

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

THOMAS T. S. KAUNG,)
)
Plaintiff,)
)
v.) C.A. No. 163-N
)
COLE NATIONAL CORPORATION,)
a Delaware Corporation,)
)
Defendant.)

MEMORANDUM OPINION

Submitted: June 9, 2004

Decided: August 27, 2004

Revised: August 30, 2004

Edward M. McNally, Esquire, MORRIS, JAMES, HITCHENS & WILLIAMS, Wilmington, Delaware; Robert D. Goldberg, Esquire, BIGGS AND BATTAGLIA, Wilmington, Delaware; Steven D. Cundra, Esquire, Jeffrey M. Sherman, Esquire, O'ROURKE AND CUNDRA, Washington, D.C., *Attorneys for the Plaintiff.*

Donald J. Wolfe, Jr., Esquire, Arthur L. Dent, Esquire, Catherine A. Strickler, Esquire, Joseph B. Cicero, Esquire, POTTER ANDERSON & CORROON, LLP, Wilmington, Delaware; Robert P. Duvin, Esquire, Robert M. Wolff, Esquire, Heidi Duncan Alten, Esquire, DUVIN, CAHN & HUTTON, Cleveland, Ohio, *Attorneys for the Defendant.*

LAMB, Vice Chancellor.

I.

A former corporate officer seeks advancement in connection with an SEC investigation and related litigation. The officer engaged in his defense both a non-lawyer consultant and a law firm recommended by that consultant. At first, the company advanced the fees of both the consultant and the law firm but coupled payment with requests for information about the consultant to determine whether it was reasonable to continue advancing his fees. When these requests went unmet, the company stopped advancing the consultant's fees but continued advancing the law firm's fees. The former officer then filed this action, claiming the right to advancement of all the fees of both the consultant and the lawyers who were working with him.

The discovery phase of this summary litigation was marked by excess and misconduct on the part of the plaintiff's attorneys and his consultant. For example, after deposing the corporation's general counsel over three days, the plaintiff's attorneys noticed the depositions of four directors, two insurance carrier representatives and sixteen other persons. Remarkably, the very consultant whose fees were at issue repeatedly resisted appearing for his deposition and, when he finally did appear, refused to answer questions and behaved disruptively. As disturbingly, the plaintiff's out-of-state attorney not only failed to control his witness but actively participated in the witness's disruptive conduct.

In light of this pretrial misconduct, new Delaware counsel appeared at the trial and the out-of-state attorney did not participate in the presentation of the case. Moreover, as a direct result of the consultant's wrongful conduct, the plaintiff withdrew his request for advancement of the consultant's fees. Thus, the trial in the case focused on whether the plaintiff was entitled to recover his attorneys' fees incurred working with the consultant, and whether the company was entitled to a recovery of or an offset against future advances for amounts previously advanced in relation to activities by the consultant.

For the reasons discussed herein, the court concludes that the former officer is not entitled to receive advancement of any part of his legal counsels' fees that relate to time spent working with the consultant. Moreover, the court concludes that the corporation is entitled to set off against any future advancement obligation owed to the plaintiff all sums previously advanced with respect to either (i) fees of the consultant, or (2) attorneys' fees relating to time spent with the consultant. Finally, the court awards the defendant its attorneys' fees and expenses, together with court costs, incurred in connection with this action.

II.

The plaintiff, Thomas T.S. Kaung, was the CFO of defendant Cole National Corporation¹ from March 2000 to July 2002.² At the time that Kaung became

¹ Cole is incorporated in Delaware with its principal place of business in Ohio.

CFO, he entered into an indemnification agreement with Cole. In December 2002, only a few months after Kaung's departure, the SEC began an investigation into Cole's accounting and financial reporting, covering periods during which Kaung was the CFO. Cole then restated its earnings for fiscal years 1998-2001 and for the first quarter of fiscal year 2002. Also in December 2002, Cole stockholders filed a class action suit alleging securities fraud against various corporate officers of Cole, including Kaung.

