COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: February 20, 2013
Date Decided: May 8, 2013

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Re: *In re Mobilactive Media, LLC*
Cons. C.A. No. 5725-VCP

Dear Counsel:

On January 25, 2013, the Court issued a post-trial Memorandum Opinion (the "Post-Trial Opinion") rendering its findings of fact and conclusions of law in this action.[1] Currently before the Court are two motions related to the Post-Trial Opinion: (1) Plaintiff's Motion for Reargument ("Plaintiff's Motion") and (2) Defendants' Motion for Reargument and to Supplement the Record ("Defendants' Motion" and, collectively, the "Motions"). The Motions generally pertain to the Court's calculation of a damages figure

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[1] *In re Mobilactive Media, LLC*, 2013 WL 297950 (Del. Ch. Jan. 25, 2013) [hereinafter Post-Trial Op.]. The Court presumes familiarity with the Post-Trial Opinion and generally employs the same nomenclature as used therein.

of $3,084,524.00. Unsurprisingly, Plaintiff contends the Court undervalued the damages award, whereas Defendants argue the Court overvalued that award. Having considered both parties' arguments and the Motions, I conclude that both Motions should be denied.

In accordance with this Court's instructions, Plaintiff filed a Proposed Final Order and Judgment (the "Proposed Judgment") on February 8, 2013. The parties disagree as to the terms of the Proposed Judgment and set forth their respective positions in letters filed on February 12 and 20. The Court is entering concurrently with this Letter Opinion a Final Order and Judgment reflecting the Court's rulings on the disputed issues. With the possible exception of the question of whether the Court retains jurisdiction to consider an application by Plaintiff for attorneys' fees, the Court's Final Order and Judgment speaks for itself. Because the attorneys' fee issue is somewhat more involved, I address that issue briefly at the end of this Letter Opinion.

I. ANALYSIS

A. Standard

The standard applicable to a motion for reargument under Rule 59(f) is well-settled. To obtain reargument, the moving party must demonstrate either that the Court overlooked a controlling decision or principle of law that would have a controlling effect, or the Court misapprehended the facts or the law so the outcome of the decision would be

different.[2] It is the moving party's burden to show that "the court's misunderstanding of a factual or legal principle is both material and would have changed the outcome of its earlier decision."[3] As such, motions for reargument must be denied when a party merely restates its prior arguments.[4] Additionally, this Court generally does not consider new evidence on a motion for reargument unless the moving party can "show the newly discovered evidence came to his [or her] knowledge since the trial and could not, in the exercise of reasonable diligence, have been discovered for use at the trial."[5]

A court reviews a motion to supplement the record by using its equitable discretion to determine whether reopening the trial record to consider allegedly newly discovered evidence would serve the interests of fairness and substantial justice.[6] A

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2 *See, e.g.*, *Medek v. Medek*, 2009 WL 2225994, at *1 (Del. Ch. July 27, 2009); *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007).

3 *Medek*, 2009 WL 2225994, at *1 (internal quotation marks omitted); *see also Serv. Corp. of Westover Hills v. Guzzetta*, 2008 WL 5459249, at *1 (Del. Ch. Dec. 22, 2008).

4 *Guzzetta*, 2008 WL 5459249, at *1.

5 *Reserves Dev. LLC*, 2007 WL 4644708, at *1 (citing *Bata v. Bata*, 170 A.2d 711, 714 (Del. 1961)); *see also id.* ("Reargument . . . is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion.").

6 *See, e.g.*, *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, 2010 WL 1818907, at *1 (Del. Ch. Apr. 23, 2010) ("The Court will allow the introduction of additional evidence when doing so will serve the interests of fairness and substantial

motion to reopen or supplement the record is addressed to the sound discretion of the Court.[7] The factors Delaware courts consider in determining whether to grant a motion to reopen the record include: (1) whether the evidence has come to the moving party's knowledge since the trial;[8] (2) whether the exercise of reasonable diligence would have caused the moving party to discover the evidence for use at trial;[9] (3) whether the evidence is so material and relevant that it likely will change the outcome;[10] (4) whether the evidence is material and not merely cumulative;[11] (5) whether the moving party has made a timely motion;[12] (6) whether undue prejudice will inure to the nonmoving party;[13]

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justice."); *In re Transamerica Airlines, Inc.*, 2008 WL 509817, at *4 (Del. Ch. Feb. 25, 2008); *cf.* Fed. R. Civ. P. 16(e) ("The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.").

