COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ORACLE CORPORATION DERIVATIVE LITIGATION	Consolidated C.A. No. 2017-0337-SG

MEMORANDUM OPINION

Date Submitted: September 20, 2023
Date Decided: December 28, 2023

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GLASSCOCK, Vice Chancellor

Larry Ellison and Safra Catz are fiduciaries of Oracle Corporation. This litigation involved stockholders' derivative allegations that Oracle was harmed by Ellison and Catz (among others) causing Oracle to overpay in the acquisition of another entity, NetSuite, an entity in which Ellison held a large interest. The litigation was long, hard fought, and (pertinently here) expensive. After trial, I found that Ellison and Catz had not breached their duties to Oracle. As prevailing parties, Ellison and Catz seek costs for the litigation from the derivative Plaintiffs.

This Court, by rule, awards costs to the prevailing party in litigation, as a matter "of course."[1] Merriam Webster defines the phrase "of course" as meaning "following the ordinary way or procedure" or "as . . . expected."[2] Consonant with this definition, the Court of Chancery Rule is not absolute; it allows the Court to decline to award costs.[3] The statute from which the Rule depends defines when the Court should refrain; cost should only be shifted "when agreeable to equity."[4] The question here, then, is whether equity can support the ordinary-course shifting of costs from the prevailing parties onto their adversaries, the stockholder-Plaintiffs, under the pertinent facts.

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[1] Ct. Ch. R. 54(d).
[2] *Course*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/course (last visited Dec. 28, 2023).
[3] Costs are shifted as a matter of course "unless the court otherwise directs." Ct. Ch. R. 54(d).
[4] 10 *Del. C.* § 5106.

In an ordinary derivative case, it is easy to apply the Rule and shift fees, of course. The fact that a fiduciary defendant's costs were advanced by the entity, and that the entity must indemnify the successful defendants, would be of no moment as to the prevailing parties' right to recover costs under Rule 54(d). But this litigation is by no means ordinary.

Here, the entity that has indemnified Defendants' costs is the entity, Oracle, on whose behalf Plaintiff brought suit. After the matter withstood a motion to dismiss, Oracle appointed a special litigation committee, empowered to investigate the litigation and decide whether it was in the corporate interest. The SLC could have determined that dismissal was in the best interest of Oracle. It did not. It could have determined that the litigation should go forward and have caused Oracle to take control of the action and prosecute it. It did not. Instead, the SLC determined that it was in Oracle's best interest that *derivate counsel, through the stockholder-Plaintiffs*, continue to litigate the matter on Oracle's behalf, through trial. This derivative counsel did, with vigor and skill. Nonetheless, the Defendants prevailed. In other words, and under these unique circumstances, Oracle found that the litigation was an asset in its best interest for the *derivative Plaintiffs* to pursue. Oracle is, in an equitable sense, both the beneficiary of Plaintiffs' efforts *and* the losing party here. Oracle has paid the prevailing parties' costs. Defendants' request

to shift their costs onto the derivative Plaintiffs, as is generally done of course, would not serve equity in these circumstances. I therefore exercise my discretion and decline to shift costs. I explain more fully, below.

I. BACKGROUND

A. Factual Background

This litigation has been ongoing for six years, and has resulted in numerous opinions, including a rather lengthy post-trial memorandum; I will spare the reader another retelling of the saga that has led us to this point.[5] The information necessary for my analysis relates entirely to the procedural history and therefore I limit my discussion of this matter's background to only the relevant portions of the procedural history.

B. Procedural History

The initial complaint in this matter was filed on May 3, 2017, [6] and a separate action was filed on July 18, 2017.[7] The actions were then consolidated, and the case was reassigned to me.[8] On March 19, 2018, I denied motions to dismiss under Court

[5] For interested readers, the full factual background underlying this action can be found in my May 2023 post-trial opinion. *In re Oracle Corp. Deriv. Litig.*, 2023 WL 3408772, at *3–16 (Del. Ch. May 12, 2023).
[6] *See* Verified S'holder Deriv. Compl. for Breach of Fiduciary Duty, Dkt. No. 1.
[7] *See* Pl. Firemen's Ret. Sys. of St. Louis' Verified Deriv. Compl., C.A. No. 2017-0519-JTL, Dkt. No. 1.
[8] Order for Consol. of Related Actions, Dkt. No. 16.

of Chancery Rules 23.1 and 12(b)(6) with respect to Defendants Larry Ellison and Safra Catz after determining that Plaintiffs pled facts which made it reasonably conceivable that a majority of the Oracle board lacked independence from Ellison.[9]

