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Case No. Multi-Case

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DEBORAH PETTRY and GAIL FRIEDT, Plaintiffs, v. GILEAD SCIENCES, INC., Defendant.	C.A. No.: 2020-0132-KSJM
RICHARD C. COLLINS, Plaintiff, v. GILEAD SCIENCES, INC., a Delaware corporation, Defendant.	C.A. No.: 2020-0138-KSJM
HOLLYWOOD POLICE OFFICERS' RETIREMENT SYSTEM, Plaintiff, v. GILEAD SCIENCES, INC., Defendant.	C.A. No.: 2020-0155-KSJM

ANTHONY RAMIREZ, Plaintiff, v. GILEAD SCIENCES, INC., Defendant.	)	C.A. No. 2020-0173-KSJM

DEFENDANT GILEAD SCIENCES, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR AN AWARD OF FEES AND EXPENSES

Gilead Sciences, Inc. ("Gilead"), submits this opposition to Plaintiffs' Motion for an Award of Fees and Expenses (the "Motion").

INTRODUCTION

1. Gilead undoubtedly mounted a vigorous defense to Plaintiffs' sprawling books and records demands, believing established precedent supported each and every defense. But it did not engage in bad-faith litigation conduct, and the Court's rejection of Gilead's defenses, even if forceful, does not warrant the imposition of fee-shifting against Gilead.

2. Plaintiffs bear a heavy burden in order to obtain fee-shifting under the bad-faith exception to the American Rule, which is the only basis they rely on in the absence of a fee-shifting provision under 8 *Del. C.* § 220. They must show by *clear evidence* that Gilead acted in *subjective* bad faith that rose to the level of *glaring*

egregiousness. But Plaintiffs fail to establish that Gilead's arguments were advanced for any purpose other than Gilead's good-faith belief that the case law and factual record developed through discovery supported its arguments.

3. That should end the inquiry. Indeed, it would be inappropriate to use fee-shifting to advance purported public policy goals absent clear evidence of subjective bad-faith conduct by Gilead rising to the level of glaring egregiousness in this case. Plaintiffs' Motion should be denied.

BACKGROUND

A. The Demands.

4. Plaintiffs served books and records demands seeking an expansive list of documents collectively spanning a 15-year period based on unproven allegations in other proceedings attacking Gilead's core business.[1] Faced with such far-sweeping demands, Gilead informed each Plaintiff that their requests were overbroad and asked them to provide "circumscribed requests for information essential" to their purpose. Ex. 6 at 4, 8; Ex. 7 at 4; Ex. 8 at 4; Ex. 9 at 5. Throughout the case, Plaintiffs steadfastly refused to meaningfully narrow the scope of their demands until the eve of trial.

[1] *See* Exhibits 1-5.

B. This Litigation.

5. After Plaintiffs filed these actions, Gilead agreed to an expedited schedule. All parties engaged in discovery, including serving document requests, interrogatories, and deposition notices.

1. The Parties Engaged in Mutual Discovery.

6. Gilead, believing that Plaintiffs' discovery was premature and irrelevant, filed a timely motion for a protective order. Dkt. 11 ("parties shall serve responses and objections . . . or any motion for protective order"). Specifically, Gilead believed that Plaintiffs were not entitled to discovery into the existence and location of documents until they first established a proper purpose and that the requested documents were necessary and essential to achieving that purpose, and that their discovery into Gilead's legal theories was improper. *See* Dkts. 20, 33. Upon the Court's denial of Gilead's motion, Gilead promptly complied with the Court's ruling and responded to more than 50 additional interrogatories (including sub-parts) from Plaintiffs regarding the existence and location of documents. Ex. 10. Gilead's responses provided such detail that Plaintiffs agreed to forego taking the previously noticed Rule 30(b)(6) deposition. Ex. 11.

