IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL J. KATES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1480-VCP
	)	
BEARD RESEARCH, INC. and	)	
CHARLES D. BEARD and	)	
CAROLINE V.K. BEARD,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: December 3, 2009
Decided: April 23, 2010

John A. Elzufon, Esquire, ELZUFON AUSTIN REARDON TARLOV & MONDELL, P.A., Wilmington, Delaware, *Attorneys for Plaintiff*

R. Karl Hill, Esquire, Jared T. Green, Esquire, SEITZ, VAN OGTROP & GREEN, P.A., Wilmington, Delaware, *Attorneys for Defendants*

PARSONS, Vice Chancellor.

This case deals with the propriety of a $100,000 per month management fee (the "Shared Expenses Fee") a company charged its affiliate. Dr. Charles D. Beard ("Dr. Beard") owned, along with his wife, Caroline V.K. Beard ("Mrs. Beard"), 100 percent of CB Research & Development, Inc. ("CB") and also was the controlling shareholder of Beard Research, Inc. ("BR," collectively with Dr. Beard and Mrs. Beard, "Defendants"). In 1997, Dr. Beard hired Michael J. Kates and, when he formed BR in 1999, gave Kates 33 percent of BR's stock. In 2000, when BR employed four full-time equivalent chemists, Dr. Beard and Kates agreed that, because CB covered the majority of BR's overhead expenses, BR would pay CB a Shared Expenses Fee of $50,000 per month. In September 2001, BR began paying CB a Shared Expenses Fee of $100,000 per month. Kates filed this suit on July 7, 2005 alleging that the $50,000 per month increase in the Shared Expenses Fee constitutes corporate waste and a breach of Dr. Beard's fiduciary duties. This Memorandum Opinion reflects my post-trial findings of fact and conclusions of law on Kates's claim.

For the reasons stated herein, I find that Kates failed to prove that the increase in the Shared Expenses Fee amounts to waste or a breach of fiduciary duty and, therefore, dismiss Kates's Complaint with prejudice.

I. BACKGROUND

A. The Parties

Plaintiff, Kates, started working at CB in 1997. Upon the formation of an affiliated company, BR, two years later, Kates was given, without contributing any cash or capital, 33 percent of BR's stock. Kates also served as a director and officer of BR.

Between 2000 and 2004, Kates received a salary from both CB and BR. Kates was never a stockholder of CB, however. Kates resigned from CB and BR on February 13, 2004.[1]

Defendant BR was formed as a Delaware corporation operating under subchapter S of the Internal Revenue Code on November 12, 1999. BR's ownership structure was as follows: Dr. Beard – 34 percent, Kates – 33 percent, Mrs. Beard – 13 percent, and David and Paul Beard – 10 percent each.[2] Only Dr. Beard's and Kates's stock had voting rights. BR dissolved on December 29, 2005.[3]

Defendant Dr. Beard is the founder of both CB and BR, as well as a shareholder, officer, and director of those companies. Dr. Beard and his wife own 100 percent of CB's stock.[4]

Mrs. Beard is also named as a Defendant. She was an officer of both CB and BR and at one point performed administrative duties for CB.[5]

B. Facts

Dr. Beard formed CB in 1990 as a contract research organization ("CRO") serving the pharmaceutical and biopharmaceutical industries.[6] The types of business a CRO can

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1 Pretrial Stip. and Order § 2.

2 DX 22. David and Paul Beard are Dr. and Mrs. Beard's children.

3 Pretrial Stip. and Order § 2.

4 *Id.*

5 T. Tr. 236-37 (Dr. Beard). Citations in this form are to the trial transcript. Where, as here, the identity of the testifying witness is not clear from the text, it is noted parenthetically.

