COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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RE: *Wimbledon Fund LP–Absolute Return Fund Series v. SV Special Situations Fund LP*, Civil Action No. 4780-CS

Dear Counsel:

The non-indigent plaintiff in this case, Wimbledon Fund LP–Absolute Return Fund Series ("Wimbledon"), moved for summary judgment very early in the action. Wimbledon was then faced with a cross-motion for summary judgment from the defendant, SV Special Situations Fund LP ("SV Fund"). In response to the cross-motion, Wimbledon did not seek discovery. Rather, it completed briefing on the cross-motions. I reminded Wimbledon's counsel of that reality when she began to press a new argument based on evidence not in the summary judgment record at the oral argument on the cross-motions.[1] Wimbledon's counsel backed off, stating that Wimbledon had chosen to

[1] *Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, C.A. No. 4780, at 24-26 (Del. Ch. Mar. 30, 2010) (TRANSCRIPT); *see also id*. at 12 (counsel for Wimbledon admitting that she was making an argument not in the record and that evidence in

forego discovery or submitting more affidavits because it thought that it could depend on the existing record to sustain its position.[2]

The court granted summary judgment for SV Fund.[3] Wimbledon appealed.

The parties briefed the appeal fully.

Only after briefing on the appeal was complete did Wimbledon then seek leave to reopen the record. Wimbledon sought *for the first time* to introduce evidence *in its own possession*. Wimbledon made no showing that it could not have found this evidence in its own possession earlier. Rather, it simply sought to change the record on which the case was based, despite having moved for summary judgment and having failed to seek discovery when faced with a cross-motion.

Despite Wimbledon's failure to show any proper procedural basis for the admission of this evidence found in its own files, the Supreme Court seemed to give Wimbledon the right to introduce the evidence, but would not consider that evidence in the first instance itself. Rather, the Supreme Court seemed to ask this court to do a do-

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favor of Wimbledon's position was likely to be found in discovery, but *not seeking* discovery); *id*. at 16, 23 (Wimbledon suggesting discovery would be in order only if existing record created a material issue of fact).

[2] *Id*. at 26 (Q. Why isn't it [in the record], though? I mean, you had a chance on reply. That's obviously an affidavit your client could have put in. A. Well, because we thought that we could focus on the September 30th letter. Q. Well you can, but…if it doesn't work, the choice is – you know, the only thing I have in the papers is this; right? A. Right.").

[3] *Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, 2010 WL 2368637, at *6 (Del. Ch. June 14, 2010).

over based on a new record.[4]

This confused this court as there was no basis cited for why Wimbledon was granted this unusual leniency. Believing that the Supreme Court might have wished this court to consider whether there was any ground to admit the evidence under the Rules of this court, which are subject to Supreme Court approval, this court found that the plaintiff had no ground for introducing this evidence so late under any of the recognized procedural rules, including among others, Rule 60(b).[5] But because the Supreme Court order was not clear, this court also examined the motions for summary judgment again based on the new record and concluded that the tardily-introduced evidence would have changed the outcome if it was properly before the court.[6] Finding no proper basis for the belated use of this evidence, however, this court did not alter its prior judgment against Wimbledon.[7]

On appeal, the Supreme Court allowed Wimbledon to use the evidence but failed to explain that decision in terms of any of the rules of civil or appellate procedure under which Wimbledon and SV Fund were operating. That is, the Supreme Court did not find error in this court's determination that Wimbledon had no basis under rules like Rule 56,

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[4] *See Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, No. 430, 2010 (Del. Dec. 20, 2010) (ORDER).
[5] *Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, 2011 WL378827, at *10 (Del. Ch. Feb. 4, 2011) [hereinafter, "*Wimbledon III*"].
[6] *Id.*
[7] *Id.*

Rule 59 or Rule 60(b) to wait so long.[8] Instead, the Supreme Court cited to this proposition in support of its ruling: that it has the "inherent power to deal with the situation before it in the manner best calculated to promote the interests of justice."[9] That proposition was drawn from a 1958 case in which the trial transcript had been lost by the court reporter, and a litigant sought a new trial because the original trial record had been lost through the fault of the court reporter and not that litigant.[10]

This is a case where the plaintiff is not an indigent acting without counsel. Wimbledon is a self-described hedge fund[11] – a so-called "sophisticated investor" – and is represented by well-qualified counsel.

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[8] *See passim*.

