IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AVETA INC., MMM HOLDINGS, INC., and PREFERRED MEDICARE CHOICE, INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 3598-VCL
ROBERTO L. BENGOA,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: July 27, 2010
Date Decided: August 13, 2010

Richard L. Horwitz, Brian C. Ralston, Berton W. Ashman, Ryan W. Browning, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; Andrew J. Frackman, Kenneth Murata, Peter C. Herrick, O'MELVENY & MYERS LLP, New York, New York; *Attorneys for Plaintiffs Aveta Inc., MMM Holdings, Inc. and Preferred Medicare Choice, Inc.*

Scott D. Cousins, GREENBERG TRAURIG, LLP, Wilmington, Delaware; Jeffrey A. Hirsch, GREENBERG TRAURIG, LLP, Fort Lauderdale, Florida; David Long-Daniels, GREENBERG TRAURIG, LLP, Atlanta, Georgia; *Attorneys for Defendant Roberto L. Bengoa*.

LASTER, Vice Chancellor.

By letter opinion and contemporaneously entered final order dated December 11, 2008, this Court ordered defendant Robert L. Bengoa, Jr. to arbitrate certain disputes pursuant to an Agreement and Plan of Merger and Stock Purchase dated as of May 4, 2006 (the "Purchase Agreement," cited as "PA"). *See Aveta Inc. v. Bengoa*, 2008 WL 5255818 (Del. Ch. Dec. 11, 2008); *Aveta Inc. v. Bengoa*, C.A. No. 3598-VCL (Del. Ch. Dec. 11, 2008) (ORDER) (together, the "Arbitration Decision"). Notwithstanding this Court's order, Bengoa failed to arbitrate. In September 2009, the plaintiffs, whom I refer to collectively as "Aveta," moved to enforce the Arbitration Decision.

After reviewing Aveta's application and hearing argument, I issued a rule to show cause requiring Bengoa to demonstrate why he was not in contempt. By opinion and order dated December 24, 2009, I held Bengoa in contempt of the Arbitration Decision. *Aveta Inc. v. Bengoa*, 986 A.2d 1166 (Del. Ch. 2009) (the "Contempt Decision"). As a partial sanction, I ordered Bengoa "to bear all of the expenses, including attorneys' fees, that Aveta has incurred because of [his] contempt." *Id.* at 1188 (the "Fee Award").

Aveta subsequently presented Bengoa with a demand for over $700,000 in expenses. Bengoa refused to pay. Aveta then moved to enforce the Fee Award. This opinion resolves Bengoa's substantive and procedural objections. In short, Aveta is entitled to the expenses it demanded, except for two categories of expenses that fall outside the Fee Award: (i) expenses Aveta incurred transitioning this matter from one forwarding firm to another, and (ii) expenses Aveta incurred pursuing the arbitration that would have been incurred regardless of Bengoa's contempt. Aveta will clarify other expenses and the parties will meet and confer as described herein.

I. FACTUAL BACKGROUND

Aveta first submitted its demand for payment of expenses on April 22, 2010. Bengoa responded by asking for underlying documentation, including timesheets, invoices, and proofs of payment, so he could determine whether the expenses were reasonable and fell within the scope of the Fee Award. On May 6, Aveta provided Bengoa with proofs of payment and summary invoices showing the aggregate amount billed on each invoice. Bengoa reiterated his request for underlying documents.

On May 28, 2010, Aveta furnished Bengoa with detailed supporting invoices showing the individual time entries for Aveta's counsel and disbursements grouped by category. Aveta demanded an answer from Bengoa by June 4 as to whether he intended to make a payment. When Bengoa did not respond, Aveta moved to enforce the Fee Award. Bengoa first identified his objections to Aveta's demand when he filed his opposition on June 28.

