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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALGON CARBON CORPORATION, Defendant-Below, Appellant/Cross-Appellee, v. INTER-LOCAL PENSION FUND GCC/IBT, Plaintiff-Below, Appellee/Cross-Appellant.	No. 225,2019 Court below: Court of Chancery C.A. No. 2017-0910-MTZ **PUBLIC VERSION – SEPTEMBER 19, 2019**

CORRRECTED APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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I. NATURE OF PROCEEDINGS

This is a summary proceeding. Plaintiff seeks books and records to investigate potential merger-related wrongdoing.[1] "Delaware courts have strongly encouraged stockholder-plaintiffs to utilize Section 220" before filing fiduciary duty complaints. *King v. VeriFone Hldgs., Inc.*, 12 A.3d 1140, 1145 (Del. 2011). This Court has also recognized "the importance of maintaining §220 actions as streamlined, summary proceedings that do not get bogged down in collateral issues." *United Techs. Corp. v. Treppel*, 109 A.3d 553, 561 (Del. 2014).

The issues in this action are simple. Has Plaintiff established stockholder status? 8 *Del. C.* §220(c). Did Plaintiff satisfy the "form and manner" requirements for a demand? *Id.* And does Plaintiff have a "proper purpose" for inspection? *Id.* Then, assuming the answer to those three questions is yes, are the requested books and records "necessary and essential" to Plaintiff's proper purpose? *See, e.g., Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1271 (Del. 2014). Here, the Court correctly found in Plaintiff's favor on each of these issues.

In appealing that finding, Calgon Carbon Corporation ("Calgon") (i) reasserts the unsupported claim that Plaintiff's stated purpose is not its actual purpose (without

[1] "Plaintiff" refers to Plaintiff-Below, Appellee/Cross-Appellant. "Defendant" refers to Defendant-Below, Appellant/Cross-Appellee.

any evidence of some secret, improper purpose); (ii) raises an affirmative defense – acquiescence – that is, at best, appropriate only in a plenary action (and on a developed record), and is nevertheless unavailable on these facts; (iii) asserts, despite its failure to preserve the issue for appeal, that the then-Master in Chancery abused her discretion by not summarily dismissing the proceeding on the basis of an affidavit that was improperly notarized and subsequently excluded; (iv) claims that the trial court was wrong in determining that the minimal standard of "some evidence" to suggest a "credible basis" to suspect wrongdoing was met; and (v) reargues that the scope of production ordered was overly broad because Plaintiff somehow (while saying the exact opposite in briefing and at trial) waived categories of requested documents.

In addition to addressing Calgon's arguments on appeal, Plaintiff cross-appeals the award of fees against Plaintiff in the amount of $197,471.44. As set forth below, the majority of those awarded fees, which are in no way based on any bad-faith conduct on the part of Plaintiff or Plaintiff's counsel, lack statutory or other grounds. Moreover, the amount of fees was unreasonable, as a result of the court's failure to perform the analysis required under this Court's precedents.

II. SUMMARY OF ARGUMENT

As to Appeal:

1. Denied. The Court of Chancery properly rejected the "fact intensive and difficult to establish" defense to inspection that Plaintiff's stated purpose is a false pretense. *Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 817 (Del. Ch. 2007). The evidence showed Plaintiff's purpose is that articulated in the Demand: to investigate potential wrongdoing regarding the Acquisition. The factual finding that Plaintiff's stated purpose is its actual purpose should not be disturbed.

The Court of Chancery also correctly rejected Calgon's acquiescence defense. That merits-based affirmative defense is inappropriate for this summary proceeding. In any event, it only applies to fully informed stockholders, and the court correctly found a credible basis to suspect disclosure violations.

2. Denied. The Court of Chancery has broad discretion to craft remedies. On Calgon's motion to dismiss based on an allegedly invalid affidavit, the court made the most Calgon-friendly factual findings the record could arguably have supported. It then applied an orderly and logical deductive process to select the appropriate remedy. It decided against dismissal, consistent with this Court's teachings that dismissal is a severe sanction that should be used only in the unusually clear case. Instead, it granted a remedy – precluding Plaintiff, but not Calgon, from using the

affidavit – that fit the conduct and addressed any potential prejudice. It did not abuse its discretion.

3. Denied. Given the "considerable deference" owed to the trial court's "determination that a credible basis does (or does not) exist,"[2] there is no basis to overturn the trial court's finding of "'some evidence' to suggest a 'credible basis'" to infer that "wrongdoing may have occurred."[3] The record "tells a story of Calgon repeatedly rebuffing Kuraray[4] until Calgon's management and Board were enticed with promises of retention, compensation, or other rewards." Opening Br. Ex. A ("Opinion") at 30. That evidence suggests "that debatable tactical decisions were motivated not by a principled evaluation of the risks and benefits to the company's stockholders, but by a fiduciary's consideration of his own financial or other personal self-interests."[5] There is also some evidence to suspect manipulation of projections. *Id.* at 33. It is entirely appropriate for Plaintiff to use the "tools at hand" to investigate these facts.

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[2] *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 287 (Del. 2010).

[3] *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 118 (Del. 2006).

[4] "Kuraray" refers collectively to Kuraray Co., Ltd., Kuraray Holdings U.S.A., Inc. and KJ Merger Sub, Inc.

[5] *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 439 (Del. Ch. 2012) (Strine, C.).

4. Denied. The Court of Chancery correctly rejected the argument that Plaintiff waived eight of its thirteen requests by addressing them in general terms in its reply brief, rather than repeating each specific argument made in its opening brief.

As to Cross-Appeal:

5. The court below erred by awarding Calgon unreasonable fees and expenses. The lower court abused its discretion by awarding nearly $200,000 in fees and expenses. Having found no bad-faith conduct, having denied the motion to dismiss, and Calgon having withdrawn most of its motion to compel, the court had no basis to shift any fees for the motion to dismiss or the motion to compel. Even setting that aside, the court ignored Delaware law requiring it to consider the "results obtained" in assessing the reasonableness of Calgon's fee request. Providing no reasoning, it granted the full fees on a motion to dismiss that was denied, and on a motion to compel that was withdrawn based on receiving a small fraction of the relief sought. The Fee Order (defined below) was an abuse of discretion.

III. STATEMENT OF FACTS

A. The Parties and Relevant Non-Parties

Plaintiff was, at all relevant times, a beneficial owner of shares of Calgon common stock. A59; A398; A556; B227. At closing of the Acquisition, Plaintiff held 6,825 shares. B227.

Before the Acquisition, Randall Dearth was Calgon's President, CEO, and Board Chairman. B023. Calgon's other executive officers were Robert Fortwangler, CFO; Stevan Schott, head of Advancement Materials, Manufacturing and Equipment; James Coccagno, head of Core Carbon and Services; and Chad Whalen, General Counsel and Secretary. B026.

B. The Process Leading to the Acquisition

The Acquisition process began in August 2016 with an apparently unsolicited outreach by Kuraray. A164. Kuraray requested a meeting to discuss "general introductions of the parties' respective businesses and 'preliminary discussion regarding potential partnership and/or business synergies.'" *Id.* The meeting happened on October 18. A165. In November, Kuraray requested another meeting, with Dearth, to discuss "M&A." *Id.*

On January 10, 2017, Kuraray again suggested "an acquisition by Kuraray of Calgon Carbon." *Id.* Calgon responded that "Calgon Carbon was not for sale." *Id.* Kuraray followed up with an email reiterating "its perspective that a combination of

Calgon Carbon and Kuraray would be highly attractive to Kuraray and generate significant value for the parties' respective stakeholders." *Id.* Dearth again replied that "Calgon Carbon was not for sale." A165-66. Dearth declined Kuraray's request for due diligence.

On May 31, 2017, Dearth, Coccagno, and Whalen again met with Kuraray. Again, Dearth told Kuraray that "Calgon Carbon was not for sale." A167. Nonetheless, Kuraray said it would send an indication of interest in a strategic transaction. *Id.*

On June 14, Kuraray emailed Dearth a non-binding proposal to acquire Calgon for $20 per share in cash. *Id.* The proposal explicitly stated that "Kuraray intended to maintain the headquarters of the business in the United States and retain and rely on the existing management and employee base following completion of a transaction." *Id.*

Suddenly, Calgon's management changed its tune. On June 29, management (and Morgan Stanley) convinced a "working group" of Calgon directors, which included Dearth, that they should "recommend to the full board of directors that Calgon Carbon continue to engage with Kuraray and proceed to a phase of limited and focused due diligence." A168. Management and Morgan Stanley apparently discouraged the directors from contacting any parties on their "list of other potential

strategic and financial companies that might be interested in an acquisition of Calgon Carbon at that time." *Id.* The Board did as recommended. *Id.*

When Calgon's management next spoke to Kuraray, its position was very different from before Kuraray said it would "retain and rely on the existing management." A167. Dearth told Kuraray on July 6 that "while Calgon Carbon was not for sale, the Calgon Carbon board of directors would be willing to permit Kuraray to conduct limited and focused due diligence, including sharing with Kuraray Calgon Carbon's strategic plan and limited other nonpublic information." A168. He further explained that the Board would "carefully evaluate the merits of [any] revised proposal" from Kuraray. *Id.* Kuraray was "pleased" by Calgon's newfound openness to an acquisition by Kuraray. *Id.*

Around the same time, management suddenly decided it needed to make "adjustments to … Calgon Carbon's strategic plan, which is referred to as the Calgon Carbon Projections" in the Proxy. A168-69.

Over the summer of 2017, Kuraray made "repeated requests" to discuss post-transaction employment with Dearth. A174. When Dearth met with Kuraray representatives on September 15, Kuraray provided employment term sheets for Dearth, Coccagno, Schott, Fortwangler, and Whalen. A174-75. The term sheets were "consistent with each employee's current salary level, with a retention bonus to be

paid out to the employees at the conclusion of three years' employment post-closing." A175. The Proxy conspicuously does not represent that this meeting – which happened as the parties were negotiating the Merger Agreement's terms – was the first time Kuraray broached the concept of "retention bonuses."