6 Pretrial Stip. and Order § 2.

engage in include: (1) one-off work, where the CRO bids a fixed price for a contract to synthesize a desired compound for a customer, thereby taking on all risk associated with that synthesis; (2) catalog business, where customers order a desired quantity of immediately available compounds advertised for sale by a CRO; and (3) full time equivalent ("FTE") work, which involves an arrangement where chemists (the FTEs) are hired by a CRO to service a client. For FTE work, the CRO typically receives a set annual fee from the client and pays all expenses and overhead associated with the chemists, including their salaries and benefits. CB primarily performed both one-off and catalog work.[7]

CB hired Kates as a chemist in 1997.[8] CB began leasing a 16,000 square foot space in 1999 and fit out this space as a chemistry lab. In that regard, CB purchased (or leased) expensive equipment and machinery. The fit-out occurred before the creation of BR.[9]

Also in 1999, CB began performing one-off work for Parke-Davis, which, in 2000, became a part of Pfizer. CB's strong performance on these projects led Pfizer to look into sponsoring FTEs at CB.[10] In contemplation of receiving FTE work from Pfizer, Dr. Beard formed BR in late 1999 to perform FTE work exclusively.[11] Kates was a

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7 T. Tr. 254 (Dr. Beard); DX 9.

8 Pretrial Stip. and Order § 2.

9 T. Tr. 348-49 (Dr. Beard); DX 31-32.

10 T. Tr. 249-51 (Kates).

11 Pretrial Stip. and Order § 2.

shareholder, director, and officer of BR from the outset.[12] Dr. Beard and Kates agreed at BR's formation to discuss all aspects of the company's business and not move forward on any key issue unless there was a consensus between them on what to do.[13] Once BR was up and running, Dr. Beard and Kates met "every day" to discuss the operations of both CB and BR.[14]

Around the beginning of 2000, Pfizer and CB agreed to have Pfizer sponsor four FTEs at BR.[15] CB fit out part of its lab space to accommodate BR's FTEs sometime in early 2000. Because CB paid for this fit-out, as well as all overhead for both companies, which included expenditures on rent, utilities, insurance, employee benefits, and the salaries of employees who split time between CB and BR, Kates and Dr. Beard agreed that BR would pay CB a Shared Expenses Fee. At that time, BR employed four FTEs and Kates agreed that the Shared Expenses Fee would be $50,000 per month.[16] The $50,000 per month fee was based on Dr. Beard's understanding of a rule of thumb in the CRO industry that overhead costs are $100,000 per year per FTE.[17]

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12 *Id.*

13 T. Tr. 344-45 (Dr. Beard). Dr. Beard also noted that "we could have broken a consensus by a vote, but we never did." *Id.* In any event, if a disagreement had arisen between Dr. Beard and Kates, Dr. Beard had the power to overrule Kates. *Id.* at 230 (Dr. Beard).

14 *Id.* at 294-95 (Kates).

15 *Id.* at 250-51 (Kates).

16 *Id.* at 147-54 (Baylis-Powell), 341-43 (Dr. Beard). There was never a written agreement regarding the Shared Expenses Fee. *Id.* at 229 (Dr. Beard).

17 *Id.* at 343-45 (Dr. Beard).

Over time, BR employed an increasing number of FTEs. BR retained seven FTEs in the second quarter of 2001, twelve in the third quarter, and fifteen in the fourth quarter. In 2002, BR employed between thirteen and sixteen FTEs.[18] Pursuant to a contract between CB and Pfizer (the "Contract"), BR was to maintain a minimum of sixteen FTEs for three years starting January 1, 2003.[19] As the number of FTEs at BR grew, so did the overhead expenses related to BR. To accommodate the additional FTEs, CB performed a large, expensive fit out of its space and purchased or leased more equipment. CB financed the fit-out from the cash flow of both companies, but purchased or leased the equipment itself.[20]

Starting in September 2001, BR began paying CB a higher Shared Expenses Fee of $100,000 per month.[21] Dr. Beard testified that Kates agreed to this increase in the Shared Expenses Fee with no reservations and never asked him for any information supporting the increase.[22] Kates testified, however, that he only provisionally agreed to the increased fee in the sense that his final approval was subject to receiving a breakdown of costs justifying the increase. There is no dispute that Kates knew about the increase of the Shared Expenses Fee to $100,000 per month when it was first implemented and that

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18 DX 2.

19 DX 25.

20 T. Tr. 294, 309-10 (Kates); DX 31.

21 T. Tr. 294 (Kates).

22 *Id.* at 346-47.

