castle County. EAST COAST INSULATION SALES CO., INC., Plaintiff,

v.

Eddie STEVENSON and Juriel Potter, Defendants.

No. 2359, SEPT.TERM 1989. Submitted: July 3, 1990. Decided: Aug. 20, 1990.

Upon plaintiff's motion for reargument. Denied. Samuel J. Frabizzio, Wilmington, for plaintiff.

Michael W. Modica, Wilmington, for defendant Stevenson.

MEMORANDUM OPINION

GEBELEIN, Judge.

*1 The defendant signed a guaranty agreement which contained a confession of judgment clause. Subsequently, the plaintiff obtained a default judgment. FNI This Court voided the judgment FNI because service of process was improper where no attempt was made to serve the individual at his residence, which is required when service is made on an individual. FNI

Now, the plaintiff moves for reargument alleging that the Court erred in interpreting the term "address" in Rule 58.1. The plaintiff contends that Rule 4(f), which requires that service on an individual be made at "his dwelling house or usual place of abode," does not apply to default judgments.

Rule 58.1 sets out the notice procedure for a debtor who is subject to an entry of judgment by confession. The Rule requires that a certified letter be sent to the debtor at his "address".

To interpret statutes, the Court looks to the rules of statutory interpretation. <u>1 Del. C. § 301</u> (rules of

construction are to be observed in construing the Code). The rule regarding interpretation of statutory words and phrases requires the Court to give terms their common meaning, unless they have a peculiar and appropriate meaning in the law. <u>1 Del. C.</u> § 303.

The term "address" has a peculiar meaning in law because of the significance of notice. Notice and opportunity to be heard are required under the due process clause before one can be derived of life, liberty or property. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (due diligence must be exercised in ascertaining the party's whereabouts before notice by publication is sufficient).

Notice must be such that it is reasonably calculated to reach the interested parties to apprise them of the pendency of an action. <u>Id. at 657</u>. To insure such notice, reasonable steps must be made to ascertain an individual's address, when the proceeding is against an individual. <u>Webster v. Ferm</u>, Del.Super., C.A. No. 83C-OC-50, Martin, J. (Apr. 24, 1986) (where the proceeding was against an individual, service of process on the Secretary of State was not justified when by taking reasonable steps the defendant's home address could be found and service made in compliance with Rule 4).

Thus, to meet procedural due process requirements, the Court looks to the Superior Court Rules which govern all procedures in Superior Court, unless otherwise excepted under Rule 81. Service of process is not such an exception and, therefore, is governed by the rules.

Rule 4 governs service of process for an individual and it requires that service be made at the "dwelling house or usual place of abode." Read in pari materia with Rule 58.1, Rule 4 provides meaning to the term "address." See, Osmond v. Spence, D.Del.F.Supp. 1349 (1971) (statutory scheme and court rules which failed to provide for notice and hearing before an entry of judgment by confession violated due process requirements under the 14th amendment).

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To permit otherwise would render due process protections meaningless. When notice is a person's due, process which is "mere gesture is not due process." *Mullane* at 657.

*2 Therefore, this Court again concludes that to meet procedural due process requirements when there is a claim against an individual, a reasonable effort must be made to serve the individual at a home address. FN4

This Court previously found that service on the defendant at an incorrect business address was void because it did not comply with Rule 4. The plaintiff now states that this issue was addressed at oral argument before the Court, however, the Court concludes that the plaintiff failed to present evidence that reasonable steps were taken to properly notice the defendant. The purpose of a motion for reargument is to afford the Court an opportunity to correct errors prior to appeals. <u>Hessler, Inc. v. Farrell, Del.Supr., 260 A.2d 701, 702 (1969)</u>. Because there is no error in law or fact, the plaintiff's motion for reargument is DENIED.

IT IS SO ORDERED.

<u>FN1.</u> Superior Court Civil Rule 58.1 provides for entry of judgments by confession after notice to the debtor.

FN2. East Coast Insulation Sales, Co., Inc. v. Stevenson, No. 2359, Sept. Term, 1989, J.D. No. L-15, Page 066, Gebelein, J. (June 29, 1990).

FN3. Superior Court Civil Rule 4(f).

<u>FN4</u>. In this case this is especially appropriate as there is no indication on the record that defendant ever frequented the business address used primarily by his partner.