On September 20, Dearth "confirm[ed]" to Kuraray that he would "be committed to remaining in [his] current role as CEO of [Calgon Carbon] following its merger with a subsidiary of [Kuraray]." A176. Dearth confirmed he was "comfortable in principle" with Kuraray's proposed terms of his retention, and the parties would use that proposal as the "basis for [their] discussions." *Id.*

Later on September 20, the Board met. A177. Recognizing it had done nothing to investigate any other party's willingness and ability to pay more than Kuraray or at least push it to increase its offer, the Board rationalized that, according to management and Morgan Stanley, "Kuraray was the potential strategic transaction party most likely to offer the greatest value in the near term to Calgon Carbon's stockholders" and "if any other buyer were willing and capable of providing superior value, announcing a transaction with Kuraray would be the best way to elicit such an offer." *Id.* The Board unanimously approved the Merger Agreement. *Id.* It was executed and announced the next morning.

Despite its rationalization, the Board did not establish a post-signing market check procedure to inform itself as to the alternatives available. Instead, it agreed to a Merger Agreement with a no-solicitation provision and deal-protection provisions, including a flat 3% termination fee and three-business-day unlimited matching right (two business days after an amended proposal), that were likely to deter any potentially interested parties in a context where none had any discussions with Calgon or received any of the information that would be crucial to the ability to consider a proposal. A220; A232; A285-88; A299-301.

Stockholders approved the Acquisition on December 28, 2017. A378. Plaintiff's advisor, Segal Marco Advisors, voted 125 of Plaintiff's shares for the Acquisition, but against the officers' golden parachute compensation, in accordance with ISS's recommendation. A521. After the stockholder vote, Calgon was no longer contractually permitted to terminate the Merger Agreement to enter into a superior proposal. *See* A299. The Acquisition closed on March 9, 2018. A581.

C. The Officers', Directors' and Banker's Interests in the Acquisition

Calgon's officers and directors appear to have been financially motivated to consummate the Acquisition. The senior officers were each told they would be retained by Kuraray. A167. They were also told Kuraray would pay them lucrative "retention bonuses." A174-75; A197-98. Dearth stood to receive a retention bonus

worth $7 million, and Fortwangler, Schott, Coccagno and Whalen each stood to receive retention bonuses worth $1.75 million. A198. Kuraray also agreed to provide them short-term and long-term incentive compensation based on the post-Acquisition company's results, further aligning their interests with Kuraray's. A197.

The officers already knew that, if they were not retained, they would receive handsome "golden parachute" benefits. A203-06. Dearth stood to receive $4.9 million, and both Schott and Coccagno stood to receive over $1 million, in "single-trigger" golden-parachute compensation. A204. Dearth would receive over $4.4 million in "double-trigger" golden-parachute compensation if his employment were terminated post-Acquisition, and Fortwangler, Schott, Coccagno and Whalen would receive similar payments ranging from about $1 million to over $1.2 million. *Id.*

Calgon's non-employee directors also were entitled to receive cash for their vested and unvested outstanding equity awards, in amounts significantly higher than each director's 2016 director compensation:

Non-Employee Director	Value of Equity Awards	2016 Director Compensation
Alexander	$237,505	$155,852
Lyons	$237,505	$160,852
Massimo	$237,505	$151,852
Newlin	$324,476	$154,852
Paro	$237,505	$153,255
Roberts	$439,436	$160,852
Rupert	$324,476	$170,852
Templin	$237,505	$153,352

A200; B061. The Board agreed to pay Morgan Stanley $19 million if the Merger Agreement was executed and the Acquisition closed, but nothing absent a deal. A196.

D. The Proxy Relied on Projections that Were "Adjust[ed]" by Conflicted Management and Understated a Key Opportunity

A crucial factor that the Board cited and relied upon in recommending the Acquisition to stockholders was Morgan Stanley's analysis of Calgon's "value on a standalone basis relative to the $21.50 per share" Acquisition consideration. A177-78. The Board also emphasized that it considered Calgon's "business and operations, strategy, its current and historical financial condition and results of operations, and projected performance," the "perceived challenges and risks of continuing as a standalone public company," and the Board's "assessment that no other internally developed alternatives were reasonably likely in the near term to create greater value for Calgon Carbon stockholders than the merger, taking into account business,

competitive, industry and market risks." A178. All of these considerations turned on management's financial projections.

Management "adjust[ed]" those projections at a crucial time, when they knew both the approximate price that Kuraray would pay for the Company and that Kuraray desired to retain and reward them. A169. The Proxy does not disclose the nature or direction of the "adjustments," other than that there were changes to "gross margin levels, future operating expenses, and other matters." A182. In addition, management (not the Board) directed Morgan Stanley not to value the Company using pro forma 2017 projections, which are projections that reflect successful implementation of Calgon Carbon's 2017 initiatives, and did not provide Morgan Stanley similar projections for any other year. A186.

The disclosed projections do not extend beyond 2021. A184-85. In this case, that brevity is significant. One of the most promising opportunities available to Calgon, the ballast water treatment initiative, will involve a "five-year window" beginning in September 2019. *See* B193; B010. Over those five years, approximately 64,000 existing ships must add ballast water treatment systems. B146. Calgon has estimated this as an $18-$28 billion opportunity for the industry – one that Calgon is "well positioned to benefit from." B137; B146. Calgon "expect[s] to be a significant supplier" in this market. B110-11.

While implementation of the regulation requiring these systems was delayed from September 2017 to September 2019, analysts emphasized that this only "pushes off" the potential market, and "all ships are required to meet compliance by 2024, which is the original full compliance date." B157. As a result, "the program has gone from a seven-year implementation (2017-2024) to a five-year program (2019-2024)," *id.*, making even more drastic the already-anticipated "'hockey stick' of revenues and earnings." B151. "The ballast water equipment end market could effectively double [Calgon's] earnings if it captures only a small portion of this opportunity for several years." B152. Because the disclosed projections omit at least half of the five-year implementation period, it appears they do not fully capture this valuable opportunity.

E. Plaintiff Demanded Inspection But Was Refused

On December 14, 2017, Plaintiff made a written demand on Calgon to inspect its books and records under Section 220 (the "Demand"). A588-98. On December 21, Calgon rejected the Demand. A599-605. This litigation ensued.

F. Calgon Moves to Compel, Then Withdraws Its Motion After Receiving Ten Publicly Available Documents

On March 23, 2018, Calgon moved to compel production of all documents in Plaintiff's or its counsel's possession that, among other things, "refer or relate to the issues or facts alleged in the Demand" or in the Complaint – that is, counsel's entire file – and of all privileged documents or a revised privilege log. B247; B257-58.

Plaintiff noted in correspondence (and noted again in its opposition to the motion) that these documents were "relevant only to the extent Plaintiff ultimately relies on them in briefing and argument of its claims, in which case they will be cited and/or attached as exhibits to Plaintiff's briefs." B229-30; B322-23.

On April 13, 2018, nearly two months before the then-scheduled trial, Plaintiff filed its Opening Trial Brief. A606-63. Plaintiff attached thirteen exhibits: two documents Plaintiff had previously produced to Calgon, five Calgon SEC filings, three publicly available transcripts of Calgon investor/analyst conference calls, two publicly available analyst reports about Calgon, and Calgon's interrogatory responses. B383-88.

On April 19, 2018, the trial court heard the Motion to Compel. Ex. A ("MTC Transcript").[6] At the hearing, Defendant's counsel said Plaintiff's submission of the ten publicly-available not-previously-produced exhibits with its Opening Trial Brief "mooted" the motion to compel issues; it did not seek any other documents, and it told the court "we don't need to worry about the privilege log." *Id*. at 5, 12. Nonetheless, the court ruled that "because the motion had to be filed, the fees for the motion and for rescheduling the deposition … should be awarded to the defendant under Rule 37." *Id*. at 12. The amount of the award was not ruled upon at that time.

[6] The MTC Transcript is also in Calgon's Appendix at A670-85.

G. Plaintiff's Representative Testified Clearly As to Plaintiff's Purpose for Inspection

On May 11, 2018, Plaintiff's Executive Director, Lawrence Mitchell, was deposed as a representative of Plaintiff. A686-895. Mr. Mitchell's testimony confirmed Plaintiff's purpose:

> Q. Why did you send the demand letter?
>
> * * *
>
> A. Because we want to see if this merger agreement was in the best interest of the stockholders.
>
> Q. Any other reason?
>
> A. No, sir.

A754.

> Q. So what do you understand the purposes are for making this demand?
>
> * * *
>
> A. It's my understanding the purposes of making this demand is just to determine if there was a breach of fiduciary duty to the stockholders.

A773-74.

> Q. What do you recall being discussed about the purposes?
>
> * * *
>
> A. The purpose was to make sure that the selling price of Calgon Carbon was fair to the stockholders.

A775.

> Q. And what did [counsel] tell you about the proposed acquisition?

* * *

> A. They went over the fact that the merger was happening; that there might be opportunity to see if the merger agreement was maybe not at a fair price. … And that there was an opportunity for the Fund to see if this warrants investigation.

A726-27; *see also* A729; A746.

Consistent with Plaintiff's responses to Defendant's interrogatories, Mr. Mitchell demonstrated knowledge of the "general background" of the Acquisition. *See* A529-30 (stating that Mr. Mitchell had knowledge "with respect to Plaintiff's ownership of Calgon common stock and the general background of the Proposed Acquisition"). Mr. Mitchell testified to his understanding of the key facts underlying this investigation, including the identity of the parties to the Acquisition; the "management flip-flop[]"; the failure to seek other potential acquirors; the retention bonuses; and the apparent manipulation of projections. A726-29.