II. LEGAL ANALYSIS

Aveta seeks payment of $714,601 in fees and costs. Bengoa has raised a series of procedural and substantive objections. Procedurally, Bengoa argues that because there is not yet an appealable final judgment requiring him to pay a specific dollar amount, Aveta has nothing to enforce. Bengoa also complains that Aveta has not moved properly for a fee award under Court of Chancery Rule 88. Substantively, Bengoa disputes the reasonableness of Aveta's expenses. Bengoa also argues that broad swathes of expenses fall outside the Fee Award.

A. Bengoa Is Presently Obligated To Pay Aveta's Expenses.

Bengoa initially objects that "Aveta is not entitled to an immediate payment of fees and expenses not yet adjudicated because there is no final, appealable order in this case that obligates Bengoa to pay." Bengoa's Mem. in Opp. at 1-2 (cited as "Opp."). He further asserts that "it is premature for Aveta to attempt to enforce payment without first having an adjudication of the amounts it is entitled to, and entry of a final order." *Id.* at 5. Bengoa apparently believes that he need not comply with this Court's orders, including the Contempt Decision, unless they are memorialized in a final, appealable judgment. *See id.* at 6 ("Only when a ruling becomes a final judgment – and thus a final, appealable order – will a party against whom the judgment is rendered become obligated to pay that judgment.") (footnote omitted). Bengoa similarly seems to believe that he need not comply with any obligation to pay money due unless a court has ordered him to pay a particular amount in dollars and cents. *See id.* at 7 ("Aveta's motion puts the cart before the horse by contending that it is entitled to immediate payment of its unilateral demand when the Order ***only*** determined entitlement to attorneys' fees and expenses, and ***not*** a specific amount."). Bengoa is wrong on both counts.

"[A]n interim order awarding fees does not hang in suspension until the entry of a final judgment. A trial court has inherent power to enforce its orders and direct timely payment." *Kurz v. Holbrook*, 2010 WL 3028003, at *1 (Del. Ch. July 29, 2010). In *Kurz*, the party ordered to pay a fee award made precisely the same argument as Bengoa, *viz.*, that it was not and could not be required to pay except pursuant to a final (or partial final) judgment. *Kurz* rejects that position. *Id.* at *3. It applies here.

Bengoa's obligation to pay Aveta likewise does not hang in suspension until this Court reduces it to a precise figure quantified in the coin of the realm. Regardless of whether an obligation arises from contract, statute, regulation, judicial order, or the common law, a party has a duty to comply. Parties are not free to ignore obligations unless and until a court issues a particularized order. When a court enters a precise money judgment, the court is not conjuring an obligation from the incorporeal air. The court is enforcing the pre-existing legal or equitable obligation with which the party failed to comply. *Cf. Citrin v. Int'l Airport Ctrs., LLC*, 922 A.2d 1164, 1168 n.14 (Del. Ch. 2006) (rejecting on similar grounds "the notion that it is proper for parties to refuse to make contractually-required payments until they are sued").

Delaware's approach to pre-judgment interest illustrates these basic principles. When a party has a right, contractual or otherwise, to a monetary amount, the party "is entitled to prejudgment interest running from the date the [p]ayment is due." *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 508 (Del. 2001). Payment becomes due when a particular amount is demanded. *Id.* at 509 n.127 (quoting *Moskowitz v. Mayor and Council of Wilmington*, 391 A.2d 209, 211 (Del. 1978)). Once a proper demand has been made, "prejudgment interest is awarded as a matter of right." *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1991). The right to pre-judgment interest demonstrates that the duty to pay arises out of the underlying obligation, not the judicial order enforcing it. Full compensation for the breach of the obligation "requires [an] allowance" for the failure to pay, and "interest is used for measuring that allowance." *Moskowitz*, 391 A.2d at 210.

In this case, the Purchase Agreement imposed an obligation to arbitrate on Bengoa. He failed to comply with that obligation, leading to the Arbitration Decision. Even after his pre-existing contractual obligation was memorialized in an order of this Court, Bengoa continued to ignore it. This led to the Contempt Decision, which included the Fee Award. The Fee Award directed Bengoa to pay Aveta's expenses as a remedial sanction for his persistent failure to comply with his underlying contractual obligation, even after being ordered to do so. From the date of the Fee Award, Bengoa was obligated to pay Aveta's expenses. Once Aveta made a sufficiently supported demand for payment, the resulting amount became due and payable as of that date.