7. Gilead served its own discovery relating to, among other topics, Plaintiffs' purposes for seeking books and records. Gilead engaged in several attempts to resolve disagreements related to its discovery without the Court's

intervention, but because of the expedited schedule, Gilead was required to file a motion to compel in order to secure its right to discovery. *See* Ex. 12. Only after Gilead's motion was fully briefed, and on the eve of the hearing, did Plaintiffs finally commit to provide Gilead with discovery into the disputed topics. Ex. 13.[2]

8. Like Plaintiffs, Gilead also issued deposition notices. Plaintiffs initially objected to Gilead's deposition notices on the basis that they were not "necessary or proportionate to the needs of the case." Ex. 14 at 1.[3] Ultimately, the parties reached agreement on the timing and manner of the depositions, each of which, with the exception of Ramirez, who had to take breaks due to connectivity and technical issues, lasted only 3 to 3.5 hours, including breaks. Collins 1, 132; Hollywood 2, 89; Pettry 1, 106; Ramirez 1, 227; Friedt 9, 125.

2. Trial.

9. The day before trial, Plaintiffs substantially narrowed the scope of their requested books and records, as reflected in their trial demonstrative.[4] Pls. Presn. at 46-48; Trial Tr. 80-93; Pls. Corrected Combined Post-Trial Br. at 53-62.

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[2] Plaintiffs served multiple amended interrogatory responses and produced documents right up until the date of (and in some instances, after) the scheduled hearing on the motion to compel.

[3] Gilead's deposition notices provided that video depositions could be conducted due to COVID-19. *See* Dkts. 21-22.

[4] Prior to this time, Plaintiffs were collectively seeking the email communications and other electronic files of more than 30 custodians. *See, e.g.*, Ex. 5 at 11 n.17 (seeking the "e-mails of directors or officers, whether or not stored on the

10. In its post-trial Memorandum Opinion (the "Opinion"), the Court determined that Plaintiffs had a proper purpose and that most of the narrowed categories of documents were necessary and essential. Opinion at 51-61. The Court denied Plaintiffs' request to inspect even the recently narrowed set of senior management emails because Plaintiffs "failed to demonstrate that these emails [were] necessary and essential to their stated purposes." *Id.* at 58-59.

ARGUMENT

I. LEGAL STANDARD.

11. Plaintiffs argue, without citing any case precedent, that the Court is permitted to shift fees under 8 *Del. C.* § 220(c). Motion ¶37. To the contrary, the Court has stated that "Section 220 does not . . . authorize an award of attorneys fees[.]" *Hall v. Search Capital Grp., Inc.*, 1996 WL 696921, at *2 (Del. Ch.); *see also Juul Labs, Inc. v. Grove*, 238 A.3d 904, 917 (Del. Ch. 2020).

12. For the Court to depart from the American Rule and shift fees under the bad-faith exception, Plaintiffs must adduce *clear evidence* that Gilead acted in *subjective* bad faith that rose to the level of *glaring egregiousness*. *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 877-79 (Del. 2015); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 47 (Del. Ch. 2010). The bad-faith exception is "narrow"

Company's servers" from 2013 to present); Ex. 4 at 7 nn.6, 7 (seeking "electronic communications" from Gilead's board and "any named executive officer of the Company," without any date limitation).

and "applied in only the most egregious instances of fraud or overreaching." *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997), *aff'd*, 720 A.2d 542 (Del. 1998).[5] "Delaware law requires that any bad faith fee award relate causally to fees and expenses incurred due to the bad faith conduct." *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member*, 2013 WL 5152295, at *2 (Del. Ch.). The record does not support fee-shifting here.

II. BAD-FAITH FEE-SHIFTING IS NOT WARRANTED.

A. Plaintiffs Have Not Shown By Clear Evidence That Gilead Acted In Subjective Bad Faith Rising To The Level Of Glaring Egregiousness.

12. Gilead's responsive arguments to Plaintiffs' Motion are not intended to reargue the merits of the underlying books and records demands. Rather, they are intended to demonstrate that Gilead advanced colorable arguments based on open legal and factual questions. *See Zheng*, Tr. at 8; *Haywood v. Ambase Corp.*, 2005 WL 2130614, at *9 (Del. Ch.); *P.J. Bale, Inc. v. Rapuano*, 2005 WL 3091885, at *2 (Del.); *Arbitrium*, 705 A.2d at 233. Gilead respects that the Court disagreed with

