IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CRESTVIEW-OXBOW ACQUISITION, LLC, CRESTVIEW-OXBOW (ERISA) ACQUISITION, LLC, ROBER J. HURST and BARRY S. VOLPERT,	:	
Plaintiffs,	:	
v	:	C. A. No. 2018-0654-JTL
OXBOW CARBON, LLC,	:	
Defendant.	:	

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Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, January 15, 2019
3:12 p.m.

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BEFORE HON. J. TRAVIS LASTER, Vice Chancellor

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ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
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-and-
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for Plaintiffs

THOMAS W. BRIGGS, JR., ESQ.
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for Defendant

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THE COURT: Welcome, everyone.

MR. BARLOW: Good afternoon, Your Honor. Mike Barlow from Abrams & Bayliss. It's a privilege to be here this afternoon.

Quick introductions of people that may not need any introduction today. April Kirby from my firm, Mr. Mike Carlinsky and Silpa Maruri from the Quinn Emanuel firm, and Mr. Ross Oliver, general counsel of Crestview are here today.

THE COURT: Thank you all for being here.

MR. BRIGGS: Tom Briggs of Morris Nichols on behalf of Oxbow. And I think Your Honor knows my colleague Richard Li.

THE COURT: I do. It's good to see you both.

MR. BARLOW: Your Honor, this is the time the Court has set to hear the Crestview plaintiffs' application for attorneys' fees in connection with the litigation of this books and records action.

Your Honor has said in the past that in considering an application for attorneys' fees for bad faith, the parties should think about it twice,

three times, four times. We did that here. We focused on the Court's guidance in that respect, and we did so and ultimately decided that we needed to bring this application for functionally two reasons.

One, the evidence of bad faith was obvious and overwhelming. And without getting into the details of my presentation in that respect, I think this case compares very similarly to McGowan v. Empress Entertainment decided by Vice Chancellor Jacobs. And, indeed, the situation is worse, in that we have both a denial of a clearly established and defined right and a misrepresentation made in connection with that clearly established right intended to prevent us from litigating the claim.

But the second reason, and perhaps the just as important reason, that we brought this fee application is because we think this is an attorneys' fees case where further misconduct can be deterred by a finding of bad faith and entry of an award.

Since Your Honor decided the exit sale litigation, there have been a series of events involving the management of the company in which Mr. Koch, chairman, CEO, and majority owner, has taken actions to prevent my clients from fully engaging in

their roles as fiduciaries for the company and as major investors in the company.

And these may seem like little things, but they build up. Scheduling a board meeting for the same day as Crestview's annual investor meeting. Then agreeing to move that meeting, only after a few weeks of back and forth, and then declaring unilaterally that people can't participate by phone for the first time, or can't even bring a proxy, in violation of the LLC Act. Denying my clients opportunities to actually get the PowerPoint presentations made at those meetings. And under the LLC agreement in this case, the company's summary annual budget has to be prepared by January 31st, 2019. We're at the middle of the month, and a board meeting to consider that summary annual budget hasn't even been scheduled.

So there have been a number of little steps that have been taken by the company to prevent my clients from being fully engaged in protecting their rights as minority investors and protecting the rights of the other minority investors. And we think this is a case, not dissimilar to Your Honor's decisions under Rule 37, where a ruling in favor of my clients, clearly justified by applicable case law, can

nudge the company towards appropriate conduct in the future.

There are two bases by which the Court can award fees today. First is this Court's decision that the denial of the clearly established right establishes our right to fees. I don't need to get into the details, but, obviously, the Crestview entities are members, and have been for ten years. And my other clients, Mr. Volpert and Mr. Hurst, are directors of the company, and pursuant to the LLC agreement have the rights of managers, including the right under 18-305 of the LLC Act.