On January 24, 2003, pursuant to the terms of the indemnification agreement, Kaung submitted an undertaking to the Cole board. Cole then began to advance to Kaung his expenses in the SEC investigation and related litigation.³ Kaung initially retained the law firm of Jones Day to represent him along with other persons implicated in the SEC inquiry and the stockholder class action. After a determination was made that certain indemnitees, including Kaung, should seek separate representation and the Cole board of directors passed a resolution approving such separate representation, Kaung hired Malcolm Kelso, the sole employee of the Irontree Group, Inc., as his "advisor."⁴ Kelso then introduced

² Kaung was first employed by Cole from 1979 to about 1990 as a corporate controller. Tr. at 9-11.

³ The Cole board authorized the advancement of Kaung's legal expenses on January 23-24, 2003 and again on March 27, 2003. The stockholder class action was settled against all defendants in principle in May 2003.

⁴ On April 24, 2003, Kaung notified Cole that he had retained Kelso's consulting services. Kaung testified that he and Kelso have known each other for over twenty years. Tr. at 17.

Kaung to Steven D. Cundra of the Washington D.C. law firm O'Rourke & Cundra, with whom Kelso had a prior relationship.⁵ In March 2003, Kaung retained the law firm of O'Rourke & Cundra as his separate counsel in connection with the SEC investigation and the class action. As more fully described herein, the court is left to infer that Kelso recommended these lawyers and urged Kaung to hire them principally because he had engaged in profitable joint representations with them before and despite the fact that Cundra and his firm have little, if any, relevant experience or expertise.⁶

On May 2, 2003, counsel for Cole sent a letter to O'Rourke & Cundra concerning the advancement of their bills and inquiring about Kelso's qualifications and his role in the litigation.⁷ On May 9, 2003, Cole's General Counsel, Leslie Dunn, sent another letter, this time directly to Kaung, inquiring about Kelso's qualifications and stating that Cole would only continue to advance

⁵ The parties dispute the extent of Kelso's prior relationship with O'Rourke & Cundra, but the record is clear that they have worked together on numerous occasions.

⁶ Cundra testified that he was aware of Kelso's controversial background - including being serially sanctioned, found liable for civil theft in securities fraud, incarcerated for contempt of court, and described by one judge as using "litigation to harass opponents and disrupt the judicial process." *Legal Econometrics v. Abramson*, 1997 WL 786249, at *2 (N.D. Tex. Dec. 16, 1997). Notwithstanding this knowledge, Cundra allowed Kelso to appear as Kaung's representative before the SEC in its investigation. *See* Tr. at 62-63; Kaung Dep. at 214-17.

⁷ "In addition, you have submitted bills for work performed by Malcolm Kelso of the Irontree Group, Inc. To assist the Company, please explain the nature and definition of Mr. Kelso's role in the proceeding, the work he is performing, and who has retained him. This will be needed before the Company can pay these bills." Def.'s Ex. 70 (Letter from Mark Herrman, counsel for Cole National, to Steven Cundra, counsel for Kaung (May 2, 2003)).

Kelso's fees once Kaung had submitted Kelso's qualifications and described the nature of his work for Kaung.⁸ Dunn testified that despite these repeated requests for information she never received any information regarding Kelso's education or professional background, the scope of his work in representing Kaung, or even the number of hours he worked or his billing rate.⁹ In fact, the record reflects that Kaung and Kelso were at best non-responsive to any inquiry as to Kelso's qualifications or the scope of his work.¹⁰ Kelso's qualifications remain a mystery.¹¹

Cole has advanced approximately \$150,000 with respect to Kelso's bills for time spent through May 15, 2003.¹² Acting in good faith and with a reasonable expectation that she would get answers to her questions about Kelso, Dunn

⁸ "Payments for any future charges must rest on a demonstration that Irontree/Kelso meets the reasonableness requirement in the context of your already having counsel working for you." Def.'s Ex. 74 (Letter from Leslie Dunn, Cole's General Counsel, to Thomas Kaung (May 9, 2003)).

