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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CANTOR FITZGERALD, L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 16297
	)	
IRIS CANTOR, et al.,	)	
	)	
Defendants.	)	
----------	X	
IRIS CANTOR and CANTOR FITZGERALD INCORPORATED,	)	
	)	
Third-Party Plaintiffs,	)	
	)	
v.	)	
	)	
CANTOR FITZGERALD GROUP MANAGEMENT, INC.,	)	
	)	
Third-Party Defendant.	)	

Submitted: April 17,200l
Decided: May 11,200l

MEMORAND UM OPINION

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Stephen E. Jenkins and Richard LG. Jones, Jr. of Ashby & Geddes, Wilmington, Delaware. OF COUNSEL: Barry I. Slotnick and Michael Shapiro of Slotnick, Shapiro & Crocker, LLP, New York, New York; Saul B. Shapiro of Patterson, Belknap, Webb &Tyler LLP, New York, New York; Jack C. Auspitz and Howard E. Heiss of Morrison & Foerster LLP, New York, New York. Attorneys for Defendants.

STEELE, Justice (by designation)

Presently before this Court are the post-trial motions of both the plaintiff and the defendants.[1] On March 13, 2000, this Court rendered its decision in this case in a lengthy opinion ("March decision").[2] That opinion contains a full discussion of the facts and prior procedural history of this action. For that reason, those matters will only be discussed in this opinion as they are necessary to the discussion and analysis of the merits of the motions.

In the March decision, the Court decided a number of issues. Pertinent to the present motions was the Court's ruling that the defendants, as limited partners in a limited partnership, owed the plaintiff contractually-created duties of loyalty. Moreover, the Court ultimately ruled that the defendants, in operating a competing business venture, committed an "egregious breach of the partnership agreement" that violated their duty of loyalty to the partnership.[3] To remedy this breach of the partnership agreement and the duty of loyalty, the Court granted the plaintiff certain declaratory relief and an award of damages measured by the

[1] For simplicity, where I refer to the "plaintiff," I mean Cantor Fitzgerald L.P. Where I refer to "defendants," I mean Iris Cantor, Cantor Fitzgerald, Inc., Market Data Corp., and Rodney Fisher.

[2] ***See Cantor Fitzgerald, L.P. v. Cantor,*** Del. Ch., C.A. No. 16297, Steele, V.C. (March 13, 2000) (Mem. Op.).

[3] ***Id.*** at 3.

amount of money spent by the plaintiff to seek judicial redress for harm caused by the breach.[4] The present motions relate to the Court's award of monetary damages predicated upon attorneys' fees and expenses incurred in the course of litigation related to -redress of that harm.

On March 24, 2000, the defendants, challenging the Court's monetary award of damages, tiled a motion pursuant to Court of Chancery Rules 59(a) and (e) and Rule 60(b) seeking either a new trial, an amended judgment, or relief from a judgment or order. On April 6, 2000, the plaintiff tiled its application for redress of harm that set its outlay for attorneys' fees and expenses at $11,105,380. All motions were fully briefed and oral argument was heard. on June 14, 2000.[5] The defendants' motions will be addressed first and then the plaintiffs. For the reasons discussed below, the defendants' motions are denied and the plaintiff's application is granted in accordance with the March decision.

I. Defendants' Motions under Rule 59.

The defendants have moved for relief from the Court's award of a monetary judgment under various provisions of Court of Chancery Rules 59

[4] ***Id.***
'Other disputes between the parties and circumstances beyond their control have unfortunately delayed resolution of this issue for some time.

and 60. In general, Rule 59 provides a mechanism for a new trial and Rule 60 provides relief from a judgment or order. Rule 59(a) provides that:

> A new trial may be granted to all or any of the parties, and on all or part of the issues for any of the reasons for which rehearings have heretofore been granted in suits in equity. The Court may open the judgment, if one has been entered, take additional testimony, amend or make new factual findings and legal conclusions, and direct the entry of a new judgment.

Rule 59(e), however, provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Finally, Rule 60(b) provides relief from a judgment or order because of "mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc."[6]

Consideration of these motions is complicated by the fact that the Court naively assumed that the parties could confer and agree on a declaratory judgment order and has, therefore, not issued a final order in this case. Thus, the requirements for Rule 60(b) are not satisfied and the defendants are not entitled to relief under that rule.' For the same reasons, the requirements for a motion under rule 59(e) are, likewise, unmet.[8]

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[6] Court of Chancery Rule 60(b).

