2021 WL 5260537 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

DG BF, LLC, a Delaware limited liability company, individually and derivatively on behalf of American General Resources LLC, a Delaware limited liability company; and Jeff A. Menashe, individually and derivatively on behalf of American General Resources LLC, a Delaware limited liability company, Plaintiffs,

v.

Michael RAY, an individual, and Vladimir Efros, an individual, and American General Resources, LLC, a Delaware limited liability company, Defendants;

and

American General Resources LLC, a Delaware limited liability company, Nominal Defendant.

No. 2020-0459-MTZ.
November 4, 2021.

Defendants' Application for Attorneys' Fees and Costs

Benesch, Friedlander, Coplan & Aronoff LLP, Sean A. Meluney, Esq. (# 5514), Matthew D. Beebe, Esq. (# 5980), 1313 North Market Street, Suite 1201, Wilmington, Delaware 19801, Telephone: (302) 442-7010, Facsimile: (302) 442-7012, smeluney@beneschlaw.com, mbeebe@beneschlaw.com, for defendants Michael Ray and Vladimir Efros.

Berger Harris LLP, David B. Anthony, Esq. (# 5452), 1105 N. Market Street, Ste 1100, Wilmington, Delaware 19801, Telephone: (302) 655-1140, Facsimile: (302) 655-1131, danthony@bergerharris.com, and Perry J Woodward, Esq., (admitted pro hac vice), Hopkins & Carley, A Law Corporation, The Letitia Building, 70 S First Street, San Jose, CA 95113-2406, Telephone: (408) 286-9800, Facsimile: (408) 998-4790, pwoodward@hopkinscarley.com, for Nominal Defendant American General Resources, LLC.

PUBLIC VERSION FILED: November 4, 2021

INTRODUCTION

1. Defendants Michael Ray, Vladimir Efros and American General Resources, LLC (“AGR”, and together with Ray and Efros, collectively “Defendants”) submit this memorandum in support of an award of attorneys' fees and costs against Plaintiffs JeffMenashe and DG BF, LLC.

2. Throughout this litigation, Plaintiffs have engaged in bad faith litigation conduct that has caused Defendants to incur over $2 million in fees and costs. Not only were Plaintiffs' claims misguided and without merit, but Plaintiffs also (i) refused to follow any of the deadlines in the parties' stipulated scheduling order; (ii) spoliated evidence; (iii) concealed harmful documents; (iv) disrupted a properly noticed deposition; (v) violated multiple discovery orders; and (iv) were found in contempt of Court. Plaintiffs' conduct has already led the Court to shift fees four times, and ultimately led to their case being dismissed. Defendants have a right to recover their fees and costs under the “bad faith” exception to the American Rule.

3. Moreover, the current version of the Operating Agreement allows for the “prevailing party” to recover their fees and costs, providing another basis for the Court to award Defendants the fees and costs they incurred in this litigation.

4. This Court should grant Defendants an award of costs and attorneys' fees against Plaintiffs.

STATEMENT OF FACTS

I. DEFENDANTS DEFEAT PLAINTIFFS' SERIES E CLAIMS AND MOST OF PLAINTIFFS' FIRST AMENDED COMPLAINT IS DISMISSED.

5. After failing to strong-arm AGR into accepting a below-market deal to lead AGR's Series E round of financing, Plaintiffs followed through on their pre-litigation threats and filed the original Complaint, a self-described "shot over the bow." Dkt. No. 1; Exhibit 1. While the thrust of the Complaint was that Defendants fraudulently induced DG BF into investing $5 million in 2019 based in large part on "fraudulent financials," the Complaint also claimed, among other things, that AGR's Series E financing violated AGR's Operating Agreement. *Id.* In connection with their Series E claim, Plaintiffs also filed a "status quo" motion. Dkt. No. 2.

6. While Plaintiffs succeeded on their pre-litigation threats of disrupting the Series E financing, the Court rejected Plaintiffs' claim that terms of the Series E Round of financing breached the Operating Agreement after an expedited hearing ("July 9th Order"). Dkt. No. 35. In its July 9th Order, the Court held that "the parties shall submit briefing on any potential damages incurred as a result of the TRO, *including attorneys'fees." Id.* at p. 15 (emphasis added). Plaintiffs challenged the ruling by seeking to certify the decision for interlocutory appeal which was also denied. Dkt. No. 44.