7 *See, e.g.*, *Lola Cars Int'l Ltd.*, 2010 WL 1818907, at *1; *Pope Invs. LLC v. Benda Pharm., Inc.*, 2010 WL 3075296, at *1 (Del. Ch. July 26, 2010); *Carlson v. Hallinan*, 925 A.2d 506, 519–20 (Del. Ch. 2006).

8 *Poole v. N.V. Deli Maatschappij*, 257 A.2d 241, 243 (Del. Ch. 1969) (motion to reopen record to conform to appellate court's ruling).

9 *Id.*

10 *Id.*

11 *Id.*; *see also Procter & Gamble Co. v. Paragon Trade Brands, Inc.*, 15 F. Supp. 2d 406, 409 (D. Del. 1998) (motion for a new trial or, alternatively, to alter or amend the judgment).

12 *Fitzgerald v. Cantor*, 2000 WL 128851, at *2 (Del. Ch. Jan. 10, 2000).

13 *Id.*; *Kahn v. Tremont Corp.*, 1997 WL 689488, at *5 (Del. Ch. Oct. 28, 1997) (motion to reopen record on remand after appellate court shifted burden of proof).

and (7) considerations of judicial economy.[14] Ultimately, however, a motion to reopen turns on the interests of fairness and justice.[15]

B. Bienstock's Motion for Reargument

The Court, in calculating its damages figure, assessed: (1) the benefit of the asset sale by Adenyo to Motricity; (2) an allocation factor for the percentage of the operations that were within Mobilactive's line of business; (3) an allocation factor for the percentage of operations attributable to North America; (4) the capital costs attributable to those operations within Mobilactive's line of business; and (5) the operating costs attributable to the North American operations within Mobilactive's line of business.[16] The Court multiplied the total revenues Defendants received from the sale to Motricity by the allocation factors that reflected Defendants' activities in North America and Mobilactive's line of business, and then subtracted the capital costs and operating costs attributable to the North American operations within Mobilactive's business.[17] The Court

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14 *Fitzgerald*, 2000 WL 128851, at *2; *Tremont Corp.*, 1997 WL 689488, at *5; *see also Vianix Del. LLC v. Nuance Commc'ns, Inc.*, 2011 WL 487588, at *3 (Del. Ch. Feb. 9, 2011) ("In exercising my discretion in the circumstances of this case, I consider the Rule 60(b)(2) standard for evaluating whether to reopen a judgment to consider newly discovered evidence, though not controlling, to be both analogous and instructive.").

15 *Tremont Corp.*, 1997 WL 689488, at *5.

16 Post-Trial Op. at *24.

17 *Id.*

then reduced that result by half to account for the fact that Bienstock held a one-half interest in the joint venture.[18] Significantly, the Court also adjusted the capital costs and operating losses attributable to North American operations within Mobilactive's line of business to reflect Defendants' cost of equity.[19] The cost of equity the Court applied was a risk-weighted equity rate of return of 35%, which was based on the midpoint of Adenyo's cost of equity in a valuation provided by PricewaterhouseCoopers (the "PWC Valuation").[20]

Bienstock contends that the Court should have adjusted operating costs using Adenyo's 3.90% after-tax cost of debt and should have adjusted operating acquisition costs using Adenyo's 31.5% weighted average cost of capital ("WACC"). Doing so purportedly would result in a higher final damages award of $5,818,592.00.

