2022 WL 102553 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

DG BF, LLC, et al., Plaintiffs,

v.

MICHAEL RAY, et al., Defendants,

and

American General Resources LLC, Nominal Defendant.

No. 2020-0459-MTZ.
January 6, 2022.

Plaintiffs' Answering Brief in Opposition to Defendants' Application for Attorneys' Fees and Costs

Dailey LLP, Andrew H. Sauder (#5560), 1201 N. Orange Street, Suite 7300, Wilmington, Delaware 19808, Telephone: (302) 468-5007, asauder@daileyllp.com, Of Counsel: Marina V. Bogorad, Gerard Fox Law P.C., 1880 Century Park East, Suite 1410, Los Angeles, CA 90067, Telephone: (310) 441-0500, mbogorad@gerardfoxlaw.com, Counsel for plaintiffs.

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PRELIMINARY STATEMENT

In its Order of Dismissal dated November 19, 2021 (the "Order"), the Court directed Defendants to address Plaintiffs' claimed entitlement to recover their attorneys' fees outside of discovery motions. (*See* Order at 18.) [1] In conjunction with the Court's limiting its bad faith finding only to Plaintiffs' conduct of discovery (*see id.* at 16), Defendants are yet to show a legitimate basis for claiming entitlement to fee shifting outside of discovery. As shown below, there is no such basis.

Moreover, any fees to be shifted must be "reasonable," as the very authority cited in support of the Court's shifting of "[a]ll" fees clearly demonstrates. (Order at 18, citing *TR Invs., LLC v. Genger,* 2009 WL 4696062, at * 19 (Del. Ch. Dec. 9, 2009) (awarding only "reasonable" fees once shifted and also holding that if the parties cannot come to an understanding as to what amount would be reasonable, "I shall appoint a special master who will address the fee dispute, with the costs of the master being charged in full against the party whose position as to the amount deviates the most from the final amount awarded by the court").)

This is a case that had been pending for fourteen months at the time of the Court's dismissal, with four of those months producing no activity, as the case remained dormant awaiting this Court's decision on Defendants' motion to dismiss. Given only ten months of active litigation-with only three depositions taken, no expert witness discovery conducted, and no trial ever taking place, the over $2 million in total fees claimed by Defendants is grossly excessive and is far from "reasonable." Moreover, the active discovery process itself lasted only about a little over three months, rendering the claimed total fees of over $600,000 for that process alone similarly unreasonable.

STATEMENT OF FACTS

On June 25, 2019, Jeff Menashe, through his investment vehicle, DG BF LLC, invested $5 million into AGR, a cannabis company. Although lured with Defendants' promises of concrete results based on the actual historical sales data, "the rosy picture the defendants had painted began to fade" soon after the investment, as the Court aptly summarized Plaintiffs' allegations in its decision on Defendants' motion to dismiss. (D.I. 116 at 1.) As the Court further recounted,

> The [supposedly impending] lucrative merger deal vanished without explanation. Less than four months after the plaintiff invested, the company's chief financial officer ("CFO") pled guilty to creating fraudulent financial records and misleading investors in a $1 billion Ponzi scheme at another company. While the defendants allegedly knew the CFO was being investigated, they did not disclose that issue to the plaintiff before he invested. Moreover, the CFO was responsible for preparing the company's historical financial records and projections that the defendants presented to the plaintiff to secure his investment. Once the plaintiff invested, the company's historic financial performance was revised downward and, with it, the company's projected future growth. Within months, the company was insolvent and pursuing more money in a new "Series E" financing round.

(*Id.*) After spending the ensuing year trying to fix the company from within-all to no avail, Plaintiffs initiated this litigation on June 11, 2020.

A. Pre-Discovery Litigation

On June 26, 2020, the Court granted the TRO that precluded only the closing but not the shopping of the Series E financing. (D.I. 33.) Importantly, as the Court later confirmed, the relief was granted "[a]pplying the standard for a temporary restraining order" (D.I. 35 at 3), which thus necessarily meant that the Court had: (1) determined that Plaintiffs made out "a colorable claim," (2) weighed the threatened irreparable harm to Plaintiffs against "the possible injury to defendant if the remedy is improvidently granted," and (3) decided that the former outweighed the latter. *Cottle v. Carr,* 1988 WL 10415, at *3 (Del. Ch. Feb. 9, 1988) (Allen, C.).