[5] Even if Plaintiffs demonstrate they had a clearly defined and established right to books and records, they still must establish that Gilead acted in subjective bad faith. *See Zheng v. San Yang Asia Supermarket, LLC*, C.A. No. 2020-0447-MTZ (Del. Ch. Jan. 27, 2021), Tr. at 6; *Carlson v. Hallinan*, 925 A.2d 506, 545 (Del. Ch. 2006).

the arguments Gilead made and the inferences it drew, but such disagreement is not clear evidence of subjective bad faith rising to the level of glaring egregiousness.[6]

13. Moreover, Gilead's decision not to initially produce any documents in response to Plaintiffs' demands is not indicative of bad faith, contrary to Plaintiffs' suggestion. *Id.* ¶13.[7] Gilead was within its rights to assert its good-faith belief in its proper purpose and scope defenses. Although the Court rejected Gilead's proper purpose defense, the Court agreed that Plaintiffs' demands sought books and records that were not necessary and essential to their purposes, which weighs against shifting fees under the bad-faith exception to the American Rule. *See Senetas Corp. Ltd. v. Deepradiology Corp.*, C.A. No. 2019-0170-PWG (Del. Ch. May 6, 2020), Tr. at 109 (noting that plaintiff "did not obtain all that it demanded" as one factor in refusing to shift fees); *Haywood*, 2005 WL 2130614, at *9 (rejecting fee-shifting request and noting that defendant had "valid concerns regarding the scope of the documents requested").

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[6] Plaintiffs suggest that Gilead acted in bad faith by "outright declin[ing] Plaintiffs' offer to amicably resolve the issue of Plaintiffs' fees and costs." Motion ¶6. But, declining to pay Plaintiffs' fees when Gilead does not believe that they were incurred as the result of any subjective bad-faith conduct by Gilead is not evidence of "bad-faith."

[7] The Court has declined to shift fees under the bad-faith exception where defendants did not produce any documents in response to 220 demands, but instead mounted a full defense. *See, e.g.*, *Donnelly v. Keryx Biopharmaceuticals, Inc.*, 2019 WL 5446015, at *3, 6 (Del. Ch.); *Haywood*, 2005 WL 2130614, at *1, 3, 8-9.

1. Gilead's Arguments Were Made In Good-Faith And Supported By Case Law And Record Evidence.

14. Plaintiffs argue that fee shifting under the bad-faith exception is warranted based on three defenses asserted by Gilead at trial: (i) Plaintiffs failed to meet their burden to show a credible basis, (ii) Plaintiffs lacked standing to pursue their demands, and (iii) Plaintiffs' stated purposes were not their own. Motion ¶¶26-28.

15. The Court's recent ruling in *Zheng* is instructive. In *Zheng*, the defendant corporation refused plaintiff's 220 demand and invited plaintiff to file suit. *Zheng*, Tr. at 4. The defendant corporation then took a series of actions that the plaintiff argued supported fee-shifting, including: (1) filing a "skeleton motion to dismiss" on the grounds that plaintiff lacked a credible basis (*id.*); (2) refusing to answer interrogatories and engaging in "hostile" and "bullying" communications with plaintiff's counsel (*id.* at 10-11); and (3) making arguments that found no support in the case law and advocated for new law, eliciting skepticism from the Court at the pretrial conference (*id.* at 7). The Court found that defendants "pushed the boundaries of what could be considered a nonfrivolous basis to deny inspection," but the Court declined to shift fees under the bad-faith exception because it concluded that defendant's position was not "held or wielded insincerely or in bad faith," and that defendant "resisted based on a tenuous, but genuinely held and consistently applied, basis for denying inspection." *Id.* at 7-8, 9, 12.

16. Gilead's defense comes nowhere close to the circumstances found in *Zheng*. Gilead advanced arguments supported by law and the nuances of an evolving books and records practice. Gilead answered more than 50 additional interrogatories from Plaintiffs at great time and expense. Gilead did not engage in any hostile or bullying tactics. Gilead "vigorously defended" against the demands, but its "conduct during litigation was typical of litigants before this Court" and Gilead at all times "subjectively believed" that its defenses found support in case law, record evidence, and books and records practice.[8] *eBay*, 16 A.3d at 47; *see also, e.g.*, *Zheng*, Tr. at 6-12; *Donnelly*, 2019 WL 5446015, at *6; *Haywood*, 2005 WL 2130614, at *9.