Following my ruling, the Oracle board of directors formed a special litigation committee ("SLC") to investigate the claims underlying this action,[10] namely whether Ellison used his position as a controlling stockholder of Oracle to cause Oracle to overpay to acquire NetSuite, an entity in which Ellison owned a larger percentage than he did in Oracle.[11] After conducting its investigation, the SLC, surprisingly, declined either to litigate these derivative claims or to move for the dismissal of this action,[12] concluding it was in the best interest of Oracle and its stockholders for Plaintiffs to prosecute the action.[13] The litigation was returned to Plaintiffs who ultimately did not prevail on the merits following a ten-day trial.[14]

[9] *In re Oracle Corp. Deriv. Litig.*, 2018 WL 1381331, at *20–23 (Del. Ch. Mar. 19, 2018).
[10] *In re Oracle Corp. Deriv. Litig.*, 2023 WL 3408772, at *16.
[11] *See id.* at *1.
[12] *Id.* at *16.
[13] *See* Letter to Vice Chancellor Glasscock from Kevin R. Shannon at 2, Dkt. No. 146 ("SLC Letter").
[14] *See In re Oracle Corp. Deriv. Litig.*, 2023 WL 3408772, at *36.

Defendants Ellison and Catz have moved to shift costs related to "electronic filing and service fees, Court fees and costs, and virtual trial fees"[15] as well as expert witness fees for three experts retained by Defendants.[16]

II. ANALYSIS

A. Court of Chancery Rule 54(d): A Primer

Before I assess the merits of the motion for costs brought by Defendants Ellison and Catz, a brief explanation of the origins of Court of Chancery Rule 54(d) is necessary to understand the Rule's purpose and the discretion afforded to the Court.

1. Development From Common Law

Court of Chancery Rule 54(d) largely mirrors the language of Federal Rules of Civil Procedure ("FRCP") Rule 54(d).[17] The United States Supreme Court adopted the FRCP in 1937, which were then adopted by Congress in 1938.[18] The original language of FRCP Rule 54(d) stated, in relevant part, "Except when express

[15] *See* Aff. Richard J. Thomas Supp. Att'ys' Fees and Costs, Dkt. No. 840.
[16] *See* Aff. Christopher S. Turner Supp. Expert Witnesses' Fees and Costs, Dkt. No. 841.
[17] *See Graham v. Keene Corp.*, 616 A.2d 827, 828 (Del. 1992) (explaining that comparable Delaware Superior Court Rules of Civil Procedure "Rule 54(d) is substantially similar to Federal Rules of Civil Procedure Rule 54(d).").
[18] *Federal Rules of Civil Procedure*, U.S. COURTS, https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure#:~:text=The%20rules%20were%20first%20adopted,were%20last%20amended%20in%202023 (last visited Dec. 28, 2023).

provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ."[19] The adoption of this rule displaced the common law rule whereby prevailing parties were not awarded costs associated with bringing suit unless the courts were statutorily authorized to grant the prevailing party such costs.[20] As such, it shifted the default from the common law that each party would bear its own costs, to a presumption that the prevailing party was entitled to recover costs from its adversary.

In relevant part, Court of Chancery Rule 54(d) provides that "[e]xcept 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."[21] Rule 54(d) is in accordance with the Court of Chancery's statutory authority under 10 *Del. C.* § 5106, which provides that "[t]he Court of Chancery shall make such order concerning costs in every case as is agreeable to equity." The passage of 10 *Del. C.* § 5106 and the adoption of Court of Chancery Rule 54(d) displaced the common law rule in Delaware that, absent statutory authority, a prevailing party in the Court of Chancery of the State of Delaware would not be awarded costs.

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[19] *See Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 111 F.2d 940, 941 (2d Cir. 1940).
[20] *See Antoni v. Greenhow*, 107 U.S. 769, 781–82 (1883) (explaining that litigation costs were historically not recoverable under common law).
[21] Ct. Ch. R. 54(d).

2. Rule 54(d)'s Application in Equity as Compared to the Law

In Delaware, courts of law and equity alike are given discretion when determining whether to grant a prevailing party's motion for costs,[22] but the statutes enabling courts of law and equity to grant such a motion differ.[23] When a party prevails on the merits in an action brought in law, that party is generally entitled to recover costs as a matter of right.[24] While ordinarily the Court of Chancery follows the same rule that the prevailing party is, generally, entitled to recover its costs, the Court of Chancery is an equitable court with broad discretion conferred by statute with respect to considering such a motion.[25] The Court of Chancery is empowered to consider the equities in a particular case when determining whether to grant a motion for costs,[26] even though, typically, the burden lies with the non-prevailing

[22] *Compare* Ct. Ch. R. 54(d) (". . . costs shall be allowed as of course to the prevailing party unless the Court otherwise directs."), *with* Super. Ct. Civ. R. 54(d) (". . . costs shall be allowed as of course to the prevailing party. . . unless the Court otherwise directs.").

