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IN THE SUPREME COURT OF THE STATE OF DELAWARE

YOUNG MIN BAN Plaintiff Below, Appellant/Cross- Appellee, v. JOSEPH P. MANHEIM, DELAWARE VALLEY REGIONAL CENTER, and WEST 36TH, INC., Defendants Below, Appellees/Cross- Appellants	)	No. 19,2026 Court Below: Court of Chancery of the State of Delaware C.A. No. 2022-0768-JTL (Consolidated Lead Case)

APPELLEES' CROSS-APPEAL REPLY BRIEF

PRICKETT, JONES & ELLIOTT, P.A.
Bruce E. Jameson (No. 2931)
Kevin H. Davenport (No. 5327)
John G. Day (No. 6023)
1310 N. King Street
Wilmington, Delaware 19801
(302) 888-6500
bejameson@prickett.com
khdavenport@prickett.com
jgday@prickett.com

Attorneys for Joseph P. Manheim, Delaware Valley Regional Center, and West 36th, Inc.

OF COUNSEL:

Joshua K. Bromberg
KLEINBERG, KAPLAN,
WOLFF & COHEN, P.C.
500 Fifth Avenue
New York, NY 10110
(212) 986-6000

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I. PLAINTIFF WAIVED HIS RIGHT TO SEEK LEGAL FEES.

In their opening brief, defendants argued and cited legal authority that holds that a party may waive its right to seek attorneys' fees under the bad faith exception where that party fails to raise the issue in its pleadings, trial briefs, or the pretrial stipulation and order.[1] Ban does not cite any legal authority that contradicts that authority. He also does not cite any legal authority that even discusses waiver.

Instead, Ban cites *In re Rural Metro Corp*.[2] to assert that "a court may consider a fee application after entry of a final judgment."[3] Defendants do not contest that a court may consider a fee application after issuance of a post-trial opinion where that issue has been preserved and not waived. Therefore, Ban's legal citations provide no guidance on the issue at hand: whether Ban waived his right to seek fees.

Further, the facts from *In re Rural Metro Corp.* are not analogous to the issue here because that case involved a fee request after trial that was based on conduct

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[1] Appellees' Answering/Opening Brief at 45-46 & n.135. Defined terms from Appellees Answering/Opening Brief are used herein.

[2] *In re Rural Metro Corp.*, 88 A.3d 54, 110 (Del. Ch. 2014), *aff'd sub nom, RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015).

[3] Appellants Reply/Answering Brief at 28. Ban's articulation of the issue is incorrect as here the fee application was presented after issuance of the Post-Trial Opinion but before entry of the final judgment. In their discussion, defendants treat the issue as whether the fee application was appropriately raised after trial.

that occurred during the litigation. Here, the question is whether a post-trial fee request may be made based upon pre-litigation conduct but not raised for the first time until after trial. In *Rural Metro*, the Court of Chancery in its post-trial opinion determined liability, but then directed the parties to provide revised expert submissions and further briefing regarding a contribution defense. The court then stated that: "The plaintiffs have asked for fee-shifting under the American Rule in light of the strained testimony provided by RBC's witnesses at trial and the extensive conflicts between the evidentiary record and the assertions in RBC's pre-trial briefs."[4] The court noted that RBC's pre-trial brief and a pre-trial letter to the court "contrasted sharply with the evidence at trial" and granted the plaintiff leave to seek fee shifting based upon those conflicting positions, along with its common-fund fee application, after damages were determined.[5]

In re Rural Metro Corp. is not helpful in analyzing the current question because the fee application there was not based on pre-litigation conduct. Rather, the fee request was premised on conduct that occurred during the litigation and at trial. Here, the Court of Chancery based its award of fees solely on pre-litigation

[4] *Rural Metro*, 88 A.3d at 109.

[5] *Id.* at 109–10.

conduct, and defendants were entitled to fair notice of that claim so that they could address it at trial.

