



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

**PLAINTIFFS' MOTION
FOR AN AWARD OF FEES AND EXPENSES**

1. Plaintiffs in the above-captioned matters hereby move for an award of fees and expenses in the amount of \$1,757,075.25, on the grounds set forth below.

INTRODUCTION

2. After a full 220 trial, this Court found for Plaintiffs and directed Defendant Gilead Sciences, Inc. ("Gilead") to produce substantial books and records. The Court also invited Plaintiffs to move for fees, stating:

Regrettably, Gilead's overly aggressive defense strategy epitomizes a trend. As described recently by a group of scholars, defendants are

increasingly treating Section 220 actions as “surrogate proceeding[s] to litigate the possible merits of the suit” and “place obstacles in the plaintiffs’ way to obstruct them from employing it as a quick and easy pre-filing discovery tool.” Defendants like Gilead adopt this strategy with the apparent belief that there is no real downside to doing so, ignoring that this court has the power to shift fees as a tool to deter abusive litigation tactics.

Opinion at 3-4.

3. This invitation was appropriate given Gilead’s baseless arguments designed to make this action difficult, slow, and expensive for Plaintiffs, and burden the Court with substantial, time-consuming, and unnecessary litigation.

4. For example, Gilead met Plaintiffs’ strong credible basis allegations, which “join[ed] in a chorus with other accusers,” including “persons living with HIV, activists, regulatory agencies, the Department of Justice, and Congress,” with “half-hearted” arguments. *Id.* at 1-2. Likewise, Gilead repackaged “proper purpose” arguments, asserting derivative action pleading requirements in a 220 action, which this Court had previously rejected as “standing arguments,” in “semantic sleight of hand.” *Id.* at 3. Most egregiously, Gilead mounted the “absurd” defense that five separate Plaintiffs in four separate actions, represented by separate counsel, fell within the “extreme facts” of *Wilkinson v. A. Schuman, Inc.* *Id.* at 2-3 (citing 2017 WL 5289553, at *3–4 (Del. Ch. Nov. 13, 2017)). Ignoring the facts (and common sense) and attempting to bolster its “unsupported” *Wilkinson* defense with

“misleading” record citations, Gilead embarked on a course to punish Plaintiffs for asserting their clearly defined statutory rights. *Id.* at 44.

5. Gilead also delayed the litigation by seeking to bifurcate an already expedited and streamlined proceeding, which burdened the Court in hearing and rejecting that motion. Gilead also made an unnecessary motion to compel designed to harass Plaintiffs.

6. Even now, Gilead has not gotten the message and has outright declined Plaintiffs’ offer to amicably resolve the issue of Plaintiffs’ fees and costs.

7. Given Gilead’s sustained conduct, fee-shifting is appropriate.

PROCEDURAL BACKGROUND

A. The 220 Demands

8. Plaintiffs Collins, Pettry, Friedt, Ramirez, and Hollywood each made separate written 220 demands on Gilead on December 2, 2019, December 30, 2019, January 8, 2020, February 4, 2020, and February 11, 2020, respectively (collectively, the “Demands”). Opinion at 18 & n.80.

9. Gilead provided no documents in response to any of the Demands.¹

10. Each Plaintiff filed 220 complaints, which were coordinated for the benefit of the Court and Gilead. Opinion at 19.

¹ *Id.* at 18. Gilead did, however, preview its meritless “standing” argument. *See, e.g.*, Ex. A (Feb. 18, 2020 Eagan Letter to Lebovitch).

B. Plaintiffs Seek An Amicable Resolution

11. Before trial, Plaintiffs’ counsel attempted to avoid protracted litigation.

12. On January 29, 2020, counsel for Pettry and Friedt responded to Gilead’s rejection letter, pointing to much of the same authority the Court cited, and enclosed additional proof of Friedt’s stock ownership to address Gilead’s “standing” argument. Ex. B (Jan. 29, 2020 Del Gaizo Letter to Eagan). On January 13, counsel for Collins similarly provided a detailed response explaining Gilead’s mistaken reasons for rejecting Collins’s demand. Ex. C (Jan. 13, 2020 Bruckner Letter to Eagan). Ramirez’s counsel similarly sent a letter to Gilead on February 27, 2020, indicating that Gilead had evidenced a “categorical refusal by the Company to produce any documents to the Stockholder” and demonstrated why Gilead’s positions were without justification. Ex. D (Feb. 27, 2020 Bottini Letter to Eagan). Gilead continued to reject the Demands. Opinion at 18 n.82.