Aveta demanded payment of a specific amount on April 22, 2010, but did not provide detailed supporting invoices until May 28. It was at that point that Aveta "sufficiently gave [Bengoa] a fair chance to make prompt payment." *Schoon v. Troy Corp.*, 948 A.2d 1157, 1173 (Del. Ch. 2008). Bengoa remained free to challenge elements of Aveta's demand – as he has done – but to the extent his challenges are unsuccessful, the amounts remain due and payable as of May 28. *See id.* at 1173-74. Pre-judgment interest will accrue from that date at the legal rate, compounded quarterly. *See* 6 *Del. C.* § 2301(a); *Taylor v. Am. Specialty Retailing Grp., Inc.*, 2003 WL 21753752, at *13 (Del. Ch. July 25, 2003) (applying quarterly compounding interval for legal rate "due to the fact that the legal rate of interest most nearly resembles a return on a bond, which typically compounds quarterly").

B. Aveta's Motion Adequately Presents The Fee Issue.

Bengoa next asserts that Aveta's motion to enforce is procedurally deficient under Rule 88, which speaks in terms of "an application . . . for a fee." This is a tempest over a title.

Rule 88 provides:

> In every case in which an application to the Court is made for a fee or for reimbursement for expenses or services the Court shall require the applicant to make an affidavit or submit a letter, as the Court may direct, itemizing (1) the amount which has been received, or will be received, for that purpose from any source, and (2) the expenses incurred and services rendered, before making such an allowance.

Ch. Ct. R. 88 (footnote added). Rule 88 applies to fee awards imposed as a contempt sanction. *See Dickerson v. Castle*, 1992 WL 205796, at *1-2 (Del. Ch. Aug. 21, 1992). The rule "does not provide an independent basis for the reimbursement of a litigant's expenses . . . ." *Gaffin v. Teledyne, Inc.*, 1993 WL 271443, at *1 (Del. Ch. July 13, 1993). It rather regulates the procedure by which an application is made. *See id.* The Court of Chancery has discretion in determining the level of submission required. *See Cohen v. Cohen*, 269 A.2d 205, 207 (Del. 1970) (affirming Court of Chancery's award of counsel fees for multiple matters without requiring specification by individual controversy).

Aveta's motion to enforce satisfies Rule 88. Aveta has submitted a declaration executed under penalty of perjury by Andrew J. Frackman, its lead counsel. The attachments to the declaration include summary invoices, proofs of payment, and detailed supporting invoices specifying individual time entries. Each time entry identifies (i) the

date on which services were provided, (ii) the name of the professional providing services, (iii) a description of the services performed, and (iv) the amount of time billed. The detailed supporting invoices show disbursements by category. Aveta has made minimal redactions.

Aveta's submission ably supports a fee application, however denominated. Styling the filing as a motion to enforce rather than an application for fees does not merit denial. Were I to rule in that manner, Aveta appropriately could re-label its motion and re-file it with the same supporting declaration. The State of Delaware would benefit from an incremental filing fee, but no other public interest would be served. I will not force Aveta to take a procedural penalty lap. *Cf. Nagy v. Bistricer*, 770 A.2d 43, 58 (Del. Ch. 2000) (declining to require plaintiff to file separate appraisal proceeding despite authority suggesting this route where separate filing would "disserve judicial and litigative efficiency").

C. The Total Expenses That Aveta Has Demanded Are Reasonable.

Turning to substance, Bengoa argues that Aveta's total expenses are unreasonable. I disagree. Having conducted the underlying proceedings, reviewed all of the papers submitted, and presided over the hearings in which counsel presented argument, I regard the total expenses as reasonable for the litigation effort that Aveta undertook. I will not approve Aveta's demand to the extent entries fall outside of the scope of the Fee Award, but I also will not reduce the amounts Aveta properly seeks as either excessive or unreasonable.