Ban argues that the lower court's finding that it was more efficient to address fees after the court issued its Post-Trial Opinion supports its conclusion that there was no waiver.[6] Efficiency cannot trump due process. Where a party's pre-litigation conduct is asserted as a basis for fee shifting, that party must have fair notice and an opportunity to present evidence at trial that its conduct did not meet the "subjective bad faith" or "unusually deplorable behavior" standard that would support an award of legal fees pursuant to the bad faith exception to the American Rule.[7] As the lower court noted, the trial focused on damages, and, as defendants explained, that was reasonable given that Ban ultimately sought only money damages based upon the value of his former indirect interest in DVRC.[8] Because defendants did not know that legal fees were being sought based upon their prelitigation conduct, they had no reason to structure their evidentiary presentations to address that issue.

The efficiency argument cuts both ways. While the lower court is right that sometimes it may be more efficient to defer briefing and consideration of legal fees until after a final ruling on the merits, it is also true that where the parties have both

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[6] Appellant's Reply/Answering Brief at 29.

[7] *See* Appellees' Answering/Opening Brief at 51.

[8] *Id*.

effectively presented a trial on damages only, it would be inefficient for parties to then expend party and court resources presenting evidence about the nature of the prelitigation conduct. The question before this Court is not when legal fees must be briefed. The question before the Court is when notice must be given of a claim for fees based on prelitigation conduct so that a party has a fair opportunity to create an appropriate record at trial.

For example, had defendants been afforded proper notice, they would have had the opportunity to build a more fully developed record on the reasons behind the WestCo Call Right and the Penfold Redemption, or presented a more fully developed defense to liability based on, for example, the advice of the four separate law firms. Defendants also could have put on additional evidence about the settlement proposals that had been presented to Ban and Ban's unreasonable unwillingness to engage in realistic discussions.[9] Because those communications were part of settlement communications between counsel and there was no claim asserted seeking damages based on Manheim's subjective bad faith, defendants instead chose to address only an isolated email that Ban submitted as a trial exhibit to misleadingly claim that Ban attempted to negotiate with Manheim but was ignored. Ban submits that "presumably, Manheim chose not to present any such

[9] *See, e.g.*, A819–21 and A923–25.

evidence because he did not have any evidence to contest his liability or refute Plaintiff's evidence that Manheim repeatedly engaged in bad faith conduct," but that argument presupposes its conclusion. Manheim's decision to "largely punt on liability" and focus on damages (because, as he testified, he had every intention of paying Ban the fair value of his interests) saved considerable resources of the parties and the Court, but is now characterized by Ban as evidence of bad faith.

As Ban acknowledges, determining whether a party's conduct warrants fee shifting under the bad faith exception is a "fact-intensive inquiry."[10] Such an inquiry cannot occur where a party (i) does not know that the bad faith exception is being asserted, (ii) does not know what conduct the plaintiff contends supports a finding of bad faith, and (iii) has not been afforded a fair opportunity to make a complete factual record. Recognizing these realities, Delaware courts correctly have held that a party will waive a claim for legal fees under the bad faith exception when that claim is not fairly and timely raised.[11] This record clearly demonstrates that Ban

[10] Appellant's Reply/Answering Brief at 31 (citing *Auriga Cap. Corp. v. Gatz Props.*, 40 A.3d 839, 880–81 (Del. Ch. 2012), *aff'd*, 59 A.3d 1206 (Del. 2012)).

[11] *See, e.g.*, *In re Mobilactive Media, LLC*, 2013 WL 1900997, at *6 (Del. Ch. May 8, 2013) ("Importantly, however, Bienstock failed to provide notice of his request for such a remedy or damages. Bienstock did not seek attorneys' fees in his Complaint, the Joint Pretrial Stipulation and Order, his pre-trial briefs, or his post-trial briefs. As a result, it is now too late for Bienstock to make a request for attorneys' fees under the American Rule, and any such request has been waived.").

waived any claim for legal fees based on the bad faith exception to the American Rule by not timely raising it. As a result, the lower court abused its discretion when it awarded fees and its ruling should be reversed.

II. THE LOWER COURT ERRED AS A MATTER OF LAW IN AWARDING FEES BASED ON PRE-LITIGATION CONDUCT.

Ban contends that defendants misapprehended *RBC*.[12] They did not. While defendants agree that RBC involved post-litigation conduct, its articulation of the legal standard is the most recent pronouncement of that standard by this Court that quotes two prior Supreme Court decisions.