And what I thought was interesting in going back and reviewing the cases is if you look at the three cases of which I am aware in which the Court has granted a bad faith fee application in connection with a books and records case, two out of the three of them involve claims brought by directors. That's the McGowan case and the Carlson case cited in our papers. And we think that's pretty clear, because obviously a director has virtually an unfettered right to the books and records of the corporation. So it shouldn't be surprising that that situation, like our situation, is the paradigmatic case where the absolute refusal by

the company to comply with their obligations should warrant the application of fees.

Now, the only real argument brought by my colleagues to explain all of this is essentially to say, "But we got religion, Your Honor. At some point later in the process, we eventually decided to produce the documents, and you agreed to take the case off trial."

And there's, I think, fundamentally four reasons that that doesn't exclude bad faith.

The first reason is that the decision to comply with the law after a lawsuit has been filed doesn't change the fact that under this Court's precedent, like McGowan, we were nonetheless forced to bring suit and impose costs on this Court and impose costs on Delaware taxpayers to vindicate rights that are clearly established. So it's the action of having to bring a suit to vindicate rights that does it. The fact that afterwards they eventually decided to comply with the law doesn't excuse bad faith in the first instance.

And that's why, actually, if you look at at least two of the cases cited in our papers, both McGowan and Carlson are cases in which parties did

produce documents to avoid a trial. Your Honor's decision in Marilyn Trust was a case that actually got fully litigated. But the two other cases cited in our brief are both cases in which the corporate defendant decided to obviate having a trial. So we think that that should defeat their argument here that the fact that they eventually complied makes their conduct not at all distinguishable from other cases in which bad faith has been found.

But it's also the case that the rule that they are proposing makes no sense as a matter of law. In fact, it would encourage parties to act in bad faith prelitigation, because they get a "get out of jail free" card after a lawsuit is filed, and can then, by complying with the law after a suit is filed, somehow obviate any sanction relating to their prior bad faith.

It's also the case from a practical perspective that we're only seeking half of our fees here, Your Honor. At some point, perhaps with the involvement of the Morris Nichols firm, they did eventually decide to produce documents. And for that reason, we voluntarily reduced our fee request. Had they litigated this through trial, we would be here,

Your Honor, asking for 100 percent of our fees, but that's not what we're doing today.

So I think that covers why our right is clearly established. They do make some arguments in their opposition that, well, maybe they had a purpose challenge, although Mr. Nachbar admitted in the motion to expedite that we had a proper purpose. I don't think that that counts. And this Court was clear in McGowan that those kind of back-door attempts to argue in an attorneys' fee application that you really had defenses, even though you didn't assert them, doesn't prevent the finding of bad faith.

And the second one, and one that's particularly important, is that a knowing misrepresentation was made to us in connection with the response to the demand. Specifically, as it related to private plane travel, the company represented that there were no documents to produce in response to the demand because they didn't have any such documents. And that was a knowing misrepresentation that was intended to keep us from vindicating our rights by bringing an action. And I think the easiest way to show that is with a demonstrative.

May I approach, Your Honor?

THE COURT: Of course.

MR. BARLOW: Your Honor, I am handing up what is Exhibit 2 and Exhibit 3 to our motion, with some highlighting that I have added. Because I want to compare and contrast how the company created its response. And I want to compare and contrast specifically how the company responded to the Chatham Bars Inn Mintz Levin retreat versus the private plane issue.

Now, as Your Honor knows, as it relates to the Chatham Bars Inn affair, after we made our demand, the company all of a sudden realized that it had inadvertently paid for a $65,000 vacation for Mintz Levin attorneys. After that was uncovered, Mintz reported that it immediately refunded the money. So if you look at this email that was sent from Mintz attorney Bob Popeo to Bill Koch on Monday, August 27, just hours before the response was sent by Mr. Scott Humphrey from Oxbow, you will find three representations about the Chatham Bars Inn issue. One of them is that the intention was always to have Mintz Levin cover the costs. The other was that this was a mistake, and we've immediately refunded it. And the

third one is that we're happy to address that at a board meeting.