At trial, Bienstock's expert, Gregory Cowhey, did not provide any opinion or other evidence regarding an appropriate discount rate, nor did he attempt to calculate a damages figure that reflected a discount rate. Instead, Cowhey testified that he disagreed with the statement that any award that would be granted to Bienstock would need to be

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18 *Id.*

19 *Id.* at *26–27.

20 *Id.*

discounted.[21] Now, for the first time, Bienstock advocates (in a motion for reargument) that the capital costs and operating losses should have been discounted by different rates than they were. Thus, Bienstock, in effect, criticizes the Court for "misapprehending" a "fact" (an appropriate discount rate and discounted damages figure) that he himself never advocated for or proved through competent evidence at trial. Based on this underdeveloped state of the record, Bienstock's argument is both curious and unpersuasive.[22]

Moreover, the record supports the conclusion that Adenyo was dependent on equity capital to fund operating losses. For example, according to the PWC Valuation, "In order to finance Adenyo operating losses . . . Genuity was engaged in late 2009 to raise equity financing."[23] Silverback's 2009 financial statements also stated that "the Company has the ability to finance operations for the foreseeable future" and went on to describe recent equity financing.[24] This evidence confirms that the Court did not misapprehend or misapply the facts by using the equity rate of return to discount operating losses.

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21 Tr. 579–80 (Cowhey).

22 *See Ryan v. Tad's Enters., Inc.*, 709 A.2d 675, 679–80 (Del. Ch. 1996).

23 JX 653 at 00446.

24 JX 427 at 09014.

Similarly, the Court's selection of 35% as the discount rate for acquisition costs did not reflect a misapprehension or a misapplication of the facts. According to the PWC Valuation, the estimated WACC for Adenyo was in the range of 28.5% to 35%.[25] Thus, the Court's selection of 35% as the discount rate was within the range of estimated WACC.

Based on these reasons, I deny Bienstock's motion for reargument.

C. Silverback's Motion for Reargument and to Supplement the Record

In the Post-Trial Opinion, the Court considered Defendants' argument that the aspect of Bienstock's claim based on Silverback's acquisition of 51% of Atlas was barred by the doctrine of laches. The undisputed record showed that this phase of the Atlas acquisition "was not completed until September 2007,"[26] which is slightly less than three years before Bienstock filed his Complaint in this action. Nonetheless, Silverback argued that the Court should consider a June 2007 date as the beginning of the three-year analogous limitations period for purposes of its laches analysis. I rejected the June 2007 date, and instead held that the earliest possible date Bienstock's claim could have accrued was the date that Silverback and Atlas entered into a binding agreement regarding the Atlas acquisition. Because Silverback, which had the burden of proving its laches

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[25] JX 653 at 00465.

[26] *See* Post-Trial Op. at *10 (citing JX 193 at 10131).

defense, failed to prove that the parties had entered into a binding agreement before the critical date, August 16, 2007,[27] I concluded that Bienstock's breach of contract action based on the Atlas acquisition accrued within the analogous three-year limitation period. Therefore, I denied Silverback's laches defense in regard to the Atlas acquisition.[28]

Silverback does not dispute that the Atlas acquisition did not close until September 2007. Rather, Silverback argues that the record contains uncontested proof that Silverback and Atlas entered into a definitive, binding contract on July 27, 2007.[29] Alternatively, Silverback requests that the Court allow the record to be supplemented with an execution copy of a July 27, 2007 Share Subscription Agreement whereby Silverback committed to acquiring a 51% interest in Atlas.

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27 *Id.* at *11.

28 *Id.* ("Because Defendants here have not shown by a preponderance of the evidence that the alleged cause of action accrued before August 16, 2007, I reject Silverback's laches defense in regard to the Atlas acquisition.").

29 The only evidence Silverback cited for this proposition is a June 25, 2009 Share Purchase Agreement and Out of Court Settlement between Silverback and Atlas, which defines "Share Subscription Agreement" as "the share subscription agreement signed between the parties on 27 July 2007, the share subscription amending agreement signed between the parties on 17 August 2007 and the share subscription second amending agreement signed between the parties on 2 September 2007." JX 374 § 1.1.17. None of the witnesses nor any of the parties made any reference to this statement during the trial, the briefing, or the post-trial argument.