[9] *Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, 2011 WL 3689009, at *1 (Del. Aug. 23, 2011) [hereinafter, "*Wimbledon IV*"]. *But see Levine v. Smith*, 591 A.2d 194, 203 (Del. 1991), *overruled in part on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (stating that an "appellant seeking relief from a judgment on the basis of newly discovered evidence should promptly apply for relief [under Rule 60(b)] to the court which entered the judgment," and if the trial court indicates that it will allow the motion the appellant should then ask the Supreme Court to remand the cause); *but see also* Fed. R. Civ. P. 62.1 (providing that, "[i]f a timely motion is made for relief that the [district] court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue," and "[t]he district court may decide the motion if the court of appeals remands for that purpose."); CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2873 (2d ed. & Supp. 2011) (discussing the holding of several circuits, now explicitly authorized by Federal Rule 62.1, that, "during the pendency of an appeal the district court may consider a Rule 60(b) motion and if it indicates that it is inclined to grant [the motion], application then can be made to the appellate court for a remand," and concluding that "[t]his procedure is sound in theory and preferable in practice.").

[10] *See Moore v. Moore*, 144 A.2d 765, 767-69 (Del. 1958).

[11] *Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, C.A. No. 4780, at 11 (Del. Ch. Mar. 30, 2010) (TRANSCRIPT) (counsel for Wimbledon referring to Wimbledon as "hedge fund guys").

In my remand decision, I indicated that if the judgment against Wimbledon were to be lifted on the basis of evidence that it had in its own possession since the beginning of the case but failed to use in a timely way, then it should bear responsibility for the fees and costs needlessly incurred by its adversary:

> If, despite my denial of Wimbledon's right to supplement, the Supreme Court concludes that the supplemental evidence should be considered, any alteration of my judgment against Wimbledon should, at the very least, be conditioned on Wimbledon having to pay all the attorneys['] fees and expenses incurred by SV Fund in this action since January 11, 2010 – the date on which Wimbledon filed its answering brief to SV Fund's cross-motion for summary judgment. Wimbledon's failure to timely present evidence in its possession or to otherwise use appropriate procedural avenues has caused SV Fund, as well as this court and the Supreme Court, to waste scarce resources.[12]

In its decision after remand, the Supreme Court declined to rule on this aspect of my ruling, leaving it to me in the first instance.[13] SV Fund has now moved for fees and costs.

SV Fund's argument is simple. The tardily-introduced evidence was in Wimbledon's possession since Wimbledon filed its complaint. Wimbledon filed its own motion for summary judgment. *Wimbledon did not cite the evidence*. SV Fund filed a cross-motion for summary judgment. Wimbledon filed an answering brief. *Wimbledon did not cite the evidence*. SV Fund filed a reply brief. Wimbledon did not ask for the chance to file a surreply. That is, *Wimbledon did not cite the evidence*. At oral argument,

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[12] *Wimbledon III*, 2011 WL378827, at *1.
[13] *See Wimbledon IV*, 2011 WL 3689009, at *1 n.3.

Wimbledon did not cite the evidence.

When SV Fund's summary judgment motion was entered and a final judgment in favor of SV Fund was entered, Wimbledon did not seek to reargue the ruling under Rule 59(f) or reopen the judgment under Rule 60(b). *Wimbledon did not cite the evidence*. When Wimbledon appealed, it filed an opening brief. *Wimbledon did not cite the evidence*. When SV Fund answered, Wimbledon filed a reply brief. *Wimbledon did not cite the evidence.*

Only after briefing *on appeal* was completed did Wimbledon then seek to introduce the evidence. To date, no explanation for its tardiness has been presented except for the obvious one. Having lost at the trial court level and not liking the state of the record after the appeal briefs were completed, Wimbledon desired to have the case decided on a new record, and rummaged through its files to find new evidence to introduce and therefore change the record.

Ultimately, Wimbledon was successful in that effort without showing any basis under the rules of civil or appellate procedure for being allowed to do so. Rather, Wimbledon's tactical decision not to use evidence in its own possession in a timely way (or at best, its tactical decision to look through its files on appeal to change the record) was equated with the fate suffered by a litigant who could not present her appeal because the court reporter lost the transcript.[14]

[14] *See id.*

Wimbledon, rather than being grateful for being excepted from following the rules of civil procedure that apply to other litigants, now resists the notion that it should pay for SV Fund's needlessly incurred legal fees. Wimbledon says that it did nothing wrong. Wimbledon always wanted to win the case and to defeat SV Fund's motion for summary judgment. Heck, Wimbledon even filed the first motion for summary judgment, which proves the point. Thus, Wimbledon says it never changed its position in any unfair way or otherwise violated court orders or rules in any way that justifies fee shifting.