⁹ Tr. at 184-94.

¹⁰ The record is replete with evidence of Kelso's refusal to cooperate in any way with Cole. There are emails from Kelso to Dunn and outside counsel to Cole that are at best bizarre and at worst threatening. In addition, Kelso's behavior in connection with his own deposition was highly inappropriate in that he repeatedly postponed his appearance and then refused to answer questions when he finally appeared. The court is also concerned by the plaintiff's and Cundra's apparent acquiescence or assistance in this misconduct. The plaintiff did not respond to any of the interrogatories or requests for documents related to Kelso. Cundra aided and abetted Kelso's misconduct at his deposition.

¹¹ Kelso is the ex-brother-in-law of Jeffrey Cole, the company's former CEO and chairman. The record is unclear as to the extent of Kelso's history with the company, but it appears that Kelso was retained by the company in some capacity in connection with prior litigation. It also appears that Kelso was a director of Cole for less than one year in 1990. At that time, Cole was under a different name and was a closely held company.

¹² Def.'s Ex. 129 (Chart of "Legal Fees" advanced by Cole).

authorized the last of these payments before Cole received a response to its request for information about Kelso's qualifications, the work he performed, or his hourly rate.¹³ Cole also advanced all of O'Rourke & Cundra's fees through January 2004.¹⁴ In December 2003, out of concern that the fees being requested were becoming excessive, Cole retained the law firm of Duvin, Cahn & Hutton as special outside counsel to evaluate all advancement requests.

On January 7, 2004, Kaung sent the Cole board a formal Notice of Default for non-payment of the November and December bills for O'Rourke & Cundra and for Kelso's bills for the period mid-May until August 2003.¹⁵ Kaung issued this formal Notice of Default even though Cole had consistently made payments of Kaung's requests relating to his legal fees,¹⁶ and despite the fact that Kaung had never complied with Cole's requests for information related to Kelso and Kelso's bills. On January 12, Cole responded with a letter from its special outside counsel rejecting the Notice of Default and informing Kaung that the company was looking

¹³ In answers to written discovery, O'Rourke & Cundra raised privilege objections when Cole requested information as to Kelso's work for Kaung or his professional and educational background. O'Rourke & Cundra also threatened Cole with disclosure of confidential information if Cole's discovery requests were not withdrawn. *See* Def.'s Ex. 52 at 9-13, 16 (Plaintiff's Answers to Interrogatory).

¹⁴ Cole has advanced approximately \$575,000 with respect to O'Rourke & Cundra's bills. The first two invoices of 2004, however, were not paid in full.

¹⁵ Kelso has not submitted any bills since August 2003.

¹⁶ There are several emails in the record from Kelso to Dunn about late payments in April, May and October 2002. *See* Def.'s Ex. 65-67, 69, 71, 76.

into the reasonableness of the expenses submitted because those expenses appeared excessive as all litigation had already concluded.¹⁷ The very next day, the company paid the outstanding balance of O'Rourke & Cundra's bills but again notified the plaintiff that the company had retained special outside counsel to review the reasonableness of all the bills.

On January 12, 2004, Kaung filed this action seeking to compel Cole to advance the fees and expenses incurred by both O'Rourke & Cundra and Kelso in connection with the SEC investigation and related litigation. In the complaint, Kaung fancifully alleges that Cole stopped paying the advancement requests without notice because O'Rourke & Cundra cooperated with an SEC request to disclose certain documents that involved Cole's attorneys.¹⁸ Kaung persisted in

¹⁷ "Throughout your Indemnification Agreement there are repeated requirements that the expenses being indemnified be 'reasonable' and the Company has serious concerns as to the reasonableness of your aggregate defense expenses and, specifically, as to both the necessity and reasonableness of your litigation consultant expenses (in their entirety). As you are aware, there is no litigation pending at this time and the litigation that was previously pending was resolved promptly and efficiently without any liability imposed on you." Def.'s Ex. 78 (Letter from Robert Duvin, special outside counsel to Cole, to Thomas Kaung (Jan. 12, 2004)).