7. Plaintiffs then filed their First Amended Complaint ("FAC"). Dkt. No. 37, 49. The FAC continued to assert many claims that had no legal support. [1] Dkt. No. 49.

8. Defendants moved to dismiss the FAC. [2] On March 1, 2021, the Court issued its order dismissing eighteen of Plaintiffs' causes of action - thirteen of which the Court called "detritus" - including all fraud claims against Ray and all derivative claims against AGR. Dkt. No. 116.

II. PLAINTIFFS FAIL TO COMPLY WITH THE DEADLINES IN THE PARTIES STIPULATED SCHEDULING ORDER.

9. Following the Motion to Dismiss, Plaintiffs demanded that the parties enter into a stipulated schedule providing for an expedited trial date of September 15, 2021 ("Scheduling Order"). Dkt. No. 120.

10. Plaintiffs failed to adhere to *any* of the proposed deadlines in the Scheduling Order. Plaintiffs also refused to follow this Court's ESI guidelines, including their failure to collect key repositories and provide hit reports, and allowing Menashe to self-collect and review documents. Dkt. No. 146. And Plaintiffs met none of the expert disclosure deadlines. Even when Plaintiffs tried to belatedly inject opinions from their "accounting expert" into the case, that expert did not find that any of AGR's financial statements or projections were fraudulent. *See* Dkt No. 148 (Declaration of Raymond Sloane). Plaintiffs also failed to provide a Delaware-compliant privilege log.

11. Rather than comply with the deadlines, Plaintiff moved (twice) to extend the expert discovery deadline (after it lapsed), and tried to reopen discovery and continue the trial date. [3] Dkt. No. 158, 182. All these motions failed.

III. MENASHE'S FAILURE TO PRESERVE EVIDENCE, RESPOND TO DISCOVERY AND PRODUCE DOCUMENTS.

12. Not only did Plaintiffs fail to adhere to the Scheduling Order, but Plaintiffs ignored their discovery responsibilities. Starting back in April when the parties were discussing ESI protocols, Defendants requested that Plaintiffs image the email, cellphones, and computers of Menashe and his two associates who worked on the AGR investment - Kevin Raesly and Marc Levit. Plaintiffs refused. *See* Dkt. No. 146. Nor were Plaintiffs willing to search the server where Plaintiffs saved many documents related to Plaintiffs' investment in AGR. *Id.*

13. Worse, Menashe actively destroyed relevant documents throughout the litigation. Perhaps the most troubling was the fact that Menashe deleted relevant text messages about AGR and this case.[4] Dkt. No. 225 at Ex. 2 p. 223:6-224:2. Likewise, in December 2020, months after he filed this litigation, Menashe "donated" the computer he used during the due diligence period for Plaintiffs' investment in AGR, making it impossible to recover any relevant data from that device. Dkt. No. 225 at Ex. 1, 42:3-14.

14. Further, Plaintiffs failed to instruct his employees, Raesly and Levit, to preserve evidence. *Id.* at Exhibit 1, 32:23-33:20, 44:16-50:4. Menashe instructed Raesly and Levit to wipe their computers and donate those as well. It was not until July 2021, that Defendants were told that Raesly and Levit ignored Menashe's directive to destroy evidence and their computers were available to be searched. Even so, Defendants were unable to obtain any text messages from Raesly or Levit, despite having evidence that Raesly communicated with Defendants by text.

15. Plaintiffs also failed to respond to many written discovery requests seeking basic information about Plaintiffs' claims.

16. To determine the scope of the deficiencies, Defendants sought to take the 30(b)(6) Deposition ofDG BF regarding document preservation, collection, and production at that deposition. Plaintiffs' counsel, however, repeatedly disrupted and prematurely terminated the deposition. Dkt. No. 180, 204.

17. Defendants had to file a motion to obtain relevant documents, proper discovery responses, and a Delaware-compliant privilege log.

