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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** **DATED: OCTOBER 15, 2019**

APPELLANT'S REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

Plaintiff's Answering Brief confirms that the trial court committed legal errors and the judgment below must be reversed, as the Demand represents an abuse of Section 220.[1] The purported investigation is being sought to advance counsel's interests with respect to a transaction that Plaintiff itself believes is fair. This belief is evidenced by Plaintiff's own conduct, which includes not only selling shares below the Merger price, but voting in favor of the more than 60% transaction premium. At the end of the day, any future action that Plaintiff might bring would be barred by the doctrine of acquiescence.

If permitted to stand, the trial court's ruling would reward a party for repeated violations of a scheduling order, filing an affidavit that was based on knowingly false statements, and violating the notary statutes. Plaintiff's Answering Brief confirms that Plaintiff engaged in the following misconduct, which resulted in a fee award of almost $200,000 to Calgon:

- violation of the scheduling order by intentionally producing documents after the discovery cutoff;

[1] Unless otherwise indicated, defined terms have the meaning ascribed to them in Calgon's Opening Brief on Appeal.

- assertion of baseless objections to discovery, including an objection that unidentified documents in the possession of Plaintiff's counsel were equally available to Calgon;
- violation of the scheduling order by belatedly submitting an affidavit with its reply brief;
- violation of Rule 30(b)(6) by providing a witness, Lawrence Mitchell, who had no knowledge of the facts and answered "I don't know" over 100 times;
- submission of an affidavit purportedly from Mitchell, despite his lack of personal knowledge of the very issues about which he purported to testify in the Affidavit;
- false representation that Mitchell appeared before the notary in Illinois when he was, in fact, in Arizona;
- violation of Illinois law, 5 ILCS 312/6-102(a)-(c), and Delaware law, 29 *Del. C.* § 4307(f), relating to the notarization of affidavits; and
- admission in a pleading filed with the court that the illegal notarization was "evident when the Affidavit was filed, given the fax stamp on the as filed document…." (A1114.)

Such conduct goes to the heart of the integrity of Delaware's judicial system and cannot be tolerated under any circumstances. As then-Vice Chancellor Strine explained: "When a party knowingly misleads a court of equity in order to secure an unfair tactical advantage, it should forfeit its right to equity's aid. Otherwise sharp practice will be rewarded, and the tradition of civility and candor that has characterized litigation in this court will be threatened." *Parfi Holding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 915 (Del. Ch. 2008).

Plaintiff's repeated and flagrant misconduct, along with the following undisputed facts, refute any notion of a valid purpose or credible evidence of wrongdoing:

- the challenged transaction represented a 62.9% premium;
- average historical deal premiums have ranged from 19%-35%;
- Calgon was in play for more than seven months;
- not a single bidder expressed an interest in making a topping bid;
- the deal protections were modest and permitted competing proposals;
- Calgon's ultimate decision makers and financial advisor had no conflicts of interests;

- Plaintiff sold a substantial portion of its shares immediately after announcement of the Merger at prices either below or at the Merger price; and
- Plaintiff, remarkably, voted in favor of the Merger.

These factors dispel any suspicion Plaintiff might have had that the Merger price was somehow unfair. They also demonstrate that this action is being pursued not on Plaintiff's behalf, but for counsel's benefit in aid of its new business model to litigate transactions after closing. Plaintiff here was merely a rubber stamp who blindly signed every document prepared by counsel without any verification. Every aspect of the litigation, including revisions to the Demand while litigation was ongoing, were made by counsel without any consultation with Plaintiff. Indeed, Plaintiff was so divorced from this litigation that it was not asked to, and did not, produce a single document from its files.

Finally, Plaintiff's cross-appeal of the fee award should be dismissed. The trial court properly exercised its discretion in awarding Calgon $197,471.44 in attorneys' fees and expenses. Given the litany of misconduct described above, and the serial motion practice required to address that misconduct, the fee award is more than reasonable.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. Denied. The Court of Chancery did not abuse its discretion in awarding attorneys' fees to Calgon as a consequence of Plaintiff's litigation misconduct. The fee award was reasonable in light of the level of Plaintiff's misconduct and gamesmanship, and the effort that was required to compel Plaintiff's compliance with its basic obligations.

ARGUMENT ON APPEAL

I. THE LOWER COURT ERRED IN FINDING PLAINTIFF HAD A PROPER PURPOSE.

A. The Lower Court Erred In Finding Plaintiff's Stated Purpose Was Its Actual Purpose, Not Its Lawyers' Purposes.

As demonstrated in Calgon's Opening Brief, the trial record establishes that the real party in interest was Plaintiff's counsel and the stockholder was merely a nominal plaintiff. Accordingly, under Delaware precedent, including *Wilkinson v. A. Schulman, Inc.*, 2017 WL 5289553 (Del. Ch. Nov. 13, 2017), Plaintiff lacks a proper purpose for its Demand because "the trial record established that the purposes for the inspection belonged to [the stockholder's counsel] and not to [the stockholder] himself." *Id.* at *2.

In its Answering Brief, Plaintiff tries to distinguish this case from *Schulman* on the grounds that, there, "[t]he event that prompted [the plaintiff] to seek books and records differed substantially from what [counsel] sought to explore." (AB24-25 (quoting *Schulman*, 2017 WL 5289553, at *3).) The court's ruling in *Schulman*, however, did not turn on this fact and the court did not identify it as a "key factor," as Plaintiff suggests. (AB25.) Instead, it was one of many factors that led the court to conclude that "the Company proved that [the stockholder's] purported purposes were not his actual purposes." *Schulman*, 2017 WL 5289553, at *3.

The very same abdication is confirmed by the trial record below, which demonstrated that after counsel drafted a demand letter and commenced this case without any input from Plaintiff, counsel litigated the case without any substantive involvement by Plaintiff:

- Mitchell was not provided with a copy of Calgon's response to the Demand, but nevertheless verified the Complaint.[2]
- Mitchell did not review Calgon's Answer to the Complaint until his deposition preparation.[3]
- Mitchell was only asked to provide counsel with contact information, instead of substantive information, so that counsel could reach out to Plaintiff's agents under the cloak of privilege.[4]
- Plaintiff did not search for or produce a single document from its files.[5]

[2] A789.