Less than two weeks after the TRO issued, the injunction was dissolved by the Court's Order dated July 9, 2020 (D.I. 35), in which the Court found that the Operating Agreement "does not require AGR to seek approval" from Plaintiffs to amend the Operating Agreement and issue Series E financing. Notably, the Court agreed with Plaintiffs that "[b]ecause issuing Series E units ... requires amending the Operating Agreement ..., [t]he Company cannot issue Series E units without considering the Series D Manager's consent rights ...." (*Id.* at 9.) It was the reach of those consent rights that the Court adjudged to fall short of providing Plaintiffs with the right to block the transaction because, under the Court's interpretation of the contract, although the Operating Agreement does provide Plaintiffs with priority standing, it does not do so in perpetuity. (*Id.* at 12-13.) There was nothing in the Court's reasoning that indicated that Plaintiffs' position was unreasonable or undertaken in bad faith-rather, based on the Court's disposition of the arguments, there clearly was a bona fide disagreement over the contractual language.

The parties then proceeded with their briefing and argument over Defendants' motion to dismiss, which the Court eventually granted only in part, resulting in the core claims asserted proceeding to discovery. (D.I. 116.) Importantly, while Defendants attempt to minimize the import of this decision by elevating numbers over substance and quoting the Court's classification of thirteen of Plaintiffs' claims as "detritus" (App. at ¶ 8), nowhere in its analysis did the Court suggest that the dismissed claims were mere fluff (and the "detritus" classification appeared as a mere reference to the Court's disposition of those claims prior to its analysis of the fraud claims).

In fact, the Court itself confirmed that the surviving claims were "the crux" of Plaintiffs' complaint. (D.I. 116 at 55.) Notably, independent commentators agreed, reporting that Plaintiffs' "core allegations" survived and headlining that the Court "preserved" Plaintiffs' "fraud claim."[2]

Indeed, all the twelve alleged contractual breaches by the company survived the analysis and moved forward, as did a certain portion of the contractual claims against Defendant Ray. All Plaintiffs' fraud allegations against Defendant Efros were similarly adjudged to state a valid claim. The Court also left the defamation claim undecided, raising a jurisdictional issue; moreover, the declaratory relief claim also moved forward, with the Court raising the possibility that it should be litigated ahead of all the other claims.

As such, the Court's decision endorsed Plaintiffs' belief that they had been defrauded as a "reasonable" one. (D.I. 116 at 58-50 ("It is ***reasonable*** at this stage to infer that Efros presented these projections to Menashe with the intent to deceive him.").)

Notably, while their motion to dismiss was pending, Defendants also sought and received a stay of all discovery, which continued from October 5, 2020 until March 1, 2021. (D.I. 90.) This stay, among other things, froze Defendants' obligation to respond to Plaintiffs' discovery requests, which had been propounded shortly after Plaintiffs initiated this litigation. (D.I. 45.) Indeed, the Court denied Plaintiffs' motion to compel Defendants' discovery because of this stay. (D.I. 91.)

B. Discovery

By the time discovery resumed, however, Defendants were on the brink of selling the company for spare parts, compelling Plaintiffs to move fast so that they could still save their investment. (*See* D.I. 147 (discussing the details of the impending sale transaction in the later filed and now withdrawn Motion to Appoint Receiver).) That impending sale compelled the expedited schedule setting the trial to occur mere five months later, which the Court approved on March 30, 2021. (D.I. 120.)

Since the Court has already made it findings as to Plaintiffs' discovery conduct, Plaintiffs will reserve their arguments for appeal. Notably, however, Defendants' recounting of these events is often spotty. For example, Defendants discuss the findings of Plaintiffs' accounting expert and hastily conclude that he did not find that AGR's financial statements or projections were "fraudulent." (App. at ¶ 10, citing D.I. 148.) But the expert did specifically testify, *inter alia,* that: (1) the financials provided by Defendants were "inadequate, incomplete, and in many cases, inconsistent" (D.I. 148 at ¶ 5); (2) numerous discrepancies were noted rendering the income statements provided "inaccurate and unreliable" (*id.* at ¶¶ 7-8); (3) based on his review of AGR's QuickBooks files, it did not appear that the year-end information contained therein comported with any of the consolidated financial statements produced in discovery to date (*id.* at ¶¶ 10-11); and (4) the expert thus had "no confidence in the accuracy and reliability of the Defendants' financial information provided to the Plaintiffs in this matter" (*id.* ¶ 13). In other words, while this was an accounting expert that could not offer a legal opinion that Defendants were engaged in "fraud[]," his above-described observations strongly suggested as much.