Ban next asserts that the fees could be awarded under the third exception stated by *Scion*, that "the action giving rise to the suit involved bad faith, fraud, 'conduct that was totally unjustified, or the like."[13] Neither *Scion* nor *Barrows v. Bown*, the case on which *Scion* relies for that principle, awarded fees based on that exception.[14] Likewise, this Court in *Weinberg v. U.O.P.* (cited by *Barrows*) declined to grant fees under that exception despite its findings that the defendant had treated minority stockholders unfairly and breached its fiduciary duty in a manner that was not minor or technical.[15] The only case that Ban cites where the *Scion* exception was applied to award legal fees based on prelitigation conduct is *Star America Rail*

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[12] Appellant's Reply/Answering Brief at 32.

[13] *Id.* at 32–33.

[14] *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 687 (Del. 2013); *Barrows v. Bown*, 1994 WL 514868 (Del. Ch. Sept. 7, 1994).

[15] *Weinberger v. U.O.P., Inc.*, 517 A.2d 653 (Del. Ch. 1986); *Hutchinson v. Fish Eng'g Corp.*, 204 A.2d 752, 753 (Del. Ch. 1964), *aff'd*, 213 A.2d 447 (Del. 1965).

HoldCo, LLC v. Cathcart,[16] but that case involved a finding of significant misconduct during the litigation in addition to the defendants' deliberate creation of falsely inflated financial statements, and assertion of false representations that those financial statements had been reviewed and blessed by the company's creditors.[17]

In *Barrows*, Chancellor Allen considered the third *Scion* exception and declined to award legal fees despite acknowledging that the defendants "struck a notably beneficial deal with two elderly persons, one of whom was incompetent."[18] That ruling is consistent with the Court's articulation of the exception and caution that it should be applied in only the rarest of circumstances that involve "unusually deplorable behavior."

> While this court can imagine situations which may be so egregious as to warrant an award of attorney's fees on the basis of fraud, the American Rule would be eviscerated if every decision holding defendants liable for fraud or the like also awarded attorney's fees. Even more harmful would be to extend this narrow exception to situations involving less than unusually deplorable behavior.[19]

[16] 2024 WL 5239938, at *10 (Del. Ch. Dec. 17, 2024).

[17] *Id.* at *11.

[18] *Barrows*, 1994 WL 514868, at *2.

[19] *Id.*

Barrows cited *H & H Brand Farms, Inc. v. Simpler*[20] as the basis for its articulation of the legal standard that ultimately became the third *Scion* exception. However, in *H & H*, the Court of Chancery relied on 10 *Del. C.* § 5106, which governs costs, as the basis of its authority to award legal fees.[21] As defendants discussed in their opening brief, this Court in *Scion* clarified that 10 *Del. C.* § 5106 is not a basis for awarding legal fees.[22] Thus, the Court of Chancery's award of fees in *H & H Brand Farms* was, itself, premised on legally erroneous grounds.

In short, neither the Court of Chancery nor Ban has identified any case in which the third *Scion* exception has provided the basis for an award of legal fees under the bad faith exception to the American Rule based solely on pre-litigation conduct. And, defendants are aware of none. The lack of any such precedent is powerful evidence of how rarely it is viable.

The third exception in *Scion* can be reconciled with the legal standard in *RBC*. *Barrows* and *Scion* both recognize that an award of fees based on "totally unjustified" prelitigation conduct is authorized because the "attorney's fees are

[20] 1994 WL 374308 (Del. Ch. June 10, 1994).

[21] *Id.* at *5 ("I find also that plaintiff is entitled to attorney fees. This Court has authority to award attorney fees as equity so requires. 10 *Del. C.* § 5106.").

[22] Appellees' Answering/Opening Brief at 50.

considered an appropriate part of damages."[23] That means that where a party pleads (i) a substantive claim, and (ii) that the conduct supporting that substantive claim is so glaringly egregious or deplorable that it supports awarding legal fees as part of the plaintiff's damages, then prelitigation conduct can support an award of fees under the bad faith exception. The *Scion* exception differs from *RBC* in that the relevant conduct necessary to support the exception is part of the conduct that supports the underlying claims themselves, and the specific nature of that conduct supports a claim of bad faith sufficient to support an award of attorneys' fees that can be pled as part of a plaintiff's damages. In contrast, the conduct relevant to an *RBC* analysis occurs post-litigation, which necessarily means it cannot form the basis of a plaintiff's original claim for damages. Because such *Scion*-based claims for legal fees must be explicitly tied to conduct supporting a substantive claim pled in the complaint, they must be specifically pled by plaintiff as the basis for his damages. *RBC*-based awards, on the other hand, are essentially a sanction for litigation misconduct, rather than a substantive claim. *Scion*-based damages can logically be characterized as special damages which must be "specifically stated" in a pleading pursuant to Court of Chancery Rule 9(g). The failure of Ban to plead