18. On August 3rd, the Court granted Defendants' motion, and required Plaintiffs to turn over all documents retrieved with Defendants' proposed search terms (after a quick-peak privilege review) from the requested repositories, and Defendants were then to review the document production at Plaintiffs' expense ("August 3rd Order"). Dkt. No. 183. The Court also ordered Plaintiffs to provide complete discovery responses to several interrogatories, and provide a complete privilege log. *Id.* The Court shifted fees. *Id.*

19. Defendants also had to file another motion in order to compel proper deposition conduct and a second 30(b)(6) deposition. Dkt. No. 204. The Court granted that motion as well finding that Plaintiffs' counsel, among other things, was "'rude [and] uncivil ... and ... obstructed the ability of the questioner to elicit testimony ...'" and fees were shifted ("August 12th Order"). *Id.*

IV. DEFENDANTS UNCOVER MANY EXCULPATORY EMAILS THAT PLAINTIFFS WITHHELD FROM THEIR ORIGINAL PRODUCTION.

20. Plaintiffs did not comply with the Court's order on the Motion to Compel. While limited in scope, it quickly became apparent why Plaintiffs had resisted complying with their discovery obligations, as the documents in the production undercut Plaintiffs' claims. In one previously withheld email, Menashe tells his counsel that "the issue is NOT that financials were revised downward - so avoid mentioning $s and ." EXHIBIT 2. IN ANOTHER EMAIL, ONE OF MENASHE'S ADVISORS ACKNOWLEDGED THE ENTIRE INTENT OF THE LAWSUIT WAS MEANT AS A "SHOT OVER THE BOW" - OMITTING ANY MENTION OF ANY FRAUD. EX. 1.

21. Defendants also uncovered documents showing that Plaintiffs were fully aware of the assumptions in AGR's financial projections, and even engaged in financial modeling themselves. *See, e.g.,* Confi. Exhibit 3 (Raesly stating that he spent "2.5 hours with AGR" and "[i]n terms of the model, we walked through step-by-step / tab-by-tab, their thinking into the assumptions"); *see also* Confi. Exhibits 4-6; *but c.f.* Dkt. No. 225 at Ex. 2 p. 163:3-6 (Menashe misrepresenting that Plaintiffs "do not put forth financial models....").

22. Further still, Defendants uncovered communications between Raesly and Menashe showing that Defendants notified Plaintiffs about the revised projections the same day they were uploaded to the data room. Confi. Exhibit 7. The concealed documents also show that Plaintiffs did their own analysis of AGR's revised financials, that Plaintiffs believed that decreases in revenue were "to be expected with a young industry as it works out the kinks," and that Plaintiffs even created an updated presentation (with revised financial projections) to provide to investors. Confi. Ex.'s 5-6.

23. All of those documents were responsive to Defendants' discovery requests, but were originally withheld.

V. PLAINTIFFS' IGNORE COURT ORDERS ULTIMATELY LEADING TO THE DISMISSAL OF PLAINTIFFS' CLAIMS.

24. Meanwhile, while Defendants were reviewing the limited production from Defendants, Plaintiffs continued flouting the Court's Motion to Compel Order. Plaintiffs had still failed to image, search, and provide documents from multiple repositories, including Menashe's cellphone and Plaintiffs' server. Nor would Plaintiffs provide a concrete date when that imaging would occur. And Plaintiffs refused to provide the Court-ordered written discovery responses.

25. Defendants contacted the Court, and another hearing was held on August 12th about, in part, Plaintiffs' failure to comply with the Motion to Compel Order. At the hearing, Plaintiffs said that Menashe's cellphone was being imaged. Plaintiffs also agreed, and the Court then ordered, that "by the end of the day," Plaintiffs would provide dates certain "when [][the remaining repositories] will be turned over and imaged, when the search terms will be applied, when a hit report will be offered, and when their production will be made." Exhibit 8, pp. 15-21.

26. Following the August 12th hearing, Plaintiffs did not provide a report to Defendants "by the end of the day" as to when they would turn over the outstanding devices. And it became apparent that Menashe's cellphone was not being imaged. Making matters worse, Plaintiffs continued to refuse to provide the ordered supplemental written discovery responses, and continued to withhold relevant documents under an erroneous claim of privilege.