[7] The "Court may relieve a party . . .from a final judgment [or] order . . . ." Court of Chancery Rule 60(b).

[8] Rule 59(e) is a motion to "alter or amend *a judgment."* The Court of Chancery Rules define a judgment as "any order from which an appeal lies." Court of Chancery Rule 54(a). See *also* Court of Chancery Rule 58 ('The order of the Court shall constitute the judgment of the Court.").

Because "the manifest purpose of all Rule 59 motions is to afford the Trial Court an opportunity to correct errors prior to appeal,"" the Court agrees that the defendants' motions are properly considered under Rule 59. However, as the defendants seek reconsideration of the Trial Court's findings of fact and/or conclusions of law, it is more properly considered a motion for reargument under Rule 59(f).[10] For these reasons, the **Court** will evaluate the defendants' motions under the standards applicable for Rules 59(a) and (f).[11]

As noted above, the Court may grant a new trial under Rule 59(a) for "any of the reasons for which hearings have heretofore been granted in suits of equity."[12] In ruling on such a motion, the Court is charged with exercising, the "judicial discretion of the Court so that injustice may be

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[9] ***Eisenmann Corp. v. General Motors Corp.,*** Del. Super., CA. No. 99C-07-260, Quillen, J. (Feb. 24, 2000) Let. Op. and Order **al.** 1.

[10] ***See id.***

[11] The Court recognizes that the defendants motions may 'have been tiled more than five days after "the filing of the Court's opinion or the receipt of the Court's decision." Court of Chancery Rule 59(f). The defendants, in their motion, requested that, should the Court find that Rule 59(f) is more appropriate, the time for the motion be enlarged pursuant to Court of Chancery Rule 6(b). See Defendants' Motion Pursuant to Rules 59(a) and (e) and 60(b) at n. 1 (Mar. 24, 2000). I find that the defendants have met the requirements of Rule 6(b) because their conduct is even more benign than "excusable neglect." There was a legitimate argument that other provisions of Rule 59 applied and the defendants chose to proceed under those provisions. Moreover, enlarging the time for a motion for reargument by several days does not prejudice the plaintiff. For these reasons, the defendants' request to enlarge the time for a motion under Rule 59(f) is granted.

[12] Court of Chancery Rule 59(a).

prevented . . . ."[13] The standard for a motion for reargument under Rule 59(f) is slightly different. The Court will generally deny a motion for reargument "unless the Court has overlooked a 'decision or principal of law that would have controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected."[14]

ANALYSIS

The defendants argue that the Court improperly awarded the plaintiff its attorneys' fees as the prevailing party. Specifically, they argue that the parties never presented argument on the -issue of fees and that the issue was never properly raised before the Court for consideration. More importantly, however, they direct the Court's attention to a provision in the partnership agreement that they allege proscribes an award of attorneys' fees in this case. Thus, they argue, the Court misapprehended both the facts and the resulting rule of law and that they should. be granted either a new trial or an opportunity to reargue the issue of attorneys' fees.

The plaintiff, however, argues that the Court's March decision did not order "fee-shifting" in the traditional sense, but, rather, it found that the plaintiff bad been damaged by the defendants' behavior, and the most

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[13] ***Daniel D. Rappa, Inc. v. Hanson,*** Del. Supr., 209 A.2d 163, 166 (1965).
[14] ***Continental Ins. Co. v. Rutledge &*** Co., ***Inc.,*** Del. Ch., C.A. No. 15539, Chandler, C. (Feb. 15, 2000) Let. Op. at 2 (citing ***Miles, Inc. v. Cookson America, Inc.***, Del. Ch., 677 A.2d 505 (1995)).

appropriate measure of these damages was the arnount the plaintiff had spent in prosecuting the action. In the alternative, the plaintiff argues that, in this case, the partnership agreement provision would not prevent the Court from shifting the responsibility for attorneys' fees and expenses to the culpable party under an exception to the American Rule.

As one can see, the parties have widely differing views on the Court's intent in crafting its remedy in the March decision. To the extent I failed to articulate my reasoning clearly in the language of that opinion, these motions allow me to re-articulate that reasoning. The plaintiffs reading of the March decision is correct. As discussed more fully below, the Court intended to use the plaintiffs fees and expenses as a measure of damages in this case. Even had that not been the Court's intent now that defendants raise the issue, traditional fee shifting would still be appropriate.