In similar vein, Defendants, *inter alia:*
(1) state that Plaintiffs "fail[ed] to ... provide hit reports" (App. at ¶ 10), yet their Motion to Compel cited in support of this statement confirms that hit reports were provided (but found unsatisfactory by Defendants, D.I. 146 at ¶ 18 & Ex. 22)-indeed, Defendants now seek to be reimbursed for reviewing these supposedly nonexistent hit reports (*see, e.g.,* Meluney Aff., Ex. A at p. 6 (time entries by Mr. Beebe for 8/4/21 & 8/5/21));

(2) assert that Plaintiffs refused to search the relevant servers (*see* App. at ¶ 12), yet the evidence they cite simply shows that Plaintiffs sought additional time to ascertain availability of those searches (D.I. 146 at Ex. 22, pp. 2-3); and

(3) recount that Plaintiffs supposedly refused to provide "a concrete date" for imaging (*see* App. at ¶ 24), even though the unrebutted record reflects that the purported refusal was nothing but the vendor's unanticipated technical difficulties that rendered it unable to commit to a concrete imaging date (*see, e.g.,* D.I. 194 at 2-3; D.I. 200 at 7 n.2).

Defendants' cited sources for their spoliation assertions fare no better. Thus, Defendants claim Menashe deleted "relevant text messages" but then refer to Menashe's testimony dealing with texts deleted *months* before this litigation started. (*See* App. at ¶ 13, citing D.I. 225 at Ex. 2, p. 223:6-224:2; *see id.* at 220:7-8 (making clear that the text being discussed was from March 2020).) Notably, in the same deposition, Menashe also testified under oath that he did not anticipate litigating this dispute "for months into 2020" (*id.* at 228-229). [3] As for the laptop donations, they were part of a routine preexisting policy (*see id.* at 41:20-42:14). Defendants also claim that Plaintiffs failed to instruct their employees to preserve evidence, but the cited testimony shows that Plaintiffs believed all the evidence was on auto-preserve. (*See* App. at ¶ 14, citing D.I. 225, Ex. 1 at 32:23-33:20 & 44:16-50:4; *see also id.* at 29:6-14, 38:7-39:7, 46:22-23 & 54:14-18; *cf id.* at 60:3-5 (Plaintiffs' employees are not allowed to save documents anywhere but the server, which backs up automatically).) At the very least, this clearly establishes that any suggested improper motive was simply lacking here.

Finally, Defendants point to Plaintiffs' repeated attempts to extend discovery deadlines and continue the trial date. (*See* App. at ¶ 11.) Rather than demonstrating some supposedly improper motives, however, these attempts actually show that Plaintiffs did try to alleviate any perceived production shortcomings in good faith by seeking more time to fix them. As such, this is further evidence that Plaintiffs did not pursue any kind of improper agenda but rather simply struggled to keep up, litigating against three different firms with much greater resources than their own.

ARGUMENT

I. Defendants Failed to Introduce Any Evidence, Let Alone the Required "Clear" Evidence of "Subjective Bad Faith," to Support Their Request for Fees Outside of the Discovery Process

"[T]ypically litigants must pay their own attorneys' fees and expenses under the American Rule." *Marra v. Brandywine Sch. Dist.,* 2012 WL 4847083, at * 4 (Del. Ch. Sept. 28, 2012); *see also K & G Concord, LLC v. Charcap, LLC,* 2018 WL 3199214, at * 1 (Del. Ch. June 28, 2018) (observing that the American Rule applies "regardless of the outcome of litigation"). "Only rarely do Delaware courts deviate from this standard." *Marra,* 2012 WL 4847083, at * 4 (citing *Weinberger v. UOP, Inc.,* 517 A.2d 653, 654 (Del. Ch. 1986) (noting that "Delaware courts have been very cautious in granting exceptions" to the American Rule)). This "rare[]" occasion can be justified only by a finding of bad faith, [4] and "[t]he bad faith exception applies only in ***extraordinary*** cases." *Lawson v. State,* 91 A.3d 544, 552 (Del. 2014); *RBC Cap. Markets, LLC v. Jervis,* 129 A.3d 816, 877 (Del. 2015) (affirming denial of fee shifting because "[t]he bad faith exception applies only in ***extraordinary*** cases," despite the record below showing the party's intentional misstatements of fact to the court; although "aggressive" and "problematic," the conduct still did not cross "the threshold of glaring egregiousness").