27. Given Plaintiffs conduct, Defendants filed an expedited Renewed Motion to Compel and for Sanctions against Plaintiffs. Dkt. No. 212. At the August 23rd hearing on that motion, Menashe was found in contempt of the August 3rd Order. Additionally, to remedy Plaintiffs' discovery failures, the Court ordered certain evidentiary sanctions. Exhibit 9, p. 29-33. Further, the Court ordered that Menashe turn over his cellphone and the server to Defendants for imaging that day. *Id.* The Court also held that Plaintiffs lost any ability to do even a "quick peak" privilege review but the documents were subject to clawback procedures. *Id.* Fees were once again shifted, and the Court took Defendants' request for terminating sanctions under submission. *Id.*

28. Meanwhile, based on the evidence gathered, it became clear that Plaintiffs had destroyed many relevant documents, including all of Menashe's text messages and data on his laptop. Additionally, Plaintiffs failed to take any steps to preserve text messages sent or received by Raesly or Levit related to this lawsuit (though text messages existed). As a result, on August 24, 2021, Defendants filed their motion regarding Plaintiffs' spoliation of evidence ("Spoliation Motion"). Dkt. No. 225. Plaintiffs' opposition did not contest the core allegations in the Spoliation Motion. Dkt. No. 237.

29. Rather than comply with the Court's Order on the server, Menashe used two other entities that he controls to file a "Motion to Quash" the Court's August 23rd Order-showing he had no intention of providing the server for imaging. Dkt. No. 234. Additionally, while Menashe eventually sent his cellphone (after the deadline set by the Court), he covertly tried to undercut

the Court's ruling by including a letter with the phone to "make clear" that Defendants' vendor (1) was "not to provide opposing counsel with any correspondence between me" and any of the thirty-four listed individuals on privilege grounds; and (2) the vendor was not to provide Defendants' counsel with "any content from my photos and videos as they are personal." Dkt. No. 242, 244. Such an instruction violated the Court's August 23rd Order. Defendants were able to confirm that Menashe had deleted all of the text messages between himself and the Individual Defendants. *Id.*

30. Soon after Defendants filed their reply brief in support of the Spoliation Motion, the Court sent out its letter advising that "this matter will be dismissed and judgment will be entered in favor of Defendants." Dkt. No. 243.

LEGAL ARGUMENT

I. Plaintiffs' Bad Faith During Litigation Supports An Award Of Attorneys' Fees And Costs.

31. While Delaware Courts generally follow the "American Rule," for attorney's fees, Delaware courts have recognized several exceptions, including the exception for "bad faith" conduct during litigation. *Montgomery Cellular Holding Co. v. Dobler,* 880 A.2d 206, 227 (Del. 2005). "[B]ad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *In re SS & C Techs., Inc. S'holders Litig.,* 948 A.2d 1140, 1149 (Del. Ch. 2008). Thus, courts have "broad discretion to award attorneys' fees where litigation was brought in bad faith or where bad faith conduct by one of the parties increases the costs of the litigation." *Id.*

32. As explained above, Plaintiffs refused to comply with the Scheduling Order, intentionally withheld documents undercutting their claims, and destroyed evidence. Menashe also took no steps to preserve the text messages or documents from Raesly or Levit. And Menashe made material misrepresentations several times about the existence of certain documents to try to cover-up his spoliation and concealment of records. *See* Dkt. No. 225 at Ex. 1, p. 75-76 (Menashe denying that he ever "text[s] about business-related matters..."); *but c.f.* Dkt. No. 242 at pp. 5-6 (summarizing many examples of Menashe conducting business by text). Further still, Plaintiffs repeatedly violated orders from this Court, leading to them being held in contempt, and ultimately, for their case to be dismissed. Such conduct alone is bad faith and warrants the award of Defendants' fees and costs.

33. As for the substance of the claims, it is now evident that Plaintiffs knew they lacked merit. The crux of the claim was that Defendants financially defrauded Plaintiffs. But by Menashe's own words, that was not "[t]he issue." Ex. 2. Despite having full access to AGR's financials and financial databases, Plaintiffs were never able to identify a single fraudulent financial statement. And the documents produced show that despite claiming that he was defrauded, Menashe wanted to lead "a $5M to $6M equity financing" round. *See* Dkt. No. 242 at Ex. 24.

34. Plaintiffs' conduct amounts to bad faith and warrants the award of all of Defendants' fees and costs. As set forth in the accompanying declarations, those fees and costs total $2,253,262.56.

II. DEFENDANTS ARE ENTITLED TO THEIR FEES AND COSTS BASED ON THE ATTORNEY'S FEE PROVISION IN THE OPERATING AGREEMENT.

35. When a contract awards attorneys' fees and costs to the "prevailing party," Delaware law dictates a party is entitled to the award where it achieves "predominance in the litigation." *2009 Caiola Fam. Tr. v. PWA, LLC,* No. CV 8028-VCP, 2015 WL 6007596, at *33 (Del. Ch. Oct. 14, 2015).