Del.Super.,1990.
East Coast Insualtion Sales Co., Inc. v. Stevenson
Not Reported in A.2d, 1990 WL 122994 (Del.Super.)

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Not Reported in A.2d, 2001 WL 536911 (Del.Ch.) (Cite as: 2001 WL 536911 (Del.Ch.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware. CANTOR FITZGERALD, L.P., Plaintiff,

V.

Iris CANTOR, et al., Defendants.

Iris CANTOR and Cantor Fitzgerald Incorporated,
Third-Party Plaintiffs,

CANTOR FITZGERALD GROUP MANAGE-MENT, INC., Third-Party Defendant.

> No. 16297. Submitted: April 17, 2001. Decided: May 11, 2001.

Rodman Ward, Jr., Thomas J. Allingham II, and <u>Karen Valihura</u> of Skadden, Arps, Slate, Meagher & Flom, LLP Wilmington, Delaware. of Counsel: <u>Thomas J. Schwarz</u> and <u>Joseph M. Asher</u> of Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York. Attorneys for Plaintiff.

Stephen E. Jenkins and Richard I.G. Jones, Jr. of Ashby & Geddes, Wilmington, Delaware. of Counsel: Barry I. Slotnick and Michael Shapiro of Slotnick, Shapiro & Crocker, LLP, New York, New York; Saul B. Shapiro of Patterson, Belknap, Webb & Tyler LLP, New York, New York; Jack C. Auspitz and Howard E. Heiss of Morrison & Foerster LLP, New York, New York. Attorneys for Defendants.

MEMORANDUM OPINION

STEELE, Justice (by designation).

*1 Presently before this Court are the post-trial motions of both the plaintiff and the defendants. ENI On March 13, 2000, this Court rendered its decision in this case in a lengthy opinion ("March decision"). EN2 That opinion contains a full discussion of the facts and prior procedural history of this action. For that reason, those matters will only be discussed in this opinion as they are necessary to the discussion and analysis of the merits of the motions.

FN1. For simplicity, where I refer to the "plaintiff," I mean Cantor Fitzgerald L.P. Where I refer to "defendants," I mean Iris Cantor, Cantor Fitzgerald, Inc., Market Data Corp., and Rodney Fisher.

FN2. See Cantor Fitzgerald, L.P. v. Cantor, Del. Ch., C.A. No. 16297, Steele, V.C. (March 13, 2000) (Mem.Op.).

In the March decision, the Court decided a number of issues. Pertinent to the present motions was the Court's ruling that the defendants, as limited partners in a limited partnership, owed the plaintiff contractually-created duties of loyalty. Moreover, the Court ultimately ruled that the defendants, in operating a competing business venture, committed an "egregious breach of the partnership agreement' that violated their duty of loyalty to the partnership. FN3 To remedy this breach of the partnership agreement and the duty of loyalty, the Court granted the plaintiff certain declaratory relief and an award of damages measured by the amount of money spent by the plaintiff to seek judicial redress for harm caused by the breach. FN4 The present motions relate to the Court's award of monetary damages predicated upon attorneys' fees and expenses incurred in the course of litigation related to redress of that harm.

FN3. Id. at 3.

FN4. Id.

On March 24, 2000, the defendants, challenging the Court's monetary award of damages, filed a motion pursuant to Court of Chancery Rules 59(a) and (e) and Rule 60(b) seeking either a new trial, an amended judgment, or relief from a judgment or order. On April 6, 2000, the plaintiff filed its application for redress of harm that set its outlay for attorneys' fees and expenses at \$11,105,380. All motions were fully briefed and oral argument was heard on June 14, 2000. FN5 The defendants' motions will be addressed first and then the plaintiff's. For the reasons discussed below, the defendants' motions are denied and the plaintiff's application is granted in accordance with the March

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decision.

<u>FN5.</u> Other disputes between the parties and circumstances beyond their control have unfortunately delayed resolution of this issue for some time.

I. Defendants' Motions under Rule 59.

The defendants have moved for relief from the Court's award of a monetary judgment under various provisions of Court of Chancery Rules 59 and 60. In general, Rule 59 provides a mechanism for a new trial and Rule 60 provides relief from a judgment or order. Rule 59(a) provides that:

A new trial may be granted to all or any of the parties, and on all or part of the issues for any of the reasons for which rehearings have heretofore been granted in suits in equity. The Court may open the judgment, if one has been entered, take additional testimony, amend or make new factual findings and legal conclusions, and direct the entry of a new judgment.