"[T]he party seeking to invoke th[e] [bad faith] exception must demonstrate by 'clear evidence' that the party from whom fees are sought ... acted in subjective bad faith." *Lawson,* 91 A.3d at 552. Defendants bear "the ***stringent*** evidentiary burden" to produce the required clear evidence of subjective bad faith because the "bad faith exception is not lightly invoked ...." *K & G Concord,* 2018 WL 3199214, at * 1. In fact, "[t]he standard is ***arduous:*** situations in which a party acted vexatiously, wantonly, or for oppressive reasons." *Branson v. Branson,* 2011 WL 1135024, at * 1 (Del. Ch. Mar. 21, 2011) (denying request for fees where the conduct was "more fairly viewed as an aggressive prosecution of deeply held beliefs and not as an example of vexatious or bad faith conduct"), citing *Merrill Lynch Tr. Co., FSB v. Campbell,* 2009 WL 2913893, at * 13 (Del. Ch. Sept. 2, 2009) (same where "a legitimate disagreement existed, [Plaintiff] was authorized to present that disagreement to this Court, and in doing so an inference of bad faith cannot be drawn. Absence such a showing, there is no basis to deviate from the presumption that [Defendant] must bear her own expenses.").

In fact, this Court has confirmed that the standard presents a "high bar" because the exception is "quite narrow" and "applie[s] in only the most egregious instances of fraud or overreaching." *Owen v. Tavistock Civic Ass'n, Inc.,* 2019 WL 1349656, at * 5 (Del. Ch. Mar. 26, 2019); *see also Julius v. AccurusAerospace Corp.,* 2019 WL 5681610, at * 17 (Del. Ch. Oct. 31, 2019). Notably, "evidence that the purchaser was disappointed and brought a host of grievances ... does not demonstrate bad faith. Further, that ... [the] claims were eventually dismissed does not mean that they were brought in bad faith." *Supernus Pharms., Inc. v. Reich Consulting Grp., Inc.,* 2021 WL 5046713, at * 7 (Del. Ch. Oct. 29, 2021); *accord Marra,* 2012 WL 4847083, at * 4 ("Generally, a party acting merely under an incorrect perception of its legal rights does not engage in bad-faith conduct.").

As the facts set forth above demonstrate, Defendants here have introduced nothing into the record that is even close to suggesting that Plaintiffs had been somehow acting in bad faith by the time discovery started, let alone the required "clear evidence" of "subjective" intent. Thus, Defendants' request for $2,253,262.56 in fees should be rejected. Instead, Defendants' "bad faith" argument outside of the discovery context boils down to a handful of prelitigation emails, which, as shown below, fail to satisfy Defendants' "stringent" evidentiary burden on this issue. [5]

First, Defendants point to two emails as supposedly "undercut[ting]" Plaintiff's claims. (App. at ¶ 20, citing Exs. 1 & 2; *see also* App. at ¶ 33 (claiming the emails show that "Plaintiffs knew" their claims "lacked merit").) [6] In one, Mr. Menashe, a non-lawyer, comments on the draft complaint and disagrees with the focus of the allegations, since, in his opinion, the main signal that something was amiss was that Defendants were not transparent about the revisions rather than the revisions themselves. (*See* Ex. 2.) As a matter of law, however, both aspects were significant, and this is the very reason why Mr. Menashe is represented by counsel in the first place-so that he is properly advised of his rights and proceeds with his claims accordingly.

Moreover, the claims as stated actually reflect that the financial revisions kept happening even before Plaintiffs invested-yet they were explained away by Defendants' projecting the same level of promised profitability by a date certain and touting the supposed impending $30 million merger. (FAC at ¶ 48.) The issue was not that the "financials" were revised but that the

underlying historical data started changing; specifically, Defendants "revised AGR's historical monthly net income for each month between January and May 2019 downwards an average of approximately $161,000." (FAC at ¶ 5.) The distinction is clearly reflected by the allegations; indeed, the Court picked up on it when it allowed Plaintiffs' fraud claims to proceed:

> Plaintiffs also point to AGR's ***historical financial data*** [in addition to the purported impending Distribution Merger], which Efros presented to Menashe on June 1, in advance of the Investment. These historical numbers were representations of fact. Plaintiffs plead ***these numbers*** were inaccurate, as evidenced by the adjustment to them in July. Plaintiffs allege that Efros knew this data was false, especially given that they were prepared by Roach.

(D.I. 116 at 57.)