¹⁸ Specifically, the complaint alleges that in December 2003, Kaung's attorneys were asked by the SEC to provide information regarding a statement made by an attorney from Jones Day to Kaung's attorneys at a meeting discussing the SEC investigation. Kaung's attorneys advised Jones Day of the SEC request, and Jones Day responded by letter on December 17 that the information should not be disclosed. According to the plaintiff, since Cole stopped paying the advancement requests shortly after this interaction with Jones Day regarding the SEC disclosure, somehow the two events are related. The plaintiff's attempt at portraying Cole's refusal to continue advancing fees as some type of retaliation for his cooperation with the SEC is simply preposterous. The plaintiff was asked numerous times for information on Kelso so that the company could determine the "reasonableness" of advancing fees on his behalf. These requests are clearly notice that Cole would not continue to advance fees for Kelso's work unless the plaintiff provided evidence as to Kelso's qualifications or the scope of his work.

prosecuting this case even though the O'Rourke & Cundra bills were brought current the day after the complaint was filed.

Since the filing of the complaint, the plaintiff has turned a simple summary proceeding into an appalling display of harassment and delay. The plaintiff's counsel has also intentionally wasted the court's time and resources. An advancement proceeding is by statute a summary proceeding. Yet, O'Rourke & Cundra inexplicably sought the deposition of four Cole directors even though they had already deposed Dunn, Cole's general counsel, for three days. O'Rourke & Cundra also continuously refused to sign a confidentiality order. Cole was therefore forced to file a Motion for Protective Order in order to settle these two issues. At the May 14, 2004 hearing on that motion, O'Rourke & Cundra argued that it needed the depositions because Cole refused to stipulate to certain matters. O'Rourke & Cundra made this argument even though Dunn had already made the requested concessions in her deposition and, most notably, the proposed stipulations were only submitted to Cole in the late afternoon of *the day before the hearing*. Moreover, Cundra only offered to discuss the terms of the proposed confidentiality order once the motion was filed even though he had received it over two months before the hearing.¹⁹ Notably, O'Rourke & Cundra finally agreed to a

¹⁹ Counsel for Cole provided Cundra with the confidentiality agreement on February 27, 2004. On March 1, 2004, Cundra responded that the confidentiality agreement was "overbroad and unnecessary." Aff. of Robert M. Wolff Ex. C (Letter from Steven Cundra to Robert Wolff,

confidentiality stipulation proposed by Cole immediately before the May 14 hearing.

Further, O'Rourke & Cundra sought to depose representatives of Cole's D&O insurance carrier and representatives of a separate insurance company. It also sought to depose sixteen other witnesses, including former Arthur Andersen partners involved in the underlying SEC investigation, partners from Jones Day, partners from Duvin, Cahn & Hutton, among others. These deposition requests were highly inappropriate in the context of a summary advancement action and are further evidence of the plaintiff's inappropriate conduct in this litigation.

The court held a one-day trial on June 18, 2004. At the pretrial conference, Kaung's new Delaware counsel stated that Kaung was withdrawing any request for payment of the outstanding portion of Kelso's fees.²⁰ The plaintiff's remaining issue for trial was the reasonableness of O'Rourke & Cundra's fees. That inquiry

special outside counsel to Cole (March 1, 2004)). During the month of March, the parties continued to exchange letters concerning the confidentiality agreement. The agreement was also discussed at length in Dunn's deposition. The record is clear that Cundra was unwilling to negotiate the terms of the confidentiality agreement in any productive manner and after months of stalling, immediately before the May 14 hearing, finally agreed to a confidentiality agreement.