Rule 59(e), however, provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Finally, Rule 60(b) provides relief from a judgment or order because of "mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc." FN6

FN6. Court of Chancery Rule 60(b).

*2 Consideration of these motions is complicated by the fact that the Court naively assumed that the parties could confer and agree on a declaratory judgment order and has, therefore, not issued a final order in this case. Thus, the requirements for Rule 60(b) are not satisfied and the defendants are not entitled to relief under that rule. For the same reasons, the requirements for a motion under rule 59(e) are, likewise, unmet. FN8 Because "the manifest purpose of all Rule 59 motions is to afford the Trial Court an opportunity to correct errors prior to appeal," FN9 the Court agrees that the defendants' motions are properly considered under Rule 59. However, as the defendants seek reconsideration of the Trial Court's findings of fact and/or conclusions of law, it is more properly considered a motion for reargument under Rule 59(f). FN10 For these reasons, the Court will evaluate the defendants' motions under the standards applicable

for Rules 59(a) and (f). FN11

<u>FN7.</u> The "Court may relieve a party ... from a final judgment [or] order" <u>Court of Chancery Rule 60(b)</u>.

FN8. Rule 59(e) is a motion to "alter or amend a *judgment*." The Court of Chancery Rules define a judgment as "any order from which an appeal lies." <u>Court of Chancery Rule 54(a)</u>. See also <u>Court of Chancery Rule 58</u> ('The order of the Court shall constitute the judgment of the Court.").

FN9. Eisenmann Corp. v. General Motors Corp., Del.Super., C.A. No. 99C-07-260, Quillen, J. (Feb. 24, 2000) Let. Op. and Order at 1.

FN10. See id.

FN11. The Court recognizes that the defendants motions may have been filed more than five days after "the filing of the Court's opinion or the receipt of the Court's decision." Court of Chancery Rule 59(f). The defendants, in their motion, requested that, should the Court find that Rule 59(f) is more appropriate, the time for the motion be enlarged pursuant to Court of Chancery Rule 6(b). See Defendants' Motion Pursuant to Rules 59(a) and (e) and 60(b) at n.1 (Mar. 24, 2000). I find that the defendants have met the requirements of Rule 6(b) because their conduct is even more benign than "excusable neglect." There was a legitimate argument that other provisions of Rule 59 applied and the defendants chose to proceed under those provisions. Moreover, enlarging the time for a motion for reargument by several days does not prejudice the plaintiff. For these reasons, the defendants' request to enlarge the time for a motion under Rule 59(f) is granted.

As noted above, the Court may grant a new trial under Rule 59(a) for "any of the reasons for which hearings have heretofore been granted in suits of equity." FN12 In ruling on such a motion, the Court is charged with exercising the "judicial discretion of the Court so that injustice may be prevented" FN13 The standard for a motion for reargument under Rule 59(f)

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is slightly different. The Court will generally deny a motion for reargument "unless the Court has overlooked a decision or principal of law that would have controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected." FN14

FN12. Court of Chancery Rule 59(a).

FN13. Daniel D. Rappa, Inc. v. Hanson, Del.Supr., 209 A.2d 163, 166 (1965).

FN14. Continental Ins. Co. v. Rutledge & Co., Inc., Del. Ch., C.A. No. 15539, Chandler, C. (Feb. 15, 2000) Let. Op. at 2 (citing Miles, Inc. v. Cookson America, Inc., Del. Ch., 677 A.2d 505 (1995)).

ANALYSIS

The defendants argue that the Court improperly awarded the plaintiff its attorneys' fees as the prevailing party. Specifically, they argue that the parties never presented argument on the issue of fees and that the issue was never properly raised before the Court for consideration. More importantly, however, they direct the Court's attention to a provision in the partnership agreement that they allege proscribes an award of attorneys' fees in this case. Thus, they argue, the Court misapprehended both the facts and the resulting rule of law and that they should be granted either a new trial or an opportunity to reargue the issue of attorneys' fees.