I have numbered them each 1, 2, 3. And if you look at the response a few pages back, what you will find are three sentences that say exactly the same thing, sometimes with the exact same words, leading one to believe that Mr. Humphrey either had Mr. Popeo's email right next to him when he was composing this response, or this response was composed by Mintz Levin and then sent out under Scott Humphrey's name. In either respect, what happened is very clearly they had all the information in Bob Popeo's email when they chose to send the response.

And I want to compare that with the highlighting in yellow as it relates to the private plane use, because in the very first sentence of that private plane use he says, as you have known, Mintz Levin -- during the period of time when Oxbow was reimbursing directors for private plane travel, Oxbow covered the same costs for Mintz Levin attorneys.

And then if you look at the response sent a few hours later, that admission that there was, in fact, private plane use is contained nowhere in the response. That fact is actually hidden from us. They

have chosen to admit it. Instead, the response makes two misleading and untrue statements.

First, that Crestview already has the information because it was contained in the Mintz Levin invoices. That's not true. Mintz sent those invoices, and they knew it. Oxbow paid those invoices, and they knew what was in the Mintz Levin invoices. Those invoices say nothing about who paid for private plane travel.

And then they also say after the period of June 2016, June 2016 being the month the lawsuit for the exit sale litigation was filed, Bob Popeo says, "Well, we paid our own travel, and we sought reimbursement from the company." But actually, Mr. Humphrey's letter goes a bit further and says there was no private plane travel and there were no documents to produce. Again, that was misleading and untrue.

And so if you put those facts together, you've got Oxbow's decision not to disclose private plane costs, to mislead us by making a false statement that all of this would have been in invoices that said nothing about it, and that by saying after June 2016 there were no documents to produce, which

was also not true, because Exhibit 4 to the motion shows that Bill Koch personally approved several private plane flights after June 2016. So I think to suggest that this wasn't an intentional misrepresentation is just unfounded.

They argue, essentially, that this was an honest mistake. And I think that just can't comport with the facts as we've shown them. And importantly, they haven't offered any affidavit to explain that they made a mistake. In fact, they actually admit that they reviewed some of the invoices before they sent the response. And that's in their opposition at, I believe, paragraph 8. So it defies explanation that they could have made these misrepresentations innocently.

But beyond that, one, the knowledge of the company is imputed to Oxbow. So what Mr. Humphrey may or may not have known at any given moment doesn't change the fact that the company knew these facts. And then also importantly, to the extent that the facts might not have been known, a reckless misrepresentation in a situation in which someone could have very easily checked records is itself bad faith. And that's the Acierno decision cited in our

papers.

So we think that the basis here is very clearly established for an award of attorneys' fees. We think this case is actually very similar to McGowan, and, indeed, somewhat worse than McGowan because they actually represented the documents didn't exist. And in McGowan, the company actually even produced documents, some of them voluntarily, before a lawsuit was filed. And here, we got nothing. We got stiff-armed.

We voluntarily limited our request to $60,000, which is approximately half of our fees incurred. They haven't challenged the reasonableness, so I would suggest that that has been established as a matter of law. And we think that this is a case where the entry of a fee application can have a salutary effect for the parties going forward. We recognize $60,000 is not a huge number. It's a big number in real-person dollars, but in the context of the exit sale litigation, it's not. So just to explain to the Court why we're here today, we do think that the Court's entry of an order can have a salutary effect on the parties' conduct going forward.

THE COURT: Thank you very much.

MR. BARLOW: Thank you, Your Honor.

MR. BRIGGS: Good afternoon, Your Honor.

As Your Honor is fully aware, fee shifting for bad faith is a pretty extreme remedy. It turns not only on the particular facts of each case, but it's also plaintiffs' burden to establish by clear and convincing evidence subjective bad faith.

We don't think the plaintiffs have met that burden here. When plaintiff sent the demand, they basically sought to investigate improper expenses that they -- expenses they claim were improper premised on two issues: One, whether the company had paid for private plane travel for its lawyers; and, two, whether the company paid for a weekend retreat for lawyers on Cape Cod.

