COURT OF CHANCERY
OF THE
STATE OF DELAWARE

J. TRAVIS LASTER
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: February 10, 2017
Date Decided: February 16, 2017

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RE: *In re: El Paso Pipeline Partners, L.P. Derivative Litigation*,
C.A. No. 7141-VCL

Dear Counsel:

Defendant El Paso Pipeline GP Company L.L.C ("El Paso") seeks to recover its costs from Peter R. Brinckerhoff, the representative plaintiff. Brinkerhoff obtained a post-trial judgment against El Paso in the amount of $100,206,000, plus pre- and post-judgment interest. El Paso appealed, and the Delaware Supreme Court vacated the judgment. As the prevailing party, El Paso seeks to recover as part of its bill of costs the premium of $1,065,000 that El Paso paid to secure a supersedeas bond in the amount of $142,000,000. That request is denied.

Court of Chancery Rule 54 governs the taxing of costs. It states:

> (d) *Costs*. Except when express provision therefor is made either in a statute or in these Rules, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs. The costs in any action shall not include any charge for the Court's copy of the transcript of the testimony or any depositions.
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> (e) *Unnecessary costs*. If at any time during the progress of an action it appears to the Court that the amount claimed is exorbitant so that the opposite party is put to unnecessary expense in giving bond, or if any party unnecessarily swells the record or otherwise causes unnecessary expense, the Court may, in its discretion, order such unnecessary expense to be taxed against the party causing the same, without regard to the outcome of the action.

Ct. Ch. R. 54(d)–(e). Delaware courts have interpreted "costs" under Rule 54 to mean those "expenses necessarily incurred in the assertion of [the prevailing party's] rights in court." *Peyton v. William C. Peyton Corp.*, 8 A.2d 89, 91 (Del. 1939). Expenses that are necessarily incurred include "expert witness fees that are covered by statute, court filing fees, and the usual and customary costs incurred in serving of process." *Jackson's Ridge Homeowners Ass'n v. May*, 2008 WL 241617, at *1 n.3 (Del. Ch. Jan. 23, 2008) (internal quotations omitted). They do not include "the expense of computer legal research, transcript fees, miscellaneous expenses (such as travel and meals), and the cost of photocopying." *Id.* (internal quotations omitted). Determining what costs to award is a matter of judicial discretion. *Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 723 (Del. 1976).

In this case, the cost of the bond was not an expense that El Paso necessarily incurred to pursue its appeal. "Stays pending appeal and stay and cost bonds [are] governed by article IV, § 24 of the Constitution of the State of Delaware and by the Rules of the Supreme

Court." Ct. Ch. R. 62(d). Article IV, Section 24 of the Delaware Constitution of 1897 states that "[w]henever a person . . . appeals or applies to the Supreme Court for a writ of error," the judgment at the trial court level will not be stayed "unless the appellant . . . shall give sufficient security." Del. Const. art. IV, § 24. Rule 32(c) of the Rules of the Supreme Court of Delaware addresses "sufficient security":

> (c) Supersedeas bond or other security. —A stay or injunction pending appeal shall be granted upon filing and approval of sufficient security. Such security shall be presented to and approved or disapproved in the first instance by the trial court. The type, amount, and form of the security shall be determined in the first instance by the trial court, whose actions shall be reviewable by this Court. . . .
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> > (i) Type of Security. —Security for a stay or injunction pending appeal shall be a supersedeas bond or other security. The trial court shall have the discretion to set a type of security other than a supersedeas bond, with the party seeking such other type of security having the burden to demonstrate the sufficiency of such other type of security.
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> > (ii) Amount of security. —With regard to a judgment or a portion of a judgment for a sum of money, the security shall ordinarily equal such sum of money and all costs and damages, including damages for delay. The trial court shall have the discretion to set the security at a lesser amount . . .

Supr. Ct. R. 32(c). As contemplated by the rule, a supersedeas bond is one type of security, but it is not the only type. A party may provide "other security," and the trial court has discretion to determine the "type, amount, and form of the security." *Id.*

After noticing its appeal, El Paso asked Brinckerhoff if El Paso could forego posting a supersedeas bond. Brinkerhoff did not insist on a bond, but he did insist on security. Under one proposal, he suggesting that El Paso pay the judgment, but that he would not distribute it unless the Supreme Court affirmed and would repay it with interest if the

Supreme Court reversed. Alternatively, Brinckerhoff suggested that El Paso place sufficient cash to cover the judgment in in a segregated, jointly-controlled, interest-bearing bank account. El Paso rejected these alternatives and proposed to have its parent entity provide an unsecured guarantee. Brinckerhoff rejected that option. El Paso then applied for a stay pending appeal secured by a bond. *See* Dkt. 260, ¶ 4. That choice was El Paso's to make, but El Paso cannot now claim that it "necessarily" incurred the cost of the bond. El Paso had other alternatives that it could have pursued.

El Paso also has not shown that Brinckerhoff "cause[d] unnecessary expense" so as to warrant taxing him with the cost of the bond under Rule 54(e). "The primary purpose of the security, or supersedeas bond, is to protect the appellee from losing the benefit of the judgment through the delay or ultimate non-performance by the appellant." *DiSabatino v. Salicete*, 681 A.2d 1062, 1066 (Del. 1996). El Paso contends that Brinckerhoff unreasonably rejected its proposed alternative of an unsecured parent-level guaranty. The judgment in this case called for El Paso to pay $100,206,000, plus pre- and post-judgment interest. Brinckerhoff declined the alternative of an unsecured, parent-level guarantee because of uncertainty about the financial stability of El Paso's parent. When El Paso proposed the guaranty, its parent's stock price had declined by 66% in eight months, its debt load exceeded its asset value by more than 200%, and Moody's, Fitch, and Standard & Poor's had given its debt the lowest possible investment grade rating. *See* Dkt. 261, ¶¶ 3–4; *see generally* Dkt. 287 Exs. B–G. Brinkerhoff wanted tangible security. Brinckerhoff reasonably rejected El Paso's proposal to provide an unsecured, parent-level guarantee.

El Paso is therefore not entitled to recover the cost of the supersedeas bond. This result comports with the outcome reached in other jurisdictions.[1] This decision does not hold that a party can never recover the cost of a supersedeas bond as a matter of law. It may be possible in a future case for a party to make the showing that Rule 54 requires.

In addition to the bond, El Paso's bill of costs included $6,631.50 in filing fees. El Paso represented to Brinkerhoff that it was not including *pro hac vice* fees in its bill of costs, but the bill nevertheless included $2,408.25 in *pro hac vice* fees. *See* Dkt. 282, Ex. A, at 4, 6. In light of El Paso's representation, those amounts are excluded from the award.

El Paso is awarded costs of $4,231.50.

Sincerely yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor

JTL/rss

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[1] *See, e.g.*, *Hirsch v. Tushill*, 542 A.2d 897, 900 (N.J. 1988); *Briner Elec. Co. v. Sachs Elec. Co.*, 703 S.W.2d 90, 91 (Mo. Ct. App. 1985); *AgMax, Inc. v. Countrymark Coop.*, 661 N.E.2d 1259, 1263 (Ind. Ct. App. 1996); *Ex parte Purcell Co.*, 451 So. 2d 801, 802–03 (Ala. 1984).