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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 – OCTOBER 28, 2019**

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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I. NATURE OF PROCEEDINGS

In its Opening Brief on Cross-Appeal, Plaintiff explained that the Court of Chancery's orders shifting $197,471.44 of fees constituted an abuse of discretion for two reasons.[1] First, most of those fees lacked statutory or other grounds. Second, the amount of fees was unreasonable because the court failed to conduct the analysis required under this Court's precedents.

Despite its bluster, Calgon's Reply Brief fails to rebut either point. Calgon repeats its supposed "litany of misconduct," while failing to address the trial court's actual findings and claiming "misconduct" where the court found none. *Cf.* Appellant's Reply Br. on Appeal and Cross-Appellee's Answering Br. on Cross-Appeal ("Calgon Reply Br.") at 1-4. Calgon goes so far as to claim the trial court, although not "expressly us[ing] the phrase 'bad faith,'" nonetheless "did find bad faith on the part of Plaintiff." *Id*. at 36 n.18. Calgon ignores that the Court of Chancery ***did*** use the phrase "bad faith," and did not find it. The court rejected Calgon's reliance on the bad-faith exception to the American Rule because "[i]t [was] not clear to [it] that the Fund's reliance on Mitchell was in bad faith." MTD Report at 22.

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[1] Capitalized terms have the same meaning as ascribed in the Corrected Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal ("Pl.'s Br."). The MTD Report and MTC Transcript are attached as Exhibits A and B to Pl.'s Br.

Calgon's specific legal arguments fare no better. As to the lack of basis to shift fees on the motion to dismiss, Calgon claims the order, again without the court so stating, was based on the court's "inherent power to sanction." Calgon Reply Br. at 35-36. But the court was clear – it did not rely on the bad-faith exception, or on its inherent authority to address misconduct, but merely "extend[ed] [its] ruling on the motion to strike." MTD Report at 22-23. Calgon's failure even to try to justify the court's actual order proves the obvious – the court had no authority to "extend" Plaintiff's voluntary agreement from the limited scope to which Plaintiff agreed, to also encompass the motion to dismiss. The motion to dismiss fees should be reversed.

As to the lack of basis for fees on the motion to compel, Calgon tries to ignore the portions of its motion that sought all documents in Plaintiff's or its counsel's possession in any way relating to any facts alleged in the Demand or the Complaint, and all documents on the privilege log. But it cannot change the record. The handful of documents Plaintiff produced were a small subset of what Calgon requested and moved to compel. Plaintiff's opposition was substantially justified. Accordingly, Court of Chancery Rule 37 did not authorize fee-shifting.

Beyond the lack of basis for fee-shifting, Calgon has no meaningful defense for the court's failure to consider the results obtained in assessing reasonableness. Its core argument is that Plaintiff must prove a negative: "there is no evidence that the

trial court failed to consider the results obtained." Calgon Reply Br. at 39-40. But the court's lack of reasoning regarding the results obtained, and failure to make any adjustment based on that factor, is evidence enough.

In short, the Court of Chancery abused its discretion in shifting nearly $200,000 of fees against Plaintiff. Its fee-shifting orders should be reversed.

II. ARGUMENT

A. The Trial Court Had No Basis to Award Fees on the Motion to Dismiss or the Motion to Compel

Plaintiff's Opening Brief on Cross-Appeal explained that the court had no authority for its initial fee-shifting orders on either the motion to dismiss or the motion to compel. Pl.'s Br. at 58-60. Plaintiff further explained that by shifting fees without authority, the trial court "abused its discretion and committed 'plain error requiring review in the interests of justice.'" *Id*. at 63.

In response, Calgon tries to avoid the question of the trial court's authority by arguing Plaintiff's appeal of these determinations "is barred because Plaintiff did not timely take exceptions to those rulings." Calgon Reply Br. at 32-34. But regardless of whether a party takes exceptions under Court of Chancery Rule 144, this Court undisputedly may reverse an order "where 'the trial court committed plain error requiring review in the interests of justice.'" Calgon Reply Br. at 33 (quoting *Smith v. Del. State Univ.*, 47 A.3d 472, 479 (Del. 2012)). Here, the trial court's initial fee-shifting orders should be reversed because they constituted plain error.[2]

[2] Moreover, the "interests of justice" (Del. Supr. Ct. R. 8) favor considering this issue because Plaintiff had only three business hours in which to consider the MTD Report before the deadline for exceptions, and it was told that (despite the lack of authority for fee-shifting) it would also have to pay Calgon's "fees and costs incurred in . . . exceptions and any rescheduling that occurs because of exceptions." MTD Report at 23.