[23] *Compare* 10 *Del. C.* § 5106 ("The Court of Chancery shall make such order concerning costs in every case as is agreeable to equity."), *with* 10 *Del. C.* § 5101 ("In courts of law. . . [g]enerally a party for whom final judgment in any civil action. . . shall recover, against the adverse party, costs of suit, to be awarded by the court.").

[24] *See* 10 *Del. C.* § 5101 ("Generally a party for whom final judgment in any civil action. . . shall recover, against the adverse party, costs of suit, to be awarded by the court."); Del. Super. Ct. Civ. R. 54(d) ("Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party. . . unless the Court otherwise directs.").

[25] *See* Ct. Ch. R. 54(d); 10 *Del. C.* § 5106; *see also Everitt v. Everitt*, 146 A.2d 388, 393 (Del. 1958) ("[T]he general rule recognizes that the awarding of costs is always within the sound discretion of the [Vice] Chancellor.").

[26] 10 *Del. C.* § 5106 ("The Court of Chancery shall make such order concerning costs in every case as is agreeable to equity.").

party to rebut the presumption under Court of Chancery Rule 54(d) that the prevailing party should receive costs, of course.[27] The Court of Chancery can, and does, deny costs to a prevailing party where the principles of equity require it.[28]

B. Special Equity Exists in This Case

Defendants contend that "there is no basis to conclude that awarding costs to Defendants would be inequitable, and Plaintiffs cannot meet their burden of showing otherwise."[29] I disagree. The circumstances that led to the litigation for which Defendants seek costs are unique and provide a basis for finding that special equity exists in this case. As noted above, the SLC, which was empowered to investigate Plaintiffs' claims against Defendants Ellison and Catz, determined that it would be in Oracle's best interests if the litigation were to proceed.[30] The SLC also concluded that "it was in [Oracle's] best interests to allow [Plaintiffs] to proceed with the

[27] *See Gaffin v. Teledyne, Inc.*, 1993 WL 271443, at *3 (Del. Ch. July 13, 1993) (explaining that "the prevailing party is entitled to costs unless the facts of the particular case are such as to make this clearly inequitable.").

[28] *See Adams v. Calvarese Farms Maint. Corp.*, 2011 WL 383862, at *3 (Del. Ch. Jan. 13, 2011) (explaining that, "[w]hile the use of the term 'shall' implies that this Court should award costs to the party it deems to have prevailed, the Court has wide discretion in awarding or apportioning costs in each particular case"); *see, e.g., In re Tesla Motors, Inc. S'holder Litig.*, 2022 WL 1237185, at *49 (Del. Ch. Apr. 27, 2022) (declining to grant the prevailing party's motion for costs because the litigation likely could have been avoided had the prevailing party "simply followed the ground rules of good corporate governance in conflict transactions."); *Barrows v. Bowen*, 1994 WL 514868, at *3 (Del. Ch. Sept. 7, 1994) (using the discretion statutorily granted to the Court to deny the prevailing parties' motion for costs for its expert witness because the Court did not find the expert witness's testimony helpful).

[29] Defs.' Mot. for Costs ¶ 9, Dkt. No. 839.

[30] *In re Oracle Corp. Deriv. Litig.*, 2023 WL 3408772, at *16.

litigation on behalf of Oracle" and returned the case to Plaintiffs.[31] This, I note, allowed Oracle to allow the attempt to monetize the litigation asset on behalf of the Company while free-riding on the derivative Plaintiffs' litigation efforts. While my May 12, 2023 memorandum opinion ultimately vindicated Defendants Ellison and Catz, finding that Ellison was recused from the acquisition process and neither he nor Catz materially tainted the process,[32] the SLC, acting on behalf of the Company through authority conferred to it by Oracle's board, had determined that litigation was in the corporate interest and sanctioned the continuation of this litigation *on Oracle's behalf* by allowing Plaintiffs to prosecute the claims.

In furtherance of their opposition to Defendants' motion for costs, Plaintiffs contend that Defendants' motion for costs should be denied on the grounds that these costs are ultimately borne by Oracle, which is obligated to advance and indemnify Defendants' costs related to this litigation.[33] Specifically, Plaintiffs note the SLC's conclusion that this litigation would be in the best interest of Oracle.[34] Defendants, on the other hand, assert that Oracle's obligation to indemnify Defendants for

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[31] SLC Letter 2.