Mr. Mitchell's testimony refuted any argument that Plaintiff "believes [the Acquisition] was fair." *See, e.g.*, Opening Br. at 23 (making this assertion without citation). Asked about certain sales of stock by Plaintiff's investment manager, Mr. Mitchell testified that he could not assess the fairness of any sale price "[w]ithout the information that we have asked for." A713.[7] As noted above, he also testified that

[7] To the extent the Court finds Plaintiff's transactions relevant, it should be aware that the Calgon-created chart of transactions (A587) is inaccurate. 8,900 shares were not "sold" in December 2017. *Id.* They were transferred into a transition account

"[t]he purpose [of the Demand] was to make sure that the selling price of Calgon Carbon was fair to the stockholders." A775.

H. Plaintiff Submits A Narrow Affidavit and Opts to Pay Limited Fees Rather Than Withdraw It

On June 4, 2018, Plaintiff submitted Lawrence Mitchell's affidavit with its Reply Trial Brief. A1006-10. On June 5, Defendant moved to strike the affidavit. A1011-24. In response, Plaintiff explained that the affidavit was submitted solely for "efficiency" to "encapsulate[] the relevant facts from Mr. Mitchell's testimony in one easily readable document and [to] clarif[y] the record about Plaintiff's Board of Trustees' … involvement in and awareness of this action," in light of misleading assertions in Calgon's Answering Pre-Trial Brief. B389-91; *see also* B398-411 (appendix showing consistency between initial deposition testimony and affidavit). Plaintiff offered for Mr. Mitchell to attend and be examined at trial the next day, if needed. B389-90.

The court held that the affidavit was permissible under *ADT Holdings v. Harris*, 2017 WL 3913164 (Del. Ch. Sept. 7, 2017). B421-22. But because the affidavit was submitted after the discovery cutoff, and Calgon declined to question Mr. Mitchell the next day, the court "offer[ed] plaintiff a choice":

(A424), and then transferred as an "in-kind allocation" to a different fund in which Plaintiff was investing. A383; B198; B200.

> The plaintiff may either withdraw the affidavit or make Mr. Mitchell available for deposition before a rescheduled trial. Because of the timing of the affidavit and the concession that it contains new information, plaintiff will be responsible for the fees and costs defendant incurs in the deposition and in rescheduling trial, if necessary.

B424. Plaintiff chose the deposition. A1025. As a result, trial was rescheduled. *Id.*

After Plaintiff produced unredacted communications about the affidavit and the meeting of Plaintiff's Board of Trustees, Calgon took the deposition. Counsel did not ask a single substantive question about the meeting of Plaintiff's Board of Trustees. *See* A1042-43. Calgon's questioning, which took place in its counsel's offices, lasted less than an hour. A1028-46.

I. Calgon "Overplay[s] Its Hand" With a Motion to Dismiss That Is Denied

Before Mr. Mitchell's second deposition, Calgon proposed to file a "supplemental pre-trial brief[]" of up to 5,000 words. *See* B428. After the deposition, however, Calgon opted not to supplement its briefing on the merits. Instead, it seized on the affidavit's notarization by a notary who regularly notarized Mr. Mitchell's signature, who resided in Illinois, while Mr. Mitchell was visiting Arizona, and moved to dismiss under Court of Chancery Rule 41(b). A1063-77. There was no claim that the signature was not actually Mr. Mitchell's.

On Sunday, July 22, 2018, with trial scheduled for July 24, then-Master Zurn issued a Draft Report denying the motion to dismiss. *See* Ex. B ("MTD Report").[8] The court found "some tension" in Illinois case-law regarding notarization, but concluded that the notarization was invalid under Illinois law. *Id.* at 12-15. As to the substance, the court did not identify any false statements in the affidavit, but found it "contained statements Mitchell could not support" with his own knowledge. *Id.* at 18-20 (capitalization omitted).

Based on these facts, the court found "Calgon overplayed its hand in requesting dismissal." *Id.* at 23. Distinguishing the case-law on which Calgon relied, the Master "conclude[d] the harsh sanction of dismissal is unwarranted." *Id.* at 21. "Instead, [she] recommend[ed] a remedy targeted at the parties' burdens of proof." *Id.* The court would "not consider the Affidavit as evidence of any understanding or knowledge that Mitchell, or the Fund, may have of this case," and precluded Plaintiff "from relying on Mitchell's testimony from the second deposition," but permitted Calgon to use the affidavit and second deposition. *Id.* at 21-22.

Master Zurn declined to shift fees for the entire litigation (as opposed to discrete parts) because "[i]t [was] not clear to [her] that the Fund's reliance on Mitchell was in bad faith." *Id.* But she "extend[ed] [her] ruling on the motion to

[8] The MTD Report is also Exhibit C to Calgon's Opening Brief.

strike," such that "[t]he Fund [was] also responsible for the fees and costs Calgon incurred in its motion to dismiss." *Id.* at 23. Again, the amount of fees was not determined at that time.

J. The Court Orders Inspection

Trial on a paper record was held on July 24, 2018. A1125-A1298. On January 25, 2019, the Court of Chancery issued the Opinion. The court found Plaintiff had satisfied Section 220's requirements, and was entitled to inspect nine categories of documents. Opinion at 45. The court entered an implementing order, following a dispute over its terms, on February 18. Opening Br. Ex. B (the "Inspection Order"). In all, it took over fourteen months from the Demand, and four hearings, for this action to reach that point.

On April 25, after another hearing, the court issued an Order Regarding Application for Fees and Expenses, requiring Plaintiff to pay Calgon $197,471.44 of the $221,425.44 Calgon had requested. Ex. C (the "Fee Order");[9] B478. The court stayed the Inspection Order, but not the Fee Order, pending appeal.

[9] The Fee Order is also Exhibit D to Calgon's Opening Brief.

IV. ARGUMENT

A. The Trial Court Did Not Err In Finding Plaintiff Had a Proper Purpose

1. Question Presented

Did the Court of Chancery commit reversible error in finding that Plaintiff's stated purpose was its actual purpose, or in finding that its right to inspection is not foreclosed by the doctrine of acquiescence? A632-44; A974-87; A989-98; A1127-87; A1281-95.

2. Scope of Review

"The determination of whether plaintiff's stated purpose for the inspection was its primary purpose, is a question of fact warranting deference to the trial court's credibility assessments." *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1030 (Del. 1996) (internal citations and quotation marks omitted). Such a determination will be upheld if it is "adequately supported by the record, and appear[s] to be the result of an orderly and logical deductive process." *CM&M Grp., Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982).

"A trial court's application of equitable defenses [including acquiescence] presents a mixed question of law and fact." *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043 (Del. 2014). On such questions, "the Court of Chancery's factual findings will be reviewed for 'clear error' and its legal determination … will be reviewed by

this Court de novo." *DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago*, 75 A.3d 101, 109 (Del. 2013).

3. Merits of Argument

The trial court correctly found that Plaintiff has a proper purpose for inspection. There is no dispute that Plaintiff's stated purposes are, in the abstract, proper purposes. *See* A921-92; Opening Br. at 21-31, 37-48. The trial court's conclusions on proper purpose are amply supported by the record and the law.

a. Plaintiff's Stated Purpose Is Its Actual Purpose

The trial court correctly found Plaintiff's stated purpose to be its actual purpose. Calgon adduced zero evidence suggesting any alternative purpose secretly harbored by Plaintiff. Accordingly, the decision below should be affirmed.

Under Delaware law, "[p]roper purpose has been construed to mean that a shareholder's ***primary purpose*** must be proper, irrespective of whether any secondary purpose is proper." *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 565 (Del. Ch. 1998) (emphasis in original). Thus, a defendant may try to "show as a factual matter, the plaintiff's true purpose is other than what is stated in the demand," *i.e.*, that the plaintiff "has pursued its claim under false pretenses." *Sutherland v. Dardanelle Timber Co.*, 2006 WL 1451531, at *8 (Del. Ch. May 16, 2006). That defense, however, "is both fact based and hard to establish." *Id.*

The record is devoid of evidence showing any alternative, improper purpose – much less that any such purpose is "primary," not just "secondary." Mr. Mitchell's testimony was clear: Plaintiff "want[s] to see if this merger agreement was in the best interest of the stockholders" (A754) or if, instead, "there was a breach of fiduciary duty to the stockholders" (A773-74). *See also* A729; A746; A775.

This testimony aligns with the purposes stated in the Demand: "[Plaintiff] seeks to investigate the events leading to the … Acquisition in order to determine whether it is appropriate to pursue litigation against all or some members of the Board and/or Company management or others based on the apparent wrongdoing in connection with the … Acquisition." A589-90. Plaintiff "also seeks to investigate the independence and disinterestedness of the directors generally and with respect to the … Acquisition." A590.

The trial court thus correctly found that "Mitchell's testimony … reveals that the Fund did not hold a purpose distinguished from those professed in the Demand." Opinion at 27.

Nonetheless, Calgon asserts a false-pretenses defense (*see* Opening Br. at 22-28), relying on the inapt case of *Wilkinson v. A. Schulman, Inc.*, 2017 WL 5289553 (Del. Ch. Nov. 13, 2017). In *Schulman*, "[t]he event that prompted [the plaintiff] to

seek books and records differed substantially from what [counsel] sought to explore." *Id.* at *3.

> Wilkinson testified that he was unhappy with how the Company has performed financially, and he decided to pursue a books and records inspection after the Company announced negative financial results. As he put it, "[t]hey lost $365 million, which is a pretty good reason, don't you think?" L&K, by contrast, chose to investigate the Board's decision to accelerate Gingo's equity awards when he retired in 2014. Wilkinson testified that he is not aware of any facts suggesting wrongdoing, mismanagement, or waste relating to the compensation decision in 2014.

Id. As the court below explained, "[t]hat misalignment of goals between the stockholder and his counsel was a key factor in the Court's determination [in *Schulman*] that there was no proper purpose for the demand." Opinion at 26.

By contrast, the Court of Chancery here correctly found that "unlike in *Schulman*, the Fund's testimony regarding its purposes aligns with those professed in the Demand and does not mirror the situation in *Schulman* where counsel usurped the process for a different purpose." *Id.* at 28. Calgon does not even try to challenge this finding. *See* Opening Br. at 22-28. The decision below should be affirmed on this basis alone.