In shifting fees on Calgon's motion to dismiss, the court below eschewed reliance on the bad-faith exception. MTD Report at 22. As noted above, Calgon's argument that the court implicitly "did find bad faith on the part of Plaintiff" without "us[ing] the phrase 'bad faith'" is just wrong. Calgon Reply Br. at 36 n.18. The court declined to apply the bad-faith exception because "[i]t [was] not clear to [the court] that the Fund's reliance on Mitchell was in bad faith." MTD Report at 22; *cf*. *Shawe v. Elting*, 157 A.3d 142, 149-50 (Del. 2017) (for bad-faith exception to apply, "[t]he party seeking fees must demonstrate by clear evidence that the other party acted in subjective bad faith"), *cert. denied*, __ U.S. __, 138 S. Ct. 93 (2017). Notably, Calgon has now abandoned its claim that "the Affidavit contains numerous false statements." *Compare* Calgon Opening Br. at 18 (citing only inability to recall time of meeting), *with* Pl.'s Br. at 44 ("Lack of recollection does not equate to falsity."), *and* Calgon Reply Br. at 1-3 (identifying no false statements).[3] And while it does double down on several counterfactual claims about Plaintiff's purported lack of involvement in the

[3] Calgon does, however, label as "misconduct" multiple items that the court never found were wrongful, and certainly did not constitute clear evidence of subjective bad faith. *Compare* Calgon Reply Br. at 1-2 (citing "violation of Rule 30(b)(6) by providing a witness . . . who had no knowledge of the facts" and statement that the fact the affidavit had been faxed was "'evident when the Affidavit was filed'"), *with* MTD Report at 21-22 (noting "it is proper to prepare a Rule 30(b)(6) witness to testify about information . . . that may not be within the deponent's personal knowledge" and that Mitchell "is a Rule 30(b)(6) witness, and also a human being," and explaining "there is 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").

litigation, despite Plaintiff's Answering Brief having disproven those claims, it does not link those claims to an argument of subjective bad faith, much less a judicial finding on the point. *Compare* Pl.'s Br. at 29-31 (debunking "Calgon's mischaracterization of the record"), *with* Calgon Reply Br. at 7-8 (repeating mischaracterizations without addressing Plaintiff's evidence). Calgon's unsupported hyperbole just highlights the weakness of its position. There is no basis to conclude that fee shifting was (or could have been) based on the bad-faith exception.

And contrary to Calgon's *post hoc* rationalization, the court did not justify fee-shifting based on alternative grounds, like its "inherent authority to police the litigation process." *Compare* Calgon Reply Br. at 35-36, *with* MTD Report at 21-23.[4] Nor had Calgon proffered any basis for fee-shifting other than the bad-faith exception. *See* A1075 (citing only bad-faith exception); B437 (same). Even now, the only authority Calgon offers to support its "inherent power" argument is a portion of a case that addressed dismissal, not fees. Calgon Reply Br. at 35-36 (citing *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 932 (Del. Ch. 2008)). Calgon fails to explain how "inherent" powers could justify fee shifting where the court expressly found Calgon failed to make the showing necessary to invoke the bad-faith exception,

[4] The court invoked its "inherent authority to address misconduct" only to "recommend a remedy targeted at the parties' burdens of proof," by barring Plaintiff from using the Mitchell affidavit or second deposition at trial. MTD Report at 21.

i.e., "clear evidence that the other party acted in subjective bad faith." *Shawe*, 157 A.3d at 149-50; *cf. Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1222 (Del. 2012) (discussing "inherent authority to shift fees," but applying bad-faith litigation standard). To the contrary, Calgon's failure to make that showing meant the court had no authority, "inherent" or otherwise, to shift fees. *See ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 2013 WL 5152295, at *6 (Del. Ch. Sept. 16, 2013) ("Regardless of the theory presented, the party seeking fees must produce 'clear evidence' of the bad faith conduct."). The order shifting fees for the motion to dismiss was plain error.[5]

The court also had no basis to shift fees for Calgon's motion to compel. On that motion, the court simply disregarded the scope of relief Calgon had sought in its motion, and accordingly ignored the fact that Plaintiff's "opposition to the motion was substantially justified." Ct. Ch. R. 37(a)(4)(A). Calgon now concedes that Plaintiff only "mooted part of the motion." Calgon Reply Br. at 37. Before the hearing, Calgon never limited its request to "the documents on which Plaintiff was relying as evidence of wrongdoing," as it now suggests. Calgon Reply Br. at 37. It expressly insisted on "[a]ll documents relating or referring in any way to the issues or facts alleged in the Demand" and "in the Complaint." A502. And its requests specifically

[5] The motion to dismiss fees totaled $61,689.50. B484; B494.

required production from the files of "the named plaintiff and all its attorneys." A496.[6] Plaintiff told Calgon exactly which documents relevant to the allegations were in Plaintiff's possession (B230), and explained that documents in Plaintiff's counsel's possession 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). Nonetheless, Calgon moved to compel production of ***all*** documents responsive to these requests, and of all documents and communications logged as privileged. B242; B246. Then it withdrew its requests when Plaintiff filed a handful of exhibits with its Opening Trial Brief, as Plaintiff had said it would do all along. MTC Transcript at 4-5, 12; B229-30; B322-23; B383-88.

