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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RBC CAPITAL MARKETS, LLC, Defendant Below, Appellant/Cross-Appellee v. JOANNA JERVIS, Plaintiff Below, Appellee/Cross-Appellant.	No. 140, 2015 Court Below: Court of Chancery, of the State of Delaware, Consolidated C.A. No. 6350-VCL

APPELLEE/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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SUMMARY OF CROSS-APPEAL ARGUMENT

In the Opening Brief on Cross-Appeal ("Cross-App. OB"), Lead Plaintiff discussed how the Court of Chancery's adoption of a "glaring egregiousness" standard for fee-shifting has no support in this Court's precedents. Cross-App. OB 78-80. Lead Plaintiff further discussed how the factual findings of the Court of Chancery—that RBC misrepresented facts relating to a fundamental issue in a manner that reflected "some egregiousness"—are sufficient to warrant fee-shifting. *Id.* 28-29, 77-78, 81-83.

RBC makes three arguments in its answering brief on cross-appeal ("Cross-App. AB"). None of them are legally or factually supported. *Firs*t, RBC argues that this Court's precedents set a standard no lower than "glaring egregiousness," Cross-App. AB 41, even though those cases do not equate "bad faith" conduct with "glaringly egregious" conduct. *Second*, RBC argues that Lead Plaintiff did not bring forward "clear evidence" of bad faith conduct, Cross-App. AB 42-43, even though Lead Plaintiff's case for fee shifting is based on an admission at trial by RBC's lead witness. *Third*, RBC argues that it engaged in "typical" advocacy that cannot support fee shifting, Cross-App. AB 44, even though its conduct violated the standard set forth in Court of Chancery Rule 11(b)(3).

The trial revealed a critical fact that RBC had concealed from Rural's Board and Rural's stockholders and that RBC had denied the existence of when

constructing its defense in its pre-trial briefs—that RBC's most senior bankers, who were in touch with the senior banker advising Rural, tried to convince Warburg as late as Saturday, March 26, 2011, to replace its committed acquisition financing with staple financing from RBC. A2192-93. RBC is prohibited from filing papers that misrepresented what its senior bankers knew to be true about an event that went directly to RBC's culpability for aiding and abetting. Reversal is necessary so that fee shifting for such bad faith litigation conduct can be assessed under the appropriate legal standard. This is Lead Plaintiff's Reply Brief on its Cross-Appeal.

CROSS-APPEAL ARGUMENT

I. THE COURT OF CHANCERY'S DENIAL OF FEE SHIFTING WARRANTS REVERSAL BECAUSE THE "GLARING EGREGIOUSNESS" STANDARD IS UNSUPPORTED AND RBC'S LITIGATION CONDUCT WAS FOUND TO BE "SOMEWHAT EGREGIOUS"

Lead Plaintiff's Opening Brief on Cross-Appeal identified numerous cases in which this Court has held that a finding of subjective bad faith litigation conduct is the touchstone for fee-shifting under the bad-faith exception to the American Rule. Cross-App. OB 78-80. That was not the standard applied by the Court of Chancery. The Court of Chancery would have shifted fees "if the standard were not glaring egregiousness" (*i.e.*, if "this level of egregiousness [by RBC] was sufficient to warrant some term of fee shifting"). Cross-App. OB Ex. A at 72, 75.

RBC does not cite any precedent from this Court for its contention that "glaring egregiousness is the level to which the bad faith conduct must rise for a court to consider shifting fees." Cross-App. AB 39. Recognizing that this Court has never used a "glaring egregiousness" standard, RBC argues that this Court requires "what amounts to glaringly egregiousness conduct" and no "lower standard than glaring egregiousness." Cross-App. AB 40, 41. As discussed below, none of the cases cited by RBC support the distinction relied upon by the Court of Chancery between "the level of glaring egregiousness that our case law seems to

require" and the "some egregiousness" or "level of egregiousness" exhibited by RBC. Cross-App. OB Ex. A at 68, 72, 75.

In *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084 (Del. 2006), this Court held that conduct "abusive and disrespectful of the judicial process … constitutes bad faith." *Id.* at 1094. The Court also recognized that "[b]ad faith has been found to exist (*inter alia*) in cases where 'parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims[,] … mis[led] the court, alter[ed] testimony, or chang[ed] position on an issue.'" *Id.* at 1093 (quoting *Beck v. Atlantic Coast PLC*, 868 A.2d 84, 850-51 (Del. Ch. 2005)). That list hardly excludes the availability of fee shifting when a trial court finds "some egregiousness" in a party's false representations in pre-trial briefs that "essentially deny the existence of" underlying conduct "address[ing] a fundamental issue in the case" relating "to matters that were within [the party's] knowledge." Cross-App. OB Ex. A at 68, 71-72.