13. On February 24, 2020, Hollywood’s counsel asked Gilead’s counsel whether “there [was] a willingness to discuss production of documents,” to which Gilead’s counsel flatly responded: “at this time we do not see the value of a meet and confer.”² Hollywood’s counsel again inquired whether Gilead would “get serious about what [Plaintiffs] are seeking and what the [C]ompany can produce

² Ex. E (Feb. 25, 2020 Eagan email to Lebovitch). Gilead similarly rejected each of the remaining Plaintiffs’ requests to meet and confer. Opinion at 18 n.82.

without forcing this trial” and suggested that “[e]ven if we end up litigating the 220 scope and purpose issues to conclusion, folks should keep it in perspective and not turn this into Sherman’s March.” Ex. F (May 14, 2020 Lebovitch email to Eagan).

ARGUMENT

I. DEFENDANT’S BAD FAITH CONDUCT SUPPORTS AWARDING PLAINTIFFS THEIR REASONABLE FEES AND EXPENSES

A. The Legal Standard

14. “Bad faith litigation conduct allows a court to shift fees as exception to the American Rule that requires each party to pay its own attorneys’ fees.” *Bay Capital Fin., L.L.C. v. Barnes & Noble Educ., Inc.*, 2020 WL 1527784, at *10 (Del. Ch. Mar. 30, 2020).

15. “Shifting fees for bad faith is not, properly speaking, an exception to the American Rule on fees; it is a method for reducing and appropriately allocating the costs of vexatious behavior sufficiently serious that justice requires such mitigation.” *Martin v. Harbor Diversified, Inc.*, 2020 WL 568971, at *1 (Del. Ch. Feb. 5, 2020).

16. “If [plaintiff] had a clearly established legal right to inspect [defendant’s] books and records, and [defendant’s] conduct forced him to bring this action to secure that right, then the defendant can be found to have acted in bad faith and be ordered to pay the plaintiff’s legal fees and expenses.” *McGowan v. Empress*

Entm't, 791 A.2d 1, 4 (Del. Ch. 2000). Similarly, fee shifting is appropriate in “situations when ‘the defendant in bad faith has forced the plaintiff to bring the lawsuit to enforce a legal claim that the defendant knew was valid.’” *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 2013 WL 5152295, *10 (Del. Ch. Sept. 16, 2013) (quoting *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997)).

17. “A court also may award attorneys’ fees when a litigant ‘through his bad faith conduct increased the litigation’s cost.’” *Id.* at *10. Conduct that “unnecessarily require[s] the institution of litigation, delay[s] the litigation, assert[s] frivolous motions” has been found to constitute bad faith, as do instances where a defendant “ha[s] no valid defense and kn[ows] it.” *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998) (“awarding [plaintiff] his full reasonable attorneys’ fees.”).

18. These considerations are particularly apt in a 220 action, which “is intended to be an expedited proceeding.” *Amerisourcebergen Corp. v. Lebanon County Emps.’ Ret. Fund*, 2020 WL 2095512, at *2 (Del. Apr. 29, 2020) (ORDER) (“*Amerisourcebergen II*”). As the Supreme Court stated:

It has become evident that the interjection of merits-based defenses—defenses that turn on the quality of the wrongdoing to be investigated—interferes with [the expedited 220] process. As the Court of Chancery has noted, a Section 220 proceeding “is not the time for a merits assessment of Plaintiffs’ potential claims against [the corporation’s] fiduciaries.”

AmerisourceBergen Corp. v. Lebanon Cty. Emps. ' Ret. Fund, 2020 WL 7266362, at *13 (Del. Dec. 10, 2020) (“*Amerisourcebergen III*”) (quoting *In re Facebook, Inc. Section 220 Litig.*, 2019 WL 2320842, at *2 (Del. Ch. May 30, 2019)).