(a) Credible Basis.

17. Gilead did not, contrary to Plaintiffs' suggestion, ignore the evidence and cases cited by Plaintiffs in support of their credible basis argument. Motion ¶26. Gilead presented thorough arguments in which it (i) discussed the alleged evidence on which Plaintiffs relied, (ii) distinguished the cases cited by Plaintiffs, and (iii) cited case law in support of its position that Plaintiffs failed to show a credible basis. Defs. Pre-Trial Br. 22-31; Defs. Post-Trial Br. 4-22; Defs. Presn. DX1.

[8] That Gilead's conduct is typical of other corporate litigants coupled with an arguably shifting landscape in the Court's jurisprudence related to 220 actions, rebuts the idea that Gilead acted with subjective bad faith. As such, it would be improper to shift fees here, particularly given that the Court had not shifted fees in other such actions.

18. Gilead was not aware of any decision from a Delaware court specifically holding that unproven allegations of wrongdoing, without more, are sufficient to satisfy the credible basis standard. As such, Gilead firmly held the good-faith belief that prior analysis by this Court of the credible basis standard supported the argument that Plaintiffs here had not met their burden. The Court's disagreement with Gilead's interpretation and assessment is not evidence of subjective bad faith. *See Owen v. Cannon*, 2015 WL 3819204, at *33 (Del. Ch.) (reasonable disagreement "on the legal import" of issues does not warrant bad-faith fee shifting).

(b) Standing.

19. Gilead's standing arguments were premised on factual inferences drawn from record evidence suggesting that Plaintiffs' end game for seeking books and records was to bring derivative litigation. Based on those factual inferences, Gilead relied on case law to support its argument that Plaintiffs lacked standing to bring the contemplated derivative claims. Pre-Trial Brief 18-22; Post-Trial Brief 36-43; Defs. Trial Presn. DX2.

20. Gilead believed its position found support in the case law. Indeed, the Supreme Court recently recognized in *AmerisourceBergen* that there were Court of Chancery decisions on both sides of a divide related to whether and when a corporation can insert a merits-based defense into an inspection demand and

specifically noted the "apparent tension" in the case law. *AmerisourceBergen Corp. v. Lebanon Cnty. Emps.' Ret. Fund*, 243 A.3d 417, 432-37 (Del. 2020). Presenting arguments on issues where the "import and application of [case law] is not free from criticism" and where there is no "binding decision of the Delaware Supreme Court" resolving the issue does not evidence subjective bad faith rising to the level of glaring egregiousness. *Owen*, 2015 WL 3819204, at *33.

(c) *Wilkinson*.

21. As to Gilead's *Wilkinson* defenses, Plaintiffs do not appear to suggest that Gilead acted in bad faith by seeking discovery into matters that bore on this argument. Instead, Plaintiffs appear to argue that Gilead's decision to "press[] this defense" after Plaintiffs' depositions constituted bad faith.[9] Motion ¶28. However, Plaintiffs ignore the record evidence that supported Gilead's arguments.

22. For example, Plaintiffs ignore that Ramirez testified at his deposition that he retained counsel to investigate opioids, even though his counsel was seeking books and records relating to HIV drugs in this litigation. Ramirez 175-80. This disconnect is precisely what led the *Wilkinson* Court to hold that the purpose stated in the demand did not belong to the stockholder. *See Kosinski v. GGP Inc.*, 214 A.3d

[9] Accordingly, by Plaintiffs' own admission, the fees incurred prior to Plaintiffs' depositions could not have been caused by any bad-faith conduct. *See ASB*, 2013 WL 5152295, at *2; *infra* n.16.

944, 950 (Del. Ch. 2019). While Ramirez later changed his testimony at trial, his conflicting testimony created a factual dispute. Additionally, Collins's deposition revealed that he had no knowledge of multiple prior demands that his counsel sent purportedly on his behalf seeking many of the same documents from Gilead that were at issue here. Collins 36-37, 105-22.[10] Again, this created a factual dispute bearing on issues that the Court has determined are relevant for purposes of *Wilkinson*. *See Kosinski*, 214 A.3d at 950.[11]

2. Gilead Did Not Attempt To Mislead The Court Or Misrepresent The Record.

23. The Court stated in the Opinion that Gilead's citations to Plaintiffs' depositions and retention agreements, in support of its inference that Plaintiffs' only

[10] Prior to his deposition, Collins stated unequivocally in his sworn interrogatory responses that he had not made any other books and records demands (Ex. 15, Response 13), and Plaintiffs' counsel also made a similar representation in correspondence to Gilead (Ex. 16 at 7). These demonstrably false statements, combined with Collins's deposition testimony, severely impaired Collins's credibility in Gilead's eyes.