This Court has discretion in determining a reasonable award. *Mahani v. EDIX Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007). In *Mahani*, the Delaware Supreme Court held that "[t]o assess a fee's reasonableness, case law directs a judge to consider the factors set forth in the Delaware Lawyers' Rules of Professional Conduct . . . . " *Id.* at 245-46 (footnote omitted). The factors are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Del. Lawyers' R. Prof'l Conduct 1.5(a). The *Mahani* decision also instructed trial courts to consider "whether the number of hours devoted to litigation was excessive, redundant, duplicative, or otherwise unnecessary." *Mahani*, 935 A.2d at 247-48 (internal quotation and citation omitted).

Mahani involved a contractual fee-shifting provision. Another list of factors appears with even greater frequency in Delaware fee-award decisions. In *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 140 (Del. 1980), the Delaware Supreme Court stated

that when awarding fees for conferring a corporate benefit or creating a common fund, a court should consider:

> the "results achieved" by counsel plus the following factors. . . : the amount of time and effort applied to a case by counsel for plaintiff, the relative complexities of the litigation, the skills applied to their resolution by counsel, as well as any contingency factor and the standing and ability of petitioning counsel.

Id. at 149 (internal quotation omitted). The *Sugarland* factors are "virtually identical" to factors in Rule 1.5(a). *Blank Rome, LLP v. Vendel*, 2003 WL 21801179, at *8 (Del. Ch. Aug. 5, 2003); *accord State Wis. Inv. Bd. v. Bartlett*, 2002 WL 568417, at *5 (Del. Ch. Apr. 9, 2002) (same).

Despite the powerful family resemblance between the two lists of factors, there does not appear to be a hereditary link. The *Sugarland* list was quoted from Chancellor Marvel's trial court opinion. *See* 420 A.2d at 149 (quoting *Thomas v. Kempner*, 398 A.2d 320, 327 (Del. Ch. 1979)). Chancellor Marvel set out his list and supported it with a string citation to earlier Delaware precedent. *See Thomas*, 398 A.2d at 327 (citing *McDonnell Douglas Corp. v. Palley*, 310 A.2d 635 (Del. 1973); *Chrysler Corp. v. Dann*, 223 A.2d 384 (Del. 1966); *Treves v. Servel*, 154 A.2d 188 (Del. 1959); *Aaron v. Parsons*, 144 A.2d 155 (Del. 1958); *Richman v. DeVal Aerodynamics, Inc.*, 185 A.2d 884 (Del. Ch. 1962); *Lewis v. Great W. United Corp.*, 1978 WL 2490, at *4 (Del. Ch. Mar. 28, 1978)). None cited Rule 1.5(a) or a predecessor rule. The earliest of the cited decisions – *Aaron* – relied on *Swacker v. Pennroad Corp.*, 57 A.2d 63 (Del. 1947). *Swacker* in turn relied on *R.H. McWilliams, Jr., Co. v. Missouri-Kansas Pipe Line Co.*, 190 A. 569 (Del.

Ch. 1936). *McWilliams* did not promulgate a list of factors or announce a general rule; it discussed the specific factual attributes of the fee applications presented by the receivers in that case. *Sugarland*'s trail does not lead to Rule 1.5(a).

Nor does Rule 1.5(a)'s trail lead to *Sugarland*. The Delaware rule tracks Model Rule of Professional Conduct 1.5(a). That rule repeated factors enumerated in the Model Code of Professional Responsibility DR 2-106 (1969). The Model Code provision added two factors to a list previously found in Canon 12 of the ABA Canons of Professional Ethics from 1908. Canon 12 paraphrased Sections 49 and 50 of the code of ethics adopted in 1887 by the Alabama State Bar Association, which was the first code adopted in the country. *See* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 Fordham. L. Rev. 2395, 2478 n.442 (2003).