Similarly, in the second email, one of Mr. Menashe's *advisors* (and not even Mr. Menashe himself) makes a reference to a possible "shot over the bow," which Defendants elevate as significant because the advisor on that particular occasion "omit[ed] any mention of fraud." (App. at ¶ 20, citing Ex. 1.) But the email in question is an *introduction* email. In it, Mr. Menashe is introduced to his counsel for the first time to discuss his "options," one being a possible "warning shot" to protect his investment. Neither Mr. Menashe nor his advisors had had the benefit of any legal analysis of the facts at that point and could not possibly start assigning legal labels to what was happening. Yet, from that reference alone, Defendants extrapolate "the entire intent of the lawsuit ...." This is overreaching and certainly no "clear" evidence of subjective bad faith. It is hardly any evidence of anything at all. Indeed, Defendants' own authority confirms that such "sparse record" cannot possibly justify a finding that the entire litigation was brought in *"subjective"* bad faith. *In re SS & C Techs., Inc. S'holders Litig.,* 948 A.2d 1140, 1150 (Del. Ch. 2008) (original italics).

Second, Defendants point to an email purportedly demonstrating that "Plaintiffs were fully aware of the assumptions in AGR's financial projections" (App. at ¶ 21, citing Ex. 3) but this is old news. Plaintiffs' familiarity with those assumptions is evident from their complaint-indeed, it is those assumptions that explain away why Plaintiffs did not have a problem with Defendants' revisions to the projections that occurred *prior* to Plaintiffs' investment. (*See* FAC at ¶ 48.) Yet the "assumptions" underlying the changing projections do not explain the revisions ***to the historical data*** that came later. [7] In fact, what changed in July is the data that Defendants had never disclosed as fluctuating. (*Compare* Ex. 3 (listing disclosed assumptions as fluctuating product launch dates, dropping costs due to lower distillate price and growing brand awareness), *with* Declaration of Kevin Raesly at ¶¶ 4-13 (explaining that the July 2019 projections were driven by the dramatically slower pace of opening new licensed dispensaries and shutting down the unlicensed ones, as well as the company's inability to effectively compete in Nevada and the barely existing CBD sales) & *id.* at Ex. A (email by Defendant Efros dated July 29, 2021, with an attachment setting forth the new previously undisclosed risk factors).)

Even further from real news is Defendants' contention that they supposedly "uncovered communications ... showing that Defendants notified Plaintiffs about the revised projections the same day they were uploaded to the data room." (App. at ¶ 22, citing Ex. 7.) But the "uncovered" email merely provides that Raesly received the data room's automatic notification that some unidentified "files" had been uploaded. This is a far cry from Defendants' supposed notification of "the revised projections." In any event, Plaintiffs' complaint openly confirms this supposed newly "uncovered" knowledge. (*See* FAC at ¶ 93 ("On or around July 25, 2019, ... Menashe first learned through his Associate Kevin Raesly, who had access to AGR's online "dataroom," that there was a dataroom posting [containing the revisions].").)

Notably, Defendants then cite emails dated November 2019 as if they were reacting to the above-discussed July revisions. (*See* App. at ¶ 22, citing, *inter alia,* Ex. 6.) In reality, the emails on their face discuss AGR's October 2019 reporting, which, although worrisome, was still explainable by the initial assumptions. Yet this was still only within three months of the investment, while

Defendants had projected positive cashflow within five months, obtaining 2020 revenue between $62 million and $82 million, in addition to the expected $30 million to come through the promised merger. (*See* FAC at ¶ 60.) Moreover, this was still before Plaintiffs learned about Roach's guilty plea and conviction (as these facts were never disclosed by the company, *see id.* at ¶ 90) and before the December 4, 2019 announcement that the company was on the brink of insolvency, with its cash running out within the next four months (*see id.* at ¶ 113).[8] Combined with Defendants' consistent lack of transparency, their disregard for basic corporate formalities, their failure to meet the projected Series D's closing minimum, their staunch refusal to respond to Plaintiffs' attempts to fix the problems from within, as well as the other projected events simply disappearing into thin air (such as the purportedly impending Distribution Merger), these subsequent events led Plaintiffs to a "reasonable" belief that they had been defrauded-a belief reinforced by the Court's own findings.

In the end, this Court has already determined that, based on the facts in their possession at the time, Plaintiffs bore a "reasonable" belief that they had been defrauded. (D.I. 116 at 59.) Given this finding, any fee shifting for Plaintiffs' conduct outside of discovery would be simply inconsistent. In any event, having stated a "colorable" claim, Plaintiffs cannot qualify for the "bad faith" exception based on their pre-discovery conduct. *See, e.g., FGC Holdings Ltd. v. Teltronics, Inc.,* 2007 WL 241384, at *7 (Del. Ch. Jan. 22, 2007) ("There appears to be at least a colorable basis for the claim .... Thus, I am not confident that Teltronic' claim was so lacking in merit as to constitute bad faith."); *accord P.J. Bale, Inc. v. Rapuano,* 888 A.2d 232, 2005 WL 3091885, at *2 (Del. Nov. 17, 2005) (TABLE); *see also In re Sunbelt Beverage Corp. S'holder Litig.,* 2010 WL 26539, at *15 (Del. Ch. Jan. 5, 2010) (refusing to shift fees where the parties "could and did reasonably differ on the legal import" of the underlying facts, which presented "a legitimate legal question").