Calgon cites no case where – setting aside situations where plaintiffs had primary purposes that were not their proper, stated purposes – a Delaware court denied inspection because the stockholder's counsel initiated the process, or the stockholder was insufficiently involved in the litigation. *See* Opening Br. at 22-28; *cf.*

Elow v. Express Scripts Hldg. Co., 2017 WL 2352151, at *6 (Del. Ch. May 31, 2017) (rejecting argument that, based on plaintiff's alleged lack of involvement, stated purposes were "sham purposes constructed by the lawyers to maintain this action," explaining plaintiff was "within his rights to rely on counsel's advice in making a demand, prosecuting this action, and determining next steps"). Even if such considerations by themselves could justify denial, however, Plaintiff clears any applicable bar.

In *Schulman*, the court recognized that "[a] stockholder obviously can use counsel to seek books and records. Section 220 expressly contemplates that a stockholder can make a demand 'in person or by attorney or other agent.'" 2017 WL 5289553, at *3. "Indeed, given the complexity of Delaware's sprawling Section 220 jurisprudence, a stockholder is well-advised to secure counsel's assistance." *Id.*; *see also Kosinski v. GGP Inc.*, 2019 WL 4052054, at *5 (Del. Ch. Aug. 28, 2019) (rejecting *Schulman* argument, noting "[t]he fact that Plaintiff sought and accepted the advice of counsel is to his credit, not his detriment"). But the *Schulman* court distinguished between appropriate reliance on counsel and "having an entrepreneurial law firm initiate the process, draft a demand to investigate different issues than what motivated the stockholder to respond to the law firm's solicitation, and then pursue the

inspection and litigate with only minor and non-substantive involvement from the ostensible stockholder principal." 2017 WL 5289553, at *3.

Here, the trial court correctly found that "[u]nlike in *Schulman*, the Fund's counsel did not come to it with a pre-packaged demand letter. Robbins Geller was retained far in advance and tasked with monitoring the Fund's portfolio for precisely the sort of conduct alleged in the Demand." Opinion at 28. Robbins Geller had long been engaged to "monitor [Plaintiff's] portfolio to see if there was any potential losses that might have been avoided and if there's a potential to recover any of those losses for the pensioners of the Fund." A736-37.

A portfolio monitoring agreement like this is a laudable way for pension fund fiduciaries to oversee the fund's investments.[10] "Arguably, a pension fund's failure to take steps to be aware of existing or prospective litigation that affects its investments" – including by "arrang[ing] for a law firm to keep it apprised of events (including lawsuits) that might be of interest" – "would be an abdication of duty." *In re Am. Italian Pasta Co. Sec. Litig.*, 2007 WL 927745, at *5 (W.D. Mo. Mar. 26, 2007). And as the court below observed:

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[10] *See, e.g.*, *Plumbers & Pipefitters Nat'l Pen. Fund v. Burns*, 292 F.R.D. 515, 523 (N.D. Ohio 2013) ("Courts have routinely rejected attacks on the propriety of portfolio monitoring agreements such as the one between [plaintiff] and Robbins Geller."); *see also In re TD Banknorth S'holders Litig.*, 2008 WL 2897102, at *4-*5 (Del. Ch. July 29, 2008) (rejecting inadequate representation argument based on portfolio monitoring).

> Individual stockholders and smaller institutions cannot be expected to have an independent, in-house team to cultivate purely homegrown legal analyses of their investments. Stockholders are entitled to hire counsel to review and monitor their portfolios for potential mismanagement or wrongdoing. They are also entitled to rely on that counsel to raise concerns, to advise them on how to remedy those concerns, and to pursue appropriate remedies.

Opinion at 28; *see also Kosinski*, 2019 WL 4052054, at *3-*5 (rejecting *Schulman* argument, where plaintiff only "learned of his information rights" and "came to believe that obtaining information was the logical first step" through counsel, and "counsel helped articulate his demand purposes").

Plaintiff's involvement and knowledge in this case also distinguish *Schulman*. In *Schulman*, the plaintiff was "not aware of any facts suggesting wrongdoing, mismanagement, or waste" relating to the subject of the wrongdoing being investigated. 2017 WL 5289553, at *3. He did not review any correspondence about the demand, did not review the company's answer to the complaint, and "was not even sure that the Company and his counsel communicated about the demand." *Id.* He "did not participate in drafting the responses" to the company's discovery requests, and "simply verified what counsel wrote." *Id.*

Here, Mr. Mitchell testified to his understanding:

- that "the merger was between Kuraray and Calgon Carbon" (A727);
- that "management flip-flopped on their views of selling after meeting with one potential buyer" (*id.*);

- that "[i]n the merger documents they weren't going to solicit any other bids" (A727-28);

- that "there was bonuses being paid out to the management for retention of employment" (A728); and

- that "with the projections used in the sale, which was a five-year projection that went out to 2021, that for the industry that Calgon Carbon is in that the Ballast Water Initiative wouldn't have been available until 2019 and that the projections that they used did not fully capture the upside of what the Ballast Water Initiative could have brought to Calgon Carbon" (A728-29).

The fact that Mr. Mitchell later did not know how to answer several nuanced questions, like which of these facts "would constitute wrongdoing" or "would constitute a breach of fiduciary duty" (*see* Opening Br. at 12-14), is irrelevant. *See Kosinski*, 2019 WL 4052054, at *5 (rejecting *Schulman* argument, where plaintiff in deposition "intentionally left the legal question of whether breach may have occurred to his attorneys").

Mr. Mitchell was also sufficiently involved in proceedings. Mr. Mitchell met with counsel several times, earlier in proceedings and before each of his depositions. A693; A1029-30. Contrary to Calgon's mischaracterization of the record (Opening Br. at 24), Mr. Mitchell clearly testified that he did review the Demand.[11] Similarly, Calgon claims "Mitchell was not provided with a copy of Calgon's response to the

[11] A747 ("Q. Did you review the demand? A. The attachment? Q. Yes. A. Yes, sir.").

demand" (Opening Br. at 25), citing testimony that does not support that proposition.[12] The record shows the opposite.[13] Calgon's claim that "Mitchell did not review Calgon's answer to the Complaint until his deposition preparation" (Opening Br. at 25) likewise mischaracterizes the testimony.[14]

Mr. Mitchell testified that he reviewed the interrogatories with counsel, understood them to be "a list of questions that Calgon Carbon wanted answered by the Fund," and that his role was "[p]roviding the information requested." A796-97. While Mr. Mitchell testified that he did not personally search for documents in response to Calgon's document requests (*see* Opening Br. at 25), he also made clear that he discussed the document requests with counsel and "that whatever documents that [counsel] requested [he] made sure that they went to the correct professional." A793; *cf. The Men's Wearhouse, Inc. v. Wildrick*, C.A. No. 9383-VCL, at 32 (Del.

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[12] A789 ("Q. Going back to Exhibit 9, my letter is dated the 21st and this complaint is dated the 22nd. So do you recall having any discussions about the response to the demand between the 21st and the 22nd when the complaint was filed? A. I do not recall, sir.").

[13] A783 ("Q. For the record, No. 9 is a response to your demand from me. Have you seen this before? A. I have, sir. Q. When was the first time you saw it? … A. I don't recall the date, sir. … Q. Did you see it before your deposition prep? A. Yes, sir."); B204; B220-25 (email from counsel to Mr. Mitchell, attaching response letter).

[14] A790 ("Q. And did somebody provide you a copy with [sic] the answer? A. Yes, sir. … Q. Do you know how you received it? A. I assume I would have received this electronically, sir. Q. Did you review it? A. I did, sir."). *Cf.* A792 (testifying only that "deposition prep" was "the only time [Mr. Mitchell] ***talked about*** the answer").

Ch. Mar. 4, 2014) (TRANSCRIPT) ("This Court has a tradition of being skeptical of self-collection of documents.").

As to the scope of the Demand, Mr. Mitchell testified that he was "relying on the advice of my legal counsel," but that he understood the information requested to be what "is needed just to see what was actually discussed about the actual merger" and that the requested information "is what would be necessary to determine if there was going to be any potential follow-up." A757-61.

In short, Plaintiff's representative's involvement and knowledge far exceeds that in *Schulman*. It also easily exceeds the (inapplicable) standard for adequacy to represent a class. *In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 291 (Del. 2002) ("Our case law requires little more than that a representative be generally familiar with the litigation.").

Calgon's failure to show any improper "primary" purpose means its false-pretenses defense fails. To the extent relevant, Plaintiff's involvement in and knowledge of this action also more than suffice. Plaintiff's proper, stated purpose is its actual purpose.

b. Acquiescence Does Not Bar Plaintiff's Right to Inspection

The trial court correctly rejected Calgon's acquiescence defense, to which it "devote[d] only a few sentences" below.[15] Legally, acquiescence is a merits-based defense that is inappropriate for this summary proceeding. Factually, acquiescence does not apply because Plaintiff has a credible basis to suspect the stockholders were not fully informed.

Under *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840 (Del. 1987), "when an ***informed*** minority shareholder either votes in favor of the merger, or … accepts the benefits of the transaction, he or she cannot thereafter attack its fairness." *Id.* at 848 (emphasis added). "Following *Bershad*, the question of acquiescence turns on whether plaintiffs were 'informed' stockholders at the time they tendered their shares for the merger consideration." *Iseman v. Liquid Air Corp.*, 1993 WL 40048, at *2 (Del. Ch. Feb. 11, 1993). This means a defendant must "show that [the plaintiff] was aware of ***all*** the material facts, not simply that she was aware of some of the material facts that buttress her claims." *Clements v. Rogers*, 790 A.2d 1222, 1238 (Del. Ch. 2001) (emphasis in original).[16]

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[15] Opinion at 42-43; A926-27.