19. Courts have suggested plaintiffs might seek fees and costs to deter bad faith litigation defenses. For example, in *Amerisourcebergen II*, upon the appellants’ motion to stay pending appeal, the Supreme Court encouraged plaintiff to seek a bond given defendant’s obstructive litigation conduct to that point. 2020 WL 2095512, at *3 n.8. Vice Chancellor Laster similarly observed that the Court had “been dealing with a multitude of these 220 trials,” suggested “paring things down so that we don’t waste time on stuff that’s really not fairly litigable,” and posited whether fee-shifting was an appropriate remedy for defendants’ “having put us all through this.” *Police & Fire Ret. Sys. of the City of Detroit v. Walmart Inc.*, C.A. No. 2020-0478-JTL, 52, 56-57 (Del. Ch. Oct. 5, 2020) (TRANSCRIPT) (Ex. G).

B. Gilead’s Bad Faith Conduct Merits Fee-Shifting

1. Plaintiffs Had Clearly Established Inspection Rights

20. While the specific limits of scope can be debated, Plaintiffs’ entitlement to exercise inspection rights was clear. “To inspect books and records under Section 220, a plaintiff must establish by a preponderance of the evidence that the plaintiff is a stockholder, has complied with the statutory form and manner requirements for

making a demand, and has a proper purpose for conducting the inspection.” Opinion at 20.

21. Gilead could not dispute the first two requirements. Yet, it still aggressively opposed Plaintiffs’ statutory inspection rights “despite the ample evidence of a credible basis and the obvious responsiveness of certain categories of documents.” *Id.* at 68. Said differently, Gilead effectively “forced [Plaintiffs] to bring the lawsuit to enforce a legal claim that [Gilead] knew was valid.” *ASB*, 2013 WL 5152295, at *10.

2. Gilead Engaged In Bad Faith Litigation Tactics

22. “Gilead *exemplified* the trend of overly aggressive litigation strategies by blocking legitimate discovery, misrepresenting the record, and taking positions for no apparent purpose other than obstructing the exercise of Plaintiffs’ statutory rights.” Opinion at 68 (emphasis added).

23. Gilead’s aggressive discovery tactics and frivolous motions imposed unnecessary costs on Plaintiffs and the Court. *ASB*, 2013 WL 5152295, at *10; *Johnston*, 720 A.2d at 546. Gilead served myriad document requests and interrogatories on Plaintiffs in pursuit of its meritless standing argument, to which each Plaintiff responded while also sitting for individual depositions. Opinion at 19, 41. Plaintiffs were also forced to respond to two discovery motions. Gilead moved to compel depositions that Plaintiffs had already agreed to provide once Gilead

confirmed they would occur remotely, and pursued other unnecessary and premature discovery matters despite Plaintiffs commitment to consider and respond accordingly before the filing of their motion. Pls.' Opp. To Mot. to Compel, Trans. ID65646471, at 3-4.

24. Gilead also moved for a frivolous protective order that was directly contrary to Delaware law. Trans. ID65558280. Indeed, Vice Chancellor Laster explained just a few months earlier in a decision Gilead conspicuously failed to cite that a plaintiff can “serve interrogatories or notice a Rule 30(b)(6) deposition to understand what books and records exist and who has them.” *Lebanon Cty. Emps.’ Ret. Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, at *26 (Del. Ch. Jan. 13, 2020) (“*AmerisourceBergen I*”).

25. More perniciously, Gilead pursued several facially meritless arguments, which vastly increased the time and expense of the litigation.