[11] Plaintiffs rely on *Bay Capital*, *ASB*, and *Arbitrium* in their Motion. These cases are distinguishable. Plaintiff in *Bay Capital* lied in its complaint, defrauded the Court into granting a motion to expedite based on that falsehood, continued to press the falsity, and obstructed a deposition. *Bay Capital Fin., L.L.C. v. Barnes & Noble Educ., Inc.*, 2020 WL 1527784, at *11 (Del. Ch.), *aff'd*, -- A.3d -- (Del. 2021). In *ASB*, defendants knew their core allegations were false, but nonetheless filed baseless suits in three jurisdictions, and engaged in numerous frauds and falsehoods. *ASB*, 2013 WL 5152295, at *1-3, 13. In *Arbitrium*, defendants defrauded the Court into ordering unnecessary discovery, falsified testimony and evidence, presented a defense they knew was invalid, and knowingly violated a standstill agreement. *Arbitrium*, 705 A.2d at 229, 230. Gilead has not engaged in any such conduct.

true end was to bring plenary litigation, were "misleading" and "misrepresentations of the record."[12] Opinion 44, 45, 49. Plaintiffs argue that fee-shifting is warranted as a result. Motion ¶27.

24. Gilead respectfully disagrees that any of its citations were misleading or a misrepresentation of the record, and they certainly were not intentionally so. Gilead believes that the record and the inferences that could be drawn therefrom were susceptible to different interpretations and that the record evidence left open a factual question concerning Plaintiffs' credibility regarding their purpose for pursuing books and records.

25. Ramirez repeatedly referred to a "case" in response to questions about his purpose for inspection. Ramirez 108-12. Pettry's and Friedt's engagement agreements confirmed that their counsel was retained to bring derivative litigation. Pettry 64-65; Friedt 54-55, 80-81. Gilead cited the Collins deposition where he stated that he had no present intention of bringing a derivative suit, but Collins' demand mentioned bringing derivative litigation. Collins 103.[13]

[12] The "misleading" statements and "misrepresentations" identified by the Court were in at most two sentences in Gilead's Post-Trial Answering Brief.

[13] Gilead's use of the adjective "obvious" to describe the import of the deposition testimony in retrospect may have been an overstatement based on the conflicting inferences that could be drawn from the totality of the evidence. However, its use was not intended to mislead.

26. Gilead subjectively believed that the inference it offered regarding Plaintiffs' end was supported by the totality of the evidence. As in many cases, there was also evidence supporting a contrary finding. That the Court rejected Gilead's arguments and factual inferences does not mean that Gilead intended to misrepresent the record or mislead the Court. *See Gen. Video Corp. v. Kertesz*, 2009 WL 106509, at *1 (Del. Ch.) ("Obviously, not every lawsuit which fails as a question of fact constitutes bad faith. To hold otherwise would make bad faith the exception that swallows the American Rule."); *Haywood*, 2005 WL 2130614, at *9 (even "strained" arguments do not warrant fee shifting under the bad-faith exception).

27. However, even if the Court deems that those two sentences amounted to misrepresentations, there is no evidence that Gilead acted intentionally. Accordingly, bad-faith fee-shifting is not appropriate (and certainly not for *all* of Plaintiffs' fees), particularly because the Court has refused to shift fees for conduct that was substantially more egregious. *eBay*, 16 A.3d at 47; *see also In re Rural/Metro Corp. S'holders Litig.*, C.A. No. 6350-VCL, 2015 WL 1523103, Tr. at 18-19 (Del. Ch. Feb. 12, 2015) (determining that statements that were "inaccurate," "misleading," "flatly wrong," "not true," and "troubling" did not rise to the level of "glaring egregiousness" that is necessary to shift fees under the bad-faith exception); *Gen. Video Corp.*, 2009 WL 106509, at *1 (declining to award fees despite prior

findings that the plaintiff's "version of events is a fabrication" and that a key document "is . . . not authentic").