[16] *See also In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1079 (Del. Ch. 2001) ("The result in *Bershad* would, in my opinion, have been different had the

The "acquiescence doctrine is particularly fact intensive." *Himawan v. Cephalon, Inc.*, 2018 WL 6822708, at *11 (Del. Ch. Dec. 28, 2018) (denying motion to dismiss plenary litigation based on acquiescence defense, because "the facts supporting acquiescence are not in the record"). *Bershad* was an appeal from a summary judgment decision in plenary litigation. 535 A.2d at 843. Even in plenary litigation, the Court of Chancery has held that a motion to dismiss based on acquiescence should be converted to a summary judgment motion, and the plaintiff allowed discovery. *Wood v. Best*, 1999 WL 743482, at *1 (Del. Ch. Sept. 7, 1999).

To Plaintiff's knowledge, no Delaware court has applied acquiescence as a defense to inspection under Section 220. This argument is an inappropriate attempt "to litigate a 'merits' defense to [a] claim to inspect books and records in order to investigate possible mismanagement." *Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at *6 (Del. Ch. Apr. 28, 2004). "Besides being circular and conceptually wrong, that litigation approach, is inequitable and subversive of §220." *Id.* It contradicts the principle that "[a] stockholder is 'not required to prove by a preponderance of the evidence that waste and [mis]management are actually occurring.'" *Seinfeld*, 909 A.2d at 123. That is why "an affirmative defense that might successfully meet a claim investigated through a Section 220 inspection does

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plaintiffs raised a colorable duty of loyalty claim, as the plaintiffs in this case have done.").

not necessarily preclude access to the pertinent books and records." *Amalgamated Bank v. UICI*, 2005 WL 1377432, at *2 (Del. Ch. June 2, 2005).

Like a *Corwin* defense, which also requires a fully informed vote, acquiescence is particularly ill-suited to this context. Indeed, a *Corwin* defense has already been rejected as non-justiciable in the Section 220 context. *In Lavin v. West Corporation*, 2017 WL 6728702 (Del. Ch. Dec. 29, 2017), the Court of Chancery held that:

> [T]he notion that the court would engage with *Corwin*, and all that it entails, in a summary Section 220 proceeding has little to commend it as a matter of procedure, at least in the view of this trial judge. Simply stated, *Corwin* does not fit within the limited scope and purpose of a books and records action in this court.

Id. at *9. The Lavin court distinguished the "rare circumstances where inspection rights have been denied based on an assessment of the merits of the claim the stockholder seeks to investigate," because in those cases:

> The courts have emphasized either that the claim was simply not "justiciable," or that the claim on its face was not viable as a matter of law. In either event, it was clear to the court that ***no amount of additional information would aid the stockholder*** in pleading or prosecuting the contemplated plenary action, so the inspection demand was denied.

Id. (emphasis added) (distinguishing *Se. Pa. Transp. Auth. v. AbbVie Inc.*, 2015 WL 1753033, at *13 (Del. Ch. Apr. 15, 2015), *aff'd*, 132 A.3d 1 (Del. 2016); and *Graulich v. Dell Inc.*, 2011 WL 1843813, at *7 (Del. Ch. May 16, 2011) (cited in Opening Br. at 31)).

Calgon has now abandoned its argument that *Corwin* bars inspection,[17] and waived any challenge to the lower court's rejection of that argument. *See* Opinion at 41-42. The same rationale precludes its acquiescence defense.

Even if an acquiescence defense were justiciable in a Section 220 proceeding, moreover, the court properly concluded that there is a credible basis to suspect that stockholders, including Plaintiff, were not fully informed.

The Court of Chancery recently confirmed that "if the circumstances surrounding the preparation of final projections relied upon by the Board and disclosed to stockholders cast doubt on their reliability, then those circumstances should be disclosed." *Chester Cty. Employees' Ret. Fund v. KCG Hldgs., Inc.*, 2019 WL 2564093, at *14 (Del. Ch. June 21, 2019). Here, Plaintiff presented evidence supporting the suspicion that the disclosed projections were misleading because (a) they were "subject to 'adjustments' to the Company's pre-existing strategic plan made by conflicted management at a time that management knew both the approximate price that Kuraray would pay for the Company and that Kuraray desired to retain management after the Proposed Acquisition,"[18] and (b) they excluded much of the

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[17] *Cf.* A605 (response letter arguing stockholders may not "use Section 220 to investigate transactions subject to stockholder approval"); A946 (Calgon pre-trial brief, arguing *Corwin* in a footnote to "preserve[] the argument for appeal").

[18] A627 (citing A169; A182); A639; A976; A981; A1149; A1283.

cash flow attributable to "[o]ne of the most promising opportunities available to the Company, the ballast water treatment initiative," by ending the projection period two years into that initiative's five-year implementation window.[19]

The trial court correctly "found that the Fund states a proper purpose to investigate Calgon's disclosures related to projections." Opinion at 43; *see also Id.* at 33 ("[T]he Fund has provided sufficient evidence to investigate the justification and motivation for the length of Calgon's disclosed projections and the July 2017 adjustment thereto."). That factual finding is entitled to "considerable deference." *Axcelis*, 1 A.3d at 287.

In short, this is not the time to assess any acquiescence defense. But even at this early stage, Plaintiff has presented sufficient basis to suspect that it and other stockholders were not fully informed. The doctrine of acquiescence does not bar inspection.

[19] A628-29 (citing B001-10; B106-17; B118-48; B149-54; B155-61; B162-97); A639; A981; A985-86; A1283.

B. The Trial Court Correctly Denied Calgon's Motion to Dismiss Under Rule 41(b)

1. Question Presented

Is Calgon procedurally barred from appealing the denial of its motion to dismiss and, if not, did the Court of Chancery abuse its discretion in denying that motion? A1110-23.

2. Scope of Review

The parties agree that this Court reviews a trial court's denial of a motion to dismiss for abuse of discretion. Opening Br. at 32. "Discretionary findings are not overturned if supported by the record and are the product of an orderly and logical deductive process. Only if the findings below are clearly wrong, and justice requires their overturn, are we free to make contradictory findings of fact." *Yancey v. Nat'l Tr. Co.*, 633 A.2d 372, 1993 WL 370844, at *3 (Del. 1993) (Order).

3. Merits of Argument

As an initial matter, Calgon is barred from appealing then-Master Zurn's draft report recommending denial of its motion to dismiss because Calgon failed to take exception to the draft report. Under Court of Chancery Rule 144, "[a]ny party failing to file a notice of exception" in a timely manner "shall be deemed to have waived the right to review the report, except insofar as the report is modified in response to the exceptions of other parties." Ch. Ct. R. 144(b). The MTD Report directed that any

exceptions were due by noon on July 23, 2018. MTD Report at 24; *see also* Ct. Ch. R. 144(d). Calgon never filed a notice of exception. Accordingly, "any claims [Calgon] purport[s] to assert in this appeal are procedurally barred. Because [Calgon's] claims may not be considered in this appeal, the judgment of the Court of Chancery must be affirmed." *Sutor-Banks v. Moffett*, 74 A.3d 655, 2013 WL 4538570, at *2 (Del. 2013) (TABLE).

In any event, the court's denial of the motion to dismiss was "supported by the record" and was "the product of an orderly and logical deductive process." *See Yancey*, 1993 WL 370844, at *3. Calgon does not point to a single finding that was wrong, much less one that was "clearly wrong," or give any persuasive reason that "justice requires" the harsh sanction of dismissal. *Id.* The denial of that draconian remedy was not an abuse of discretion.

Chancery Court Rule 41(b) allows involuntary dismissal "[f]or failure of the plaintiff to prosecute or to comply with these Rules or any order of court." Ct. Ch. R. 41(b).[20] "The sanction of dismissal is severe and courts are and have been reluctant to apply it except as a last resort." *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 717 (Del. 2008).[21] "A Rule 41(b) motion should be 'granted sparingly' and only in

[20] Calgon has not asserted failure to prosecute. Opening Br. at 32-36.

[21] *Hoag* considered dismissal as a sanction under Superior Court Civil Rule 37(b)(2)(C), but relied in part on cases under Fed. R. Civ. P. 41(b) and did not indicate

'unusually clear cases.'" *Stearns v. Div. of Family Servs.*, 23 A.3d 137, 144 (Del. 2011).

Here, "[t]he record reflects no facts suggesting that this is an 'unusually clear case' or that the denial constituted an abuse of the judge's considerable discretion." *Id.* While Calgon cites two cases where the Court of Chancery granted motions to dismiss under Rule 41(b), those cases do not make this the "unusually clear case" for dismissal, or establish an abuse of discretion.

In *Bessenyei v. Vermillion, Inc.*, 2012 WL 5830214 (Del. Ch. Nov. 16, 2012), *aff'd*, 67 A.3d 1022 (Del. 2013) (TABLE), the court granted dismissal where the plaintiff's repeated improper notarizations violated a Rule that inherently invalidated his claims – if the complaints had not been verified, the case could not have been initiated. *Id.* at *1 (citing Ct. Ch. R. 3(aa)). "[L]awyers integrally and knowingly facilitated the false notarization." MTD Report at 20 (citing *Bessenyei*, 2012 WL 5830214, at *6-*8). In *Parfi*, the plaintiffs "invented" a "story" in a Court-ordered status report, which "was clearly false and designed to influence the court into lifting

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any distinction between dismissal as a sanction for discovery violations and for other violations. Applying Fed. R. Civ. P. 41(b), "[a] very impressive number of federal courts throughout the nation have warned, quite appropriately, that 'dismissal with prejudice is a drastic sanction to be applied ***only in extreme situations***.'" 9 Wright & Miller, *Federal Practice & Procedure* §2369 (3d ed. 2018).

the Stay Order on false pretenses." *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 929-30 (Del. Ch. 2008).