26. Gilead ignored “ample” evidence of Plaintiffs’ credible basis to suspect wrongdoing. Opinion at 68. Instead, Gilead “half-heartedly” argued that stockholders cannot use allegations from other lawsuits to support their credible basis without “explain[ing] why a credible basis analysis should ignore allegations forming the basis of other lawsuits” (*id.* at 2) and ignoring recent decisions rejecting that argument.³

³ See, e.g., *In re UnitedHealth Gp., Inc. Section 220 Litig.*, 2018 WL 1110849, at *6

27. Gilead also vigorously pursued its standing “defense” throughout the case. The Court noted the “vexing aspect” of Gilead’s “so-called standing argument” was that “it [was] undisputed that each Plaintiff held stock when filing their complaints.” Opinion at 40-41. Indeed, Plaintiffs had made apparent their standing at the time of their Demands. Gilead carried this so-called defense forward by mislabeling “the viability of derivative claims that Plaintiffs might pursue in the future” under the standing rubric. *Id.* at 42. That defense was meritless *ab initio*. *See id.* (quoting *UnitedHealth*, 2018 WL 1110849, at *7 & n.95 and collecting cases). Worse, Gilead rested this meritless argument on misrepresentations of the record. *Id.* at 44.

28. Gilead also invoked a “lawyer-driven” affirmative defense under *Wilkinson*. The Court rightly described that argument as “border[ing] on absurd” and “raise[ing] more questions about Gilead’s purpose than the plaintiffs’.” *Id.* at 2-3. It is now well-settled (and was at the time of Defendant’s Answers) that *Wilkinson* “involved extreme facts.”⁴ Nevertheless, Gilead pressed this defense even after each

(Del. Ch. Feb. 28, 2018); *Elow v. Express Scripts Hldgs. Co.*, 2017 WL 2352151, at *5 (Del. Ch. May 31, 2017).

⁴ Opinion at 2; *see also Kosinski v. GGP Inc.*, 214 A.3d 944, 950-51 (Del. Ch. 2019) (observing that the facts in *Wilkinson* were “unusual” and that “Defendant’s efforts to analogize this case to the unusual facts of *Wilkinson* are deeply misguided.”); *Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp.*, 2019 WL 479082, at *10 (Del. Ch. Jan. 25, 2019) (noting the key factor in *Wilkinson*, the misalignment of goals between the stockholder and counsel, was not present).

of Plaintiffs’ respective depositions that established that Plaintiffs were involved in, apprised of, and “knowledgeable about the basis for their Demands.” Opinion at 34.

29. Combined with Gilead’s abusive discovery tactics, each of Gilead’s meritless arguments crossed from “vigorous litigation” to “frivolous opposition in an attempt to game the system,” warranting fee-shifting. *Donnelly v. Keryx Biopharmaceuticals, Inc.*, 2019 WL 5446015, at *6 (Del. Ch. Oct. 24, 2019).

C. Public Policy Warrants Fee-Shifting

30. Several policy reasons also justify fee-shifting here.

31. *First*, Gilead’s conduct needlessly burdened the Court. Gilead ignored the well-worn refrain that 220 proceedings are “summary” in nature and sought to “expand a books-and-records action into a plenary proceeding.” *Amerisourcebergen I*, 2020 WL 132752, at *23, *26. Even when urged not to turn this simple matter into “Sherman’s March,” Gilead sought to “turn[] [this] litigation into a surrogate proceeding to litigate the possible merits of the suit where they place obstacles in the plaintiffs’ way to obstruct them from employing it as a quick and easy pre-filing discovery tool.” Opinion at 67 (quoting James D. Cox, Kenneth J. Martin, Randall S. Thomas, *The Paradox of Delaware’s “Tools at Hand” Doctrine: An Empirical Investigation*, 75 BUS. LAW. 2123, 2150 (2020) (hereinafter, Cox)).

32. *Second*, Gilead’s conduct needlessly burdened Plaintiffs. As the Court observed, the “massive resistance” by corporate defendants to Section 220 demands

“increase[s] the investment required from stockholder plaintiffs and their counsel when pursuing 220 inspections.” Opinion at 68. This imposes costs on stockholders whose attorneys “do not normally earn any fees from Section 220 cases, but are forced to absorb the suits’ costs, unless their subsequent merits-based suits end successfully with a judgment or settlement.”⁵ “Plaintiffs’ expected costs for inspection cases could be lowered by insuring that they are compensated if the corporation’s refusal is frivolous.” Randall Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 370 (1996) (hereinafter, Thomas); *see also* Cox at 2151 (“Delaware should give serious consideration to awarding plaintiffs their attorneys’ fees in cases where the defendants make untoward efforts to delay the resolution of these summary cases.”).