Convergent jurisprudential evolution produced virtually identical lists. I cannot discern any reason to distinguish between them. In lieu of debating which list applies, what matters is the weight given to the different factors for different types of fee applications. When a plaintiff seeks a fee award for conferring a corporate benefit or creating a common fund, our law emphasizes the results obtained. *See Sugarland*, 420 A.2d at 149. By contrast, when a party seeks to recover under a contractual fee-shifting provision, the results are secondary. *See Mahani*, 935 A.2d at 248. "Absent any qualifying language that fees are to be awarded claim-by-claim or on some other partial basis, a contractual provision entitling the prevailing party to fees will usually be applied in an all-or-nothing manner." *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza,*

LLC, 2009 WL 458779, at *8 (Del. Ch. Feb. 23, 2009). Courts focus principally on enforcing the parties' agreement to make the prevailing party whole. *Id.*

When awarding expenses as a contempt sanction or for bad faith litigation tactics, this Court takes into account the remedial nature of the award. *See In re SS & C Techs., Inc. S'holders Litig.*, 2008 WL 3271242, at *3 n.14 (Del. Ch. Aug. 8, 2008) (noting that because fees were awarded as a sanction, the Court did not focus narrowly on the Rule 1.5(a) factors); *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 1998 WL 155550, at *3 (Del. Ch. Mar. 30, 1998) (taking into account that fees were shifted because of bad faith litigation tactics when evaluating award). Such an award is designed to make whole the party who was injured by the other side's contumely. Contempt Decision, 986 A.2d at 1181 ("The remedy of civil contempt serves two purposes: to coerce compliance with the order being violated, and to remedy injury suffered by other parties as a result of the contumacious behavior."). The remedial nature the award commends putting primary emphasis on reimbursing the injured party. The results achieved are of secondary importance.

Determining reasonableness does not require that this Court examine individually each time entry and disbursement.[1] Having considered the Rule 1.5(a) factors, I regard

[1] *E.g., Weichert Co. v. Young*, 2008 WL 1914309, at *2 (Del. Ch. May 1, 2008) ("A discussion of each specific invoice item that Young contests would neither be useful nor practicable."); *Blank Rome*, 2003 WL 21801179, at *8-10 (rejecting alleged requirement of line-item review for contractual fee-shifting provision); *see M & G Polymers USA, LLC v. Carestream Health, Inc.*, 2010 WL 1611042, at *76 (Del. Super. Apr. 21, 2010) (finding no authority that "requires this Court to engage in a line-by-line

Aveta's demand as reasonable. Aggregate fees of approximately $700,000 are within the range of what a party reasonably could incur over the course of ten months pursuing an adversary engaged in a "mix of open defiance, evasion and obstruction." Contempt Decision, 986 A.2d at 1178. A further indication of reasonableness is the reality that when Aveta filed its motion to enforce and paid the expenses it now seeks to recover, Aveta did not know that it would be able to shift those expenses to Bengoa. Aveta had a potential claim to recover fees under Section 13.5 of the Purchase Agreement, but only if Aveta prevailed. If not, then Aveta would bear its own expenses. Aveta therefore had sufficient incentive to monitor its counsel's work and ensure that counsel did not engage in excessive or unnecessary efforts.[2]

In reaching the conclusion that Aveta's demand is reasonable, I have considered Bengoa's specific objections. He summarizes them thusly:

> Aveta seeks payment for a combined four different law firms, twenty different lawyers, and seven different paralegals. The hourly rates of the lawyers that worked on the file ranges [sic]

---

analysis of the components of an attorneys' fee application when an award of fees is based upon the bad faith exception to the American Rule").