The plaintiff, however, argues that the Court's March decision did not order "fee-shifting" in the traditional sense, but, rather, it found that the plaintiff had been damaged by the defendants' behavior, and the most appropriate measure of these damages was the amount the plaintiff had spent in prosecuting the action. In the alternative, the plaintiff argues that, in this case, the partnership agreement provision would not prevent the Court from shifting the responsibility for attorneys' fees and expenses to the culpable party under an exception to the American Rule.

As one can see, the parties have widely differing views on the Court's intent in crafting its remedy in the March decision. To the extent I failed to articulate my reasoning clearly in the language of that opinion, these motions allow me to re-articulate that reasoning. The plaintiff's reading of the March decision is correct. As

discussed more fully below, the Court intended to use the plaintiff's fees and expenses as a measure of damages in this case. Even had that not been the Court's intent now that defendants raise the issue, traditional fee shifting would still be appropriate.

A. The Court's award of damages measured by attorneys' fees.

*3 In the March decision, the Court found that the plaintiff was harmed by the defendants' conduct in several identifiable, but inherently unmeasurable, ways. FN15 Any attempt to express those damages by a sum certain would have required the Court to engage in near speculation. Despite problems in quantifying the harm to the plaintiff, this "Court, fortunately, has broad discretion to tailor remedies to suit the situation as it exists." FN16 Moreover, where there has been a breach of the duty of loyalty, as here, "potentially harsher rules come into play" and "the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly The strict imposition of penalties under Delaware law are designed to discourage disloyalty." FN17

FN15. See March Decision at 80-82.

FN16. Andresen v. Bucalo, Del. Ch., C.A. No. 6372, Hartnett, V.C. (March 14, 1984) Mem. Op. at 10. See also Bomarko, Inc. v. International Telecharge, Inc., Del. Ch., C.A. No. 13052, Lamb, V.C. (Nov. 4, 1999, revised on Nov. 16, 1999) Mem. Op. at 44-45 ("In determining damages, the Court's powers are complete to fashion any form of equitable and monetary relief as may be appropriate." (quoting Weinberger v. UOP, Inc., Del.Supr., 457 A.2d 701, 714 (1983) (internal quotations omitted)); Universal Studios, Inc. v. Viacom, Inc., Del. Ch., 705 A.2d 579, 583 (1997) ("[W]hen the parties' agreements have been breached but neither the innocent party nor the venture suffers immediate quantifiable harm, the equitable powers of this Court afford me broad discretion in fashioning appropriate relief.").

FN17. International Telecharge, Inc. v. Bomarko, Inc., Del. Supr., 766 A.2d 437, 441 (2000) (quoting from Thorpe v. CERBCO, Inc., Del. Supr., 676 A.2d 436, 445 (1996)).

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With this mantra as a guide, the Court set out to determine an adequate remedy that would make this plaintiff whole but would, at the same time, escape the peril of over-harshly punishing the defendants. In short, the opinion, however inartfully stated, attempted to directly match the cost of the wrongdoing with the clearest proof of the monetary costs to remedy that wrongdoing. It was quite clear from the evidence that the plaintiff was expending significant resources, both internally and externally, to address, contain, and counteract the defendants' egregious breach of their duty of loyalty. Those internal costs, or expenditures, are not readily capable of quantification. The external costs, the fees for counsel and experts, however, are.

While awarding damages to the plaintiff equal to the fees and expenses spent in prosecuting this action will not make the plaintiff completely whole and will leave some harm unanswered, this Court, exercising the discretion given it, determined that damages, as measured by attorneys' fees and expenses spent to address the defendants' conduct, is an appropriate remedy for this egregious breach of the duty of loyalty. This award can be determined with specificity, is directly related to certain "injuries" to the plaintiff, and can not be characterized as punitive because it does not attempt to quantify and remedy the more subjective, if not speculative, internal costs. Thus, while the total harm to the plaintiff may actually lie at some unknown amount greater than the expenditure for attorneys' fees and expenses, the speculative nature of any additional monetary harm led me to conclude that including any such amount in any fashioned monetary remedy could fairly be deemed tantamount to awarding punitive damages.