As to the first issue, as Mr. Barlow indicated, when the company responded, we pointed out that the charge to the company was a mistake. Mintz immediately repaid that amount. And the company offered to make Mr. Popeo available to address any questions that the board of directors had.

As to the first issue, the simple fact is, at the time that the demand came in, people were

focused on the invoices, Mintz Levin's invoices. I think that's actually clear from, and consistent with, Mr. Popeo's email, where he talks about the plaintiffs having had the pre-July 2016 invoices, which would have reflected that information, they thought, as part -- you know, from the other litigation.

As to the post-June 2016 invoices, when the company checked those invoices, there weren't any expenses reflecting private plane travel from Mintz Levin, which, of course, is the source of the statement that there are no records reflecting private plane travel for Mintz Levin post June 2016.

From the beginning of the lawsuit, Oxbow made its intention to cooperate plain to both the plaintiffs and to this Court. Before trial was scheduled, we produced the front and back pages of all of outside counsel's invoices, which at the time we thought would show any expenses related to private plane travel. At the time we did that, we thought that was sufficient.

We made that production on September 11th. The next day, we responded to the motion to expedite, which again made clear that we thought the production that we had made the day before

was sufficient. As we began going through additional documents and talking to the client further, we realized there might be records reflecting private plane travel that wasn't reflected in the Mintz Levin invoices. Since then, we've produced over 2,000 documents, consisting of over 10,000 pages, including detailed time records from all of Oxbow's outside counsel, in connection with the unitholder litigation, as well as emails, over 1100 emails from numerous custodians, all without any meaningful dispute between the parties.

These productions were made in spite of the fact that we think we genuinely could have opposed much of what was requested as not relevant to the stated purpose of the demand. Specifically, the detailed time records of the attorneys, which we don't think have any real relevance to the stated purpose. Nevertheless, to avoid a dispute, we produced those records.

The record of compliance here is very different than what happened in the McGowan case, the Marilyn Abrams case, and the Carlson case, where in Carlson the company actually removed a director from the board, in part to try to avoid having to produce

documents to him.

In McGowan, the company misled the plaintiff about its intention to produce documents, forcing the plaintiff to file the lawsuit. The company then filed an answer asserting 10 affirmative defenses. They went through summary judgment briefing. It took 16 months for the plaintiff in that case to get the documents. That's very different than what happened here.

In Marilyn Abrams, the company there raised what turned out to be frivolous confidentiality arguments, objected that requests were vague, even after plaintiff's expert identified specific types of documents, and forced the plaintiff to go through a trial.

Again, none of that happened here. There was nothing close to a 16-month gap in compliance, and not even real opposition to the demand. Instead, there was a mistaken belief that plaintiffs either had the records regarding private plane travel or no such records existed.

A miscommunication or mistake does not justify a finding of bad faith. And I would direct the Court's attention to the Mickman v. American

Intern Processing case for that proposition.

The plaintiffs' argument essentially boils down to, you know, arguing, through various chains of inferences, that the company knew, should have known, or knowledge should be imputed. But the simple fact is that the individuals responding to the demand were focused on Mintz Levin's invoices during that one-week period between the demand and the response. They were focused on those invoices because they genuinely believed that would reflect any private plane travel by Mintz Levin.

The response itself never suggested that there hadn't been private plane travel that the company paid for. What the response did was said you have the documents that would reflect any of that during the time period when they believed there was that private plane travel -- i.e., in that time period when Oxbow was paying for its directors to fly by private plane.

The situation wasn't clear at the time, and there wasn't just one source that the people responding could go to to punch a button and get a list.

Finally, Mr. Barlow suggested that the

Court should exercise its equitable authority and impose fee shifting here in order to deter other conduct that they believe is improper.

Now, I can't get into the back and forth of what's been going on at the board level, because, frankly, that's not part of this case. This case is about production of documents, which the company did. And it's not a vehicle to be used to deter other types of conduct that they take issue with, which, by the way, we do disagree with, as we've pointed out in, I think, one of our oppositions.

Unless Your Honor has any questions, I have nothing further.