I find this argument remarkable, not in a positive sense, but in the callousness it displays toward the costs its proponent unfairly imposed on another party in litigation. Wimbledon sought summary judgment and should have included all of its arguments and evidence in its opening brief.[15] Wimbledon did not do so. When faced with a cross-motion for summary judgment, Wimbledon was supposed to seek additional time to

[15] *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (holding that plaintiff waived arguments by failing to raise them in its opening brief); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) (explaining that "[t]he failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal."); *Bagwell v. Prince*, 1996 Del. LEXIS 289, at *3 (Del. Aug. 9, 1996) (holding that plaintiff-appellant could not raise claims on appeal that he had not briefed in his original motion for summary judgment); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *4 (Del. Ch. Oct. 19, 2006) (explaining that, "under the briefing rules, a party is obliged in its motion and opening brief to set forth all of the grounds, authorities and arguments supporting its motion" and "should not hold matters in reserve for reply briefs"); *see also In re Asbestos Litigation*, 2007 WL 2410879, at *4 (Del. Super. Aug. 27, 2007) (noting that it is "well-settled in Delaware" that a legal issue not raised in an opening brief is generally deemed waived and "[m]oving parties must provide adequate factual and legal support for their positions in their moving papers in order to put the opposing parties and the court on notice of the issues to be decided.").

conduct discovery by filing a Rule 56(f) affidavit.[16] Wimbledon did not do so. Even when it filed its reply brief, Wimbledon did not cite the evidence. At oral argument, Wimbledon stood on the record before the court and never brought a Rule 59(f) or Rule 60(b) motion. So on and so forth, including its failure to raise the evidence in its opening and reply briefs on appeal!

Wimbledon says that it is immune because the record will not permit an inference of bad faith. But the record of its repeated failure to follow procedural rules is undisputed. When a party violates orders of the court – including scheduling orders that require the parties to file papers and make all their arguments at the required time – and rules of the court, and thereby exposes its adversary to unnecessary delay and expense, this court has the discretion to shift fees.[17] The plaintiff here has been given the chance

[16] *See* Ct. Ch. R. 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment or order…discovery to be had or may make such other order as is just."); *Avacus Partners, L.P. v. Brian*, 1989 WL 120392, at *1 (Del. Ch. Oct. 5, 1989).

[17] *See Lillis v. AT&T Corp.*, 896 A.2d 871, 879 (Del. Ch. 2005) (ordering defendant to pay legal fees and costs incurred by plaintiffs in bringing a 12(c) motion based on an answer that defendant subsequently moved to amend to withdraw certain admissions); *Beck v. Atl. Coast PLC*, 868 A.2d 840, 856 (Del. Ch. 2005) (awarding attorneys' fees when plaintiff and his counsel violated Court of Chancery Rules 11 and 37 and engaged in other "inexcusable behavior" that "taxed the resources of this court and plainly made [the] litigation excessively expensive for Atlantic Coast to defend"); *Brunswick Corp. v. Colt Realty, Inc.*, 253 A.2d 216, 220 (Del. Ch. 1969) (granting plaintiffs leave to amend their answer to defendants' counterclaim so long as they paid attorneys' fees incurred by defendants as a result of plaintiffs' delay); *Visbal Salgado v. Mobile Servs. Int'l, LLC*, C.A. No. 5268, at 5 (Del. Ch. Nov. 30, 2011) (awarding fees and costs to defendants in pursuing motion that "was necessitated by Plaintiff's conduct, inconsistent with the Rules, process, and orders of this Court"); *TR Investors, LLC v. Genger*, 2009 WL 4696062, at *19 (Del. Ch. Dec. 9, 2009), *aff'd*, 26 A.3d 180 (2011) (awarding

that every coach who ever lost a Super Bowl or World Cup would like again, to have the game played over on a different day and with different players on the field. Wimbledon has yet to demonstrate any equitable basis for its subjecting of SV Fund to such a replay, except that Wimbledon had regret over losing, went back and did a renewed search of its own files, and produced evidence that it should have produced long before SV Fund wasted its time and resources addressing a different record.[18]