CB paid the majority of BR's overhead expenses.[23] Kates also understood that the increased Shared Expenses Fee was to provide for the increased overhead costs CB would have to pay as a result of BR employing more FTEs.[24] Kates never made a written request for any supporting information, however, and never received any breakdown of costs.[25] The minutes of a meeting held on May 8, 2002 at Belfint Lyons and Shuman, the accounting firm that CB and BR used, identify as an "issue to resolve" to "Formalize management fee – BR pays CB."[26]

BR paid CB $800,000 in Shared Expenses Fees for 2001 and $1.2 million for both 2002 and 2003.[27] The parties dispute, however, the amount of Shared Expenses Fees BR paid for 2004. Plaintiffs' expert, Geoff Langdon, asserts that BR paid CB Shared Expenses Fees of $1,468,338.[28] While Defendants acknowledge that BR was billed that amount, the evidence indicates that BR actually paid only $700,000 in Shared Expenses Fees for 2004.[29]

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23 DX 1 at BR 1480 – 109; DX 11; T. Tr. 325 (Kates).

24 *Id.* at 294 (Kates).

25 *Id.* at 296-97 (Kates). According to Dr. Beard, it would have been difficult to produce a breakdown of the shared overhead costs. *Id*. at 347.

26 PX 20.

27 PX 13.

28 DX 40.

29 DX 36. This is consistent with the fact that BR effectively ceased its operations after July 2004 and, therefore, only would have paid the $100,000 per month fee for the first seven months of the year. PX 13.

Kates resigned from CB and BR on February 13, 2004. On April 13, 2004, Pfizer modified the Contract so as to eliminate BR's FTE work entirely by the end of 2004.[30] On or about September 1, 2005, BR sold all of its assets to CB "in partial satisfaction of obligations of Beard Research, Inc. to CB Research and Development, Inc."[31]

C. Procedural History

Kates filed his Complaint on July 7, 2005. In it, he asserted four counts: (1) a derivative claim for waste, misuse and misappropriation of corporate assets, and usurping corporate opportunities; (2) a derivative claim for breach of fiduciary duty based on the allegations in Count 1; (3) a direct claim for money due from BR; and (4) a direct claim for money due from Dr. Beard and Mrs. Beard. The Court held a two-day trial on January 26 and 27, 2009, and the parties completed their post-trial briefing on September 22, 2009. In his opening brief, Kates made arguments only as to his claims for waste and breach of fiduciary duty. Thus, I deem Kates to have waived the other claims asserted in his Complaint.[32]

This litigation is related to a much more complicated action filed by CB and BR against Kates and several others in 2005, which the parties to this suit refer to as the

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30 T. Tr. 365 (Dr. Beard).

31 PX 3 (emphasis omitted).

32 *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."). Kates also admitted at oral argument that he had waived his direct claims. Arg. Tr. 20.

"chemistry action."[33] The chemistry action was tried for five days in March 2009. The parties presented coordinated post-trial arguments in the two actions, which were completed in December 2009. This Memorandum Opinion reflects my findings of fact and conclusions of law in this action. It is being filed concurrently with my Opinion in the related chemistry action.

D. Parties' Contentions

Kates contends that BR's payment of $100,000 per month to CB in Shared Expenses Fees was excessive and constituted waste. Kates also claims that because Dr. Beard controlled both CB and BR, he stood on both sides of the transaction that increased the Shared Expenses Fee and, thus, must show that the fee was entirely fair. In support of his contention that the $100,000 per month fee does not meet the entire fairness standard, Kates relies primarily on his accounting expert, Langdon, and dismisses as unreliable the competing testimony of Defendants' expert witness, Jonathan Moll. Kates also contends that, if his claim is successful, he is entitled to recover the attorneys' fees he incurred in prosecuting his claims for waste and breach of fiduciary duty.