[23] *Scion*, 68 A.3d at 687 (quoting *Barrows*, 1994 WL 514868, at *1).

such damages prior to trial circles back to defendants' first argument that they were waived.

Ban's argument that Manheim defended the lawsuit in bad faith lacks merit.[24] First, the Court of Chancery made no finding of bad faith litigation conduct. Its award of fees was premised solely on Manheim's pre-litigation conduct.[25]

Second, *RBC* confirms that the level of litigation-related conduct that must be shown to support the bad faith exception must be far beyond anything supported by the record here. The exception applies "only in extraordinary cases, and the party seeking to invoke that exception must demonstrate by clear evidence that the party from whom fees are sought … acted in subjective bad faith."[26] This was a typical dispute over the value of a minority ownership interest in a Delaware entity. These types of disputes are regularly seen in this Court, and the facts underlying this dispute are not meaningfully distinguishable from the thousands of disputes that the Delaware courts have heard over the past five decades, from when the foundational version of Delaware's current General Corporation Law was adopted in 1967. If this case justifies an award of legal fees under the bad faith exception, then the exception may well swallow the American Rule going forward.

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[24] Appellant's Reply/Answering Brief at 33–34.

[25] Fee Order ¶ 4.

[26] *RBC,* 129 A.3d at 877 (citations omitted).

Ban lists a series of one-sentence facts without citation in support of his assertion that "there is ample evidence in the record to support that Manheim defended the lawsuit in bad faith."[27] Defendants have already explained at length why Manheim's actions and positions in the litigation were reasonable.[28] If any party can be accused of bad faith litigation conduct, it is Ban for his belated submission of a "supplemental" expert report on damages premised on projections Ban created, but belatedly produced, that increased his damages claim by approximately 2.5 times.[29] Manheim and the other defendants had every right to resist Ban's claims for unreasonable value for his interests, both before and during the litigation. The assertion of positions in litigation, even if they are aggressive,

[27] Appellant's Reply/Answering Brief at 33–34.

[28] Appellees' Answering/Opening Brief at 53–59, 61–62.

[29] *See* Appellant's Answering/Opening Brief at 15–16; Fee Order ¶ 11 ("Ban also seeks reimbursement of $116,524.77 paid to Asterion Consulting and $46,141.19 paid to Wonjoon Kang. 'Although the Court's reliance upon the expert's testimony is not a prerequisite to an award of expert witness fees, the expert's opinion must, nonetheless, be 'helpful to the Court….' Rather than providing a helpful report, he provided 'completely new inputs in a supplemental expert report.' Op. at 82. That did not help anyone, and it forced Mannheim to expend additional resources responding to the belatedly introduced opinions. The court will not award those amounts.").

will not and should not support a bad faith shifting of fees.[30] Here, defendants' position at trial was not even aggressive; it was reasonable.

As the lower Court acknowledged, Delaware law permits the freeze out of minority equity holders. Thus, the result of defendants' actions was legally permissible even if the method used was found to be inadequate. And, defendants' positions on damages were eminently reasonable as demonstrated by the fact that the ultimate amount awarded by the lower court was within $5 million of the amount that defendants had already set aside for Ban, but $20 million less than Ban's valuation and $30 million less than Ban's total damage demand.[31]

[30] *See RBC*, 129 A.3d at 878 (affirming denial of attorneys' fees under bad faith exception despite trial court's finding that party's actions were "aggressive" and "problematic.").

[31] Appellees' Answering/Opening Brief at 54–55.

III. EVEN IF THE LOWER COURT APPLIED THE RIGHT LEGAL STANDARD, IT ABUSED ITS DISCRETION IN AWARDING FEES BECAUSE THE RECORD DOES NOT SUPPORT A FINDING OF GLARINGLY EGREGIOUS CONDUCT BY MANHEIM.