[2] *See Bartlett*, 2002 WL 568417, at *6 ("an arm's-length agreement, particularly with a sophisticated client, as in this instance, can provide an initial 'rough cut' of a commercially reasonable fee"); *Arbitrium*, 1998 WL 155550, at *2 (considering that client had retained counsel on non-contingent basis and faced prospect of bearing full cost of litigation effort); *see also First Fed. Sav. & Loan Ass'n v. United States*, 88 Fed. Cl. 572, 585 (2009) (holding that plaintiff "had every incentive to exercise control over the work of its counsel and to monitor closely the cost of the litigation" given the "lack of any assurance" that it would prevail); *Fla. Rock Indus., Inc. v. United States*, 9 Cl. Ct. 285, 289 (1985) ("the risk of abuse is minimal because plaintiff has no assurance of recovering and must assume it will bear the full cost of the litigation").

> from $885 per hour to $125 per hour. A review of the invoices establishes that a number of lawyers billed less than ten hours on the file, and their time was added to bills months after the work was completed. Simply put, the fleet of lawyers that Aveta retained to represent its interests was not reasonable or necessary to pursue the initiation of arbitration in this matter.

Opp. at 15 (citation omitted). The four firms were Aveta's predecessor forwarding counsel, K&L Gates LLP; Aveta's current forwarding counsel, O'Melveney & Meyers LLP; Aveta's Delaware counsel, Potter Anderson & Corroon LLP; and Aveta's Puerto Rico counsel, Usera Morell Bauzá Dapena & Cartagena LLP.

In elaborating on his four law firms objection, Bengoa states that "in August, September, October and November of 2009, there were two sets of law firms on the file that appear to have a number of lawyers from each firm performing the same work." Opp. at 17. Contrary to Bengoa's assertion, Aveta acted reasonably by employing Delaware counsel and Puerto Rico counsel in addition to forwarding counsel. Relying on counsel from the jurisdiction where a proceeding takes place does not suggest duplicative or excessive charges; it rather suggests the efficient and prudent allocation of resources. Because of their focus on our State's law, Delaware lawyers frequently can answer in a telephone call questions about this jurisdiction that a forwarding law firm would spend hours or days researching. Delaware counsel can readily point to leading authorities, provide precedent filings, and help forwarding counsel prepare the case (including developing the discovery record) so that the matter can be presented most effectively. Delaware counsel must be involved sufficiently to fulfill their obligations to this Court. *See State Line Ventures, LLC v. RBS Citizens, N.A.*, 2009 WL 4723372, at *1 (Del. Ch.

Dec. 2, 2009). Giving a meaningful role to Delaware counsel is reassuring, not troubling. I am confident that the same holds true for the Puerto Rico counsel.

A second aspect of Bengoa's "four lawyers" theme, however, has merit. For reasons that are not clear to me. Aveta transitioned this matter from K&L Gates to O'Melveney. A handful of time entries relate to the transition and the concomitant need to bring O'Melveny up to speed. The decision to hire new counsel was Aveta's to make. It was not caused by Bengoa. These entries therefore fall outside the Fee Award. *See, e.g., Tafeen v. Homestore, Inc.*, 2005 WL 789065, at *6 (Del. Ch. Mar. 29, 2005) (declining to advance fully the expenses incurred when switching counsel where the switch was not caused entirely by the party obligated to advance fees). Technically, this is not a ruling on reasonableness. I have no cause to believe that Aveta acted unreasonably in changing counsel or that the transition costs were excessive. Rather, it reflects my doubt (and Aveta's failure to establish) that the transition expenses were "incurred because of Bengoa's contempt." 986 A.2d at 1188.

Bengoa's other reasonableness arguments fall short. The hourly rates charged by Aveta's counsel are not excessive. They are consistent with market rates for attorneys with reputable and sophisticated firms. The number of lawyers staffed on the case, similarly, was not excessive. The staffing appears appropriate and need not be second-guessed. *See Arbitrium*, 1998 WL 155550, at *4 (noting in ruling on fee application that "[f]or a Court to second-guess, on a hindsight basis, an attorney's judgment . . . is hazardous and should whenever possible be avoided.").

I have examined specific amounts that Bengoa considers excessive. For example, he objects to "$67,050.20 [for] six attorneys billing 134.3 hours in preparing its Motion for a Temporary Restraining Order," or "$76,375.80 [for] 8 attorneys billing 162.2 hours for briefing the Order to Show Cause." Opp. at 16. These expenditures of time, the number of attorneys involved, and the related dollar amounts are reasonable for the types of submissions that were prepared.