Defendants assert that Kates agreed to the increased Shared Expenses Fee, or at the very least acquiesced in the increased fee, and, thus, that increase should be judged under the traditional waste standard, rather than entire fairness. Defendants further deny that the increased Shared Expenses Fee amounts to waste, arguing that the increase

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[33] Complaint in *Beard Research, Inc. v. Kates*, Del. Ch. C.A. No. 1316-VCP.

reasonably relates to the increase in the overhead expenses that CB paid for BR as the number of FTEs BR employed grew. Defendants also aver that Kates's claim should be barred in equity under the doctrine of unclean hands because, as demonstrated in the chemistry action, Kates breached fiduciary duties he owed to CB and BR.[34]

II. ANALYSIS

A. The Standard Applicable to Kates's Waste Claim

While the Complaint describes his claim as one for waste, Kates contends that it should be assessed under the entire fairness standard. Kates urges use of this standard because, as the controlling shareholder of both CB and BR, Dr. Beard stood on both sides of the transaction that increased the Shared Expenses Fee from $50,000 to $100,000 per month.[35] Defendants dispute this contention and assert that the traditional waste standard applies to Kates's claim.

Kates cites *Schreiber v. Pennzoil* in support of his position.[36] There, Pennzoil charged a subsidiary, Pennzoil Offshore Gas Operators, Inc. ("POGO"), a $650,000 management fee. A POGO stockholder challenged the payment as waste. In its opinion, the court stated:

> If an objector to a corporate transaction shows . . . that the transaction involves a parent and a subsidiary with the parent controlling the transaction and fixing the terms (as here), and shows that the parent benefitted from the transaction to the

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[34] *See Beard Research, Inc. v. Kates*, C.A. No. 1316-VCP, slip op. (Del. Ch. Apr. 23, 2010).

[35] As previously noted, Kates was a shareholder of BR, but not CB.

[36] 419 A.2d 952 (Del. Ch. 1980).

> exclusion and detriment of its subsidiary, the test of propriety is not the business judgment rule but is the intrinsic fairness rule . . . .[37]

A preliminary issue in *Schreiber* involved which side had the burden of proof. The court held that because the challenged transaction had been approved by a fully-informed, but non-unanimous vote of the minority stockholders, the plaintiff bore the burden of proving that the transaction constituted corporate waste or was a breach of fiduciary duty.[38] The plaintiff failed to meet that burden. In particular, although Pennzoil controlled and benefited from the payment of the management fee by its subsidiary, the plaintiff in *Schreiber* failed to prove that Pennzoil's benefit from the transaction was to the exclusion and detriment of its subsidiary.[39] Hence, the prerequisites for application of the entire fairness standard were not met. Additionally, the court held that the plaintiff had not satisfied his burden of showing that the transaction amounted to waste or "was not the result of a sound business judgment."[40]

Kates also relies on *Balin v. Amerimar Realty Co.* to support application of the entire fairness standard.[41] In *Balin*, the plaintiff challenged as waste Amerimar Enterprises' use of Amerimar Realty's tangible assets without adequate reimbursement.

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37 *Id.* at 957.

38 *Id.* at 959.

39 *Id*. at 961.

40 *Id*. The court also observed that "in any event the facts adduced at trial show that the entire transaction was intrinsically fair to POGO and to its stockholders." *Id.*

41 1996 WL 684377 (Del. Ch. Nov. 15, 1996).

Two of the defendants, Marshall and Treatman, were directors of Amerimar Realty and an owner and officer, respectively, of Amerimar Enterprises. The court held that these defendants stood on both sides of the challenged transaction and dictated its terms and, therefore, applied the entire fairness standard to plaintiff's claim. Because defendants failed to show that the cost allocation system used to reimburse Amerimar Realty was entirely fair, the court held the defendants liable for waste based on their improper use of Amerimar Realty's assets to conduct Amerimar Enterprises' business.[42]

Defendants attempt to counter Kates's argument by citing *Criden v. Steinberg* to support using only the traditional waste standard here.[43] In that case, the plaintiff challenged as waste a corporate board's re-pricing of stock options that its members held. According to Defendants, even though the members of the board afforded themselves a benefit by re-pricing their stock options, the court did not apply the entire fairness standard because the board carried out the re-pricing pursuant to a plan the company's shareholders had approved.[44] Instead, after applying the "rarely satisfied" waste standard, the court held the plaintiff had not proved waste and dismissed her claim.[45]

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42 *Id.* at *12-13, 20.

43 2000 WL 354390 (Del. Ch. Mar. 23, 2000).

44 *Id.* at *1-3.