[3] A791-92.

[4] A797-98; A801-02. Plaintiff's counsel then used the cloak of privilege as a basis for its refusal to produce documents.

[5] A793-94. Plaintiff's counsel's determination that its files, and not Plaintiff's, were responsive to discovery further confirms that it, and not Plaintiff, was the real party in interest.

- Mitchell took no steps to verify the truthfulness of Plaintiff's responses to Calgon's interrogatories.[6]
- Plaintiff's counsel unilaterally changed the documents upon which it was relying as evidence of alleged wrongdoing, but never advised Plaintiff of the change or supplemented Plaintiff's sworn interrogatory responses to include the new documents.[7]
- Plaintiff's counsel revised the categories of documents it was seeking in the Demand, without consulting Mitchell.[8]
- Plaintiff's counsel sought to rehabilitate Mitchell's deposition testimony by drafting an affidavit containing statements about which Mitchell had no knowledge.[9]
- Mitchell did nothing to verify the truthfulness of the statements in the lawyer-drafted affidavit before signing it.[10]

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[6] A799.

[7] A850-51.

[8] A1041-42.

[9] MTD Report 20.

[10] A1034.

Mitchell's complete lack of involvement in the proceeding contrasts sharply with the stockholder's involvement in *Kosinski v. GGP Inc.*, -- A.3d --, 2019 WL 4052054 (Del. Ch. Aug. 28, 2019), a case cited by Plaintiff. There, the court rejected the company's *Schulman* defense because the trial record demonstrated that the stockholder had "been meaningfully involved [in] the demand process and this litigation, unlike the plaintiff in [*Schulman*]." *Id.* at *5. The court found, for example:

- "In his deposition, Plaintiff admitted that his counsel helped articulate his demand purposes, but demonstrated a clear understanding of the facts and goals relevant to each purpose."

- "Plaintiff emphasized the importance of investigating the disinterestedness of the Special Committee…."

- "He specifically identified that there was at least one Special Committee member who had ties to one of the merger's financiers, Royal Bank of Canada [], and that another Special Committee member held overlapping employment terms with Brookfield executives at Ernst & Young."

- "Plaintiff was able to define 'fiduciary duty' with relative accuracy…."

- "Plaintiff's deposition revealed him to be motivated to inspect GGP's documents, apprised of the contents of the demand and the circumstances of the merger, and chalk-full of common sense."

Id. (footnotes omitted). This level of involvement is wholly absent from the trial record in this case. Indeed, Mitchell could supply none of this information, except to parrot certain phrases such as "flip-flop." As explained in the Opening Brief, he could not identify a single fact evidencing a breach of fiduciary duty or explain why Plaintiff wanted the requested documents. (OB12-14.) He was so detached from the litigation that he did not even know if Plaintiff voted in favor of the Merger (which it did) or why it sold shares at prices below the Merger consideration. (A824-26.) Reliance on counsel does not excuse this deliberate indifference to the litigation.

Indeed, Plaintiff's involvement was so minimal and problematic that its counsel went to great lengths to try to cover it up. For example, Plaintiff's counsel refused to search Plaintiff's files in connection with discovery, instead producing documents out of its own files. (OB25.) This production followed Plaintiff's counsel's initial refusal to produce any documents at all, a tactic designed to frustrate Calgon's ability to depose Plaintiff's representative, which necessitated a motion to compel. (*Id.*) After Plaintiff's deposition testimony demonstrated that Plaintiff was not involved in the Demand or the litigation, Plaintiff's counsel violated the scheduling order by submitting an Affidavit that was a "lawyer-driven backstop meant to put words in Mitchell's mouth[.]" (MTD Report 20.) Then, Plaintiff's

counsel stood by the Affidavit even though further discovery revealed that it was falsely notarized and that Plaintiff was unable to substantiate the knowledge that his counsel ascribed to him in the Affidavit. (OB27.) These acts alone warrant rejection of the Demand.

Lastly, in recognition of the fact Plaintiff cannot satisfy the standard under Section 220, Plaintiff invokes the standard of adequacy for a class representative and claims that its conduct satisfies that low standard. (AB31.) As Plaintiff concedes, however, the adequacy standard for a class representative is inapplicable to Section 220 proceedings and, therefore, does not change the conclusion that Plaintiff failed to demonstrate a proper purpose for inspection. (*Id.*) Indeed, a Section 220 demand is based on a stockholder's individual statutory rights and that stockholder's individual circumstances. *See* 8 *Del. C.* § 220(b) ("A proper purpose shall mean a purpose reasonably related to *such person's* interest as a stockholder.") (emphasis added). Accordingly, the determination of whether a stockholder has a proper purpose is made without regard to whether the stockholder might be an adequate class representative.

Under these circumstances, the lower court erred in finding Plaintiff had a proper purpose for the inspection.

B. The Lower Court Erred In Finding Plaintiff Had A Proper Purpose Despite Acquiescing To The Merger.

Contrary to Plaintiff's assertion in its Answering Brief, acquiescence is a proper defense to a Section 220 action. Delaware courts have long recognized that a stockholder must have a legitimate end use for the information requested in a demand. Where the stated end use is litigation, and the anticipated future litigation would be barred by a legal defense, Delaware courts have not hesitated to deny the inspection. Accordingly, courts have refused to permit inspections where, based on the allegations in the demand and the facts developed at trial, subsequent litigation would be precluded by, for example, a Section 102(b)(7) exculpatory provision, a statute of limitations defense, or the doctrine of res judicata. *See, e.g.*, *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) (denying inspection because Section 102(b)(7) precluded litigation); *Graulich v. Dell Inc.*, 2011 WL 1843813, at *7 (Del. Ch. May 16, 2011) (denying inspection where stockholder lacked standing because of the statute of limitations and claim preclusion).

Plaintiff's contention that the acquiescence doctrine does not apply to Section 220 actions is based, in part, on its assertion that it found no cases in which an acquiescence defense was used to preclude a stockholder inspection. (AB33.)