[32] *In re Oracle Corp. Deriv. Litig.*, 2023 WL 3408772, at *36. To be clear, in my May 2023 memorandum opinion, I laid out the ways that the corporate governance utilized in this process was less than ideal. *See id.* at *28–35. Although the process was imperfect, I found that business judgment obtained, and Defendants did not face liability. *Id.* at *36.

[33] Pls.' Opp'n to Defs.' Mot. for Costs ¶ 6, Dkt. No. 856; *see also* Letter to the Hon. Sam Glasscock III from Joel Friedlander at 4, Dkt. No. 833.

[34] Pls.' Opp'n to Defs.' Mot. for Costs ¶ 6.

litigation costs does not affect "Plaintiffs' *liability* for costs[.]"[35] But the question for me is not whether the indemnification right obviates shifting costs as a matter of law. Instead, it is whether, under the peculiar circumstances here, shifting costs would be repugnant to equity.

Defendants direct the Court's attention to four cases[36] in which courts have granted motions for costs notwithstanding the fact that third parties indemnified the prevailing parties in those cases.[37] Much like the third parties in the cases relied upon by Defendants, Oracle is contractually obligated to indemnify Defendants.

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[35] Defs.' Mot. for Costs ¶ 15; Defs.' Reply in Further Supp. of Their Mot. for Costs ¶¶ 13–15, Dkt. No. 859 (emphasis added).

[36] I note that only one of the cases relied upon by Defendants is a Delaware state court state case. *See* Defs.' Mot. for Costs, ¶ 15 n.3. The Delaware case cited by Defendants interprets the Superior Court Rules of Civil Procedure. *See Brittingham v. Davis*, 2010 WL 1493474 (Del. Super. Apr. 14, 2010). As explained above in Section II.A.2, Rule 54(d) operates differently in courts of law than in courts of equity, so while informative, the holding in *Brittingham* is not persuasive given the Court of Chancery's broad discretion to determine whether granting a motion for costs "is agreeable to equity." 10 *Del. C.* § 5106. The federal court cases cited are nonetheless persuasive in interpreting the Court of Chancery Rules since FRCP Rule 54(d) and Court of Chancery Rule 54(d) have substantially similar language. *See Chaplake Hldgs., LTD v. Chrysler Cop.*, 766 A.2d 1, 6 n.3 (Del. 2001) (explaining that where Delaware state court rules of civil procedure are substantially similar to the FRCP, "federal courts' interpretation of the analogous federal rule is persuasive in the construction of" state court rules of civil procedure).

[37] *See Brittingham*, 2010 WL 1493474, at *1 (granting prevailing party's motion for costs even where the prevailing party's insurer had actually incurred the costs); *Sozio v. Sears, Roebuck & Co.*, 1994 WL 229660, at *2 (E.D. Pa. May 26, 1994) (granting prevailing party's motion for costs even though the prevailing party had been indemnified by a third party); *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 639 (11th Cir. 1991) (granting prevailing party's costs notwithstanding the fact that the prevailing party's insurer "paid the costs of litigation and completely controlled the defense"); *Haldeman v. Golden*, 2010 WL 2176089, at *2 (D. Haw. May 28, 2010) (granting prevailing party's motion for costs, even where the prevailing party's employer bore the costs, on the grounds that the Court does not inquire into the source of litigation funds that are now being sought as costs).

However, unlike the third parties in those cases, here, Oracle itself adopted Plaintiffs' prosecution of this case and affirmatively placed itself in a position to receive any benefit achieved. This is evidenced by the SLC's conclusion that "it was in [Oracle's] best interest to allow [Plaintiffs] (rather than the SLC) to proceed with the litigation on behalf of Oracle."[38] Unlike the typical derivative case, here Oracle is in an equitable sense the non-prevailing party. It has the responsibility to advance and indemnify the litigation costs now sought by Defendants against the derivative Plaintiffs. I find that equity dictates that Defendants' costs should repose with Oracle.

III. CONCLUSION

Given the unique circumstances whereby the SLC determined it was in Oracle's best interest that the claim against Ellison and Catz be prosecuted by the derivative Plaintiffs, I find that equity dictates that Defendants' costs repose with Oracle. Therefore, I deny Defendants' motion for costs. The parties should submit a form of order consistent with this memorandum opinion.

[38] SLC Letter 2.