II. There Are Indicators Suggesting the Claimed Fees are Questionable

Delaware law requires for any shifted fees to be "reasonable." *TR Invs.,* 2009 WL 4696062, at *19. The usual factors to gauge the required reasonableness include, *inter alia,* "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly," as well as "the amount involved and the results obtained and "the time limitations imposed by the client or by the circumstances...." *Parfi Holding AB v. Mirror Image Internet, Inc.,* 954 A.2d 911, 944 n.126 (Del. Ch. 2008) (discussing factors from Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct).

First, Defendants incorrectly contend that "the Court has already shifted fees in connection with its Series E ruling" (App. at ¶ 37). Not so, the Court has only requested ***briefing*** on the issue. (D.I. 35 at 15.) The Court has recently confirmed that the motion is still pending. (*See* Order at 18.) As such, $183,495.60 in fees attributed to the Court's Series E Order and included in Defendants' "already shifted" total based on the "Court's fee shifting orders to date" should be deducted from the $608,666.88 of the claimed total, for the new "already shifted" total of $425,171.28.

Moreover, as discussed above, since the Court had applied the temporary restraining order standard to halt the Series E financing for the two weeks that were covered by the initial TRO, it thus necessarily determined that Plaintiffs had a "colorable" claim and weighted the risk of injury to Defendants. (*See supra* at 3.) As such, the risk that TRO may not hold up was already baked into the ruling. As such, there is simply no cognizable basis for any fee shifting in connection with the Series E rulings.

This is especially so given the amount of the fees claimed in connection with the Series E rulings. While the company's actual claimed damages arising from the short duration of the TRO stand at only $10,528 (*see* D.I. 103), they are clearly dwarfed by the accompanying attorney's efforts on the same issue. Given that Defendants submitted only three briefs in connection with the Series E decision (*see* D.I. 7, 13 & 29) and attended two hearings, the $183,495.60 combined price tag for the work done in the space of only three weeks is hardly "reasonable." (*See, e.g.,* Meluney Aff., Ex. A at 24 (billing over 50 hours to prepare just for the TRO hearing alone).)

Second, for the about $1.6 million in fees claimed ***outside*** of the "already shifted" category, and assuming the Court's consideration of this category is even warranted, there are many issues with the submitted billing records, and the allotted space

simply does not allow to provide a comprehensive list thereof. The following examples, however, should suffice to (at least) trigger further fact finding by this Court or by a special master as described in *TR Invs.,* 2009 WL 4696062, at * 19. One such example is AGR's forwarding counsel's billing more than 85 hours over the course of one week between the three attorneys that researched and drafted Defendants' reply brief in further support of their motion to dismiss. *See, e.g., Parfi Holding,* 954 A.2d at 944 (finding 165 hours expended on two briefs "disproportionate to what it should have taken to write the two briefs in question"). Since the briefing proceeded on a stipulated schedule (D.I. 76), there were no unreasonable time limitations involved. As if this was not enough, the Individual Defendants' counsel billed over 50 additional hours for the same brief and then spent the combined amount of over 65 hours preparing for the motion to dismiss hearing. (*See* Meluney Aff., Ex. A at 18-19.) The combined 135 hours for a reply brief (with 65 more hours of hearing preparations) is entirely disproportionate, especially considering that the motion addressed standard issues of Delaware pleading, thus presenting no novel or difficult issues. *See Richmont Cap. PartnersI, L.P. v. J.R. Invs. Corp.,* 2004 WL 1152295, at * 3 (Del. Ch. May 20, 2004) (reducing the request for fees expended in preparation of two answers and two responses to motions to dismiss, as well as the attendant hearing, from 282 to 150 hours, especially given that the motions involved "no novel issues of law or fact").