Even assuming that Silverback and Atlas entered into a binding agreement on July 27, 2007, however, I still would deny Defendants' Motion because that fact would not have changed the outcome of my prior decision. Silverback still would have been required to show that between July 27, 2007 and August 16, 2007, Silverback's entrance into a binding commitment with Atlas would have given rise to a claim for either a breach of the Agreement or a breach of Silverback's fiduciary duties under the corporate opportunity doctrine. Silverback did not meet its burden of proof in that regard.

In the Post-Trial Opinion, I stated:

> Silverback's first acquisition was Atlas. At the time of the transaction, Atlas had two main products: (1) an off-the-shelf SMS gateway and reporting package; and (2) a micropayments business that allowed users to send and receive a text message to authorize the purchase of virtual goods. Later presentations by Atlas indicate that it ultimately provided "interactive TV," "interactive radio," mobile content management and delivery, and a web-based mobile marketing platform. The suite of services offered by Atlas while it was a subsidiary of Silverback, notably "interactive TV" and mobile content management, closely mirrors the services offered by Mobilactive. Thus, Atlas's activities were within Mobilactive's line of business.[30]

In other words, I based my conclusion that Atlas operated within Mobilactive's line of business on the later presentations by Atlas and, more importantly, the suite of services offered by Atlas later in its development. For the purposes of my laches analysis,

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[30] Post-Trial Op. at *21.

however, I must consider only Atlas's activities during the twenty days from July 27, 2007 to August 16, 2007, *i.e.*, whether its sale of an off-the-shelf SMS gateway and reporting package and its engagement in the micropayments business meant that it necessarily would be within Mobilactive's line of business.

Silverback's contractual obligations and fiduciary duties were defined by the Agreement and limited by the Carve-Out. Indeed, one of the elements of misappropriation of corporate opportunity is that "by taking the opportunity for his own, the corporate fiduciary is placed in a position inimical to his duties to the corporation."[31] Silverback would not have been acting inimically to its duties if it were acting in accordance with the Agreement.

In my Post-Trial Opinion, I held that the "Purpose" of Mobilactive, as defined in the Agreement, "was to enable and enhance interactive video programming and both video and non-video interactive advertising content."[32] That "Purpose" was limited by the Carve-Out, which I interpreted as follows:

> In that regard, Silverback and its existing subsidiaries would be free, notwithstanding Section 13.5, to continue conducting their non-video based mobile and online marketing businesses without regard to the primary purposes of those activities. After the Agreement was executed, Silverback and its future subsidiaries also could engage in business activities whose

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31 *Dweck v. Nasser*, 2012 WL 161590, at *13 (Del. Ch. Jan. 18, 2012).

32 Post-Trial Op. at *17.

> primary purpose was not the enabling and enhancing of interactive video programming and advertising content across multiple digital platforms. On the other hand, "[a]ny future opportunities for new or expanded Business" that included a "business activit[y]" having a primary purpose to do such things still would have to be presented to Mobilactive as a corporate opportunity. Thus, the "primary purpose" limitation refers to specific business activities, such as a new product or service, and is not confined to a business in general. That is, if Silverback learned of a future opportunity for new or expanded Business that included any business activities whose primary purpose involved the enabling and enhancing of interactive video programming and advertising content across multiple digital platforms, Silverback first would have had to present that opportunity to Mobilactive under Section 13.5.[33]

Silverback did not prove that Atlas's initial activities, *i.e.*, the micropayments business and the SMS gateway and reporting package, were activities whose primary purpose "was to enable and enhance interactive video programming and both video and non-video interactive advertising content." Notably, Tyler Nelson, Silverback's former CEO, described the micropayments business as a service that "allowed somebody to send and receive a text message to authorize the purchase of virtual goods."[34] Likewise, Nelson described the analytics package as "a business reporting package [and] analytics package" that allowed the user to "tell how many text messages were sent, how many were opened, over what period of time, and . . . do differentiation on the basis of time of

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[33] *Id.* at *19 (alterations in original).