Plaintiff explained at the motion to compel hearing that what Calgon had asked for "was everything in our investigation file. So it wasn't just what we wanted to rely on at trial. They were seeking everything." MTC Transcript at 8; *see also id*. at 7 (noting privilege log was no longer "an issue that we need to discuss"). But the court did not focus on the parts of the motion that were withdrawn, and observed that while it "didn't think that the objections were ***completely*** appropriate," it "sounds like

[6] Thus, "[t]he fact that Plaintiff's counsel viewed its files as being responsive to discovery" demonstrated only that it actually read Calgon's requests, not that counsel "was the real party in interest." *Cf.* Calgon Reply Br. at 37 n.19.

everyone kind of put all that behind us and it's not really worth parsing through all of that." *Id*. at 11 (emphasis added).

In short, the court below did not "pars[e] through" the merits of Plaintiff's objections to most of the discovery Calgon sought through the motion. *Id*. Nor did it even compare the withdrawn parts of the motion to the mooted part of the motion. *Id*. As a result, it failed to consider whether Plaintiff's opposition was "substantially justified." Ct. Ch. R. 37(a)(4)(A). As Plaintiff has explained, Calgon's decision to go from demanding potentially hundreds of documents, including counsel's entire investigative file and all documents on the privilege log, to accepting ten, shows Plaintiff's objections were substantially justified. Shifting fees on the motion to compel was plain error.[7]

[7] The motion to compel fees totaled $63,984.01. B482; B492.

B. The Court Below Abused Its Discretion By Failing to Consider the "Results Obtained" in Assessing the Reasonableness of Calgon's Fee Request

Plaintiff's Opening Brief on Cross-Appeal explained that, under this Court's clear precedent, assessing a fee's reasonableness requires a court "'to consider the factors set forth in the Delaware Lawyers' Rules of Professional Conduct,'" including the "'results obtained.'" Pl.'s Br. at 8-9 (quoting *Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245-47 (Del. 2007)). Plaintiff further explained that the court below abused its discretion by granting full fees expended on a motion to dismiss that was denied, and on a motion to compel the bulk of which was withdrawn, with no apparent analysis of the results obtained. Pl.'s Br. at 60-62.

Calgon responds with inapt cases and with the conjecture that "there is no evidence that the trial court failed to consider the results obtained." Calgon Reply Br. at 39-40. First, Calgon quotes *Aveta Inc. v. Bengoa*, 2010 WL 3221823, at *6 (Del. Ch. Aug. 13, 2010), for the principle that '"[w]hen awarding expenses as a contempt sanction or for bad faith litigation tactics, this Court takes into account the remedial nature of the award."' Calgon Reply Br. at 39. That principle is irrelevant here, where the court below never shifted fees '"as a contempt sanction or for bad faith litigation tactics."' *Id*. Instead, the trial court applied the default rule under Rule 37(a)(4) and then gave Plaintiff the choice to pay fees for a second deposition, which agreement the court subsequently purported to "extend" to the motion to dismiss.

MTC Transcript at 12; B424; MTD Report at 22-23. There is no basis to award more fees than are reasonable based on the "factors set forth in the Delaware Lawyers' Rules of Professional Conduct." *Mahani*, 935 A.2d at 245-47.

Calgon's other case, *In re SS & C Techs., Inc. S'holders Litig.*, 2008 WL 3271242 (Del. Ch. Aug. 8, 2008) (cited in Calgon Reply Br. at 39), supports Plaintiff's position. There, the court reduced a fee request by some 75%, partly because, "while the results achieved in the litigation were positive, the defendants were not entirely successful," which the court found "support[ed] significantly reducing the defendants' fee petition." 2008 WL 3271242, at *5 (citing DLRPC 1.5(a)); *see also In re SS & C Techs., Inc. S'holders Litig.*, 948 A.2d 1140, 1149-50 (Del. Ch. 2008) (fees had been shifted under the bad-faith exception); *Parfi*, 954 A.2d at 943 (DLRPC 1.5(a) provided "the relevant factors" for "determining what fees to award in connection with a discovery sanction").