THE COURT: Thank you, sir.

MR. BRIGGS: Thank you.

MR. BARLOW: Your Honor, I would like to stand up very quickly just to make a few direct points.

The first is I don't think you heard from my friend Mr. Briggs anything about why our right wasn't clearly established. That alone is a basis for establishing a right to attorneys' fees. And they have essentially offered no argument on that fact.

They did say, and make some sort of

argument, "Well, we could have challenged whether or not some of these documents were responsive." This Court dealt with that in McGowan and said you can't raise a back-door challenge after the fact in an attorneys' fee application to try to avoid an application of bad faith.

So the answer is the Court doesn't have to reach the specific intent of the company when that letter was sent, because the clearly established right is itself bad faith. And if you look at cases like McGowan, they make clear that both the violation of a clearly established right and a misrepresentation are independent indications of bad faith. So they exist independently here. One doesn't defeat the other.

But as it relates to the misrepresentation, I've got to say, I still don't understand the argument that, "No; we were focused on the invoices, and so we didn't understand what was in our invoices." I.e., the company was apparently so focused on their invoices from one period that it was okay for them to make misrepresentations about an earlier period. That just doesn't hold water to me, and it doesn't make any sense.

On the cases and the suggestion that they are somehow distinguishable because of these idiosyncratic facts, they are not. And I would encourage the Court to look at the McGowan case. This wasn't 16 months of hard-fought litigation in McGowan. The delay of 16 months in McGowan was caused because two members of the director's family had leukemia. And, therefore, he didn't act on his rights for 16 months because he was dealing with a significant family issue.

Here, we happen to have a plaintiff that did act to vindicate their rights. That doesn't change the fact that on the other side of the V we've seen the exact same indications of bad faith that we saw in that case.

And I guess I still don't understand the argument that they are making -- and perhaps I'm thick -- that the response didn't say that there was no private plane travel; therefore, it wasn't somehow technically inaccurate.

I would refer the Court to how my friends at Morris Nichols actually read those documents and understand those documents when they submitted the opposition to the motion to expedite,

where they said quite clearly "... there are no records relating to private airplane travel because Oxbow has not paid for any such travel for Mintz Levin or other attorneys involved in the underlying case." That was the express representation to this Court, without reference to time frame, in Footnote 5 of the opposition to the motion to expedite. And it was based on the same reading that my client was intended to take away from the response that that reading was because the document was misleading, and that warrants an application for attorneys' fees in this instance.

To the extent Your Honor has any questions about the factual record and an evidentiary record would need to be built, we think we have shown by documentary evidence that there was clear evidence of misconduct here and bad faith. But to the extent an evidentiary record would help assist the Court, we are happy to show up for that.

Thank you, Your Honor.

THE COURT: Thank you. I'm going to go ahead and give you-all a ruling now.

I am going to grant the motion, but I want to say at the outset that I view Morris Nichols as being part of the solution, rather than part of the

problem, and I don't want any aspect of my ruling to imply that I think the Morris Nichols firm's involvement in this matter was a contributor to or the cause of the fee award. In fact, I think that had they been involved deeply in responding to the directors' information requests at the outset, we likely wouldn't be here. I'm actually grateful to Mr. Nachbar and Mr. Briggs for their role in bringing this matter to a conclusion.

Nevertheless, despite that second-act solution, which I think is commendable, I do think this is a situation that warrants applying the exception to the American rule. Generally speaking, of course, parties bear their own legal fees in this country. But as the McGowan case explains, an exception exists "where the losing party has acted in bad faith in opposing the relief being sought in the lawsuit." The bad faith exception is, indeed, not lightly invoked. Then-Vice Chancellor Strine explained that in the Atlantic Coast case. But it is warranted not only to remedy conduct in a specific case, but also to deter the risk of abusive litigation and to protect the integrity of the judicial process. That's a paraphrase of the Delaware Supreme Court in

the Montgomery Cellular case from 2005.