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attorneys' fees when defendant violated a status quo order by destroying evidence); *Cypress Assocs., LLC v. Sunnyside Cogeneration Assocs. Project*, 2007 WL 148754, at *19 (Del. Ch. Jan. 17, 2007) (conditioning defendants' belated motion to amend their answer on an obligation to reimburse plaintiff for unnecessary costs, including attorneys' fees, that it incurred in moving for judgment on the pleadings); *Kaung v. Cole Nat'l Corp.*, 2004 WL 1921249, at *6 (Del. Ch. Aug. 27, 2004, *revised* Aug. 30, 2004), *aff'd in part, rev'd in part*, 884 A.2d 500 (Del. 2005) (awarding attorneys' fees to defendant because, among other things, plaintiff's lawyers had made "extraordinarily broad and burdensome discovery requests, thereby seeking to drag out and delay the case," while ignoring their own discovery obligations); *see also William Penn P'ship v. Saliba*, 13 A.2d 749, 758 (Del. 2011) ("The Court of Chancery has broad discretionary power to fashion appropriate equitable relief" in the context of awarding attorneys' fees). By way of analogy, federal courts have explicit authority under Federal Rule 16(f) to impose attorneys' fees as sanctions for violations of scheduling and pre-trial orders. *See, e.g.*, *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 243 (3d Cir. 2007) (district court did not abuse its discretion in awarding plaintiff expense sanctions under Rule 16(f) when defendant was wholly responsible for late document production in violation of scheduling order); *Comoa, Inc. v. NEC Telephones, Inc.*, 931 F.2d 655, 666-67 (10th Cir. 1991) (district court did not abuse discretion by awarding attorneys' fees as a sanction under Rule 16(f) for plaintiffs' failure to comply with scheduling order setting a deadline for plaintiffs' damage study). Before the addition of subsection (f) to Rule 16 in 1983, federal courts "used their inherent power to impose sanctions under the original [Rule 16]…." 6A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1531 (3d ed. & Supp. 2011).

[18] The fact that the evidence may have been generated from an agent of SV Fund has no bearing on the issue before the court, despite the pleas of Wimbledon that that is so. The unfairness to SV Fund is in having to expend resources addressing a summary judgment motion and then an appeal from the decision on that motion in reliance on the normal rules of civil and appellate procedure that apply and require litigants to timely and fairly present evidence and arguments. Wimbledon then sandbagged SV Fund by asking – with no reasonable excuse proffered – for permission to have the matter decided anew on a new record. If Wimbledon and readers cannot

Given this pattern of violating the rules of civil procedure and the case scheduling order, fee shifting is in order.[19] If Wimbledon believes that bad faith is required, then let me state my own view. If a party knows the rules – as Wimbledon did – and then waits until after all the appeal briefs are done (having forewent numerous chances to present evidence in a timely manner or to ask for permission in the procedurally correct manner for its earlier failure to do so) to dig through its files, find evidence it had all along, and then alter the record on appeal and subject its adversary to a new game based on a different record, it has acted in bad faith. Such a party knows that is in fact sandbagging its adversary. Such a party knows it has upset all the reasonable expectations of its adversary. But for selfish reasons, it has decided to ask for a new game because it lost the one it sought to play. To me that is bad faith, intentionally unsporting conduct.

The plaintiff here got away with its conduct, and got to play the game. But on the film review, the bad faith sandbagging is indisputably clear for all to see. Wimbledon

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understand why Wimbledon's conduct was violative of easily-understood procedural requirements of litigation, then they live in a different universe than this trial judge. If parties may sandbag at will – especially well-heeled and well-represented litigants such as the plaintiff here – then litigation in trial courts will simply become more expensive and unmanageable. The initial round will be just a "moot court," allowing the losing party to reshape the record on appeal to address its loss. Here, Wimbledon got a windfall at the expense of SV Fund already – a new hearing on a new record. It would be inequitable for it to also leave SV Fund bearing the costs of writing briefs on a record that Wimbledon itself shaped and then altered in an unexcused, belated way.

[19] This court entered a scheduling order for briefing in connection with Wimbledon's motion for summary judgment and SV Fund's cross-motion on December 17, 2009. The court has discretion to shift fees when a party violates rules and orders of the court. *See* cases cited *supra* note 17.

shall pay the fees and costs requested by SV Fund. But there is one alteration. After Wimbledon presented the new evidence above, SV Fund knew that Wimbledon was trying to have the game replayed with different players. Only the fees from the time Wimbledon filed its answering brief to SV Fund's cross-motion for summary judgment until the completion of the original briefing on appeal shall be assessed. After that point, SV Fund had to deal with Wimbledon's tardy application, but Wimbledon had put the issue on the table. SV Fund shall therefore excise fees and costs after October 12, 2010.

For the foregoing reasons, SV Fund's motion for an award of fees and costs is GRANTED, and it shall present an implementing order, upon notice to Wimbledon as to form, only containing those fees and expenses consistent with the time frame above.

Very truly yours,

/s/ Leo E. Strine, Jr.

Chancellor

LESJr/eb