²⁰ The plaintiff argues that there remains an unpaid balance of \$80,387.90 to O'Rourke & Cundra (\$44,668.93 for November and December 2003 invoices and \$35,718.97 for February and March 2004 invoices). The defendant, however, argues that the unpaid balance is \$70,000.

necessarily entailed a determination of whether Kelso is a legitimate consultant under the indemnification agreement because a large part of O'Rourke & Cundra's fees include time spent with Kelso. Cole also pressed its counterclaim for a declaration that it need not advance the unpaid legal fees of O'Rourke & Cundra, and, in addition, that it is entitled to reimbursement of, or credit for, amounts previously advanced that it was not legally obligated to advance. Cole also now seeks a declaration that Kelso is not a legitimate representative under the indemnification agreement, and that any request for payment of Kelso's fees, past, present or future, be declared contrary to the agreement and Delaware law.

III.

A. The Contractual Right To Advancement

The plaintiff seeks advancement pursuant to the indemnification agreement, a board resolution authorizing the "immediate payment of any and all expenses"²¹ after the receipt of an undertaking,²² and the company's by-laws. Section 2 of Article VIII of the by-laws deals with advancement and states that, in order to determine whether fees should be advanced, the company should look to the "written agreement for indemnification between the Indemnatee and the

²¹ The board resolution gives the officers of Cole the *authority* to make immediate payment of any and all expenses upon receipt of an undertaking as required by the indemnification agreement. This grant of authority does not *ipso facto* guarantee that all expenses, whether reasonable or unreasonable, must be approved by the Cole officers.

²² Kaung provided the requisite undertaking on January 24, 2003.

Corporation.”²³ Since the parties have executed an indemnification agreement, that document is the appropriate source of the plaintiff’s advancement rights and the court refers to the language of the indemnification agreement in determining whether the plaintiff is entitled to advancement.

Section 2(a) of the indemnification agreement provides that the company shall indemnify the indemnitee “against any and all costs, charges and expenses (including without limitation, attorneys’ and others’ fees and expenses), judgments, fines and amounts paid in settlement *actually and reasonably incurred*”²⁴ Pursuant to section 2(e) of the agreement, attorneys’ and others’ fees and expenses “shall be paid by the Company *in advance* of the final disposition of such action, suit or proceeding as authorized in accordance with Section 4(b) hereof.”²⁵

Section 4(b) states in relevant part:

For purposes of determining whether to authorize advancement of expenses pursuant to Section 2(e) hereof, the Indemnitee shall submit to the Board a sworn statement of request for advancement of expenses . . . averring that (i) the Indemnitee has reasonably incurred or will reasonably incur actual expenses in defending an actual, civil, criminal, administrative or investigative action, suit, proceeding or claim and (ii) the Indemnitee undertakes to repay such amount if it shall ultimately be determined that the Indemnitee is not entitled to be indemnified by the Company, under this Agreement or otherwise.

²³ App. Vol. 1 To Pl.’s Trial Mem. at tab 3 (“Cole National Corporation Amended and Restated By-Laws as Adopted and in Effect on July 28, 2003”).

²⁴ Emphasis added.

²⁵ Emphasis added.

The parties are in agreement that the aforementioned provisions provide a right to advancement. Accordingly, Cole has advanced fees to Kaung since April 2003. The dispute before this court is the reasonableness of those fees.

B. A Reasonableness Inquiry

As a threshold matter, the plaintiff argues that an inquiry into the reasonableness of the fees is not appropriate at the advancement stage. In support of this argument, the plaintiff notes that Delaware law distinguishes the right to indemnification from the right to advancement. The plaintiff further argues that the provisions authorizing advancement do not expressly condition advancement on a reasonableness determination and, therefore, it is not proper to make that determination at this time. In essence, the plaintiff seeks a blank check from Cole as to fees incurred in the SEC investigation and related litigation with a reasonableness inquiry only at the indemnification stage.²⁶

²⁶ The plaintiff asserts that the indemnification agreement provides “additional advancement protection above and beyond that provided in the DGCL.” Letter from Edward McNally, counsel for Thomas Kaung, to Vice Chancellor Lamb, Court of Chancery (June 25, 2004). The existence of an indemnification agreement providing broader protection does not mean that the company has agreed to write blank checks for advancement. *See Citadel Holding Corp. v. Roven*, 603 A.2d 818, 823 (Del. 1992) (discussing how the statutory authority conferred to a corporation to advance fees is permissive). There is nothing in the indemnification agreement stating that the company must advance all costs incurred by the plaintiff, no matter how unreasonable. For this court to interpret the indemnification agreement as reading out a reasonableness requirement simply because it gives the plaintiff greater indemnification protection would lead to an absurd result. *See id.* (discussing how an indemnification agreement that gives broader protection does not require a company to advance unreasonable expenses or to write a blank check).