Here, I think we're in a situation like McGowan, where there was a clear and established right to information. That right, in my view, is a right that Mr. Hurst and Mr. Volpert possessed as managers of the LLC, which gave them rights coextensive with directors. Under our law, directors have informational rights that are virtually unfettered. Their job is to manage and oversee the business and affairs of the entity. To be able to fulfill that charge consistent with their fiduciary duties, they have to have the ability to obtain information. It's critical that people who may disagree with the directors' reasons for acting or dispute their basis for acting understand that, nevertheless, they are obligated to comply with the directors' requests, because it's the directors who are charged with managing the company.

This was a clear and unfettered right that Hurst and Volpert had. But rather than complying, I do think the evidence indicates sufficiently to me that there was a misrepresentation regarding aspects of the information that the directors sought.

We could have some type of evidentiary hearing. We, indeed, could have further proceedings on this. But given the size, scope, and stakes in the matter, including the amount in dispute on fees, I think that the evidentiary record that I have is sufficient to address this matter at this stage.

I also think that it is important to lay down the rules of the road going forward. It's been a while since I issued my decision. I have no doubt that boardroom interactions are difficult. I don't envy either the folks who have to try to interact civilly with each other or the advisors who have to mediate what are, it was apparent to me from trial, strong personalities on both sides. But whatever disagreements these people may have as individuals or as economic actors, they have to comply with obligations that exist under Delaware law. And giving directors information is one of those obligations.

Is it possible to show that a director has an improper purpose? Yes, it's theoretically possible. But that is a very difficult standard because of the wide berth that we give directors in terms of seeking and obtaining information to fulfill

their responsibilities.

One question I've grappled with is the amount of the award. I think the plaintiffs have been reasonable in seeking only half of their fees and expenses, and I do think $60,000 on the facts of this case is a reasonable amount.

I considered, instead, keying off September 13th, 2017, which is the date that the Morris Nichols firm corrected the company's prior representations. I, frankly, don't want to consign you-all to further proceedings in which you would fight about an amount. I think any variance from the amount that the plaintiffs have requested is small, or likely to be small, and I think that the amount the plaintiffs have requested is reasonable under the circumstances.

Consequently, rather than attempting to craft a different award or sending you-all to litigate over a different award, I am going to grant the $60,000 that has been requested.

Let me say in closing that I really do not want to have to sit as a playground monitor to adjudicate back-and-forth disputes between the Crestview directors on the one side and Mr. Koch and

his directors on the other side. People need to act like grown-ups. No matter what happens in terms of the put-right litigation, or if there's future litigation, people still have to try to interact civilly with each other. They need to behave responsibly. They need to provide information that people request. They need to treat each other with the type of respect that is warranted in a business situation.

What I also don't want to have happen is for Mr. Volpert and Mr. Hurst to think that my ruling in this case makes it open season for them to request any record they want, to turn the company over and shake it, and then to get attorneys' fees if there's the slightest failure to comply. Certainly the law is going to be on the side of Mr. Hurst and Mr. Volpert when they're requesting records. That is such a clearly established and unfettered right that it is going to take an extreme set of facts for there to be any basis to claim that they are abusing it.

But what I really want is for folks like Morris Nichols, and hopefully some combination of folks on the plaintiffs' side, whether that's through the good offices of Mr. Abrams' firm through

Mr. Barlow or whether it's through Quinn, to help the principals behave responsibly so that we're not back here with further disputes over records, or who knows what other disputes are going to happen along the way.

That's my ruling on this matter. I am granting the motion. I'm granting it in the amount of $60,000 because I think that's a reasonable request under the circumstances.

But I do want to reiterate that this doesn't reflect on Morris Nichols, and that I hope that, Mr. Briggs, you can continue to be part of the solution going forward.

Thank you all for your time today. I'm grateful for your presentations and your briefing.

We stand in recess.

(Court adjourned at 3:50 p.m.)

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CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 29 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 23 through 29, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 17th day of January, 2019.

/s/ Debra A. Donnelly

Debra A. Donnelly
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
Delaware Notary Public