45 *Id.* at *3-5; *see also Canal Capital Corp. v. French*, 1992 WL 159008 (Del. Ch. July 2, 1992) (dismissing a claim that management fees paid by Canal to Edelman Management, a company controlled by Canal's majority stockholder, were excessive).

I do not read *Criden* so broadly. The court in *Criden* focused primarily on the plaintiff's waste claim due to the circumstances seen there, but nothing in that case suggests that the court held that a corporate fiduciary's self-interested transaction could not be subject to entire fairness review in circumstances such as those existing in this case. In any event, I need not resolve the parties' dispute as to whether the standard for waste or entire fairness applies here because, on the evidence presented, Kates has failed to prove his case under either standard.

B. Kates Failed to Prove that the Increase of the Shared Expenses Fee Constituted Waste

Delaware courts have described the standard for corporate waste as onerous, stringent, extremely high, and very rarely satisfied.[46] To recover on a waste claim, a plaintiff has the burden of proving that a transaction was "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration."[47] A claim of waste will be sustained only in the rare, "unconscionable case where directors irrationally squander or give away corporate assets."[48] This standard is a corollary of the proposition that where the presumption of

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46 *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 74 (Del. 2006); *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 656 (Del. Ch. 2008); *In re Nat'l Auto Credit, Inc. S'holders Litig.*, 2003 WL 139768, at *14 (Del. Ch. Jan. 10, 2003); *Criden*, 2000 WL 354390, at *3.

47 *In re Walt Disney*, 906 A.2d at 74 (quoting *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000)).

48 *Id.*

the business judgment rule applies, the decision of a corporate board of directors will be upheld unless it cannot be "attributed to any rational business purpose."[49]

Kates failed to show that the increase in the Shared Expenses Fee constituted waste. Kates admittedly accepted an arrangement whereby BR paid CB $50,000 per month in Shared Expenses Fees when BR employed four FTEs.[50] Kates also agreed that one would expect the Shared Expenses Fee charged to BR to increase as the number of FTEs BR employed increased.[51] While the relationship between the number of FTEs BR employed and the amount of overhead expenses CB paid on BR's behalf may not have been perfectly linear, as CB paid the same amount in rent and salaries for employees who split time between CB and BR regardless of how many people worked for BR, many costs did increase as a result of BR having a larger workforce. Indeed, costs such as utilities and insurance increased as the number of employees went up, and CB bore the full burden of paying employee benefits for BR's FTEs. Thus, I find that a business person of ordinary, sound judgment could conclude that CB's carrying of the overhead associated with a tripling (from four to twelve) and, later, quadrupling (to sixteen) of the number of FTEs BR employed would represent adequate consideration for BR's payment

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49 *Id.* (citing *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971), *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985)).

50 Pretrial Stip. and Order § 2; T. Tr. 274 (Kates).

51 T. Tr. 294 (Kates).

of twice the Shared Expenses Fee it paid when it had only four FTEs.[52] Further, because CB undisputedly paid greater overhead costs when BR employed more FTEs, it cannot be said that BR was giving away assets by paying the increased Shared Expenses Fee. Therefore, the evidence does not support Kates's allegations of waste and his waste claim must be dismissed.[53]

C. The Evidence Shows that the Increased Shared Expenses Fee CB Charged BR Was Entirely Fair

I also find that, even assuming the entire fairness standard would apply to the increase in the Shared Expenses Fee for purposes of his breach of fiduciary duty claim, Kates still would not be entitled to any relief. There is no dispute that $50,000 per month

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[52] DX 2. The Shared Expenses Fee was increased in the third quarter of 2001, the first quarter in which BR employed as many as twelve FTEs. *Id.*

[53] While Kates contends that BR actually paid more than $100,000 per month in Shared Expenses Fees for 2004, I previously rejected this contention. *See supra* note 29 and accompanying text.