RBC relies on language in three Court of Chancery opinions that were appealed to this Court, in which this Court issued opinions that had their own formulations of the applicable standard. Cross-App. AB 40-41. For example, in *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542 (Del. 1998), this Court affirmed the shifting of fees because the Court of Chancery "found that the

conduct of the Defendants rose to the level of bad faith." *Id.* at 546. The Court of Chancery had similarly stated: "To award fees under the bad faith exception, the party against whom the fee award is sought must be found to have acted in *subjective* bad faith." *Arbitrium (Cayman Is.) Handels AG v. Johnston*, 705 A.2d 225, 232 (Del. Ch. 1997) (emphasis in original). It is no help to RBC that the Court of Chancery also found that the defendants' bad faith litigation tactics were "sufficiently egregious" to warrant fee shifting. *Id.* at 228, *quoted in* Cross-App. AB 40. "Sufficiently egregious" is not the standard set by this Court. Nor is it the standard that was utilized below.

In *Kaung v. Cole Nat. Corp.*, 884 A.2d 500 (Del. 2005), and *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206 (Del. 2005), this Court chose not to endorse the "glaring egregiousness" standard utilized by the Court of Chancery in those cases. Instead, this Court ordered fee-shifting in both cases based on findings of "bad faith" conduct. 884 A.2d at 507; 880 A.2d at 227-29. This Court's reversal of the Court of Chancery in *Montgomery Cellular* illustrates how a "glaring egregiousness" standard is too high and too imprecise. This Court reasoned that the party's overall conduct was "regarded as demonstrative of bad faith." 880 A.2d at 228. RBC notes that this Court referred to a "most egregious instance" of the party's failure to produce documents. 880 A.2d at 228, *quoted in*

Cross-App. AB 41. That wording picked out of context does not establish a legal standard for fee-shifting.

As discussed below, RBC structured its trial defense around a denial of the existence of its end-stage lobbying of Warburg, which RBC had contemporaneously concealed from Rural's directors. Reversal is appropriate because the operative question is whether RBC's blatant, repeated, false insistence that it was operating under no conflict of interest respecting Warburg when analyzing the fairness of Warburg's bid was demonstrative of bad faith, not whether it was "glaringly egregious."

II. THE ADMISSION AT TRIAL BY RBC'S LEAD WITNESS CONTRADICTING FACTUAL REPRESENTATIONS IN RBC'S PRE-TRIAL PAPERS IS "CLEAR EVIDENCE" THAT RBC'S PAPERS WERE FILED IN BAD FAITH

RBC refers to "only conclusory allegations that RBC acted in bad faith" and argues that Lead Plaintiff "fails to provide any evidence, let only clear evidence, to support her contention that RBC intentionally made any false statements." Cross-App. AB 42-43. The requisite "clear evidence" consists of the testimonial admission of RBC's lead trial witness, managing director Tony Munoz, and the contradiction between his admission and the factual representations in RBC's pre-trial briefs.

The context for RBC's pre-trial briefs illustrates RBC's bad faith. Warburg's representative gave deposition testimony about how "RBC was trying to find a way into the debt financing" after Warburg had submitted a formal bid for Rural accompanied by a debt financing package that did not include RBC. B610; B746. RBC chose to construct its defense at trial around the contention that the testimony of Warburg's representative was untrue, and that since RBC supposedly knew it would not be financing an acquisition by Warburg once Warburg submitted a fully financed bid, RBC was not operating under any conflict of interest when it negotiated with Warburg and analyzed the fairness of Warburg's final bid.

RBC noted in a pre-trial brief that Warburg's representative "cannot remember when those alleged conversations took place." A1960 n.120. RBC insisted in its pre-trial papers that RBC's efforts to offer staple financing to Warburg ceased at the time Warburg submitted its fully financed bid and RBC began working on its fairness opinion analyses:

- "RBC was not asked to provide a fairness opinion until after it was clear that there would be no staple financing."
- "Warburg made clear that it would not use RBC's financing, hence RBC had no incentive to favor Warburg …."
- "By March 23, 2011, RBC and the Special Committee were aware that RBC would not be providing staple financing for the Transaction."
- "RBC could not have been motivated to find the Transaction fair, as it knew it would not be providing staple financing to Warburg ***before*** Rural/Metro requested a fairness opinion."
- "[T]he record makes clear that RBC did not start on its fairness analysis until it was clear that RBC would not be financing the Warburg deal and it was thus likely that Rural/Metro would be requesting a fairness opinion."
- "RBC knew that Warburg had 100% financing in place for the Transaction, and that it would not make sense for RBC to pursue Warburg regarding staple financing."
- "The RBC team offering the staple financing was distinct and separate from the RBC team advising [Rural/Metro] on the sale of the Company."
- "Unlike *Del Monte*, RBC was not secretly meeting with Warburg without Rural/Metro's consent."

Rural I at 90 (citing B737 n.1; A1932, A1944, A1960, A2033-34, A1941, A1963).