The Court found that the defendants had breached their duty of loyalty and was faced with the task of crafting a remedy to address that wrong. On these facts, I found that the most appropriate award of damages would be an award measured by the plaintiff's expenditures for attorneys' fees and expenses in prosecuting this action. FNIS The Court reaffirms the remedy crafted in the March decision.

FN18. The Court notes that this result is limited to these special facts and should not be read as stating a broad new principal, heretofore unknown, that expenditures for

attorneys' fees and expenses will always be considered a component of more general damages. Extraordinary facts will sometimes call for extraordinary remedies. See <u>Modern Dust Bag Co., Inc. v. Commercial Trust Co., Del. Ch., 91 A.2d 469 (1952)</u> ("[W]here the circumstances of a case are such as to require the application of equitable principles, the fact that no precedent can be found in which relief may be granted under a similar state of facts is no reason for refusing relief.").

B. Traditional "fee shifting" would also be appropriate.

*4 The preceding discussion fully addresses the Court's original reasoning for crafting the award as it did in this case. The defendants', however, viewed this as a decision by the Court to grant the plaintiff an award of attorneys' fees and expenses under traditional fee shifting exceptions to the American Rule. FN19 After reviewing the defendants' written and oral arguments on this issue, I have reconsidered any basis for an actual fee shifting and am now convinced that it would have been entirely appropriate to grant an award of attorneys' fees and expenses in the traditional sense in this case had I chosen to do so. The defendants do not argue that an award of attorneys' fees and expenses is not warranted in this case. Rather, they center their argument on the principal that the partnership agreement contains a pre-negotiated provision stating that both parties will bear their own attorneys' fees and expenses. Thus, there are two parts to this analysis. First, would an award of attorneys' fees and expenses generally be available under traditional common law rules? Second, may the Court award attorneys' fees and expenses despite a contractual provision purporting to address the issue? If the answer to both questions is "yes," then an award of fees and expenses under a fee shifting theory would be appropriate in this case.

FN19. As noted above, the Court's intent was focused on crafting a damages remedy and not on fee shifting. The Court, however, in reading the March decision again, and after some time removed from the drafting process, acknowledges that language in the opinion could certainly lead the defendants to their interpretation. For this reason, their argument should not be dismissed "out-of-hand" and will be addressed fully so

Not Reported in A.2d, 2001 WL 536911 (Del.Ch.) (Cite as: 2001 WL 536911 (Del.Ch.))

that no doubt will lie concerning the Court's rationale for, and its ability to craft, a remedy in this case.

Under what is commonly known as the "American Rule," absent express statutory provisions to the contrary, each party involved in litigation will bear only their individual attorneys' fees no matter what the outcome of the litigation. $\frac{FN20}{2}$ Over time, however, the Courts have acknowledged exceptions to this general rule. One exception relevant to this case is the "bad faith" exception to the American Rule. $\frac{FN21}{2}$

FN20. See Johnston v. Arbitrium (Cayman Islands) Handels AG, Del.Supr., 720 A.2d 542, 545 (1998).

FN21. Id.

No single definition for "bad faith" in this context exists and each determination will turn on the special facts of the particular case. FN22 Under this exception, fees may be awarded against a defendant where "the action giving rise to the suit involve[s] bad faith, fraud, 'conduct that was totally unjustified, or the like' and attorney's fees are considered an appropriate part of damages." FN23 I made at least one point absolutely clear in the March decision-the defendants' behavior constituted an egregious breach of the partnership agreement and their duty of loyalty. FN24 Moreover, the defendants knew, from the outset, that their acts were designed to challenge directly the core business of the plaintiff and that those acts were in derogation of the partnership agreement. FN25 Under these facts. I find that these faithless defendants have acted in "bad faith" and that an award of attorneys' fees and expenses would be appropriate under the bad faith exception to the American Rule.

FN22. See id. at 546. See also, although in a totally different context, the Supreme Court's elaborate discussion of "bad faith" in *E.I. DuPont de Nemours and Co. v. Pressman*, Del. Supr., 679 A.2d 436 (1996).

<u>FN23.</u> Barrows v. Bowen, Del. Ch., C.A. No. 1454, Allen, C. (Sept. 7, 1994) Mem. Op. at 3 (quoting <u>Weinberger v. U.O.P., Inc., Del. Ch., 517 A.2d 653, 656 (1986)</u>).

FN24. See March decision at 88-89.