However, this is not surprising given that no reasonable stockholder would make a demand that challenged the fairness of a transaction, where the stockholder also believed the transaction was fair, as demonstrated by its sales of stock below the merger price and its decision to vote in favor of the transaction. Such undisputed conduct here completely undermines the bona fides of the Demand.

The trial record makes clear that the doctrine of acquiescence would bar any subsequent litigation by Plaintiff. (OB28-31.) Plaintiff does not dispute that it received a substantial benefit by selling its Calgon shares at or below the Merger price after the announcement of the Merger. Plaintiff also does not dispute that the doctrine of acquiescence applies to stock sales. Indeed, Plaintiff's only basis for arguing that acquiescence does not apply to any subsequent litigation is its contention that the Proxy did not disclose all material information. (AB36.) But Plaintiff concedes that its only remaining disclosure claim related to the "length of Calgon's projections." (*See* Opinion 35-36; AB36).[11] In essence, Plaintiff asserts that Calgon should have disclosed that it acted improperly by not preparing

[11] Plaintiff did not appeal the lower court's ruling that the disclosure claims were so limited, and therefore its attempt to expand its disclosure claims in its Answering Brief on Appeal (AB37-38) is improper. (*See* Opinion 35-36 ("The Fund does not point to any potentially missing or suspect information beyond the length of Calgon's projections….").)

projections for more than the standard five-year period. *Cf. Ehlen v. Conceptus, Inc.*, 2013 WL 2285577, at *3 (Del. Ch. May 24, 2013) (noting that "DCFs using five-year forecasts are routine in fairness opinions supporting mergers"). Plaintiff, however, does not dispute that such a disclosure would constitute improper self-flagellation, which Calgon had no obligation to disclose. (OB30 (citing *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997).) As Plaintiff's own authority demonstrates (AB34), because Plaintiff has no actionable disclosure claim, "no amount of additional information would aid the stockholder in pleading or prosecuting the contemplated plenary action," *Lavin v. West Corp.*, 2017 WL 6728702, at *9 (Del. Ch. Dec. 29, 2017), and the Demand must be denied. This is fatal to Plaintiff's response to Calgon's acquiescence claim.

Accordingly, Plaintiff lacked a proper purpose because the doctrine of acquiescence precludes Plaintiff from bringing litigation regarding the Merger.

II. THE LOWER COURT ERRED IN DENYING CALGON'S MOTION TO DISMISS UNDER RULE 41(b).

As shown in Calgon's Opening Brief, the trial court abused its discretion in denying the Motion to Dismiss, despite the trial court's finding that Plaintiff's decision to violate the law and sign an affidavit for which he lacked personal knowledge was "untruthful[]," "rises to the level of misconduct," and "threatens the legitimacy of this proceeding." (OB32 (citing MTD Report 17, 19, 20).)

In its Answering Brief, Plaintiff opposes Calgon's appeal of the ruling on two grounds. First, Plaintiff contends that any appeal of the ruling is barred by Court of Chancery Rule 144. (AB37-38.) Second, Plaintiff contends that the trial record "reflects no facts suggesting that this is an 'unusually clear case'" warranting dismissal. (AB39 (citation omitted).) Both arguments fail.

A. This Court Can Review The Lower Court's Ruling On The Motion To Dismiss.

As an initial matter, while certain cases hold that a decision not to file exceptions in the trial court may limit appellate rights, that limitation should not be applied to the unique facts of this case. Here, the Master's Report denying the Motion to Dismiss was issued on the afternoon of Sunday, July 22, 2018, less than two days before the trial scheduled to commence on Tuesday, July 24 at 9:30 a.m. Given the ruling's proximity to trial, the lower court ordered that any exceptions be

filed within 21 hours (*i.e.*, by 12:00 p.m. on Monday, July 23, 2018), leaving only three business hours for Calgon to make a decision. As a result of timing, which was solely attributable to Plaintiff's misconduct, Calgon did not have a fair opportunity to even consider, let alone take any exceptions to, the ruling. Because it was denied a fair opportunity to take exceptions, it should not be prejudiced because it did not do so. Indeed, there is no dispute that Supreme Court Rule 8 has been complied with, as the arguments in favor of and against dismissal were fully presented to and considered by the lower court.

In any event, Calgon submits that the interests of justice support a review of the trial court's ruling. For obvious policy reasons, Delaware courts have repeatedly emphasized the importance of maintaining the integrity of the judicial process. As then-Vice Chancellor Strine stated in *Parfi Holding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911 (Del. Ch. 2008), "[w]hen plaintiffs come to [the Court of Chancery] seeking equity, they are expected to do equity by the other parties to the case and to the court itself, by being candid." *Parfi*, 954 A.2d at 934. "The integrity of the litigation process is fundamentally undermined if parties are not candid with the court." *Id.* at 933. Accordingly, appellate review is appropriate here to address Plaintiff's lack of candor.

B. The Trial Court Abused Its Discretion In Denying Calgon's Motion To Dismiss.

The trial court erred by not dismissing this action. As Plaintiff acknowledges in its Answering Brief, dismissal is the appropriate remedy in "unusually clear cases." (AB39 (citation omitted).) This is precisely such a case. Indeed, it is difficult to think of a clearer case for dismissal.

Contrary to Plaintiff's suggestion (AB38), dismissal of an action does not require a violation of a court order or rule. Instead, as the court explained in *Parfi Holding AB v. Mirror Image Internet, Inc.*, a motion to dismiss based on materially misleading statements to the court "falls under Rule 41(b) as well as the inherent authority of this court to hold litigants responsible for misconduct in the litigation process." 954 A.2d at 927 (footnotes omitted). Here, the undisputed record confirms that Plaintiff engaged in repeated misconduct in the litigation process. Indeed, the misconduct was so rampant that the court awarded nearly $200,000 in attorneys' fees as a sanction for Plaintiff's bad-faith tactics.