More informative are the several cases in which conduct more egregious than anything alleged here did not merit dismissal. In *James v. National Financial LLC*, for example, the defendant twice violated orders and then, when ordered to submit an affidavit from an IT consultant, instead affixed a notarial seal to a letter from the consultant, after the consultant signed the letter and without the consultant even knowing. 2014 WL 6845560, at *8 (Del. Ch. Dec. 5, 2014). Despite the "serious" and "willful" misconduct, the court declined to enter default judgment "in light of the Delaware Supreme Court's guidance about invoking the ultimate sanction and the availability of less punitive consequences." *Id.* at *10-*11, *13. In *TR Investors, LLC v. Genger*, a party "intentionally despoiled evidence" by "running wiping software" on his computer "in the dead of night." 2009 WL 4696062, at *16-*19 (Del. Ch. Dec. 9, 2009), *aff'd*, 26 A.3d 180 (Del. 2011). Then-Vice Chancellor Strine held "the extreme remedy of a default judgment is not appropriate … because lesser available sanctions provide an adequate remedy." *Id.* (citing "the law's preference for an adjudication on the merits where possible"). In *OptimisCorp v. Waite*, 2015 WL 5147038 (Del. Ch. Aug. 26, 2015), *aff'd*, 137 A.3d 970 (Del. 2016) (TABLE) (cited in Opening Br. at 34), the court found a "persistent and troubling course of conduct by

Plaintiffs to gain an advantage in this proceeding," including repeated "witness tampering and bribery," which was "serious and highly prejudicial." *Id.* at *20-*21. Even there, the court was "not convinced, … that such a broad-brush remedy [as dismissal of the entire action] is appropriate." *Id.* at *21.

Here, no order or Rule was violated. *Cf.* Ct. Ch. R. 41(b). If the affidavit was not notarized, any issue would have been evidentiary. *See* MTD Report at 11. The trial court found "no evidence that the Fund's counsel encouraged Mitchell to avoid an Arizona notary or even that they noticed [the fax] header before the motion to dismiss." *Id*. at 21. The affidavit's content was almost entirely redundant of Mr. Mitchell's original testimony. *See* B398-411. Setting aside the notarization, the only purported "false statement[]" Calgon cites is the statement that Mr. Mitchell "met with Plaintiff's counsel in the afternoon before the deposition notice was filed." Opening Br. at 18. Calgon claims this statement was "false" because, at deposition, Mitchell testified "I don't know if it was a morning meeting or an afternoon meeting." *Id.* (citing A1043). Lack of recollection does not equate to falsity. In short, Calgon gives no basis for any finding beyond what the trial court found: the affidavit contained statements that Mitchell could not substantiate with his own personal knowledge or recollection. MTD Report at 18-20.

As to the notarization, Plaintiff cited a case in which the Appellate Court of Illinois explained that a notary did not necessarily commit "official misconduct" even if he or she notarized the signature of an individual who "was not present when he notarized" it, because the notary simply "'must satisfy himself of the truth of a signer's identity'" and the statute allows flexibility as to what constitutes "satisfactory evidence." *Harris v. Vitale*, 8 N.E.3d 178, 184-85 (Ill. App. 1st Dist. 2014) (citation omitted). Although the court recognized "tension" in the Illinois cases, it agreed with Calgon, and "conclude[d] that the Affidavit's notarization is invalid under Illinois law." MTD Report at 15.

Ultimately, the court made the most Calgon-friendly findings the record arguably supported, and then applied an orderly and logical deductive process to decide upon the appropriate remedy. The court found that, in its "inherent authority to address misconduct, . . . the harsh sanction of dismissal is unwarranted." *Id.* at 21. Instead, it adopted "a remedy targeted at the parties' burdens of proof." *Id.* Because "[t]he Affidavit and the second deposition were put in the record in an attempt to fortify Mitchell's knowledge of the underlying issues," the court designed a "remedy

… to dismantle that fortification," by precluding Plaintiff, but not Calgon, from relying on the affidavit or second deposition. *Id.* at 21-22.[22]

The trial court did not abuse its discretion. Its denial of the motion to dismiss under Rule 41(b) should be affirmed.

[22] Calgon does not challenge the court's refusal to "shift all of Calgon's fees for this litigation" or its related finding that it was "not clear … that the Fund's reliance on Mitchell was in bad faith." *Id.* at 22.

C. The Trial Court Correctly Found a Credible Basis to Suspect Wrongdoing

1. Question Presented

Did the Court of Chancery commit reversible error by finding some evidence to suggest a credible basis from which a court can infer that wrongdoing may have occurred? A632-44; A974-87; A989-98; A1127-87; A1281-95.

2. Scope of Review

"A trial judge's determination that a credible basis does (or does not) exist to infer managerial wrongdoing is a mixed finding of fact and law that is entitled to considerable deference." *Axcelis*, 1 A.3d at 287.[23] "[E]ven though [this Court] might have independently reached different conclusions, [it] will accept the findings of the trial judge if they are supported by the record, and otherwise are the product of an orderly and logical deductive reasoning process." *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1278 (Del. 1989) (cited in Opening Br. at 37).

3. Merits of Argument

Under Delaware law, showing a "credible basis" from which to infer wrongdoing simply requires a plaintiff to "show ***some evidence*** of possible wrongdoing." *Seinfeld*, 909 A.2d at 123. "[T]he 'credible basis' standard sets the

[23] While this Court "reviews *de novo* whether or not a party's stated purpose for seeking inspection under 8 *Del. C.* §220(b) (here, to investigate possible mismanagement) is a 'proper purpose,'" *id.*, there is no dispute that investigation of possible wrongdoing is a proper purpose. *See generally* Opening Br.; A921-92.

lowest possible burden of proof." *Id.* "A stockholder is 'not required to prove by a preponderance of the evidence that waste and [mis]management are actually occurring.'" *Id.* (quoting *Thomas & Betts*, 681 A.2d at 1031).[24]

The court below found Plaintiff had "put forward credible bases for an inspection of potential mismanagement or wrongdoing, as well as concerns about the Board's independence." Opinion at 31. It based this conclusion on Plaintiff's use of public information to "tell[] a story of Calgon repeatedly rebuffing Kuraray until Calgon's management and Board were enticed with promises of retention, compensation, or other rewards." Opinion at 30-31. It found Plaintiff "provides some evidence to cast an inference of doubt, at this early stage, on at least certain players in the Acquisition process." *Id.* at 31. "Calgon proceeded with a largely single-bidder sale, which may be within the ambit of reasonable Board determinations for a merger, but which the Fund sufficiently portrays as infected and spurred by self-interest and conflicts among the decision-makers and their advisors." *Id.* It appeared "that Calgon's directors and management set up an artificially restrictive deal process to lock in personal benefits, and accordingly failed to apprise themselves of the facts necessary for a fair and competitive sales process." *Id.*

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[24] Calgon has abandoned its argument that inspection is barred by Calgon's exculpatory charter provision under 8 *Del. C.* §102(b)(7). *Compare* Opening Br. at 37-48, *with* A906-07; A920-25; A945-46.

The court also found "sufficient evidence to investigate the justification and motivation for the length of Calgon's disclosed projections and the July 2017 adjustment thereto." *Id.* at 33. First, "those projections were adjusted in July 2017 while the Acquisition was being negotiated," which may have been done "by the allegedly conflicted management to encourage Kuraray's acquisition." *Id.* at 32. And second, Plaintiff presented sufficient evidence to suspect that Calgon should have disclosed projections that "extended … beyond 2021 because the so-called company expected a purportedly lucrative project, the so-called Ballast Water Treatment Initiative, to begin in 2019." *Id.* at 32-33.

As it did below, Calgon sets up and then attacks a straw-man argument. Calgon contends that the "argument made by Plaintiff and adopted by the court below, [was] that directors must run an active sale process in order to fulfill their fiduciary duties." Opening Br. at 39. That is not Plaintiff's contention or the trial court's holding.

Neither Plaintiff nor the trial court has disagreed that the decision to sell a company through a single-bidder process, "absent conflicts of interest, 'would be one of the many debatable choices that fiduciaries and their advisors must make'" and not inherently wrongful. *See RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 854 (Del. 2015); Opinion at 31 (acknowledging that "a largely single-bidder sale … may be within the ambit of reasonable Board determinations for a merger"); *id.* at 37

n.148. But in *RBC*, this Court explained that "where undisclosed conflicts of interest exist, such decisions must be viewed more skeptically." 129 A.3d at 855; *see also In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 439 (Del. Ch. 2012) ("[W]hen there is a reason to conclude that debatable tactical decisions were motivated not by a principled evaluation of the risks and benefits to the company's stockholders, but by a fiduciary's consideration of his own financial or other personal self-interests, then the core animating principle of *Revlon* is implicated.").

Here, Plaintiff presented at least "some evidence" that Calgon's fiduciaries and their advisors made the "debatable" choice not to create competition for Kuraray for reasons that had more to do with their personal interests than with outside stockholders' interests. Calgon's management was initially resistant to a sale of the Company. A165-66. But that changed once Kuraray conveyed that it "intended to maintain the headquarters of the business in the United States and retain and rely on the existing management and employee base following completion of a transaction." A168. From then on, management seems to have favored a sale – albeit only to Kuraray. By the time management advised against seeking other potential acquirors and the Board accepted that advice, Kuraray had repeatedly indicated its desire to retain management, Dearth had been negotiating "retention bonuses" with Kuraray, and the outside directors were well aware of their potential payouts. A176-77; A196-

98; A200.[25] Similarly, Plaintiff presented evidence that the Board lacked a reliable basis to evaluate the Acquisition in the absence of a competitive process, because management and the Board's financial advisor both had significant conflicts of interest, and the projections underlying Morgan Stanley's fairness opinion appear to have been manipulated. A169; A174-75; A196-98; A203-06.

As to disclosures, Plaintiff showed that management, which was seemingly interested in personal benefits from a transaction with Kuraray, adjusted its projections just days after changing its position as to a potential sale to Kuraray. A167-69. That Kuraray subsequently "increased [its bid] twice" (Opening Br. at 46) is irrelevant. There is at least "some evidence" that Calgon's management, at the time it was making adjustments, knew the approximate price at which Kuraray was likely to acquire Calgon. A167 (Calgon offered $20 per share on June 14, 2017); A168-69 (projection adjustments were discussed on July 17, 2017); A177-78 (ultimate Acquisition price was $21.50 per share).