FN25. See H & H Brand Farms, Inc. v. Simpler, Del. Ch., C.A. No. 1658, Chandler, C. (Sept. 1, 1994) (Court found "bad faith" where the defendants adopted and continued a course of conduct that they knew would be challenged.).

I must now consider whether the partnership agreement would trump the common law determination above and prevent an award of fees and expenses. For the reasons stated below, I find that it does not and the Court may award attorneys' fees and expenses despite any provision in the partnership agreement suggesting the contrary.

*5 The defendants point to Section 20.01 of the Partnership Agreement as evidence that the parties pre-negotiated for an agreement that the parties would bear their own attorneys' fees and expenses in a case such as this. FN26 Section 20.01 is a lengthy paragraph dealing with several matters. A significant portion of the paragraph deals with arbitration and arbitration procedure. Inserted dead in the middle of the arbitration procedure discussion is the following sentence: "Each party shall bear its own expenses for counsel and other out-of-pocket costs in connection with any judicial resolution of a dispute, difference or controversy." Taken by itself, and out of context, this sentence could evince an intent by the parties to bear their own attorneys' fees and expenses in this "judicial resolution of a dispute." Placed in context, in the center of an arbitration discussion, the intent of the parties is less clear. One should not lose sight of the fact that the bad faith breach of the duty of loyalty in this case generated a petition for extraordinary relief in the form of an injunction and involved a complex web of parties, many of whom were not parties to the Partnership Agreement. It seems disingenuous indeed, to stretch the parties' intent to pay their own fees and expenses in a dispute over the terms of the Partnership Agreement, which might be resolved by arbitration, to a multi-party controversy involving parties not subject to the terms of the Partnership Agreement. Ironically, despite the fervor with which the defendants assert the Partnership Agreement's language to be a bar against a fee award, I can not overlook the fact that they themselves sought an award of attorneys' fees in their pleadings. I find it impossible to conclude that the parties reference to "judicial resolution" in this conNot Reported in A.2d, 2001 WL 536911 (Del.Ch.) (Cite as: 2001 WL 536911 (Del.Ch.))

text contemplated the course of events that have transpired in this litigation. Fortunately, for the purposes of this discussion, I do not need to unravel this enigma for even had the parties clearly intended that they bear their own fees and expenses under these extraordinary circumstances, the facts of this case warrant a remedy beyond that contemplated by the parties.

<u>FN26.</u> See Def. Motion at Ex.A. While the Partnership Agreement was an exhibit at trial, neither party directed the Court's attention to this provision. This provision is, nonetheless, a "fact" already in evidence.

As noted above, the Court has broad discretion to craft a remedy for a breach of the duty of loyalty. I believe that when the facts demonstrate behavior as egregious as that here, the Court's normal deference to pre-negotiated partnership agreement provisions ^{EN27} will yield to a conscientious effort to craft an appropriate remedy. Going beyond the remedies provided for by contract is not unknown in this jurisdiction when the Court is addressing particularly culpable conduct. ^{EN28} This case warrants a similar deviation from the parties' alleged agreement. For that reason, I find that the Court would be justified in awarding attorneys' fees and expenses under the bad faith exception to the American Rule notwithstanding any contractual provisions arguably to the contrary.

FN27. See generally Continental Ins. Co. v. Rutledge & Co., Inc., Del. Ch., 750 A.2d 1219 (2000); U.S. West, Inc. v. Time Warner, Inc., Del. Ch., C.A. No. 14555, Allen, C. (June 6, 1996) Mem. Op.

FN28. See e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Price, Del. Ch., C.A. No. 11097, Allen, C. (Sept. 13, 1989) Mem. Op.

CONCLUSION

*6 The defendants' motions for a new trial and reargument under Rule 59 are denied. The defendants have not shown that the Court misapprehended the law or the facts in a manner that would change the outcome. The defendants can not claim that the concept of measuring damages by attorneys' fees and expenses incurred in remedying their breach is a surprise in this case. Both parties, in the complaint and the coun-

ter-claims (despite the language of the Partnership Agreement), asserted that they sought attorneys' fees and expenses as a portion of their remedy. For these reasons, I reaffirm my decision to use the plaintiff's attorneys' fees and expenses as a measure of damages. I see a distinction between this and traditional fee shifting. To the extent, however, there is an argument that this is a "distinction without a difference," I find that an award of attorneys' fees and expenses under the bad faith exception to the American Rule would be warranted in this case. The award, as announced in the Court's March opinion is reaffirmed and stands as my final decision on the matter.