Bengoa lastly contends that some of the entries constitute "general, administrative type expenses [which] do not fall within the ambit of the Order." Opp. at 11. He cites the creation of litigation budgets and the preparation of audit response letters. Preparing litigation budgets reflects prudence and is an integral part of the litigation process. Aveta may recover for this item. Preparing an audit response letter is a closer call. The letters frequently cover more than one litigation matter, making it unclear whether all of the time sought falls within the Fee Award. If Aveta only seeks to recover for the sections describing litigation caused by Bengoa's contempt, then this expense is appropriate. Subject to Aveta confirming the scope of its audit response letter time entries, Bengoa will pay these amounts. This approach comports with a broad reading of the Fee Award that takes into account its remedial nature. *See Arbitrium*, 1998 WL 155550, at *3 (approving recovery of word processing charges and other disbursements as part of bad faith fee award; rejecting argument that items should be part of firm overhead).

D. Aveta Is Entitled To Expenses Incurred Pursuing The Other Shareholders.

Bengoa next argues that expenses Aveta incurred pursuing relief against certain other shareholders aligned with Bengoa fall outside the scope of the Fee Award. Aveta

first attempted to name the other shareholders as defendants in this action, then later named them as defendants in a new action, Civil Action No. 5074 (the "Other Shareholders Action"). Aveta can recover for the expenses it has incurred pursuing the other shareholders.

The Fee Award required Bengoa "to bear all of the expenses, including attorneys' fees, that Aveta has incurred because of Bengoa's contempt." 986 A.2d at 1188. In the Contempt Decision, I discussed the actions taken by the other shareholders.

> [W]hen Aveta filed the Motion to Enforce, an all-too-convenient sequence of events transpired. Bengoa obtained a one week extension to respond to the Motion to Enforce in Delaware, during which time his father and nineteen other Shareholders just happened to file suit in Puerto Rico. At the same time, the plaintiffs in the Lugo Puerto Rico Action just happened to file an amended complaint and ask the Puerto Rico court to refuse to grant Aveta any extension of time to respond. Both sets of Shareholders just happened to file parallel motions to consolidate their proceedings. These nicely coordinated events just happened to enable Bengoa to argue in a cross motion to stay that I should defer to the Puerto Rico suits because they were first filed and moving forward.
>
> . . . Bengoa had the ability as the Shareholders' Representative to bring order to this chaos. If Bengoa were truly the victim of rogue Shareholders, then Bengoa could have sought a declaratory judgment from this Court to establish his authority. In the nearly two years that Shareholders ostensibly have been disregarding Bengoa's authority, he never took this step. When asked why not, Bengoa's counsel said they never thought about it and that Bengoa has no plans to pursue such a course of action. I believe Bengoa is in fact coordinating with the other Shareholders to create problems for Aveta and avoid arbitration.

Id. at 1182.

Because Bengoa and the other shareholders were coordinating actively, Aveta properly sought this Court's assistance. Aveta originally attempted to amend its complaint in this action to name the other shareholders as defendants. Aveta did so "because of Bengoa's contempt." I denied the motion not because Aveta acted improperly, but because the Arbitration Decision was a final order. The denial of the motion to amend does not foreclose Aveta's ability to recover its expenses. As discussed in the previous section, the results achieved are a secondary consideration. The primary consideration is to make Aveta whole for the expenses that Bengoa contumacious conduct caused Aveta to incur. Having pursued the motion to amend because of Bengoa's contempt, Aveta is entitled to recover the expenses that relate to the motion. As noted in the Contempt Decision, Aveta also would be entitled to recover those expenses under Section 13.5 of the Purchase Agreement, which provides for fee-shifting to a prevailing party.