3. Gilead's Discovery Conduct Does Not Warrant Bad-Faith Fee-Shifting.

28. Plaintiffs also take issue with certain of Gilead's discovery-related choices, but Plaintiffs fail to demonstrate that such conduct (i) was undertaken in subjective bad faith, or (ii) even if brought in bad faith, would entitle Plaintiffs to recover *all* of their fees. First, Plaintiffs contend that fee-shifting is appropriate because Gilead served "myriad" discovery requests and deposed Plaintiffs "in pursuit of its meritless standing argument." Motion ¶23. Gilead, however, was entitled under Delaware law to seek discovery into relevant issues,[14] both to determine whether Plaintiffs satisfied their burdens, and to mount a good-faith defense. *See Arbitrium*, 705 A.2d at 233 (agreeing with defendants' position that "they had every right to test the *bona fides* of the plaintiffs' request for the documents, as customarily occurs in § 220 actions").

29. Second, Gilead believed its discovery requests and motion to compel were necessary. Plaintiffs originally refused to submit to depositions. Ex. 14. Plaintiffs also failed to provide complete responses to Gilead's interrogatories and document requests. Ex. 12 at 1, 3. Gilead promptly raised its concerns with

[14] *Supra* ¶¶17-22.

Plaintiffs' discovery responses by letter dated April 14, 2020. Ex. 17. Plaintiffs did not respond until April 28, 2020, and thereafter the parties held a telephonic meet and confer on May 1, 2020. Ex. 18. The meet and confer did not resolve the outstanding issues, and despite multiple follow-up email communications, Plaintiffs did not provide the requested discovery as of May 8, 2020. *Id.* In light of a May 22 fact discovery cut-off and pretrial filing deadlines shortly thereafter, Gilead believed it could not wait any longer to move to compel. Ex. 12. Only on the eve of oral argument on the motion to compel did Plaintiffs finally agree to provide Gilead with all of the discovery requested in the motion to compel, evidencing the lack of frivolousness of Gilead's requests. Ex. 13.

30. Finally, Gilead believed its motion for a protective order was necessary given the case schedule and was supported by the case law cited therein. That the Court denied Gilead's motion based on contrary case law is not evidence that Gilead's arguments were made in subjective bad faith. *See Zheng*, Tr. at 8; *Haywood*, 2005 WL 2130614, at *9; *P.J. Bale*, 2005 WL 3091885, at *2; *Arbitrium*, 705 A.2d at 233.[15]

[15] In ruling on the motion for protective order, the Court noted that "reasonable minds can differ" and that precedent existed in support of Gilead's argument for bifurcated 220 proceedings. 05/08/20 Tr. at 59. The Court also stated that it viewed aspects of Plaintiffs' Interrogatory Nos. 8 and 9, the primary subject of the motion, as irrelevant. Tr. 62. Finally, the Court did not grant Plaintiffs' request for cost-shifting in defending the motion.

31. In fact, Plaintiffs have not offered—and cannot offer—any support that any of Gilead's decisions to pursue discovery or discovery-related motions were made in subjective bad faith. And even if they could offer such support, they fail to show that the conduct in question was the cause of *all* of their fees. *See ASB*, 2013 WL 5152295, at *2.[16]

CONCLUSION

Accordingly, Gilead respectfully requests that the Court deny the Motion.

[16] The Court should further deny Plaintiffs' Motion for failing to set forth their fees with sufficient specificity, leaving the Court unable to determine which of Plaintiffs' fees "relate causally to fees and expenses incurred due to" any alleged bad faith conduct. *See ASB*, 2013 WL 5152295, at *2. For example, Plaintiffs appear to concede that even if Gilead's *Wilkinson* defense was made in bad faith (it was not), no bad faith could have been present prior to the depositions of Plaintiffs and discovery related thereto. However, the current record leaves the Court unable to determine what fees were incurred before or after discovery. Nor does the current record allow the Court to determine what fees were incurred litigating a particular argument or phase of the case, such as the motion to compel or motion for protective order.

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