[34] Tr. 824.

day, day of week, and things like that."[35] There was no showing that, in and of themselves, these businesses had a *primary purpose* that involved enabling or enhancing interactive video programming or video or non-video advertising content over multiple digital platforms. Thus, Atlas's initial activities were shielded by the Carve-Out, and Bienstock did not prove that Silverback's conduct in entering into the binding agreement with Atlas, in and of itself, would have given rise to a claim for breach of its contractual or fiduciary duties to Bienstock.

As noted in the Post-Trial Opinion, presentations regarding Atlas made at later times indicate that Silverback ultimately breached its fiduciary and contractual duties by going outside of the Carve-Out by providing "interactive TV," "interactive radio," mobile content management and delivery, and a web-based mobile marketing platform.[36] There is no evidence, however, that Silverback or Atlas did so before August 16, 2007. Thus, the evidence shows that Bienstock's claim based on the first phase of the acquisition of Atlas accrued less than three years before he filed his Complaint.

In sum, even assuming a misapprehension of fact or supplementation to the record regarding the date Silverback and Atlas entered into a binding agreement, the outcome of my decision would not be different. On a motion for reargument, "[a] misapprehension

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35 Tr. 825.

36 Post-Trial Op. at *21. The presentation relied on in the Post-Trial Opinion, JX 457, is dated February 10, 2010.

of the facts or the law must be both material and outcome determinative of the earlier litigation for the movant to prevail."[37] Similarly, in deciding whether to allow a party to supplement the record, courts consider, among other things, "whether the evidence is so material and relevant that it will likely change the outcome."[38] Here, because the evidence is not outcome dispositive, reopening the record to consider new evidence would not serve the interests of fairness and substantial justice. Thus, I deny Silverback's motion to reargue and to supplement the record.

1. A Note on Silverback's Proposed Damages Calculation

I also disagree with Silverback's proposed calculation of damages that would have applied if Silverback had prevailed on its Motion for Reargument and 51% of the value attributed to the initial Atlas transaction had been excluded. Specifically, Silverback's calculation fails to replicate accurately the Court's methodology in the Post-Trial Opinion and uses an allocation factor that overstates the operating losses. In my Post-Trial Opinion, I calculated and removed certain historical operating losses reported in the PWC Valuation and Silverback's financial statements.[39] Defendants did not provide, however,

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[37] *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 6392906, at *1 (Del. Ch. Dec. 16, 2011).

[38] *Carlson v. Hallinan*, 925 A.2d 506, 519 (Del. Ch. 2006), *clarified by* 2006 WL 1510759 (Del. Ch. May 22, 2006).

[39] Post-Trial Op. at *26 ("To calculate the operating losses attributable to North American operations within Mobilactive's line of business, I looked at historical

evidence of Atlas's historical operating losses for the years 2007 through 2011, although this information likely would have been in Silverback's control.

As a workaround, Silverback purported to reduce operating losses by an allocation factor of 12.2%. Silverback calculated the 12.2% by dividing the enterprise value of Atlas's successor, Adenyo Telecom Mobile,[40] by the enterprise value of Adenyo as a consolidated entity and multiplying the quotient by 51% to reflect the 51% of Atlas that purportedly was acquired before August 16, 2007.[41] Silverback then reduced "operating losses attributable to the North American entities within Mobilactive's line of business" of $13,299,000 by 12.2%.

While it theoretically may have been appropriate to reduce the consolidated operating losses by 12.2%, Silverback mistakenly reduced operating losses that already excluded operations outside of North America and Mobilactive's line of business. This

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operating losses and removed the losses or gains attributable to Adenyo SAS (Adenyo's European operations) and Adenyo Corp. (*i.e.*, BrainTrain).").

[40] *See* JX 653 at 00432, 00511.