II. Plaintiff's Application for Redress of Harm.

In the March decision, the Court directed the plaintiff to submit an order for declaratory relief consistent with the opinion and an application for fees and expenses. FN29 That final order has yet to be resolved and has become further complicated as a result of the dispute in Civil Action No. 18101. Upon receipt of this opinion, I ask the parties to arrange a conference to discuss:

FN29. March decision at 92.

- 1. Resolution of the actual monetary award in this action based upon Plaintiff's application for fees and expenses and defendants' opposition to that amount including the need for further factual hearings, if any; and.
- 2. The efficacy of a declaratory judgment order encompassing both this action and Civil Action No. 18101; and,
- 3. The extent to which any party seeks action by me under <u>Court of Chancery Rule</u> 54(b).

The defendants' Motions under <u>Rule 59</u> are DE-NIED.

IT IS SO ORDERD.

Del.Ch.,2001. Cantor Fitzgerald, L.P. v. Cantor Not Reported in A.2d, 2001 WL 536911 (Del.Ch.)

END OF DOCUMENT

EXHIBIT A CERTAIN DEFENDANTS' MOTION FOR REARGUMENT AND TO VACATE FINAL ORDER AND JUDGMENT

EFiled: Dec 05 2012 12:38PM 25T Filing ID 48181340 Case Number 637,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HENRY BLACK, MARY LOU BLACK, RAYMOND BUCHTA, W. SCOTT BLACK, and BLACKBALL PROPERTIES, LLC,) No, 2012)
Certain Defendants-Below Appellants,)))
v.) Trial Court Below:) Court Of Chancery of the
GARY STAFFIERI and) State of Delaware
ADRIA CHARLES STAFFIERI,) C.A. No. 7439-VCL
Plaintiffs-Below Appellees.	· }

NOTICE OF APPEAL

TO: Josiah R. Wolcott, Esquire Connolly Gallagher LLP 267 East Main Street Newark, DE 19711

> Court of Chancery Court Reporters New Castle County Courthouse 500 N. King Street Wilmington, DE 19801

PLEASE TAKE NOTICE that Henry Black, Mary Lou Black, Raymond Buchta, W. Scott Black, and Blackball Properties, LLC, Certain Defendants-Below/Appellants, do hereby appeal to the Supreme Court of the State of Delaware from the Post-Trial Order of the Court of Chancery of the State of Delaware by The Honorable J. Travis Laster dated October 24, 2012 and the Orders dated November 7, 2012 denying the Motion for Reargument, Reconsideration And/Or New Trial, in Civil Action No. 7439-VCL in that Court. A copy of the Orders sought to be reviewed are attached hereto. The name and address of the Attorney for the Plaintiffs-Below/Appellees is Josiah R. Wolcott, Esquire, whose office is located at the above address. The parties against

whom the appeal is taken are Gary Staffieri and Adria Charles Staffieri.

PLEASE TAKE FURTHER NOTICE that Appellants hereby designate the transcript in accordance with Rules 7(c)(6) and 9(e)(ii) in the following manner:

1. The full and complete transcript of trial conducted by The Honorable J. Travis Laster on October 4, 5, and 12, 2012.

ABBOTT LAW FIRM

Richard L. Abbott, Esquire (I.D.

#2712)

724 Yorklyn Road, Suite 240

Hockessin, DE 19707

(302) 489-2529

Attorneys for Certain Defendants-Below Appellants

Dated: December 5, 2012

EXHIBIT B CERTAIN DEFENDANTS' MOTION FOR REARGUMENT AND TO VACATE FINAL ORDER AND JUDGMENT



GRANTED

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GARY STAFFIERI and ADRIA CHARLES STAFFIERI	:	
Plaintiffs,	: :	
٧.	: :	C.A. No. 7439-V

HENRY BLACK and MARY LOU BLACK and RAYMOND BUCHTA and SCOTT BLACK BLACKBALL PROPERTIES LLC, and PAUL MILLER AND CANDY MILLER, and GAKIS PROPERTIES II, LLC

Defendants.