36. Section 17.4(c) of the current Operating Agreement explicitly provides that the prevailing party may recover "costs and reasonable expenses, including reasonable attorneys' fees." Exhibit 10. Defendants are able to recover their fees and costs on this ground as well.

III. AT A MINIMUM, DEFENDANTS SHOULD BE AWARDED $608,666.88 BASED ON THE COURT'S FEE SHIFTING ORDERS TO DATE.

37. To date, the Court has already shifted fees in connection with its Series E Ruling, Defendants' Motion to Compel, for Defendants' Review of Plaintiffs Document Production, for Defendant's 30(b)(6) Deposition, and in connection with Defendants' Renewed Motion to Compel and For Sanctions, as follows:

- Fees and Costs associated with the July 9th Order:[5] $183,495.60;

- Fees and Costs associated with the August 3rd Order:[6] $114,642.06;

- Review of Plaintiffs' Document Production (as Ordered by the Court): $77,639.00;

- Fees and Costs associated with the Court's August 12th Order: $54,218.92;

- Fees and Costs associated with the Court's August 23rd Order: $70,364.80;

- Fees and Costs associated with Defendants' motion for sanctions for spoliation of evidence (Dkt. No. 225) that was fully briefed before the Court's dismissal of the case. *See* Dkt. No. 243: $20,442.50; and

- Fees and costs associated with this Fee Application (*i.e.,* fees on fees): $87,864.00.

See Woodward Affidavit, ¶5; Meluney Affidavit ¶3, Ex. A; Anthony Affidavit ¶4, Ex. A. As a result, at a minimum, Defendants should be awarded $606,666.88.

CONCLUSION

38. Defendants respectfully request that its motion be granted and that Defendants be awarded their fees and costs in the amount of $2,253,262.56.

BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP

/s/ Sean A. Meluney

Sean A. Meluney, Esq. (# 5514)

Matthew D. Beebe, Esq. (# 5980)

1313 North Market Street, Suite 1201

Wilmington, Delaware 19801

Telephone: (302) 442-7010

Facsimile: (302) 442-7012

smeluney@beneschlaw.com

mbeebe@beneschlaw.com

Attorneysfor Defendants Michael Ray and Vladimir Efros

BERGER HARRIS LLP

/s/ David B. Anthony

David B. Anthony, Esq. (# 5452)

1105 N. Market Street, Ste 1100

Wilmington, Delaware 19801

Telephone: (302) 655-1140

Facsimile: (302) 655-1131

danthony@bergerharris.com

and

Perry J Woodward, Esq.

(admitted *pro hac vice*)

HOPKINS & CARLEY

A Law Corporation

The Letitia Building

70 S First Street

San Jose, CA 95113-2406

Telephone: (408) 286-9800

Facsimile: (408) 998-4790

pwoodward@hopkinscarley.com

Attorneys for Nominal Defendant American General Resources, LLC

Date: October 28, 2021

WORDS: 2,999

Footnotes

1 To inflict additional harm on AGR, Plaintiffs included detailed confidential financial information in the FAC, but then failed to file the FAC under seal. As a result, Defendants then had to meet and confer with Plaintiffs' counsel, and eventually filed a motion to seal portions of the FAC regarding AGR's financial data.

2 Notably, just before its opposition was due, Plaintiffs voluntarily dismissed all of their claims based on any agreement other than the Operating Agreement. Dkt. No. 105.

3 Rather than focus on the tasks needed to prepare this matter for trial, Plaintiffs instead focused on filing a misguided motion for a receiver. Dkt. No. 147. Approximately one month later Plaintiffs voluntarily withdrew the motion. Dkt. No. 152, 184.

4 At his deposition, Menashe claimed that he never texted about business - an assertion that was obviously false.

5 Defendants filed their original damages motion based on the Court's July 9th Order on October 15, 2020. Dkt. No. 93 Since that time, Defendants have discovered facts demonstrating that the Status Quo order and injunction was a leverage-play (i.e. a “shot across the bow”) gone bad. As a result, Plaintiffs are supplementing their prior request.

6 Defendants filed a motion seeking the recovery of these fees on August 26, 2021. Dkt. No. 238.