Delaware law recognizes the right to advancement as distinct from the right to indemnification.²⁷ This, however, does not by itself mean that a reasonableness inquiry is inappropriate at the advancement stage.²⁸ This court has held that “all contracts for advancement and indemnification are subject to an implied reasonableness term.”²⁹ Therefore, a reasonableness inquiry *is* appropriate even if the indemnification agreement does not expressly condition advancement on the reasonableness of the request. Further, this court has held that, even though advancement and indemnification are independent rights, advancement continues to be “a subsidiary element of the ultimate right to indemnification.”³⁰ Therefore, if an indemnification agreement, like the one at issue here, states that

²⁷ See *Senior Tour Players 207 Mgmt. Co., LLC v. Golftown 207 Holding Co., LLC*, 2004 WL 550743, at *2 (Del. Ch. Mar. 10, 2004).

²⁸ The plaintiff relies on *GB Sciences Corp. v. Ishihara Sangyo Kaisha, Ltd.* for his argument that a reasonableness inquiry is not appropriate at the advancement stage. 270 F. Supp. 2d 476 (D. Del. July 3, 2003). This case is distinguishable on the facts alone. The court in *GB Sciences* held, as the plaintiff argues here, that a reasonableness inquiry was only appropriate at the indemnification stage. In *GB Sciences*, however, the court was interpreting a detailed indemnification program in a stock purchase agreement. In that case, a pharmaceutical company bought part of a pesticide business that included a pesticide manufacturing facility and executed a stock purchase agreement to that end. The parties in *GB Sciences* had anticipated that there would be potential environmental contamination and had expressly drafted an open-ended reimbursement agreement with high indemnity limits for environmental claims in order to induce the buyer to take such a risk. *Id.* at 482. The court held that it was unreasonable for the seller to impute a reasonableness requirement because it effectively shifted the transaction costs back to the buyer after the parties had clearly negotiated a contract where the seller assumed such transaction costs. Moreover, nowhere in *GB Sciences* is there any attempt to construe the rights of a director or officer seeking advancement of expenses pursuant to 8 *Del. C.* § 145.

²⁹ *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761, at *5 (Del. Ch. June 18, 2002) (citing *Citadel Holding*, 603 A.2d at 823).

³⁰ *Weinstock v. Lazard Debt Recovery GP, LLC*, 2003 WL 21843254, at *4 (Del. Ch. Aug. 1, 2003).

indemnification is provided for expenses “actually and reasonably incurred” and, as a subset of the indemnification provision provides for advancement, then advancement is also available only for expenses “actually and reasonably incurred.”³¹

C. Are The Fees Requested Reasonable?

Having concluded that a reasonableness inquiry is appropriate at the advancement stage, the court now turns to applying the facts of this case to determine what is *reasonable*. To determine the reasonableness of legal fees, the court will normally look to the number of hours spent and the cost per hour.³² In this case, however, the court is faced with the unique scenario of a plaintiff who, with the support and encouragement of his lawyers, used as his primary advisor a non-lawyer consultant without any known credentials.³³ Moreover, although the

³¹ Indemnification Agreement § 2(a). *See Lazard*, 2003 WL 21843254, at *4 -*5 (citing *Greco v. Columbia/HCA Healthcare Corp.*, 1999 WL 1261446, at *7 (Del. Ch. Feb. 12, 1999)). *See also Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770, 779 n.52 (Del. Ch. 1998) (“Although indemnification and advancement *are* distinct rights, they are related concepts that are commonly addressed in neighboring statutory provisions.”).