In any event, the undisputed record establishes that Plaintiff violated the law and Court Rules by filing a false affidavit. As the trial court recognized in its ruling on the Motion to Dismiss, Plaintiff violated Illinois notary public statutes. (MTD Report 15.) Indeed, it is undisputed that Mitchell swore under oath that he personally

appeared before the Illinois notary despite the fact that he was in Arizona at the time. (*Id*. at 12.) He further admitted that this was not a unique circumstance, as Plaintiff regularly engaged in such conduct. (A1035.) In addition, the knowing submission of a false affidavit violates Court Rules, including the Delaware Lawyers' Rules of Professional Conduct, which prohibit lawyers from knowingly making false statements of fact or offering false evidence. *Bessenyei v. Vermillion, Inc.*, 2012 WL 5830214, at *6 (Del. Ch. Nov. 16, 2012) ("[A] lawyer who files or uses a document knowing it was improperly notarized may offer evidence that the lawyer knows to be false in violation of Rule 3.3(a)(3))" (internal quotation marks and footnotes omitted), *aff'd*, 67 A.3d 1022 (Del. 2013) (TABLE); *see also In re Pankowski*, 947 A.2d 1122 (Del. 2007) (TABLE) (submission of pleading "on which Respondent had signed [Petitioner's] name and had falsely notarized the signature" violated Rule 8.4(c)). Tellingly, Plaintiff's counsel does not dispute that it was aware at the time the Affidavit was filed with the trial court that the notarization was false. (*See* OB36.) To the contrary, Plaintiff represented to the lower court that the false notarization was "evident when the Affidavit was *filed*, given the fax stamp on the as-filed document . . . ." (A1114 (emphasis added).)[12] Assuming this representation

[12] As a result, the lower court's finding that counsel was not aware was clearly erroneous. (MTD Report 21.)

is truthful, there is no way to get around the fact that a document with a false statement was intentionally filed with the trial court.[13]

The cases cited in Calgon's Opening Brief, *Bessenyei v. Vermillion, Inc.*, 2012 WL 5830214 (Del. Ch. Nov. 16, 2012), *aff'd*, 67 A.3d 1022 (Del. 2013) (TABLE), and *Parfi Holding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911 (Del. Ch. 2008), confirm that dismissal was the only appropriate remedy. Plaintiff's attempts to distinguish them fail.

First, Plaintiff incorrectly claims that *Bessenyei* differs because, there, "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." (AB39.) This is a mischaracterization of the court's holding. Rather than focusing on technical compliance, the *Bessenyei* Court asked "whether the collective conduct of [Plaintiff] and Plaintiff's Delaware counsel relating to the invalid notarizations rises to the level

[13] Plaintiff asks this Court to find that Illinois law does not require the affiant to personally appear before the notary. (AB41-42.) This argument would violate the "'the golden rule' of every notarial act, whether it is paper-based or electronic," which "is the physical presence of the signer before the notary." *James v. Nat'l Fin. LLC*, 2014 WL 6845560, at *11 (Del. Ch. Dec. 5, 2014) (internal quotation marks and citations omitted). (*See also* A1069-70 ¶10.) It would also render meaningless the attestation that the Affidavit was "SWORN AND SUBSCRIBED *before me*." (*See* A1010 (emphasis added).)

of a deliberate violation of the Rules of this Court that would warrant an involuntary dismissal with prejudice under *Parfi*." *Bessenyei*, 2012 WL 5830214, at *4. After reviewing the evidence, the court found that dismissal was in fact warranted because the plaintiff knew that the document was not signed before a notary and then "did nothing to preserve the integrity of the process." *Id.* at *9. The same is true here, where Plaintiff had full knowledge that he was not appearing personally before a notary (as sworn to in the document) but then did nothing to correct the knowingly false notarization or the false statements. To the contrary, Plaintiff and his counsel have maintained a "no harm, no foul" defense and to this day have taken no steps to correct the false notarization.

Plaintiff's attempt to distinguish *Parfi* also fails. Here, as in *Parfi*, Plaintiff's counsel "'invented' a 'story'" (AB39-40)—*i.e.*, Plaintiff had personal knowledge of the Demand and recalled his involvement in specific events relating to the Demand—that "was clearly false and designed to influence the court" into believing that Plaintiff had been intimately involved with the Demand. (*Id.*) Indeed, the Affidavit was prepared by counsel in an attempt to paper over Mitchell's deposition testimony and avoid dismissal under *Schulman*.

Plaintiff likewise fails in its attempts to distinguish *OptimisCorp v. Waite*, 2015 WL 5147038 (Del. Ch. Aug. 26, 2015), *aff'd*, 137 A.3d 970 (Del. 2016)

(TABLE). (AB40-41.) Plaintiff contends that *OptimisCorp* counsels against dismissal because, there, the court dismissed the claim that was tainted by the offending conduct but declined to dismiss the entire complaint. (*Id*.) That distinction does not benefit Plaintiff here because it has brought only one claim, and the misconduct goes directly to that claim. As a result, the *OptimisCorp* court's decision not to dismiss the entire case is a distinction without a difference.

Accordingly, because this is the "unusually clear case" warranting dismissal, the lower court abused its discretion by not granting Calgon's motion.

III. THE LOWER COURT ERRED IN FINDING PLAINTIFF HAD SATISFIED THE CREDIBLE BASIS STANDARD.

In its Demand, Plaintiff's claims of wrongdoing were predicated on the Board's decision not to conduct an active auction, as well as case law that was no longer good law. (A592 (citing *In re OPENLANE, Inc.*, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011).) Contrary to Plaintiff's claims, however, this Court has held that single-bidder sale processes satisfy directors' fiduciary duties where, as here, there are reasonable deal protections. *See C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1067-68 (Del. 2014). As a result, Plaintiff is forced to concede that it must prove the existence of "conflicts of interest" (AB48) in order to meet its burden of establishing credible evidence of wrongdoing. No such conflicts exist.