C.A. No. 7439-VCL

[PROPOSED] FINAL ORDER AND JUDGMENT

On this ______, 2013, having considered certain affidavits submitted by Plaintiffs Gary Staffieri and Adria Charles Staffieri (the "Plaintiffs") in support of an award of attorneys' fees and costs as awarded in this Court's October 24, 2012 Post-Trial Order (the "Decision"), it is HEREBY ORDERED as follows:

- Judgment is entered in favor of Plaintiffs and against Defendants Henry Black, 1. Mary Lou Black, Raymond Buchta, Scott Black, Blackball Properties, LLC, Paul Miller, and Candy Miller in the amount of \$166,483.94.
- 2. Post-judgment interest is awarded at the legal rate from the date of this Order to the date of satisfaction.
- 3. The Register in Chancery shall forthwith forward to the Prothonotary of the Superior Court of the State of Delaware in and for New Castle County a certified copy of this Final Order and Judgment to be entered by the Prothonotary in the same amount and form and in the same books and indexes as judgments and orders in accordance with 10 Del. C. § 4734.

4. This judgment may be supplemented with any attorneys' fees and costs incurred by Plaintiffs in any appeal of the Decision in the above-captioned action or of this Order as well in any remand from the Delaware Supreme Court, unless this Court's award of attorneys' fees and costs has been reversed.

IT IS SO ORDERED.

The Honorable J. Travis Laster

This document constitutes a ruling of the court and should be treated as such

Court: DE Court of Chancery Civil Action

Judge: J Travis Laster

File & Serve

Transaction ID: 49129604

Current Date: Jan 31, 2013

Case Number: 7439-VCL

Case Name: APPEAL Staffieri, Gary et al vs Mary Lou Black Henry Black et al

Court Authorizer: Laster, J Travis

Court Authorizer Comments:

Despite ample time to do so, the defendants have not filed any opposition to the reasonableness of the requested amount of fees and expenses.

The Court has reviewed the requested amounts and believes they are reasonable under the factors set forth by the Delaware Supreme Court in the decision of Mahani v. Edix.

The Court recognizes that there is an appeal pending in this matter. In light of the award of fees and expenses, the Court did not intend for the post-trial order from which the appeal was taken to be its final act in the case. If it is determined that the appeal was validly taken and that this Court is without ongoing jurisdiction to quantify the fee award, then the Court will revisit the issue of fees and expenses, to the extent necessary, after and in compliance with the Supreme Court's mandate.

/s/ Judge Laster, J Travis

EXHIBIT C CERTAIN DEFENDANTS' MOTION FOR REARGUMENT AND TO VACATE FINAL ORDER AND JUDGMENT

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HENRY BLACK, MARY LOU BLACK, No. 637, 2012 RAYMOND BUCHTA, W. SCOTT BLACK, and BLACKBALL PROPERTIES, LLC, Certain Defendants Below-Court Below—Court of Chancery § of the State of Delaware, Appellants, § in and for New Castle County C.A. No. 7439 ٧. GARY STAFFIERI and ADRIA CHARLES STAFFIERI, Plaintiffs Below-Appellees.

> Submitted: January 31, 2013 Decided: February 6, 2013

ORDER

This 6th day of February 2013, upon consideration of the appellants' opening brief and the appellees' motion to affirm, the Court does not find it manifest on the face of the opening brief that the appeal is without merit under Supreme Court Rule 25(a).

NOW, THEREFORE, IT IS ORDERED that the motion to affirm is DENIED.

BY THE COURT:

/s/ Carolyn Berger
Justice

CERTIFICATE OF SERVICE

I, Richard L. Abbott, Esquire, do hereby certify that on this 7th day of February, 2013, I caused the foregoing Certain Defendants' Motion For Reargument And To Vacate Final Order And Judgment to be electronically filed with this Court and served upon the below-listed individuals as indicated:

VIA ELECTRONIC FILING

Josiah R. Wolcott, Esquire Connolly Bove Lodge & Hutz 267 East Main Street Newark, DE 19711

VIA U.S. FIRST CLASS MAIL

Paul Miller Candy Miller 1 Carillon Court Wilmington, DE 19803

Richard L. Abbott, Esquire (I.D. #2712)