³² *See Dunlap v. Sunbeam Corp.*, 1999 WL 1261339, at *6 & n.9 (Del. Ch. July 9, 1999) (discussing how to determine the reasonableness of legal fees in an advancement context when reasonableness is not defined by the parties in their agreements on indemnification and concluding that “[a]ny element of reasonability is derived solely from the overall requirement of reasonableness found in the Delaware General Corporation Law . . .”). *See also Citadel Holding*, 603 A.2d at 825 n.8 (holding that a plaintiff must demonstrate the reasonableness of his advancement request and, in doing so, “[a]ny discovery here authorized is limited to the quantum of the expenditure, including a specification of work performed . . .”).

³³ The plaintiff argues that an inquiry into Kelso’s role as Kaung’s consultant amounts to “second-guessing” the defense strategy employed by Kaung’s attorneys and contravenes Delaware law. This argument holds no weight as Kelso is not by any definition qualified to advise Kaung in the SEC investigation or related litigation. The plaintiff has failed to provide

plaintiff is no longer seeking the advancement of this consultant's unpaid fees, the record clearly reflects that O'Rourke & Cundra's representation of Kaung is inextricably tied with Kelso's "consulting." Therefore, a large part of the reasonableness inquiry rests on whether Kaung is allowed to recover *any* fees related to the consulting services allegedly provided by Kelso.

Kelso is plainly not an appropriate representative for purposes of the parties' indemnification agreement. Cole cannot be required to advance any of those fees and is entitled to recover from Kaung all such fees it mistakenly advanced in the good faith belief that Kaung would be able to show their reasonableness.

Moreover, Cole is entitled to an order directing Kaung to repay all amounts previously advanced with respect to Kelso's bills.

O'Rourke & Cundra's fees present two related issues as to reasonableness. First, that firm's billing reflects a very substantial amount of time interacting with Kelso. The record is clear that O'Rourke & Cundra was fully aware of Kelso's lack of qualifications, concealed information on that subject from both Kaung and Cole, and, nevertheless, permitted Kelso to play the leading role in a joint representation of Kaung. Indeed, it is reasonable to infer that Kelso was directing Cundra's activities. The court therefore concludes that none of the time O'Rourke

any evidence to support Kelso as a legitimate professional who should be advanced fees by the company. In fact, the record strongly reflects the very opposite.

and Cundra spent interacting with Kelso is properly the subject of a claim for advancement or indemnification.

Second, there is extensive evidence in the record that O'Rourke & Cundra's bills in connection with the SEC investigation and the class action litigation have been excessive. For representing a single witness who appeared for a single day at the SEC, O'Rourke & Cundra's bills rival those of Jones Day for representing 15 witnesses and responding to 20 separate SEC document requests. A review of this evidence, leads inexorably to a conclusion that O'Rourke & Cundra churned fees with the knowledge or expectation that Cole would continue to pay without effective protest.

This conclusion is buttressed by O'Rourke & Cundra's bad faith conduct in the course of this litigation and by the extraordinary amount of fees reportedly generated in its prosecution. No doubt aware of the decision of the Delaware Supreme Court in *Stifel Financial Corp. v. Cochran*³⁴ making an award of "fees on fees" the rule in advancement actions under Section 145(k), O'Rourke & Cundra billed more than \$500,000 in connection with the prosecution of this simple action. Yet, despite all of that recorded time, the lawyers at that firm never found the opportunity to provide any response to the most basic discovery requests about Kelso or his bills. Instead, they quite literally tried to turn this summary

³⁴ 809 A.2d 555 (Del. 2002).

proceeding into a three ring circus. The court can only imagine how much O'Rourke & Cundra would have billed in this case if it had been allowed to take all the discovery it noticed, including over twenty separate depositions!