While Plaintiff does not yet know whether the projections were, in fact, "adjusted to benefit a sale to Kuraray" (Opening Br. at 47), or whether the Board had

[25] *Cf. Wayne Cnty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *11 (Del. Ch. July 24, 2009) (cited in Opening Br. at 44-45) (complaint did "not allege that [officers] negotiated the terms of their employment agreements with [acquiror]"). *See also In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *21 (Del. Ch. Apr. 11, 2017) (depending on factual context, "timing of … equity awards" to outside directors may "bolster[] Plaintiff's self-interest theory").

received projections showing the full value of the ballast water treatment initiative, that is the point. Given its credible basis for suspicion, Plaintiff is entitled to investigate the truth. *See, e.g.*, *KCG Hldgs.*, 2019 WL 2564093, at *14 ("[I]t is reasonably conceivable the earlier projections and the circumstances surrounding the preparation of the Revised Projections would have been viewed as material and should have been disclosed. Developing the factual record on this issue is necessary to make a materiality determination on this issue."); *see also Seinfeld*, 909 A.2d at 123 ("A stockholder is 'not required to prove by a preponderance of the evidence that waste and [mis]management are actually occurring.'").

Calgon's reliance on *C&J Energy Services, Inc. v. City of Miami General Employees' & Sanitation Employees' Retirement Trust*, 107 A.3d 1049 (Del. 2014),[26] is misplaced. The lower court there "seem[ed] to have believed that *Revlon* required C&J's board to conduct a pre-signing active solicitation process in order to satisfy its contextual fiduciary duties." *Id.* at 1068. "It did so despite finding that C&J's board had no improper motive to sign a deal … and that the board was well-informed as to C&J's value …." *Id.* This Court also stressed "[t]he ability of the stockholders themselves to freely accept or reject the board's preferred course of action [was] of great importance." *Id.* And of course, *C&J Energy* was an appeal from a preliminary

[26] Opening Br. at 39-40.

injunction – the Court explained that "showing a 'reasonable probability' of success," as required on such a motion, requires "prov[ing] that [plaintiff] is more likely than not entitled to relief." 107 A.3d at 1049, 1067; *cf. Seinfeld*, 909 A.2d at 123.[27]

As noted above, the court here understood the lack of a pre-signing active solicitation was "within the ambit of reasonable Board determinations for a merger." Opinion at 31. But it found that debatable choice to merit further investigation given the existence of some evidence to suggest it may have been driven by conflicts of interest. *See* Opinion at 31, 37 n.148; *RBC*, 129 A.3d at 855; *El Paso*, 41 A.3d at 439. Plaintiff also has a proper purpose to investigate whether Calgon's directors "were not 'well-informed' as to [Calgon's] value, such that the decision to accept [Kuraray's] offer was devoid of 'important efforts' by the Company's directors 'to protect their stockholders and to ensure that the transaction was favorable to them.'" *RBC*, 129 A.3d at 856 (quoting *C&J Energy*, 107 A.3d at 1069). And Plaintiff has a proper purpose to investigate whether stockholders knew all material facts. Opinion at 32-33.

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[27] *See also In re UnitedHealth Grp., Inc. Section 220 Litig.*, 2018 WL 1110849, at *7 (Del. Ch. Feb. 28, 2018) ("This Court has repeatedly stated that a Section 220 proceeding does not warrant a trial on the merits of underlying claims. … I decline Defendant's invitation to make merit-based determinations on whether Defendant's behavior is actually wrongful or violates the law."), *aff'd sub nom. UnitedHealth Grp. Inc. v. Amalgamated Bank as Tr. for Longview Largecap 500 Index Fund*, 196 A.3d 885 (Del. 2018).

In short, and especially given the low standard and the "considerable deference" to which the Vice Chancellor's decision is entitled, *Axcelis*, 1 A.3d at 287, the trial court's determination that Plaintiff presented some evidence showing a credible basis to suspect wrongdoing should be upheld.

D. The Trial Court Correctly Rejected Calgon's Argument That Plaintiff Silently Waived Most of Its Requests

1. Question Presented

Did the Court of Chancery err by rejecting the argument that Plaintiff waived its requests for eight of the thirteen categories of document listed in the Demand, without saying so, by addressing them generally rather than serially in its Reply Trial Brief, after addressing them serially in its Opening Trial Brief?

2. Scope of Review

"A trial court's application of equitable defenses presents a mixed question of law and fact." *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043 (Del. 2014). Rejection of equitable defenses, including waiver, on the basis of factual findings "is entitled to deference on appeal." *Poliak v. Keyser*, 65 A.3d 617, 2013 WL 1897638, at *3 (Del. 2013) (TABLE). In addition, "this Court reviews the Court of Chancery's 'determination of the scope of relief available in a Section 220 books and records action for abuse of discretion.'" *Wal-Mart Stores*, 95 A.3d at 1271-72.

3. Merits of Argument

At all times in the court below, Plaintiff maintained its entitlement to all thirteen categories of documents requested in the Demand. There was no waiver.

Plaintiff's Opening Trial Brief spent sixteen pages serially explaining and justifying each of the thirteen requests. A644-58. Calgon's answering brief devoted

three sentences per request to the requests now at issue, combining some.[28] Plaintiff's reply brief explained that Calgon had "provided no concrete information that would enable the Court to assess any purported burdens associated with the scope of inspection proposed by Plaintiff," and had failed to "cite any authority to explain why any individual request is overbroad or inappropriate." A998-99. "Especially as contrasted with Plaintiff's justification and tailoring of each of its requests (*see* OB at 30-45), this approach fails to justify an order that strays from Plaintiff's already-targeted precision." A999. "In short, Plaintiff has shown that each category of documents requested is reasonably required for its stated purposes. … Plaintiff respectfully asks that the Court compel inspection of each category requested." A1002.

After trial, the court granted nine of the thirteen requests, "as tailored by the parties following the Demand, including in the pre-trial briefing." Opinion at 45 (citing Plaintiff's limitation in its reply brief of Request No. 7 to "documents created or distributed on or after August 1, 2016" as an example of how requests had been "tailored"). But Calgon contended that the court's reference to requests being "tailored" must have meant "tailored … by voluntarily abandoning" them. A1300.

[28] A953-59 (24 textual sentences addressing Requests 3-6, 8-9, 11-12).

The Vice Chancellor rightly rejected the argument Plaintiff waived requests "by not specifically reiterating them in the pre-trial reply brief":

> Plaintiff advocated in favor of all of the Demand's requests in its pre-trial opening brief. In its reply brief, Plaintiff focused on what it believed were the more complex disputed issues and otherwise generally relied on and incorporated the arguments from its opening brief. Plaintiff gave no indication that it was waiving or abandoning any requests in its Demand. At trial, Plaintiff confirmed that it was not waiving or abandoning any requests in its Demand.

Inspection Order at 2; A1188-92; A1281-82.

Plaintiff's approach below was consistent with the principle that "reply briefs should consist of material necessary to respond to the answering brief." *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *4 (Del. Ch. Oct. 19, 2006). Reply briefs are not intended to contain a "repetition of materials contained in the opening brief." *See* Supr. Ct. R. 14(c)(i); Ct. Ch. R. 171(e).

Calgon's cases are inapposite. In *Dawson v. Pittco Capital P'rs, L.P.*, 2010 WL 692385 (Del. Ch. Feb. 15, 2010), a motion to compel ruling, plaintiff disputed "general objections" (2010 WL 285560), upon which defendant represented "no documents were withheld" (2010 WL 422254), so when plaintiff's reply did not address them, neither did the court. *Dawson*, 2010 WL 692385, at *1. *See also Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 501 (Del. 2019) (argument "only vaguely referenced" in pre-trial briefing and "abandoned … altogether" in post-trial briefing and oral argument); *In re Plains*

All Am. Pipeline, L.P., 2017 WL 6016570, at *2 (Del. Ch. Aug. 8, 2017) (opening brief did not identify entity that standing argument concerned; reply did not answer argument plaintiff lacked standing to obtain entity's records since it was not unitholder); *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) (argument first raised in answering brief on remand, after fifteen years of litigation), *aff'd*, 840 A.2d 641 (Del. 2003). Courts reject waiver where, as here, the party has addressed the issue in its papers. *E.g.*, *Pine River Master Fund Ltd. v. Amur Fin. Co., Inc.*, 2017 WL 4548143, at *14 n.98 (Del. Ch. Oct. 12, 2017), *aff'd*, 190 A.3d 996 (Del. 2018).

In any event, even if this case implicated the principle that "arguments not briefed are deemed waived, this is a principle of discretion." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs, LLC*, 2012 WL 3201139, at *14 n.112 (Del. Ch. Aug. 7, 2012) (Strine, C.). The Vice Chancellor did not abuse her discretion.

E. The Court of Chancery Erred by Awarding Calgon Unreasonable Fees and Expenses

1. Question Presented

Did the court below err by imposing unreasonable fees on Plaintiff, without basis and disproportionate to the underlying conduct and to the results obtained on Calgon's motions? B495-511; B542-68. The initial rulings that fees were to be shifted (bench rulings at the conclusions of hearings on the motion to compel and the motion to strike, and the Master's draft report on the motion to dismiss) were not choate until the amount of fees was decided. Given the limited or nonexistent relief obtained by Calgon on the underlying motions, the actual fees shifted were expected to be minimal and not worth the expense of appeal. Accordingly, it is in the interests of justice to review the initial imposition of fee shifting concurrently with the amount of fees ultimately awarded. *See* S. Ct. R. 8.

2. Scope of Review

This Court reviews a decision on the amount of sanctions for "abuse of discretion." *Genger v. TR Inv'rs, LLC*, 26 A.3d 180, 190 (Del. 2011). "'Although [the Court] may not substitute [its] own notions of what is right for those of the trial judge, the trial judge's decision to impose sanctions must be just and reasonable.'" *Id.* (citation omitted).

3. Merits of Argument

The lower court's fee decisions were abuses of discretion in two ways. First, the court had no basis to award fees for a motion to dismiss that was denied, and a motion to compel that was mostly withdrawn. Second, even if some fee-shifting was permissible, the court abused its discretion by failing to consider the results obtained in assessing the reasonableness of the fees.