A. The Court's award of damages measured by attorneys' fees.

In the March decision, the Court found that the plaintiff was harmed by the defendants' conduct in several identifiable, but inherently unmeasurable, ways.[15] Any attempt to express those damages by a sum certain would have required the Court to engage in near speculation. Despite problems in quantifying the harm to the plaintiff, this "Court,

[15] See March Decision at 80-82.

fortunately, has broad discretion to tailor remedies to suit the situation as it exists."[16] Moreover, where there has been a breach of the duty of loyalty, as here, "potentially harsher rules come into play" and "the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly . . . . The strict imposition of penalties under Delaware law are designed to discourage disloyalty."[17]

With this mantra as a guide, the Court set out to determine an adequate remedy that would make this plaintiff whole but would, at the same time, escape the peril of over-harshly punishing the defendants. In short, the opinion, however inartfully stated, attempted to directly match the cost of the wrongdoing with the clearest proof o-f the monetary costs to remedy that wrongdoing. It was quite clear from the evidence that the plaintiff was expending significant resources, both internally and externally, to address, contain, and counteract the defendants' egregious breach of their duty of

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[16] ***Andresen v. Bucalo***, Del. Ch., CA. No. 6372, Hartnett, V.C. (March 14, 1984) Mem. Op. at 10. ***See also Bomarko, Inc. v. International Telecharge, Inc.,*** Del. Ch., C.A. No. 13052, Lamb, V.C. (Nov. 4, 1999, revised on Nov. 16, 1999) Mem. Op. at 44-45 ("In determining damages, the Court's powers are complete to fashion any form of equitable and monetary relief as may be appropriate." (quoting ***Weinberger v. UOP, Inc.,*** Del. Supr., 457 A.2d 701, 714 (1983) (internal quotations omitted)); ***Universal Studios, Inc. v. Viacom, Inc.,*** Del. Ch., 705 A.2d 579, 583 (1997) ("[W]hen the parties' agreements have been breached but neither the innocent party nor the venture suffers immediate quantifiable harm, the equitable powers of this Court afford me broad discretion in fashioning appropriate relief.").

"International Telecharge, Inc. v. Bomarko, Inc., Del. Supr., 766 A.2d 437,441 (2000) (quoting from ***Thorpe v. CERBCO, Inc.,*** Del. Supr., 676 A.2d 436, 445 (1996)).

loyalty. Those internal costs, or expenditures, are not readily capable of quantification. The external costs, the fees for counsel and experts, however, are.

While awarding damages to the plaintiff equal to the fees and expenses spent in prosecuting this action will not make the plaintiff completely whole and will leave some harm unanswered, this Court, exercising the discretion given it, determined that damages, as measured by attorneys' fees and expenses spent to address the defendants' conduct, is an appropriate remedy for this egregious breach of the duty of loyalty. This award can be determined with specificity, is directly related to certain "injuries" to the plaintiff, and can not be characterized as punitive because it does not attempt to quantify and remedy the more subjective, if not speculative, internal costs. Thus, while the total harm to the plaintiff may actually lie at some unknown amount greater than the expenditure for attorneys' fees and expenses, the speculative nature of any additional monetary harm led me to conclude that including any such amount in any fashioned monetary remedy could fairly be deemed tantamount to awarding punitive damages.

The Court found that the defendants had breached their duty of loyalty and was faced with the task of crafting a remedy to address that wrong. On

these facts, I found that the most appropriate award of damages would be an award measured by the plaintiffs expenditures for attorneys' fees and expenses in prosecuting this action. [18] The Court reaffirms the remedy crafted in the March decision.

B. Traditional "fee shifting" would also be appropriate.

The preceding discussion fully addresses the Court's original reasoning for crafting the award as it did in this case. The defendants', however, viewed this as a decision by the Court to grant the plaintiff an award of attorneys' fees and expenses under traditional fee shifting exceptions to the American Rule.[19] After reviewing the defendants' written and oral arguments on this issue, I have reconsidered any basis for an actual fee shifting and am now convinced that it would have been entirely appropriate to grant an award of attorneys' fees and expenses in the traditional sense in this case had I chosen to do so. The defendants do not

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[18] The Court notes that this result is limited to these special facts and should not be read as stating a broad new principal, heretofore unknown, that expenditures for attorneys' fees and expenses will always be considered a component of rnore general damages. Extraordinary facts will sometimes call for extraordinary remedies. See ***Modern Dust Bag Co., Inc. v. Commercial Trust Co.,*** Del. Ch., 91 A.2d 469 (1952) ("[W]here the circumstances of a case are such as to require the application of equitable principles, the fact that no precedent can be found in which relief may be granted under a similar state of facts is no reason for refusing relief.").