A. The Cases cite by Appellant are Inapposite.

Ban relies on *William Penn P'ship v. Saliba*[32] to argue that fees should be awarded because the lower court found a breach of the fiduciary duty of loyalty.[33] *Saliba* is distinguishable because in it, despite finding a breach of the duty of loyalty, the Court of Chancery did not award damages. Although the property at issue was sold in a conflicted transaction that was not entirely fair, the Court of Chancery found the sale price was more than the property's value as determined by the valuation experts.[34] Likewise, in *Cantor Fitzgerald,* the Court awarded attorneys' fees as damages because "[a]ny attempt to express [the] damages by a sum certain would have required the Court to engage in near speculation."[35] Thus, the Court awarded attorneys' fees in those cases as substituted damages where the plaintiff proved a fiduciary breach but, absent an attorneys' fees award, would receive nothing. Here, the lower court calculated and awarded Appellant damages of $6,898,612, which

[32] 13 A.3d 749, 756 (Del. 2011).

[33] Appellant's Reply/Answering Brief at 35.

[34] *Saliba*, 13 A.3d at 756.

[35] *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *3 (Del. Ch. May 11, 2001).

when interest is added, climbs to over $9 million, and the principal amount of that damage award has already been paid to Ban. Thus, there is no need or basis to find or award substituted damages by an award of legal fees.

To the extent Ban relies on the *Disney*[36] decision as authority for the definition of bad faith, defendants' opening brief explained that "bad faith" sufficient to establish a breach of fiduciary duty differs from the "bad faith" that is necessary to support an award of attorneys' fees.[37]

Defendants' opening brief also addressed *Straight Path*,[38] where the Court of Chancery declined to award fees despite a finding of breach of fiduciary duty and acknowledged, but did not address, the potential impediment *RBC* posed to the Court's ability to award fees based on prelitigation conduct because it was not necessary to the court's decision.[39] *Straight Path* was also a class action implicating, potentially, the common benefit doctrine. Accordingly, its analysis is not helpful to addressing the issues here.

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[36] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27 (Del. 2006).

[37] Appellees' Answering/Opening Brief at 60–61.

[38] *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2024 WL 4602914 (Del. Ch. Oct. 29, 2024).

[39] Appellees' Answering/Opening Brief at 52–53.

B. There is No Record Support for a Finding of Egregious Conduct.

Defendants have already explained why the record does not support a finding of egregious conduct sufficient to support an award of attorneys' fees and relies on and will not repeat those arguments here.[40] This was a garden-variety dispute between a majority and minority member and stockholder of the type regularly seen by the Delaware courts.

Ban first contends that Manheim's repurchase of Ban's interest was self-interested.[41] That is true of every transaction where a majority partner or stockholder unilaterally causes the buyout of a minority. But such minority buyouts are permitted under Delaware law, subject to the recognition that they must be fair. The fact that any transaction is interested, alone, cannot establish egregious behavior necessary to qualify as an exception to the American Rule, or every minority freeze-out transaction would require fee shifting. That is not the law in Delaware. Instead, this Court has long held a transaction is not wrongful or invalid simply because the purpose is to eliminate minority stockholders.[42]

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[40] *Id.* at 50–62.

[41] Appellant's Reply/Answering Brief at 36.

[42] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) (overruling caselaw holding that the freeze-out transaction should have a business purpose and not be aimed at eliminating minority ownership).

Further, Manheim's actions, when viewed in the context of the overall situation as it existed at the time of the underlying events, were reasonable and taken in good faith.

- The Reform Act created real risk for DVRC as the lower court acknowledged.[43]
- Manheim and the other WestCo directors consulted with legal and financial advisors regarding the nature of that risk, after which all WestCo directors were unwilling to sign the required certification that DVRC was in compliance with the Reform Act so long as Penfold retained its interest.[44]
- The risk DVRC faced from its over one thousand investors if DVRC lost its certification as a result of any violation of the Reform Act was significant.[45]
- The only tool available for WestCo to unilaterally deal with that risk was the MAE Clause of the Fourth LLC Agreement, and that clause

[43] Post-Trial Opinion, 339 A.3d at 55. *See also Bamford v. Penfold*, 2022 WL 2278867, at *10, 14 (June 24, 2022) (noting steps proactively taken to try to address the risk of potential federal legislation).