At no time in this case did the Court of Chancery find that Plaintiff acted in bad faith. It shifted fees on a motion to compel, applying the default rule under Court of Chancery Rule 37(a)(4). MTC Transcript at 12. It then gave Plaintiff the ***choice***, which Plaintiff took, to pay what were expected to be nominal fees for a second deposition of Plaintiff's representative, about his seven-substantive-paragraph affidavit, rather than withdraw that affidavit. B424. Then, on Calgon's motion to dismiss, the court expressly denied fee shifting under the bad-faith exception to the American Rule. MTD Report at 22. But it nonetheless required Plaintiff to pay "the fees and costs Calgon incurred in its motion to dismiss," purportedly "extend[ing] [its] ruling on the motion to strike." *Id.* at 23.

Despite this context, Calgon applied for fees and expenses of nearly a quarter-million dollars. B478. The court awarded $197,471.44. Fee Order at 2-3. That

included, among other things, $61,689.50 for all time on Calgon's motion to dismiss,[29] $63,984.01 for all time on Calgon's motion to compel and on meeting and conferring before that motion, and $40,487.50 for two Jones Day partners' apparently unproductive travel time at 100% of their $987.50 per hour blended rate, based on the motion to strike ruling. B514; B516; B518; B520. The court provided no explanation why it rejected Plaintiff's challenges to $174,177.39 of the requested amount. *See* Fee Order at 2-3; B497.

a. The Court Below Had No Basis to Award Fees on the Motion to Dismiss or the Motion to Compel

"Delaware follows the 'American Rule,' which provides that each party is generally expected to pay its own attorneys' fees regardless of the outcome of the litigation." *Shawe v. Elting*, 157 A.3d 142, 149 (Del. 2017), *cert. denied*, 138 S. Ct. 93, 199 L. Ed. 2d 28 (2017). That rule is subject to limited exceptions, including equitable doctrines, statutory fee-shifting, and bad-faith litigation. *Id.*; *Goodrich v. E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1044 (Del. 1996). Twice in this case, the court below shifted fees without basis in any of those exceptions.

[29] This reflected 101.2 hours of alleged work, including preparing for argument, even though one was never scheduled, and reading the ruling. Fee Order at 2; B484; B494; B516; B518.

The court below abused its discretion in shifting any fees on Calgon's motion to dismiss. The court expressly rejected Calgon's claim of bad-faith litigation, finding it was "not clear … that the Fund's reliance on Mitchell was in bad faith." MTD Report at 22. The court acknowledged that Calgon "overplayed its hand" by bringing the motion. MTD Report at 23. The court cited no authority, and Plaintiff is aware of none, allowing the court, after the fact, to "extend" the motion to strike ruling. *See id.* The motion to strike ruling was that Plaintiff could ***choose*** to pay Calgon's fees for a second deposition. B424. Plaintiff consented to those fees (A1025) – it has never consented to pay for the motion to dismiss. And Plaintiff could not have known that Calgon would later claim to have spent over 100 hours on its speaking motion and reply, which totaled fewer than 5,000 words, or that the court would grant disproportionate fees (as discussed below). A1063-77; B429-38.

The trial court's decision to shift fees on Calgon's motion to compel was, similarly, an abuse of discretion. Although the court said it was shifting fees under Court of Chancery Rule 37 (MTC Transcript at 12), that Rule does not allow fee-shifting where "the opposition to the motion was substantially justified or … other circumstances make an award of expenses unjust." Ct. Ch. R. 37(a)(4)(A).

Calgon's motion to compel sought ***all*** documents in Plaintiff's or its counsel's possession regarding any facts alleged in the Demand or Complaint, including the

Company's business strategies, industry opportunities, and potential value, and sought production of all documents withheld as privileged. B247; B257-58. At the hearing, Defendant withdrew those requests for relief, based on Plaintiff filing a handful of publicly available documents with its brief. MTC Transcript at 4-5, 12; B383-88. That was what Plaintiff had repeatedly told Calgon it would do. B229-30; B322-23. Nonetheless, Defendant went from demanding potentially hundreds of documents to accepting ten. It is difficult to imagine clearer evidence of a "substantially justified" opposition to a motion to compel than where a movant voluntarily withdraws its motion after receiving a small fraction of the relief it requested.

By shifting fees on these motions, the court abused its discretion and committed "plain error requiring review in the interests of justice." *Smith v. Del. State Univ.*, 47 A.3d 472, 479 (Del. 2012).

b. The Court Below Failed to Consider the "Results Obtained" in Assessing the Reasonableness of Calgon's Fee Request

"Delaware law dictates that, in fee shifting cases, a judge determine whether the fees requested are reasonable." *Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007). "To assess a fee's reasonableness, case law directs a judge to consider the factors set forth in the Delaware Lawyers' Rules of Professional Conduct." *Id.* at 245-46.

In particular, "a court shall consider 'the amount involved and the results obtained.'" *Mahani,* 935 A.2d at 247 (quoting DLRPC Rule 1.5(a)(4)). Thus, for example, this Court has held that it was "proper[]" to "tailor the [fee] award to the bases for liability on which [a party] prevailed." *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 353 (Del. 2013). Likewise, the U.S. Supreme Court has "held that attorney's fees should not be awarded for work related to claims distinct from the claim on which the party was successful. Even for work related to the successful claim, the court 'should award only that amount of fees that is reasonable in relation to the results obtained.'" *Dreisbach v. Walton,* 2014 WL 5426868, at *5 (Del. Super. Oct. 27, 2014) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 440 (1983)); *accord Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178, 184 (Del. Ch. 2003) (Strine, V.C.).

Even if this Court affirms or declines to review the decision to award any fees for the motion to dismiss, it was an abuse of discretion not to "consider … 'the results obtained,'" and limit the fees in proportion to whatever success Calgon obtained on that motion. *Mahani,* 935 A.2d at 247. The motion was denied. MTD Report at 21. Calgon obtained only an evidentiary remedy it had not sought and that did not alter the outcome. *Id.* at 21-22. At most, the $8,000 that Plaintiff suggested below[30] could have been reasonable.

[30] B509.

The court also failed to consider the "results obtained" on Calgon's motion to compel. *Mahani*, 935 A.2d at 247; *see also* Ct. Ch. R. 37(a)(4)(C) (on partially successful motion to compel, court may "apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner").

Calgon sought ***all*** documents in Plaintiff's or its counsel's possession regarding any facts alleged in the Demand or Complaint, and all privileged documents, not just those Plaintiff would rely upon in briefing. B247; B257-58. But then, at the hearing, based on Plaintiff filing a handful of publicly-available documents with its brief (B383-88), Calgon withdrew the remainder (*i.e.*, the bulk) of its motion. MTC Transcript at 4-5, 12.

Plaintiff urged that the amount of fees should correspond to the limited relief obtained, compared to what Calgon sought. B508-09. But the court awarded Calgon fees for all time spent on the motion to compel and all time meeting and conferring. Fee Order at 2-3; B482; B492.

The Fee Order does not reflect any analysis regarding the results obtained through the motion to compel, relative to the results requested in the motion. As a result, the court rejected both of Plaintiff's proposals: either a "nudge" award of $5,000, or one quarter of the total related fees ($15,996). B508-09. The latter proposal was generous, as it treated the most invasive portion of the motion

(requesting a finding of waiver of privilege) as just half of the motion, and the most far-reaching portion of the "equal availability" portion of the motion (requesting counsel's full investigative file) as just half of that portion. By rejecting these proposals, and apparently failing to consider how the motion to compel fees related to Calgon's limited success on that motion, the court below abused its discretion.

Finally, the court abused its discretion by shifting fees for two Jones Day partners' apparently unproductive travel time at their full $987.50 per hour blended rate. B514. If that time were productive on any compensable task, presumably counsel would have logged it as such. Neither Jones Day partner ultimately spoke at trial. A1125-1298. The court seemingly did not consider whether Calgon "show[ed] that the [task] could not have been conducted by less costly means."[31] The court did not obtain evidence, as Plaintiff requested (B506), as to whether counsel was unable to work on other matters for the entirety of that 41 hours.[32] Nor did the court adjust

[31] *Cf. All Pro Maids, Inc. v. Layton*, 2004 WL 3029869, at *6 (Del. Ch. Dec. 20, 2004) (reducing travel-time fees because party failed to make this showing), *aff'd,* 880 A.2d 1047 (Del. 2005).

[32] *Cf. Lillis v. AT & T Corp.*, 2009 WL 663946, at *6 (Del. Ch. Feb. 25, 2009) (noting "common practice" of billing "'dead' travel time where … the attorney was unable to perform other work"); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. at 93-379 (describing attorney billing "airplane flight on behalf of one client while working on another client's matters" as unethically "bill[ing] client for more time than she actually spent on the client's behalf").

the hourly rate to reflect the unproductive nature of that time.[33] By shifting the entirety of these fees, without the analysis required under *Mahani*, 935 A.2d at 247, the court abused its discretion.

[33] *Cf.* Laura Johnson *et al.*, *Establishing Best Billing Practices Through Billing Guidelines*, 39 U. Ark. Little Rock L. Rev. 1, 15 (2016) ("Typically, courts will award an attorney fifty percent of the usual hourly rate for pure travel time." (collecting cases)); *see also Sliwinski v. Duncan*, 608 A.2d 730, 1992 WL 21132, at *4 (Del. 1992) (TABLE) (court abused discretion by compensating expert for travel time at full hourly rate).

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court affirm the Court of Chancery's judgment respecting inspection of books and records and denial of Calgon's motion to dismiss and reverse the Court of Chancery respecting fee-shifting.

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CERTIFICATE OF SERVICE

I, R. Bruce McNew, hereby certify that on this 19th day of September 2019, I caused a true and correct copy of the foregoing PUBLIC VERSION of CORRECTED APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL to be served upon counsel listed below, via File and ServeXpress:

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