[19] As noted above, the Court's intent was focused on crafting a damages remedy and not on fee shifting. The Court, however, in reading the March decision again, and after some time removed from the drafting process, acknowledges that language in the opinion could certainly lead the defendants to their interpretation. For this reason, their argument

argue that an award of attorneys' fees and expenses is not warranted in this case. Rather, they center their argument on the principal that the partnership agreement contains a pre-negotiated provision stating that both parties will bear their own attorneys' fees and expenses. Thus, there are two parts to this analysis. First, would an award of attorneys' fees and expenses generally be available under traditional common law rules'? Second, may the Court award attorneys' fees and expenses despite a contractual provision purporting to address the issue? If the answer to both questions is "yes," then an award of fees and expenses under a fee shifting theory would be appropriate in this case.

Under what is commonly known as the "American Rule," absent express statutory provisions to the contrary, each party involved in litigation will bear only their individual attorneys' fees no matter what the outcome of the litigation.[20] Over time, however, the Courts have acknowledged exceptions to this general rule. One exception relevant to this case is the "bad faith" exception to the American Rule.[21]

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should not be dismissed "out-of-hand" and will be addressed fully so that no doubt will lie concerning the Court's rationale for, and its ability to craft, a remedy in this case.

[20] ***See Johnston v. Arbitrium (Cayman Islands) Handels AG,*** Del. Supr., 720 A.2d 542, ***545 (1998).***

[21] ***Id.***

No single definition for "bad faith" in this context exists and each determination will turn on the special facts of the particular case.[22] Under this exception, fees may be awarded against a defendant where "the action giving rise to the suit involve[s] bad faith, fraud, 'conduct that was totally unjustified, or the like' and attorney's fees are considered an appropriate part of damages."[23] I made at least one point absolutely clear in the March decision -- the defendants' behavior constituted an egregious breach of the partnership agreement and their duty of loyalty.[24] Moreover, the defendants knew, from the outset, that their acts were designed to challenge directly the core business of the plaintiff and that those acts were in derogation of the partnership agreement.[25] Under these facts, I find that these faithless defendants have acted in "bad faith" and that an award of attorneys' fees and expenses would be appropriate under the bad faith exception to the American Rule.

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[22] ***See id.*** at 546. See ***also,*** although in a totally different context, the Supreme Court's elaborate discussion of "bad faith" in ***E.I. DuPont de Nemours and Co. v. Pressman,*** Del. Supr., 679 A.2d 436 (1996).

[23] ***Barrows v. Bowen***, Del. Ch., C.A. No. 1454, Allen, C. (Sept. 7, 1994) Mem. Op. at 3 (quoting ***Weinberger v. U.O.P., Inc.,*** Del. Ch., 517 A.2d 653, 656 (1986)).

[24] See March decision at 88-89.

[25] ***See H & H Brand Farms, Inc. v. Simpler,*** Del. Ch., C.A. No. 1658, Chandler, C. (Sept. 1, 1994) (Court found "bad faith" where the defendants adopted and continued a course of conduct that they knew would be challenged.).

I must now consider whether the partnership agreement would trump the common law determination above and prevent an award of fees and expenses. For the reasons stated below, I find that it does not and the Court may award attorneys' fees and expenses despite any provision in the partnership agreement suggesting the contrary.