[44] Appellees' Answering/Opening Brief at 56–57.

[45] *Id.* at 57.

permitted only a redemption of Penfold's interest as a whole, not the individual limited partners of Penfold.[46]

- The Penfold Limited Partnership Agreement, which Manheim had believed governed Penfold, was invalidated in the Penfold Action. Because the risk that regulations would be adopted prohibiting foreign ownership had existed for many years, that limited partnership agreement had contained a provision that would have permitted the redemption of an individual limited partner.[47] In the absence of a written limited partnership agreement, Penfold was governed by the Delaware Revised Limited Partnership statute, which provides no mechanism for redeeming a single limited partner.
- Ban was notoriously difficult to negotiate with, shifted positions and would not meaningfully engage.[48]
- Ban had previously been terminated for misconduct that created business risks for DVRC and had since been working with competing EB-5 entities.[49]

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[46] *Id.* at 11–12, 57.

[47] *Id.*

[48] *Id.* at 54 n.153

[49] *Bamford*, 2022 WL 2278867, at *22.

- The foundational relationship that led to Ban's receipt of equity had fundamentally changed in that Ban was no longer involved in operating DVRC, which is a small private company.[50]
- WestCo, as DVRC's manager, valued Ban's interest at over $1.6 million in accordance with the documents it believed governed the relevant entities, and set that money aside for Ban. That amount, while lower than the fair value ultimately determined by the Court, was much closer to the $6,898,612 that the Court set, than the $24 million that Ban claimed his interest was worth.

Ban's assertions that Manheim disregarded the Court of Chancery's holding in the Penfold Litigation by relying on the Fourth LLC Agreement ignores the court's actual findings.[51] The Court of Chancery specifically declined to reach the issue of whether the Fourth LLC Agreement, as a whole, was invalid because it was unnecessary. But, the Vice Chancellor noted that the analysis, if undertaken, would be complicated given the temporal proximity requirement set forth in this Court's *TripAdvisor* decision.[52] By declining to address that issue and acknowledging that

[50] Appellees' Answering/Opening Brief at 55.

[51] Appellant's Reply/Answering Brief at 38–39.

[52] Post-Trial Opinion, 339 A.3d at 64 n.62, 70 n.89.

analysis of that issue, if undertaken, would be complex, the Court of Chancery acknowledged that the validity of the Fourth LLC Agreement remained an open issue.[53] Ban's argument to the contrary has no merit.

Ban's assertion that Manheim asserted frivolous claims is contradicted by the lower court's rulings.[54] The Court of Chancery never characterized any of the positions that Manheim asserted as frivolous. Instead, the court found "Manheim largely punted on the issue of liability, choosing to fight on the issue of damages." On that issue—damages—the court sided closer to Manheim than Ban. Further, the Court noted that "the record presents a fact finder with many challenges," was critical of both parties' practices and credibility at times, and ultimately issued a post-trial opinion that "comprise[d] the court's factual findings by a preponderance of the evidence."[55]

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[53] The Court's decision here is consistent with the Court of Chancery's ruling in the Penfold Action, where its ruling regarding the Fourth LLC Agreement was limited to invalidating the exculpatory provision as to the acts at issue in that litigation, but did not address any part of the Agreement beyond the Exculpatory Provision. *Bamford*, 2022 WL 2278867, at *33 ("The adoption of the *Exculpatory Provision* was itself a self-interested act, and it is invalid because Manheim failed to prove that the implementation of the *Exculpatory Provision* was entirely fair.") (emphasis added).

[54] Appellant's Reply/Answering Brief at 40.

[55] Post-Trial Opinion, 339 A.3d at 52.

Critically, in the Post-Trial Opinion, when the court evaluated Manheim's pre-litigation conduct, it never characterized Manheim's conduct as egregious or in any similar way. Only later, in the Fee Order, did the Court of Chancery characterize Manheim's actions as in "bad faith," despite never having done so in its Post-Trial Opinion.[56] That further substantiates defendants' contention that during trial, neither the parties nor the court understood that the degree of Manheim's pre-litigation conduct, and whether it was sufficiently egregious to support the bad-faith exception to the American Rule, was at issue. As a result, Manheim had no notice of or fair opportunity to address such claims.