Because I find that Kates's waste and breach of fiduciary duty claims fail on their merits, I do not address Defendants' argument that Kates's claim should be barred because he comes to this Court with unclean hands, with one exception. The exception relates to the dispute described in the preceding paragraph regarding the Shared Expenses Fee paid for 2004. In that regard, even if CB had paid BR more than $100,000 per month in fees for 2004, I would bar Kates from claiming those fees were excessive under the doctrine of unclean hands. In making his argument, Kates relies on the fact that BR did not employ any FTEs in the latter part of 2004. In the Opinion issued today in the related chemistry action, however, I held that the decrease in BR's business resulted from Kates's breach of fiduciary duties owed to CB and BR and his tortious interference with CB's prospective business relations. *Beard Research, Inc. v. Kates*, C.A. No. 1316-VCP, slip op. (Del. Ch. Apr. 23, 2010). Because that wrongful conduct related directly to facts on which Kates relies to prove his claim in this case, I also hold that Kates is barred by the doctrine of unclean hands from pursuing the aspect of his claims that pertain to fees paid for 2004.

was a fair fee when BR employed four FTEs.[54] I also find that Kates approved the increase in the Shared Expenses Fee. Dr. Beard testified that Kates unconditionally approved the increase in the Shared Expenses Fee from $50,000 to $100,000 per month in or around October 2001, when it was first proposed. Kates does not deny that he approved the increase, but insists that any approval he may have given was contingent on his receipt of financial information supporting the increase. Yet, there is no documentary evidence indicating that Kates ever asked Dr. Beard for any information, and Dr. Beard denies ever receiving such a request before this dispute arose. Likewise, there is no evidence of any complaints from Kates about the increase before he brought this action, even though he received notice of the increase at least as early as October 2001.[55] Also, Kates admitted that he understood that CB increased the Shared Expenses Fee because it was paying greater overhead costs on BR's behalf as a result of BR employing more FTEs.[56] Based on this evidence, I find that Kates knew the basis for the increase of the Shared Expenses Fee that BR paid to CB from $50,000 to $100,000 per month and approved that increase in or around October 2001. In that regard, I do not believe Kates's allegation that he only provisionally approved the increase. The fact that Kates had the

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54 Although Kates candidly admitted this fact, his expert, Langdon, equivocated on whether Kates had even agreed to that amount and whether Kates's agreement to the original $50,000 fee would have been relevant to his opinion. T. Tr. 128-30 (Langdon). Based on all of the evidence presented, I find Langdon's objection to the fairness of the $50,000 fee and unwillingness to acknowledge its relevance both puzzling and indicative of his overly partisan viewpoint.

55 DX 1 at BR 1480 – 109.

56 T. Tr. 294 (Kates).

ability to investigate further the basis for the increase for several years, but never did so, buttresses those conclusions and supports a finding that he acquiesced to the increase.[57] At a minimum, there was nothing unfair about the process used to establish the amount of the increase.

The accounting evidence also shows that the increased Shared Expenses Fee was entirely fair. Specifically, I find credible the opinion of Defendants' expert, Moll that CB reasonably could have charged BR an additional $1,723,985 in Shared Expenses Fees. Moll based this assertion on data from CB's financials and allocations of cost between CB and BR made by Susi Baylis-Powell, who possessed detailed knowledge of the operations of both CB and BR.[58] The contrary testimony of Kates's expert, Langdon, was based on data from tax returns and other more accessible sources, as opposed to CB and BR's financial accounting records. Consequently, I found Langdon's opinions less persuasive. All of the relevant accounting records were available to Kates and his team in discovery, but they elected not to base their proofs on that information. For all of these reasons, I find that Kates has failed to show that any of Defendants breached a fiduciary duty to BR in connection with the increase of the Shared Expenses Fee that BR paid CB to $100,000 per month.[59]

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57 *Nevins v. Bryan*, 885 A.2d 233, 246-48 (Del. Ch. 2005); *Staples v. Billing*, 1994 WL 30548, at *11-12 (Del. Ch. Jan. 31, 1994); *Papaioanu v. Comm'rs of Rehoboth*, 186 A.2d 745, 749-50 (Del. Ch. 1962).

58 DX 36.

59 Because all of Kates's claims have failed, I deny his request for attorneys' fees.

III. CONCLUSION

For the foregoing reasons, I find that Kates has failed to show that Defendants committed waste or breached any fiduciary duty by paying CB Shared Expenses Fees of $100,000 per month. Accordingly, I deny Kates's claims in their entirety and dismiss his Complaint with prejudice.

IT IS SO ORDERED.