In an attempt to meet its burden, Plaintiff argues that "where undisclosed conflicts of interest exist, such decisions must be viewed more skeptically." (AB47 (internal quotation marks and citations omitted).) The basis for this argument is *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015), and *In re El Paso Corporation Shareholder Litigation*, 41 A.3d 432 (Del. Ch. 2012). In *RBC*, the company's financial advisor designed a dual-track sale process that allowed it to obtain financing fees in another transaction with the company's competitor. *RBC*,

129 A.3d at 854-55. The financial advisor did not disclose this conflict to the company, however, which the *RBC* Court found could have negatively affected the company's sale process in a number of ways. *Id.* at 855. In *El Paso*, the company's CEO, who was solely responsible for negotiating the sale of the company to a third party, did not disclose to the company's board that he was interested in buying certain of the company's assets after the sale. *El Paso*, 41 A.3d at 443-44. The *El Paso* Court found that this undisclosed conflict disincentivized the CEO from obtaining the highest possible price for the company, given that a higher price would cause the third party to demand more for the assets eyed by the CEO. *Id.* at 444-45.

No such conflicts exist in this case. The Proxy, which constitutes Plaintiff's sole evidence of purported wrongdoing, fully disclosed every alleged conflict that Plaintiff relies upon for its Demand. Plaintiff has not made any allegation or provided any evidence that there were any undisclosed conflicts of interest. Because there were no undisclosed conflicts, there is no legal basis to view the directors' actions with skepticism.

It is now undisputed that the ultimate decision makers had no conflicts of interest. The acceleration of the directors' equity awards does not create a conflict of interest. Indeed, Delaware law, which Plaintiff has never disputed, recognizes that such equity awards aligned the directors' interests with those of the stockholders

by motivating directors to get the highest possible price. (*See* OB43 (citing *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *8 (Del. Ch. Nov. 30, 2007).) Plaintiff also does not address the fact that, in addition to the equity awards, the directors owned Calgon stock that further incentivized them to get the highest possible price. (*See* OB43.) Lastly, Plaintiff does not dispute that the directors would have been better off financially had they voted against any merger, given they would lose their jobs post-Merger. (*See id*. n.51.) As a result, Plaintiff is forced to concede no conflict of interest existed with respect to the directors.

Similarly, Plaintiff's Answering Brief fails to present any legal argument as to how Morgan Stanley, Calgon's financial advisor, was conflicted. As discussed in the Opening Brief, Morgan Stanley had a contingency fee that incentivized it to get the highest possible price for Calgon—an arrangement that the lower court acknowledged did not provide a credible basis from which to infer wrongdoing. (OB44 (citing Opinion 35).) Nevertheless, Plaintiff conclusorily asserts in its Answering Brief that "the Board's financial advisor [] had significant conflicts of interest" (AB48), while making no attempt to articulate what those conflicts of interest were or how they could have incentivized improper conduct. Plaintiff's omission confirms that no such conflict of interest existed with respect to Morgan Stanley.

Plaintiff likewise fails to identify any evidence that the officers suffered from conflicts of interest. Plaintiff's assertion that the officers were conflicted was premised on the idea that Calgon had engaged in a "flip-flop"—a phrase coined by counsel and parroted by Mitchell in his deposition to give the impression that Calgon suddenly changed its position after Kuraray made its initial bid. (OB45 n.53.) As demonstrated in Calgon's Opening Brief, this "flip-flop" story is false and based on selective and misleading quotations from the Proxy. (*See id*.) The actual facts disclosed in the Proxy demonstrated that Calgon's position, both before and after Kuraray's initial offer, was that the company was not for sale. Indeed, Mitchell admitted there was no "flip-flop." Faced with these facts, Plaintiff abandoned the so-called "flip-flop" moniker in its Answering Brief on Appeal.

Having abandoned the "flip-flop" story, the only thing that Plaintiff can point to for its conflict claim is the mere fact that Kuraray wanted to retain management after the Merger. (AB46-47.) Standing alone, this does not represent a conflict of interest. Conspicuously absent from Plaintiff's speculation is any evidence that management took (or failed to take) any actions to favor Kuraray over any other bidders. Because the deal protections were modest, bidders had an opportunity to submit a topping bid. Indeed, Plaintiff does not even respond to the case law cited in the Opening Brief making clear that where, as here, officers' jobs were never in

danger, continued employment post-acquisition does not give rise to an inference of wrongdoing. (OB44-45 (citing *Wayne Cnty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *11 (Del. Ch. July 24, 2009), *aff'd*, 996 A2d 795 (Del. 2010).) Finally, Plaintiff also has no answer for the fact that the Proxy fully discloses that the Board actively oversaw management's negotiations with Kuraray and found that management had no disabling conflicts of interest:

> The independent directors discussed whether Mr. Dearth and other members of Calgon Carbon's senior management team had any conflict of interest with respect to the potential transaction, in light of the potential payments to be made to certain executives in certain situations after a change in control of Calgon Carbon or in light of the potential for continued employment of the senior management team by the business after the closing of a potential transaction. The independent directors determined that, based on the information available to them at that time, no conflict of interest existed with respect to the senior management team in a potential transaction with Kuraray, and further determined to continue to monitor the relevant facts and the potential for any divergent interests of the senior management team with respect to the potential transaction.

(A169.) As a result, there is no credible evidence that management suffered from any conflicts of interest.

Plaintiff also fails to articulate how its rank speculation regarding the projections is supported by credible evidence of wrongdoing. Plaintiff's evidence of wrongdoing is nothing more than bald assertions that (1) "the projections may have been adjusted by the allegedly conflicted management to encourage Kuraray's

acquisition" and (2) "Calgon should have extended its projections beyond 2021 because the company expected a purportedly lucrative project, the so-called Ballast Water Treatment Initiative, to begin in 2019." (Opinion 32 (footnote omitted).)[14] In its Answering Brief, Plaintiff presents no legal argument about the length of projections and does not dispute that, under Delaware law, five-year projections are standard. (*See* OB47-48 (citing *Ehlen v. Conceptus, Inc.*, 2013 WL 2285577, at *3 (Del. Ch. May 24, 2013) (footnote omitted).) Plaintiff also does not offer any evidence or expert opinion that longer, less reliable projections would have had any impact on the value of Calgon or the price that Kuraray or any other bidder was willing to pay.