The billing records also reveal time spent on another action altogether. This Court has no basis to award fees expended on the related action being prosecuted in New York state court (which is still pending). Yet Defendants included those hours in their request for fees. (*See* Woodward Aff., Ex. A (unpaginated), billing for review of "NY motion" on 4/5/21, review of the "defense motion to dismiss in New York" on 5/19/21 and "draft[ing] and revis[ing] motion to dismiss" on 3/9/21 and 3/10/21 and "prepar[ing] reply brief for motion to dismiss" on 6/2/21-all three entries ***post***-dating the Court's decision on the motion to dismiss on March 1, 2021); *see also* Meluney Aff., Ex. A at 17 (listing time billed for "New York Complaint" and "New York case" on 1/8/21, 1/11/21, 1/12/21, 2/5/21 & 2/8/21).) The full extent of the billing for the New York action included in the Application is not entirely clear, since many task descriptions have been blocked out for privilege.

Other odd billings include Defendants' interviewing "potential" expert witnesses after the expert disclosure deadline of June 18, 2021, even though Plaintiffs had not disclosed any expert witnesses of their own (Woodward Aff., Ex. A at Mr. Woodward's entries for June 21, 2021 and June 22, 2021) and the expenses for traveling "for trial" and to Los Angeles/Montana for Menashe's depositions, even though both of them were taken through Zoom (*id.* at the last page, listing expenses dated August 10, 2021 & August 18, 2021, as well as the Montana expense dated August 26, 2021-that is, *after* Menashe's depositions were concluded on August 17, 2021).

Third, the supporting records offered for the $425,171.28 price tag accounting for the "already shifted" fees are also patchy. For example, Defendants' application describes a separate category of fees associated with the August 3 Order (totaling at $114,642 for the Court's granting of Defendants' initial motion to compel, *see* App. at ¶ 37), yet none of the billing records appears to allocate fees to this category as a separate matter (even though they do so as to the other "reimbursable" categories, such as Defendants' document review pursuant to the August 3 Order or their spoliation motion). Defendants' records also reflect that they spent more than 140 hours in "fees on fees," which appears excessive for the two applications at issue.

In the end, the entire amount claimed is simply disproportionate to the alleged misconduct. There was no trial, only three depositions, and only a few months of admittedly intensive discovery. Even assuming that Plaintiffs fell short on their compliance with the Court's Discovery Orders, and Mr. Menashe should not have deleted some texts (which Defendants would have had anyway, since they were parties to most of them), this does not warrant imposing ***$2.2 million*** in claimed fees on Mr. Menashe on top of the sanction of dismissal. This is especially so given that it would amount to ***almost half*** of the benefit obtained through counsel's efforts (avoiding $5 million in damages) and thus clearly disproportionate thereto. *See, e.g., In re Nine Sys. Corporation Shareholders Litig.,* 2015 WL 2265669, at * 4 (Del. Ch. May 7, 2015) (reducing claimed $11 million in fees to $2 million based on the estimated $7-10 million benefit obtained). Having showed no other basis for recovery, Defendants' request should be denied or substantially reduced. *Cf. TrascentMgmt. Consulting, LLC v. Bouri,* 2018 WL 4293359, at * 25 (Del. Ch. Sept. 10, 2018) (reducing the claimed amount of "reasonable attorneys' fees and costs" to two-fifths thereof, even though the claimed misconduct consisted of defendant's "false statements [that] go to the heart of two of the five counts brought by"

plaintiff); *see also BTG Int'l, Inc. v. Wellstat Therapeutics Corp.,* 2017 WL 4151172, at *22 (Del. Ch. Sept. 19, 2017) (refusing the requested "broad[]" shift of all fees despite "problematic" instances of discovery misconduct, which included necessitating a meritorious motion to compel).

CONCLUSION

The Court should deny the Application outside of the fees shifted in connection with its Discovery Orders. As for the latter, there should be further fact finding as to the claimed fees' reasonableness.

DAILEY LLP

/s/Andrew H. Sauder

Andrew H. Sauder (#5560)

1201 N. Orange Street, Suite 7300

Wilmington, Delaware 19808

Telephone: (302) 468-5007

asauder@daileyllp.com

Word Count: 6,000

Counsel for Plaintiffs

OF COUNSEL:

Marina V. Bogorad

GERARD FOX LAW P.C.

1880 Century Park East, Suite 1410

Los Angeles, CA 90067

Telephone: (310) 441-0500

mbogorad@gerardfoxlaw.com

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Footnotes

1 All internal alterations, quotation marks, footnotes and citations are omitted, and emphasis is added unless otherwise noted.

2 Sam Resiman, "Chancery Preserves Investor's Fraud Claim Against Pot Co.," *Law360* (March 1, 2021); Mike Leonard, "Cannabis Investor Advances Fraud Suit Over Bloom Farms Financing," *Bloomberg Law News* (March 1, 2021).