For these reasons, the court concludes that none of the time billed by O'Rourke & Cundra relating to any interaction with Malcolm Kelso was reasonably incurred in connection with its representation of Kaung pursuant to the indemnification agreement. The court is aware that this category of time charges is quite large and undoubtedly exceeds any of O'Rourke & Cundra's fees that have not yet been advanced.³⁵ Therefore, O'Rourke & Cundra is not entitled to the advancement of its remaining unpaid legal fees. Moreover, Cole will be entitled to offset any additional amount of those disallowed time charges against any future request for advancement. At the conclusion of the SEC matter, Cole will be entitled to sue Kaung to recover any amounts it has advanced that it believes are not properly the subject of a claim for indemnification.

³⁵ The record is clear that O'Rourke & Cundra and Kelso have worked closely together in representing Kaung. Kaung testified that in "a majority of the issues," Kelso and O'Rourke & Cundra worked together and that O'Rourke & Cundra was present at 99% of the discussion he held with Kelso. Tr. at 63. Michael O'Rourke testified that a significant portion of the bills submitted to Kaung was for time spent with Kelso. For example, O'Rourke testified that in October, November, and December 2003, every day billed to Kaung except for two involved time spent with Kelso. Tr. at 153-56.

D. The Award Of Attorneys' Fees

This court rarely invokes the bad faith exception to the American rule but will do so when there is clear evidence that the litigation was brought in bad faith or that a party has acted with bad faith during the course of the litigation.³⁶ In this case, the court concludes that the plaintiff's actions in the course of this litigation constitute bad faith conduct sufficient to justify an award of attorneys' fees.³⁷

As already discussed, the decision to file the complaint was itself not made in good faith. At the time suit was filed, Cole had already advanced more than \$150,000 with respect to Kelso's "fees" and was withholding further payment only because its inquiries about Kelso's qualifications and billing practices were never answered. Moreover, Cole was not actually delinquent in processing any of O'Rourke & Cundra bills, as evidenced by the fact that payment of the pending bills was made simultaneously with the filing of the complaint and in the same general time frame as other payments. Instead, the record suggests that the decision to file suit was made to force Cole to advance sums that were not reasonably incurred in connection with the representation of Kaung and, therefore, were not due.³⁸

³⁶ See *Nagy v. Bistricher*, 770 A.2d 43, 64 (Del. Ch. 2000).

³⁷ "[T]he court must be prepared to [award attorneys' fees] where [parties] have engaged in 'bad faith conduct,' which 'unnecessarily prolonged or delayed [the] litigation' or 'knowingly asserted frivolous claims.'" *Nagy*, 770 A.2d at 64-65 (quoting *Johnson v. Arbitrium*, 720 A.2d 542, 546 (Del. 1998)).

³⁸ An email from Kelso to Cundra, referring to the January 7, 2004 letter of default to Cole, strongly suggests this improper motive. It reads, as follows: "[t]his looks good to me—file suit as soon as possible—they will pay—DUNN is a fool." Def. Ex. 77.

Further, throughout the litigation the conduct of Kaung’s representatives has been frivolous, oppressive, and vexatious. In this simple action, they deposed Cole’s general counsel over parts of three days. When Cole finally drew the line, they made extraordinarily broad and burdensome discovery requests, thereby seeking to drag out and delay the case for improper reasons. At the same time, they ignored their own discovery obligations and were uncooperative in scheduling Kelso’s deposition. Finally, when Kelso appeared, he refused to answer any questions and Cundra improperly participated in Kelso’s defiance of this court’s process.

The court has no difficulty concluding that the conduct of plaintiff’s representatives in the course of this litigation rises to the level of “glaring egregiousness” that demands an award of the company’s attorneys’ fees expenses and costs.³⁹

³⁹ See Donald J. Wolfe, Jr., & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 13-3[b] (2004 ed.) (discussing the Court of Chancery’s infrequent use of the bad faith exception to the American rule).

IV.

For the foregoing reasons, and to the extent described herein, judgment will be entered against the plaintiff, Thomas T. S. Kaung, and in favor of the defendant Cole National Corporation. The defendants' attorneys are directed to submit a form of order giving effect to this opinion no later than September 10, 2004, on notice to the plaintiff.

By separate order entered this date, the court has denied the admission of Steven D. Cundra to practice before this court *pro hac vice*.