33. *Third*, fee-shifting helps resolve the perverse incentives for corporate defendants to stonewall 220 demands by creating “real downsides to overly aggressive defense campaigns at the Section 220 phase.” Opinion at 67. “Corporate

⁵ Cox at 2152. Indeed, a partner affiliated with Gilead’s Delaware counsel confirmed that “plaintiffs’ attorneys frequently have to bear their own costs in bringing these cases and are only compensated for their work if they successfully bring a subsequent merits-based lawsuit” whereas “defense attorneys are paid by the hour in books and records cases.” *Id.* at 2151 n.130 (citing Kevin Shannon, Partner, Potter Anderson Corroon LLP, Trending Developments: Dealing with Books and Records Inspection Demands, Address at the Third Annual Symposium on Corporate Law at U.C. Berkeley (Oct. 12, 2018)).

management can benefit from the delay resulting from the hearing (and possible appeals) if there are no adverse consequences stemming from an improper refusal to provide shareholders with the requested information.” Thomas at 365. Indeed, the Court noted the upside to defendant’ of a “scorched earth” strategy in 220 litigation as “undermin[ing] follow-on derivative claims” if that strategy is successful or “repurpose[ing]” that work product “in the context of the derivative suit” without suffering any reputational harm sufficient to deter that conduct. Opinion at 67. Fee-shifting creates the deterrent effect that an adverse ruling does not.

D. Plaintiffs Are Entitled to Their Reasonable Fees and Expenses

34. Gilead’s scorched earth defense forced Plaintiffs to wade into the merits despite “ample evidence of a credible basis” (*id.* at 68), defend against Gilead’s baseless defenses and aggressive litigation tactics, sit for harassing depositions, and proceed through and after trial. Gilead’s strategy dramatically increased Plaintiffs’ costs of exercising their 220 rights and exemplifies the wasteful litigation tactics that fee-shifting can (and does) deter. *Id.*

35. As a result of Gilead’s bad faith litigation tactics, Plaintiffs have expended \$1,757,075.25 from the filing date of each Plaintiff’s complaint through the date of the Opinion:

Firm	Hours	Fees	Expenses
Heyman, Enerio, Gattuso, & Hirzel LLP	228.6	\$117,090.00	\$7,082.21
Cotchett, Pitre, & McCarthy	367.95	\$201,191.25	\$0
Pomerantz LLP	280	\$160,800.50	\$982.78
The Law Offices of Alfred G. Yates, Jr., P.C.	40.45	\$27,910.50	\$0
Bottini & Bottini, Inc.	273.8	\$182,421.50	\$3,716.20
Bernstein Litowitz Berger & Grossmann LLP	1047.25	\$647,356.25	\$25,511.30
Klausner Kaufman Jensen & Levinson	85	\$59,500.00	\$0
Cooch & Taylor P.A.	69.8	\$55,840.00	\$5,019.10
Robbins LLP	534.75	\$260,625.00	\$2,028.66
Totals	2927.6	\$1,712,735.00	\$44,340.25
Grand Total: \$1,757,075.25			

36. A detailed summary of Plaintiffs' fees and expenses is attached as Exhibit H.

II. PLAINTIFFS' ARE ENTITLED TO FEES UNDER SECTION 220(c)

37. When the Court orders inspection, it also "may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award *such other or further relief as the Court may deem just and proper.*" 8 Del. C. § 220(c) (emphasis added). Plaintiffs submit that "such other or further relief" encompasses Plaintiffs' fees and expenses.

CONCLUSION

38. The Court should discourage similar bad faith litigation tactics in summary 220 proceedings by awarding Plaintiffs' requested fees and expenses.

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CERTIFICATE OF SERVICE

Gillian L. Andrews, Esquire, hereby certifies that on March 3, 2021 copies of Plaintiffs' Motion for An Award of Fees and Expenses were served electronically upon the following:

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