Likewise, Plaintiff provides no explanation as to how the modified projections benefited Kuraray in any way. Instead, it speculates in its Answering Brief that the

[14] In its statement of facts, Plaintiff asserts that management directed Morgan Stanley not to value Calgon using pro forma 2017 projections, but makes no mention of this in the legal section. (AB13.) To the extent Plaintiff is arguing this is evidence of wrongdoing, it was not raised below and is, therefore, barred by Supreme Court Rule 8. Moreover, the Proxy explains why the pro forma 2017 projections were not used—because those projections included the "pro forma, full-year 2017 impact of foreign currency exchange rates and the impact of the initiatives described below, as if each initiative was in full effect as of January 1, 2017. At the time that the Calgon Carbon Projections were prepared in July 2017, none of these initiatives were substantially complete, and the impact of these initiatives on Calgon Carbon's future financial performance was uncertain." (A186.)

company "knew the approximate price at which Kuraray was likely to acquire Calgon." (AB48.) This rank speculation is not evidence—credible or otherwise—of any wrongdoing and is inconsistent with the undisputed fact that Kuraray raised its bid twice after the revised projections. (OB46.) In fact, Plaintiff admits that it "does not yet know whether the projections were, in fact, adjusted to benefit a sale to Kuraray, or whether the Board had received projections showing the full value of the ballast water treatment initiative." (AB49 (internal quotation marks and citation omitted).) Given this admission, it is clear that Plaintiff merely is suspicious of the projections and wants to conduct a fishing expedition. Such a fishing expedition conflicts with well-established Delaware law. *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 565 (Del. 1997) ("The statutory remedy is not an invitation to an indiscriminate fishing expedition.").

Accordingly, because there is no credible evidence from which the trial court could infer wrongdoing, the court erred in finding that Plaintiff had a proper purpose for an investigation.

IV. THE LOWER COURT ERRED IN FINDING PLAINTIFF DID NOT WAIVE CERTAIN REQUESTS FOR BOOKS AND RECORDS.

As explained in Calgon's Opening Brief on Appeal, the lower court erred by ordering Calgon to produce categories of documents that Plaintiff initially sought in its Opening Pre-Trial Brief but later abandoned in its Reply Pre-trial Brief. (OB49-51.) Bedrock Delaware law holds that such an abandonment constitutes waiver, and Plaintiff does not contend otherwise. (OB49-50 (citing *In re Plains All Am. Pipeline, L.P.*, 2017 WL 6016570, at *2 (Del. Ch. Aug. 8, 2017); *Dawson v. Pittco Cap. Partners, L.P.*, 2010 WL 692385, at *1 (Del. Ch. Feb. 15, 2010); *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003).)

On appeal, Plaintiff concedes that, while its Opening Pre-Trial Brief spent sixteen pages "serially" addressing each category of documents requested in the Demand, the Reply Pre-trial Brief only "generally" referred to certain requests. (AB52.) However, the single case cited by Plaintiff does not support its contention that "generally" referring to issues is enough to prevent waiver. (*Id.* at 55 (citing *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).) Instead, the *Pine River* Court found that no waiver occurred where a party addressed an issue in its opening

brief and then devoted several pages to the issue in the reply brief. *Pine River*, 2017 WL 4548143, at *14 n.98 ("Pine River then invoked Section 5.07(f) in its opening brief at page 32, and again in its reply brief at pages 29 through 31. There was no waiver."). As Plaintiff admits, the same cannot be said here, where Plaintiff's Reply Pre-trial Brief specifically mentioned only five requests in order to give the impression that the Demand was narrower in scope and drafted with "'rifled' precision." (OB50.) Plaintiff's counsel did the same thing at trial, where it again discussed only five requests. (*Id*.)

This narrowing was not a coincidence, and was instead designed to mirror the Court of Chancery's decision in *Lavin v. West Corp.*, a case that was decided after Plaintiff sent its Demand to Calgon but before the trial below. In *Lavin*, the court found that the demand letter, which was prepared by the same law firm representing Plaintiff, was drafted "with the precision of buckshot" and limited inspection to five categories. *Lavin*, 2017 WL 6728702, at *14. Taking cues from *Lavin*, Plaintiff focused on five similar categories of documents so that it could portray its Demand as in line with that case. Plaintiff's decision to deliberately limit its claims constitutes waiver.

Having made the decision to drop the arguments from the pre-trial briefing, Plaintiff cannot escape its deliberate decision to abandon requests in its Reply Pre-

trial Brief by claiming in its rebuttal argument that it was not, in fact, waiving any requests. If this were the law, there could never be a waiver, as every party would assert, as Plaintiff did here, that it did not intend to waive any claims or that a waiver would require an affirmative pronouncement that the stockholder was irrevocably waiving its right to documents. That cannot be the law of Delaware. Not surprisingly, Plaintiff does not cite any case law for this novel proposition. As a result, the lower court committed error by including the waived requests in the Final Order.

ARGUMENT ON CROSS-APPEAL

V. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN AWARDING FEES FOR PLAINTIFF'S LITIGATION MISCONDUCT.

A. Question Presented

Whether the lower court abused its discretion by awarding attorneys' fees to Calgon as a result of Plaintiff's repeated litigation misconduct.

B. Standard of Review

A trial court's award of attorneys' fees is reviewed for abuse of discretion. *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011).

C. Merits of Argument

Plaintiff's appeal of the Court of Chancery's initial fee-shifting determinations is barred because Plaintiff did not timely take exceptions to those rulings, which were first issued as Master's Reports and later adopted by the Vice Chancellor as final rulings of the lower court. Plaintiff's attempt to invoke this Court's "interests of justice" exception fails because Plaintiff cannot point to any "plain error" by the lower court. Furthermore, even if Plaintiff had preserved the argument for appeal, the lower court did not abuse its discretion in ruling that attorneys' fees should be awarded to Calgon and in determining the amount of the award. After briefing and oral argument, the court determined that the time spent

by Calgon's attorneys, subject to minor adjustments, was within the scope of the court's rulings and reasonable under the circumstances.