Ban's reliance on Manheim's alleged failure to pay the final judgment from the Penfold Action was already addressed in defendants' Answering/Opening Brief.[57] That anticipated judgment, which had not yet been entered at the time of actions implementing the buyout of Ban, was reflected as a receivable on DVRC's books, and its value was included in calculating the $1,668,414.20 that Penfold set aside for Ban. At trial below, the amount was also included in both experts' damages

[56] Fee Order ¶4, 7.f. Even then, the Court did not make findings of egregious or deplorable behavior by Manheim. Instead, it simply found that his conduct constituted bad faith sufficient to support the exception.

[57] Appellant's Reply/Answering Brief at 41.

models and therefore the ultimate amount of fair value determined by the Court of Chancery.[58]

Ban's assertion that Manheim did not respond directly to an invitation from Ban to discuss a buyout ignores the record.[59] As Manheim noted, the parties were already engaged in litigation and communications regarding settlement were occurring through the parties' lawyers.[60] And, as already noted in defendants' brief, Manheim had been consistently frustrated in his efforts to get Ban to meaningfully engage in settlement negotiations since 2018.[61]

[58] Appellees' Answering/Opening Brief at 55.

[59]Defendants note that the citation contained in footnote 153 of their Answering/Opening brief to pages A389–90 was incorrect. The correct citation is to A821–22 (which are pages 390–91 of the trial transcript).

[60] A975.

[61] Appellees' Answering/Opening Brief at 54.

CONCLUSION

Prior to trial, Ban never asserted any claim for legal fees based on the bad faith exception to the American Rule or any pre-litigation conduct of the defendants. As a result, defendants were afforded no notice of the necessity of developing a record on whether defendants' conduct could be deemed egregious or deplorable to a degree sufficient to support an exception to the American Rule. In its Post-Trial Opinion, the Court of Chancery made no finding of, or suggestion that, the defendants' pre-litigation conduct was so egregious or deplorable as to support a claim for attorneys' fees under the bad faith exception to the American Rule. In allowing Ban to seek fees after issuance of the Post-Trial Opinion, the Court of Chancery abused its discretion when it determined that Ban had not waived that claim by his failure to raise it before trial.

The Court of Chancery also erred by applying the wrong legal standard in addressing when pre-litigation conduct can support the bad-faith exception to the American Rule.

Finally, even if the Court of Chancery applied the correct legal standard, the factual record does not support a finding that Manheim's pre-litigation conduct was sufficiently egregious to support the bad faith exception to the American Rule, which Delaware law provides is to be applied only in extraordinary cases where the requesting party demonstrates by clear evidence that the other party acted in

subjective bad faith. As a result, the Court of Chancery abused its discretion when it determined that Manheim's pre-litigation conduct constituted bad faith sufficient to support an exception to the American rule. For all these reasons, the Court of Chancery's award of legal fees should be reversed.

PRICKETT, JONES & ELLIOTT, P.A.

/s/ Bruce E. Jameson
Bruce E. Jameson (No. 2931)
Kevin H. Davenport (No. 5327)
John G. Day (No. 6023)
1310 N. King Street
Wilmington, Delaware 19801
(302) 888-6500
bejameson@prickett.com
khdavenport@prickett.com
jgday@prickett.com

Attorneys for Joseph P. Manheim, Delaware Valley Regional Center, and West 36th, Inc.

OF COUNSEL:

Joshua K. Bromberg
KLEINBERG, KAPLAN, WOLFF & COHEN, P.C.
500 Fifth Avenue
New York, NY 10110
(212) 986-6000

Dated: May 4, 2026

CERTIFICATE OF SERVICE

I, Bruce E. Jameson, hereby certify on this 4th day of May, 2026, that I caused a copy of the foregoing *Appellee's Cross-Appeal Reply Brief* to be served by eFiling via File & ServeXpress upon the following counsel of record:

Jeffrey S, Cianciulli, Esq.
WEIR LLP
1204 N. King Street
Wilmington, DE 19801

/s/ Bruce E. Jameson
Bruce E. Jameson (No. 2931)