RBC did not back away from these representations of fact at the opening of trial. On the first day of trial, RBC lead witness Munoz testified that by March 26, "[i]t was clear to us that Warburg would not use our commitment." A2113-14. Munoz was testifying about a contemporaneous email exchange between himself and Blair Fleming, RBC's Head of US Investment Banking, who attended the first day of trial. A2078; A2113-14; B326.

Lead Plaintiff's questioning of Munoz on the first day of trial proceeded on the assumption that the factual representations in RBC's pre-trial briefs were good-faith descriptions of the actual facts. It was not until his second day on the witness stand, after rounds of questioning by Lead Plaintiff's counsel, RBC's counsel and the Court, that Munoz acknowledged that RBC had been secretly lobbying Warburg on March 26 to replace its committed financing with staple financing from RBC:

> Q. So the most senior people at RBC are trying to make a last effort to see whether RBC can get involved in the staple on Saturday, March 26th; correct?
>
> A. Yes.

A2192-93.

The Court of Chancery's findings reflect no lack of clarity about the evidence against RBC: "I think the record at trial established that the board wasn't

aware and was never told about the final full-court press [by RBC]. It's those statements [in RBC's briefs] that essentially deny the existence of the final push for financing that I think could potentially warrant some type of fee shifting award." Cross-App. OB Ex. A at 71.

Relatedly, there is no lack of clear evidence that on the afternoon March 26, 2011, Munoz was simultaneously (i) communicating with Fleming about the effort to lobby Warburg to replace its acquisition financing, A2192-93; B326, and (ii) participating in decisions and discussions about whether to make certain downward revisions to RBC's internal valuation analyses of Warburg's bid, A824; A2405-07; A2409; B327-28. *See Rural I* at 28-30. In the fee-shifting ruling, the Court of Chancery expressed no doubt about the clarity of the evidence that RBC misrepresented the facts on that subject:

> If I skip to page 10 [A1941], there's the statement, "The RBC team offering the staple financing was distinct and separate from the RBC team advising Rural/Metro on the sale of the Company." Again, that was just wrong. Munoz was communicating with both teams. Munoz testified at trial that there were other people participating in both teams. That is a statement that is flatly wrong.

Cross-App. OB Ex. A at 69-70.

III. THE TYPE OF LITIGATION MISCONDUCT COMMITTED BY RBC IS WORTHY OF FEE SHIFTING

Lead Plaintiff seeks reversal and fee shifting for RBC's attempted fraud on the Court of Chancery to cover up its concealed and disabling conflict of interest during the final stage of the sale process. Cross-App. OB 75, 81.

RBC argues that its "advocacy was typical and cannot possibly support a fee award." Cross-App. AB 44. RBC does not respond to Lead Plaintiff's citation of Court of Chancery Rule 11(b)(3), which requires reasonable inquiry into whether "factual contentions have evidentiary support." In *Beck v. Atlantic Coast PLC*, 868 A.2d 84 (Del. Ch. 2005), then-Vice Chancellor, now-Chief Justice Strine shifted fees against a litigant who filed a pleading that "paint[ed] a fundamentally deceptive picture." *Id.* at 853. As the Court of Chancery observed below, "it's not unfair to expect a party to accurately present facts within its control…. I don't think a party can simply say that because there is not discovery, because there was not a specific e-mail, or because there is not a specific person who has contradicted what we're going to put in our pretrial brief, we can say something that is different than what is the real state of facts." Cross-App. OB Ex. A at 72.

RBC does not respond to Lead Plaintiff's citation of *E.I. duPont de Nemours and Co. v. Florida Evergreen Foliage*, 744 A.2d 457, 461 (Del. 1999), in which this Court recognized that the fraudulent procurement of a release "represents a wrong not only as to the releasing party but to the court as well." *Id.* at 461. Here,

there was a serious risk that the misrepresentations of fact in RBC's pre-trial briefs might have led to the fraudulent procurement of a settlement on the eve of trial, which fraud never would have been discovered or remedied.

RBC also fails to respond to Lead Plaintiff's citation of *Montgomery Cellular* for the proposition that fee shifting is appropriate "to deter abusive litigation and to protect the integrity of the judicial process." 880 A.2d at 227. The Court of Chancery held that a *quantum meruit* approach to fee shifting would be insufficient in this case, given the importance of the integrity of the judicial system:

> I also think there needs to be consideration given to the integrity of the legal system…. I think to the extent that it were determined that this [level of egregiousness] were sufficient, that factor would suggest a need for an award that was sufficiently deterring and not limited to a strict *quantum meruit* award based on how much of the trial was devoted to this particular aspect of the process…. And I think to the extent that there was greater concern about the integrity of the litigation process, than a higher award [than approximately $1.1 million] would be warranted.

Cross-App. OB Ex. A at 73-75.

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court reverse the Court of Chancery solely on the issue of fee-shifting.

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2015, I caused a copy of the **Appellee/Cross-Appellant's Reply Brief on Cross-Appeal** to be served on the following counsel via File and Serve Xpress:

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