Second, despite the trial court's failure to analyze the reasonableness of Calgon's fees in light of the results obtained, and despite its obvious failure to adjust the fee request in any way to account for the meager results obtained, Calgon tries to put the onus on Plaintiff to prove a negative, *i.e.*, that the court did not silently consider the results obtained on the two motions. Calgon Reply Br. at 40. But the Fee Order's lack of analysis, or even mention, of the results obtained, and its lack of

adjustment based on that factor, are ample "evidence that the trial court failed to consider the results obtained." *Id.*; *cf. Nixon v. Blackwell*, 626 A.2d 1366, 1378 nn.15 & 16 (Del. 1993) ("This Court has repeatedly cautioned trial courts on the need to supply reasons for their rulings.").

As to the actual "results obtained," Calgon says almost nothing. Its whole argument is as follows: "While Calgon was not successful in getting the case dismissed, it obtained affirmative relief on every motion that it filed." *Id.* Calgon does not explain why obtaining any "affirmative relief," no matter how trivial or how far afield from what it sought, justifies its full requested fees. In reality, as Plaintiff has explained, the relief obtained on both the motion to dismiss and the motion to compel was so limited that it was an abuse of discretion not to reduce the fees accordingly. Pl.'s Br. at 61-62; *see also Mahani*, 935 A.2d at 245-47; *SS & C*, 2008 WL 3271242, at *5. If this Court declines to review or upholds the initial decisions to shift fees on the motion to dismiss and the motion to compel, those fees should be reduced to $8,000 and $5,000, respectively. Pl.'s Br. at 65-66; B508-09.

As to the court's shifting fees for two Jones Day partners' apparently unproductive travel time at their full $987.50 hourly rate, Plaintiff noted the court's failure to "consider whether Calgon 'show[ed] that the [task] could not have been conducted by less costly means.'" Pl.'s Br. at 66 (quoting *All Pro Maids, Inc. v.*

Layton, 2004 WL 3029869, at *6 (Del. Ch. Dec. 20, 2004), *aff'd*, 880 A.2d 1047 (Del. 2005)). Plaintiff also noted the court's failure to ascertain "whether counsel was unable to work on other matters for the entirety of that 41 hours." Pl.'s Br. at 67. Calgon fails to address either point. It observes only that the expenses "were actual costs incurred," and that "there is no prohibition . . . on payment for travel time." Calgon Reply Br. at 41.[8] True, but irrelevant. The question is whether over $40,000 for unproductive travel time was reasonable. *See* B514. By failing even to address whether less costly alternatives were available, whether counsel was or could have been working on other matters, and why a nearly thousand-dollar hourly rate was reasonable for unproductive time, Calgon concedes the unreasonableness of these fees. This $40,487.50 of fees should be reversed or, at least, be halved.

Calgon's final argument is that Plaintiff's proposed reductions to reflect the results obtained on Calgon's mostly-unsuccessful motions are "absurd and reflect . . . bad faith," in light of Plaintiff's "counsel's offer to settle the fee petition for $125,000." Calgon Reply Br. at 41-42. This over-the-top argument, too, fails. A party's willingness to settle a dispute at roughly the midpoint between what it believes

[8] Calgon also incorrectly claims that Plaintiff offers only "a citation to cases interpreting 10 *Del. C.* § 8906." Calgon Reply Br. at 41. Plaintiff cited three cases, two of which do not even mention that statute, as well as an ABA ethics opinion and law review article collecting other cases, which do not mention that statute. Pl.'s Br. at 63-64.

to be the correct amount and what the counterparty has requested reflects good-faith willingness to compromise – a positive trait, which, if considered, should be encouraged. Nor does Calgon address an obvious motivation in making the offer, avoidance of the costs of further litigation about the issue. Regardless, the Delaware Rules of Evidence are clear that this offer of "valuable consideration in order to compromise" a disputed claim is "not admissible on behalf of any party either to prove or disprove the validity or amount of" the claim. D.R.E. 408(a).[9]

[9] That Plaintiff, below, filed the letter containing this offer, referring to it only as containing an "inquiry" as to Calgon's total fees for the case (B504), is irrelevant. Rule 408 is not a blanket confidentiality restriction or privilege, and disclosing an offer for a different purpose does not waive protections against its use to prove the validity or amount of a disputed claim. *See, e.g.*, *Alpex Comput. Corp. v. Nintendo Co., Ltd.*, 770 F. Supp. 161, 166 (S.D.N.Y. 1991) (applying similar federal rule).

III. CONCLUSION

For these reasons, and those set forth in Plaintiff's Answering Brief on Appeal and Opening Brief on Cross-Appeal, the trial court's orders shifting fees should be reversed. Calgon is entitled to no fees on the motion to dismiss or the motion to compel, and no more than half of its travel-time fees, in addition to the $31,310.43 that Plaintiff has not challenged on cross-appeal related to its agreement to pay for the second deposition and as to which the court below exercised its discretion.

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