The defendants point to Section 20.01 of the Partnership Agreement as evidence that the parties pre-negotiated for an agreement that the parties would bear their own attorneys' fees and expenses in a case such as this.[26] Section 20.01 is a lengthy paragraph dealing with several matters. A significant portion of the paragraph deals with arbitration and arbitration procedure. Inserted dead in the middle of the arbitration procedure discussion is the following sentence: "Each party shall bear its own expenses for counsel and other out-of-pocket costs in connection with any judicial resolution of a dispute, difference or controversy." Taken by itself, and out of context, this sentence could evince an intent by the parties to bear their own attorneys' fees and expenses in this "judicial resolution of a dispute." Placed in context, in the center of an arbitration discussion, the intent of the parties is less clear. One should not lose sight of the fact that

[26] See Def. Motion at Ex.A. While the Partnership Agreement was an exhibit at trial, neither party directed the Court's attention to this provision. This provision is, nonetheless, a "fact" already in evidence.

the bad faith breach of the duty of loyalty in this case generated a petition for extraordinary relief in the form of an injunction and involved a complex web of parties, many of whom were not parties to the Partnership Agreement. It seems disingenuous indeed, to stretch the parties' intent to pay their own fees and expenses in a dispute over the terms of the Partnership Agreement, which might be resolved by arbitration, to a multi-party controversy involving parties not subject to the terms of the Partnership Agreement. Ironically, despite the fervor with which the defendants assert the Partnership Agreement's language to be a bar against a fee award, I can not overlook the fact that they themselves sought an award of attorneys' fees in their pleadings. I find it impossible to conclude that the parties reference to "judicial resolution" in this context contemplated the course of events that have transpired in this litigation. Fortunately, for the purposes of this discussion, I do not need to unravel this enigma for even had the parties clearly intended that they bear their own fees and expenses under these extraordinary circumstances, the facts of this case warrant a remedy beyond that contemplated by the parties.

As noted above, the Court has broad discretion to craft a remedy for a breach of the duty of loyalty. I believe that when the facts demonstrate behavior as egregious as that here, the Court's normal deference to pre-

negotiated partnership agreement provisions[27] will yield to a conscientious effort to craft an appropriate remedy. Going beyond the remedies provided for by contract is not unknown in this jurisdiction when the Court is addressing particularly culpable conduct.[28] This case warrants a similar deviation from the parties' alleged agreernent. For that reason, I find that the Court would be justified in awarding attorneys' fees and expenses under the bad faith exception to the American Rule notwithstanding any contractual provisions arguably to the contrary.

CONCLUSION

The defendants' motions for a new trial and reargument under Rule 59 are denied. The defendants have not shown that the Court misapprehended the law or the facts in a manner that would change the outcome. The defendants can not claim that the concept of measuring damages by attorneys' fees and expenses incurred in remedying their breach is a surprise in this case. Both parties, in the complaint and the counter-claims (despite the language of the Partnership Agreement), asserted that they sought attorneys' fees and expenses as a portion of their remedy. For these reasons,

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[27] ***See generally Continental Ins. Co. v. Rutledge & Co., Inc.,*** Del. Ch., 750 A.2d 1219 ***(2000); U.S. West, Inc. v. Time Warner, Inc.,*** Del. Ch., C.A. No. 14555, Allen, C. (June 6, 1996) Mem. Op.

[28] ***See e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Price,*** Del. Ch., C.A. No. 11097, Allen, C. (Sept. 13, 1989) Mem. Op.

I reaffirm my decision to use the plaintiffs attorneys' fees and expenses as a measure of damages. I see a distinction between this and traditional fee shifting. To the extent, however, there is am argument that this is a "distinction without a difference," I find that an award of attorneys' fees and expenses under the bad faith exception to the American Rule would be warranted in this case. The award, as announced in the Court's March opinion is reaffirmed and stands as my final decision on the matter.

II. Plaintiff's Application for Redress of Harm.

In the March decision, the Court directed the plaintiff to submit an order for declaratory relief consistent with the opinion and an application for fees and expenses.[29] That final order has yet to be resolved and has become further complicated as a result of the dispute in Civil Action No. 18 101. Upon receipt of this opinion, I ask the parties to arrange a conference to discuss:

1. Resolution of the actual monetary award in this action based upon Plaintiffs application for fees and expenses and defendants' opposition to that amount including the need for further factual hearings, if any; and,

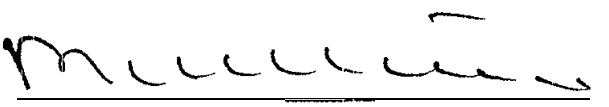
2. The efficacy of a declaratory judgment order encompassing both this action and Civil Action No. 18101; and,

[29] March decision at 92.

3. The extent to which any party seeks action by me under Court of Chancery Rule 54(b).

The: defendants' Motions under Rule 59 are **DENIED.**

IT IS SO ORDERD.



Justice Myron T. Steele
(by designation)

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