After I denied the motion to amend, Aveta filed the Other Shareholders Action. Aveta again did so "because of Bengoa's contempt." Bengoa consequently must pay for the expenses that Aveta has incurred to date in that action. Moreover, Bengoa's obligation to bear Aveta's expenses in the Other Shareholders Action is continuing; it did not end as of December 24, 2009, the date of the Contempt Decision. The Other Shareholders Action only exists because of Bengoa's contempt. Imposing Aveta's costs on Bengoa is necessary to rectify Bengoa's contumely. Aveta may make a further fee application at the conclusion of the Other Shareholders Action.

E. Aveta Is Entitled To Payment Of Fees And Expenses Incurred In Pursuing The Arbitration.

In a second scope objection, Bengoa contends that "Aveta's claimed expenses include those that relate to the merits of the arbitration." Opp. at 10. The Contempt Decision addressed the degree to which the Fee Award encompassed expenses for the Arbitration:

> This sanction includes all expenses incurred by Aveta in connection with its efforts to pursue the arbitration since February 25, 2009, when Aveta and Bengoa provided their agreed-upon form of engagement letter to [Ernst & Young]. The arbitration should have commenced at that point.

Contempt Decision, 986 A.2d at 1188. The phrase "efforts to pursue the arbitration" referred to Aveta's efforts to overcome Bengoa's evasion and intransigence and make the arbitration happen. It did not encompass efforts to pursue the arbitration in the sense of obtaining a favorable outcome in that proceeding. This distinction reflected the overarching grant of expenses, which extended to expenses "Aveta has incurred because of Bengoa's contempt." *Id.* The Fee Award was not intended to shift to Bengoa expenses that Aveta would have incurred in any event, such as efforts to litigate the merits of the arbitration. Aveta generally appears to have understood this distinction and sought expenses incurred because of Bengoa's contempt.

Along with his Opposition, Bengoa submitted a 39-page chart entitled "Fees Outside The Scope of December 24, 2009 Court Order." Many of the entries are labeled "Unable to determine whether entry falls within scope of Order" or "Outside of scope of

Court Order because entry relates to merits of Arbitration." Bengoa's objections generally appear unfounded.

With isolated exceptions, the time entries to which Bengoa objects date from August through December 2009, precisely when Aveta was preparing and then pursuing its motion to enforce the Arbitration Decision. The vast majority of the entries relate facially to matters placed at issue by Aveta's motion and Bengoa's opposition. For example, one of the principal matters in dispute was whether Bengoa acted in good faith when first negotiating, then agreeing to, and then later objecting to the terms of the engagement letter with Ernst & Young. It is to be expected that Aveta's lawyers would have time entries such as "Review Ernst & Young materials; Schedule" or "Aveta Background Meeting With Client And Accountant." Another issue was whether Bengoa legitimately objected to proceeding with the arbitration because of disputes over the terms of an agreement with Infocrossing, a consultant. Entirely appropriately, Aveta's application includes time entries for "Review and Analyze Draft Infocrossing Agreement." Yet Bengoa has objected to these and other similar entries as "[o]utside of scope of Court Order."

There are, however, some entries where the relationship to the motion to enforce is less clear, either because of the timing of the entries or due to ambiguities in the descriptions. Armed with this guidance about the scope of the Fee Order, the parties shall meet and confer regarding Aveta's time entries within twenty days of this decision. The senior lawyers from the parties' forwarding firms and the senior Delaware litigators will attend in person. Within five days after the meeting, the parties will report to me by

letter on the results of the meeting. If there are entries that remain in dispute, then Aveta may renew its application as to the disputed matters. Because I am not as familiar as the parties with the individuals involved in the proceedings, Aveta will include with any renewed fee application an alphabetized list of the names that appear on its supporting invoices. For each individual, Aveta will provide the person's title, employer, and a short description of the person's role in the arbitration and motion to enforce.

III. CONCLUSION

For the foregoing reasons, Bengoa is presently obligated to pay the expenses Aveta incurred because of Bengoa's contempt. Aveta shall provide clarification and the parties shall meet and confer as directed. IT IS SO ORDERED.