1. Plaintiff, Having Chosen Not To Taken Exceptions To The Fee Rulings, Is Barred From Appealing Those Rulings.

Plaintiff cannot appeal the trial court's initial fee rulings because Plaintiff did not take timely exceptions to those rulings. The fee rulings that are the subject of Plaintiff's appeal were issued in April, June, and July 2018 as Master's Reports.[15] Under Court of Chancery Rules, Plaintiff was required to take exceptions within three days of each ruling. Ct. Ch. R. 144(d)(2).[16] Plaintiff concedes that it did not. (AB56.) As a result, none of the rulings are appealable. *See Sutor-Banks v. Moffett*, 74 A.3d 655 (Del. 2013) (TABLE).

Plaintiff does not mention its failure to take exceptions, but apparently seeks to avoid this result by invoking the "interests of justice" exception to the general rule. (AB56, 60.) While Delaware law provides a limited avenue to appeal in cases where "the trial court committed plain error requiring review in the interests of justice," *Smith v. Del. State University*, 47 A.3d 472, 479 (Del. 2012) (internal

[15] Each of the rulings was expressly adopted by the trial court in its January 2019 Opinion.

[16] With respect to the July 2018 fee ruling in connection with the Motion to Dismiss, Plaintiff was required to take exceptions by July 23, 2018 at 12:00 p.m.

quotation marks and citation omitted), Plaintiff has made no such showing here.[17] Instead, the only purported basis for the exception is Plaintiff's assertion that "the actual fees shifted were expected to be minimal and not worth the expense of appeal." (AB56.) However, Plaintiff's flawed cost-benefit analysis and second-guessing of its own strategy was not a plain error requiring review in the interests of justice.

2. Even If Plaintiff Could Appeal The Trial Court's Fee-Shifting Rulings, The Court Did Not Abuse Its Discretion.

Even if Plaintiff had preserved its ability to challenge the trial court's initial fee-shifting rulings (and it did not), Plaintiff's appeal would nevertheless fail. As discussed below, each fee-shifting decision followed briefing and oral argument by the parties and was based on well-established equitable principles.

a. The Trial Court Had The Authority To Shift Fees In Connection With The Motion to Dismiss.

Plaintiff first attacks the trial court's ruling on the Motion to Dismiss by claiming that the court lacked the legal authority "allowing the court, after the fact, to 'extend' the motion to strike ruling" to the motion to dismiss ruling. (AB59

[17] *See also id.* (holding that appellant must show the court committed "plain error" that is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process").

(footnotes omitted).) Plaintiff did not make this argument below, either in an exception to the Master's Draft Report on the Motion to Dismiss or in connection with the parties' briefing on the fee award, and has therefore waived it. Under Supreme Court Rule 8, "[o]nly questions fairly presented to the trial court may be presented for review," thus foreclosing "new arguments on appeal." Del. Supr. Ct. R. 8; s*ee also Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013).

In any event, Plaintiff's challenge boils down to semantics. In granting the same type of relief on the motion to dismiss that was granted with respect to the motion to strike, the trial court used the phrase "extend my ruling." (MTD Report 23.) In drawing parallels between the two rulings, the court did not abuse its discretion or commit plain error. Instead, the court exercised its discretion to award fees based on the inequitable conduct of Plaintiff, which included the filing of a belated and falsely notarized affidavit that was a "lawyer-driven backstop meant to put words in Mitchell's mouth" and "threaten[ed] the legitimacy of this proceeding." (*Id*. at 20.) Obviously, the court has the inherent power to sanction such conduct. *Parfi*, 954 A.2d at 932 (recognizing "court's inherent authority to police the

litigation process, to ensure that acts that undermine the integrity of that process are sanctioned"). If it did not, then such conduct would go on unchecked.[18]

b. The Trial Court Had The Authority To Shift Fees In Connection With The Motion to Compel.

Plaintiff's contention that the trial court did not have the authority to shift fees on the Motion to Compel similarly fails. In its Answering Brief, Plaintiff offers flawed arguments for why its opposition to the Motion to Compel fell within the narrow exception to the mandatory fee-shifting requirement set forth in Rule 37(a)(4). (AB60-64.)

Plaintiff incorrectly asserts that its opposition was "substantially justified" because Calgon "went from demanding potentially hundreds of documents to accepting ten" and then "voluntarily withdr[ew]" its requests for some documents. (AB60.) In making these assertions, Plaintiff falsely characterizes the discovery sought by Calgon and the sequence of events that led to the lower court's discovery ruling to create the incorrect impression that Calgon demanded every document in

[18] Contrary to Plaintiff's assertion, the trial court did find bad faith on the part of Plaintiff. While it did not expressly use the phrase "bad faith," the court found that Plaintiff's decision to violate the law and sign an affidavit for which he lacked personal knowledge was "untruthful[]," "rises to the level of misconduct," and "threatens the legitimacy of this proceeding." (MTD Report 17, 19, 20.) This can only be characterized as bad faith.

counsel's files.[19] Through its discovery requests, Calgon merely sought the documents on which Plaintiff was relying as evidence of wrongdoing as set forth in its Demand in order to use those documents in connection with the deposition of Plaintiff's Rule 30(b)(6) witness. In response, Plaintiff asserted a series of baseless objections, claiming that the unidentified documents known only to Plaintiff's counsel were somehow equally available to Calgon and were also privileged. (A439-55.) The objective of the litigation gamesmanship was to preclude Calgon from using the documents at Plaintiff's deposition (in an effort to prevent Plaintiff's lack of involvement in and knowledge of the process from coming to light). Because Plaintiff refused to provide this basic discovery, Calgon was forced to file a motion to compel. After the motion was filed, Plaintiff filed its Opening Pre-Trial Brief and attached the very documents that Calgon had been seeking to obtain in discovery. Thus, by the time the court heard the Motion to Compel, Plaintiff had mooted part of the motion by belatedly producing documents as part of its "hide-the-ball" strategy.

[19] The fact that Plaintiff's counsel viewed its files as being responsive to discovery demonstrates that it, and not Plaintiff, was the real party in interest.