3 Defendants also cite exhibits to their previous filing (*see* App. at ¶ 32, citing D.I. 225, Exs. 22-30) but, once again, all the text messages they attached preceded this litigation by several months, the latest being Menashe's March 2020 communications. Notably, all but one of these emails deals with the limited subject matter of scheduling meetings and calls, often with either Ray or Efros.

4 Defendants also claim that they are entitled to collect attorneys' fees under the "current" newly amended Operating Agreement (App. at ¶ 36, citing Ex. 10 (Seventh Amended Operating Agreement dated July 20, 2020) but, of course, Plaintiffs had initiated litigation back on June 11, 2020, under the ***Sixth*** Amended Operating Agreement dated June 20, 2019 (*see* D.I. 1 at Ex. A). Indeed, when this Court analyzed the asserted claims for purposes of Defendants' motion to dismiss on March 1, 2021 (D.I. 116), it is the Sixth Amended Operating Agreement that it applied, as Defendants had never raised the Seventh Amended Operating Agreement as governing the claims. Defendants cannot litigate the underlying claims based on one operating agreement and then seek fees based on a different operating agreement altogether. *Cf. Blood v. Edgar's, Inc.,* 632 N.E.2d 419, 423-24 (Mass. Ct. App. 1994) (rejecting a similar retroactive application of a fee shifting amendment); *see also Salaman v. Nat'lMedia Corp.,* 1992 WL 808095, at *6 (Del. Super. Ct. Oct. 8, 1992) (rejecting retroactive application of amended bylaws and applying bylaws as they existed at the time litigation commenced).

5 Defendants also assert that Plaintiffs refused to comply with the Scheduling Order and took "no steps" to preserve relevant documents. (App. at ¶ 32.) But this conduct has been already addressed by the Court's shifting of fees in connection with its Discovery Orders; in other words, Defendants propose to punish Plaintiffs twice for the same conduct. (*See also id.* (also citing Plaintiffs' "repeatedly violating orders" and "being held in contempt" as the proposed basis for finding subjective bad faith outside of the discovery context and thus confirming that Defendants seek to impose double punishment for the same conduct).) In any event, as discussed, rather than deliberately flouting the Scheduling Order, Plaintiffs took steps to extend the relevant deadlines once they proved unworkable; moreover, Plaintiffs reasonably believed that their preservation duties were satisfied by the ongoing automatic backup of the server, thus obviating any need for further "steps."

6 Both of these emails are still protected by the attorney-client privilege.

7 Defendants also miscite Mr. Menashe's testimony contending that he denied under oath having done his own financial modeling. (App. at ¶ 21, citing D.I. No. 225 at Ex. 2 p. 163:3-6.) The actual testimony provides that Plaintiffs "do not put forward financial models that the management team that's responsible for delivering results wouldn't own." In other words, the testimony is that Plaintiffs only use financial models provided by the management rather than create their own. (*See also id.* at 203:9-18 (making clear that Plaintiffs do not develop their own projections).) This is reflected in Defendants' Exhibit 5, wherein Plaintiffs compare two models of projections, both of which were created by AGR's management.

8 Defendants also posit that Menashe "wanted to lead 'a $5M to $6M equity financing round'" in March 2020 (App. at ¶ 33, citing D.I. 242, Ex. 24 (demonstrating, on its face, that the role was envisioned as a co-lead with Nichols)), ignoring both the extensive conditions that Menashe proposed to do so (all to further his continuous attempts to fix things from within) and the fact that at that point Menashe still had no knowledge that AGR's books had been cooked by a convicted crook. (*See* FAC at ¶ 90 (explaining how Menashe came to find out the truth in May 2020); *see also id.* at Ex. O (disclosing similar proposals for additional financing to be led by Plaintiffs, with similar preconditions attached-which Defendants appeared to accept, only to renege on them later) & D.I. No. 225, Ex. 2 at 212:14-213:15 (Mr. Menashe testifying about the additional contemplated joint investment with Mr. Nichols in March 2020 as attached

to certain conditions designed as the last-ditch effort to save the company and provide it with a vote of confidence to attract further investment).) Defendants similarly overreach when they contend that "Plaintiffs were never able to identify a single fraudulent financial statement" (App. at ¶ 33), even though at least two such statements were identified in Plaintiffs' complaint-namely, the projections and historical data offered on March 31, 2019 and June 1, 2019 (*see* FAC at ¶¶ 48, 282 & 301).

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