In deciding to award fees in favor of Calgon, the court found Plaintiff's gamesmanship was improper and dismissed both of the arguments to which Plaintiff still clings:

> I maintain that [Plaintiff's] equal availability objection is not appropriate certainly in this case when documents weren't even identified, and there was not any other cooperation in responding to the discovery or attempting to narrow it, even to the documents that you intended to rely on.
>
> And then to have it be mooted by the pre-trial brief, the whole thing just seemed to be an exercise in schedule manipulation rather than a good faith objection on equal availability and expenses ground.

(A682-83.) *See also* Ct. Ch. R. 37(a)(4)(A) ("If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the Court shall . . . require the party . . . whose conduct necessitated the motion…to pay to the moving party the reasonable expenses incurred . . . ."). Accordingly, Plaintiff's opposition, intended only to impede Calgon's deposition of Plaintiff, was not substantially justified.

3. The Trial Court Appropriately Considered The "Results Obtained" In Setting The Fee Award.

The trial court considered all appropriate factors and did not abuse its discretion in setting the amount of the fee award. Under Delaware law, trial courts are vested with broad discretion to set an appropriate award in connection with an

award of fees. When assessing the reasonableness of attorneys' fee requests, the court should consider Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct and relevant case law. *See Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 247 (Del. 2007). "When awarding expenses as a contempt sanction or for bad faith litigation tactics, this Court takes into account the remedial nature of the award." *Aveta Inc. v. Bengoa*, 2010 WL 3221823, at *6 (Del. Ch. Aug. 13, 2010); *see also In re SS & C Techs., Inc. S'holders Litig.*, 2008 WL 3271242, at *3 n.14 (Del. Ch. Aug. 8, 2008) (noting that court did not focus narrowly on Rule 1.5(a) factors because fees awarded as sanction).

As an initial matter, Plaintiff's argument is premised on the notion that the "results obtained" are outcome determinative of Calgon's fee request. (AB61-62.) This is wrong as a matter of Delaware law. The level of success is merely one of at least eight factors that the court is permitted to consider in awarding fees. *See* Del. Rules of Prof. Conduct, Rule 1.5(a) (listing 8 enumerated factors). Plaintiff compounds its legal error by relying on *Mahani v. Edix Media Group, Inc.*, 935 A.2d 242 (Del. 2007), *SIGA Technologies, Inc. v. PharmAthene, Inc.*, 67 A.3d 330 (Del. 2013), and *Dreisbach v. Walton*, 2014 WL 5426868 (Del. Super. Ct. Oct. 27, 2014). Plaintiff's reliance on these cases is misplaced as each of them involved fee shifting pursuant to a contractual provision based on success in the litigation. *See, e.g.*,

Dreisbach, 2014 WL 5426868, at *7 ("Buyer or Seller, whichever is successful, shall also be liable for the other parties' court costs and attorney's fees."). No such provision is at issue in this case. In any event, there is no evidence that the trial court failed to consider the results obtained. While Calgon was not successful in getting the case dismissed, it obtained affirmative relief on every motion that it filed. The fact that the trial court did not accept Plaintiff's self-serving interpretation of the benefits obtained by Calgon does not constitute an abuse of discretion.

Indeed, the identical arguments were made in *In re Dole Food Company, Inc. Stockholder Litigation*, Consol. C.A. Nos. 8703-VCL and 9079-VCL (Del. Ch.), in opposition to a fee award. (AR15-46.) In *Dole*, the petitioner argued that the company was entitled to only a fraction of the requested fees and expenses, the fees were unreasonable because of excessive staffing, and the fees were not justified based on the level of success. (*Id*.) The court summarily dismissed these arguments and awarded the entire amount requested. (AR47-49 ("[Petitioner's] limited success did not reduce the amounts of time and effort that Dole's attorneys were forced to expend to overcome petitioner's arguments. No offset or reduction is warranted.").) As in *Dole*, the fees awarded by the lower court were reasonable and commensurate with the benefits obtained by Calgon through its motions.

The lower court likewise did not abuse its discretion in reimbursing Calgon for travel time of its attorneys, who had to travel from California on two separate occasions because of Plaintiff's gamesmanship on the eve of trial. (*See* AB66). Plaintiff ignores the fact that these travel expenses were actual costs incurred and paid by Calgon, and that Plaintiff had the option of avoiding the costs associated with rescheduling trial. Plaintiff instead selected the option of rescheduling trial, which wasted the court's and Calgon's time. With Plaintiff having willingly made that choice, Calgon is entitled to recover the attendant expenses. Moreover, there is no prohibition—ethical or otherwise—on payment for travel time. The best Plaintiff can offer is a citation to cases interpreting 10 *Del. C.* § 8906, which governs expert witness fees and therefore does not require exclusion of travel expenses. (AB63-64.)

Finally, Plaintiff attacks the trial court for not accepting either of Plaintiff's proposals for (1) a "nudge" award of $5,000, or (2) a "generous" award of $15,996 comprising "one quarter of the total related fees." (AB62.) These proposals are absurd and reflect the bad faith by which Plaintiff conducted this litigation. Given the extensive misconduct committed by Plaintiff that necessitated three separate motions, two depositions, and postponement of trial, the court had no obligation to accept Plaintiff's unreasonable proposals. Indeed, the unreasonableness of

Plaintiff's proposal is demonstrated by its counsel's offer to settle the fee petition for $125,000, which Plaintiff failed to disclose to this Court.[20] (AR3-13 ¶¶ 3, 24.) Thus, there can be no argument that the trial court abused its discretion.

[20] The "settlement" proposal was provided to the lower court by Plaintiff, thereby eliminating any claim that it was a confidential settlement communication under Delaware Uniform Rule of Evidence 408. (*See* AR1-2.)

CONCLUSION

For the reasons stated, the lower court's Opinion, Final Order, and ruling on the Motion to Dismiss should be reversed and the lower court should be instructed to enter an Order in favor of Calgon denying Plaintiff's inspection request. As to Plaintiff's cross-appeal, the lower court's Fee Award should be affirmed.

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Dated: October 4, 2019
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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2019, the foregoing documents were served electronically by File&Serve*Xpress* on the following counsel of record:

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