[41] According to the PWC Valuation, Adenyo Telecom Mobile's enterprise value was $20,449,000 and Adenyo's enterprise value was $85,515,000. *See* JX 653 at 00477, 00511. Using those values, one gets the following result: $\left(\frac{\$20,449,000}{\$85,515,000}\right) \times 51\% = 12.2\%$.

mistake likely caused Silverback to understate the operating losses, and, as a result, to understate the damages due to Bienstock, as well.[42]

D. Attorneys' Fees

Bienstock's Proposed Final Order and Judgment includes the following sentence: "The Court retains jurisdiction to award Bienstock attorneys' fees and costs in this action."[43] Defendants acknowledge that Bienstock is entitled to costs as the "prevailing party" under Court of Chancery Rule 54(d) to the extent costs are recoverable under Rule 54(d). These costs do not include attorneys' fees[44] and generally are awarded as an administrative matter. Thus, the award of costs under Rule 54(d) does not need to be addressed in a judgment.

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[42] Using the PWC Valuation's calculation of enterprise value, the 51% of Atlas Telecom Mobile comprised 26.34% of the business attributable to North American operations within Mobilactive's line of business: $\left(\frac{\$20,449,000}{\$39,596,000}\right) \times 51\% = 26.34\%$. Thus, assuming for purposes of argument that the initial Atlas transaction should have been excluded, and using Silverback's method, operating losses should have been reduced by $3,502,957 ($\$13,299,000 \times 26.34\% = \$3,502,957$). Doing so would have resulted in a damages award of $2,034,200, not $1,093,960, as Silverback proposed in its Motion.

[43] Proposed Final Order and Judgment ¶ 5.

[44] For the purposes of Rule 54(d), costs include "expenses necessarily incurred in the assertion of a right in court, such as court filing fees, fees associated with service of process or costs covered by statute . . . . [I]tems such as computerized legal research, transcripts, or photocopying are not recoverable." *See FGC Hldgs. Ltd. v. Teltronics, Inc.*, 2007 WL 241384, at *17 (Del. Ch. Jan. 22, 2007).

Defendants dispute, however, whether Bienstock can pursue in this action a request for attorneys' fees pursuant to (1) the bad-faith exception to the American Rule and (2) an indemnification provision in the Agreement, as he states he intends to do.

As to Bienstock's contemplated claim for attorneys' fees under the bad-faith exception to the American Rule, I note that Plaintiff bases that claim on Defendants' pre-litigation conduct that gave rise to his underlying claims on the merits. In other words, Bienstock seeks to keep open the possibility of pursuing his attorneys' fees in this action as an additional remedy or form of damages for Defendants' wrongful conduct.[45] Importantly, however, Bienstock failed to provide notice of his request for such a remedy or damages. Bienstock did not seek attorneys' fees in his Complaint, the Joint Pretrial Stipulation and Order, his pre-trial briefs, or his post-trial briefs. As a result, it is now too late for Bienstock to make a request for attorneys' fees under the American Rule, and any such request has been waived.[46]

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[45] Bienstock does not allege that Defendants are liable for his attorneys' fees based on the bad faith or vexatious litigation exception to the American Rule.

[46] *See Case Fin., Inc. v. Alden*, 2011 WL 1849126, at *28 (Del. Ch. May 11, 2011) ("[Defendant's] claim for attorneys' fees, however, is not well-founded. [Defendant] did not address that issue in his Pretrial Brief, Post-Trial Brief, or Proposed Findings of Fact. Therefore, he arguably has waived that claim."); *Branson v. Branson*, 2011 WL 1135024, at *1 (Del. Ch. Mar. 21, 2011), *aff'd*, 35 A.3d 418 (Del. 2011) (TABLE) ("The Defendants did not assert a claim for attorneys' fees in the Pretrial Order, and they did not seek any award of attorneys' fees in their post-trial briefing. Moreover, they did nothing else that might have

On the other hand, the Court expresses no opinion as to whether Bienstock would be entitled to attorneys' fees under the terms of the Agreement, including the indemnification provision, Section 6.3(f). It is not clear, for example, whether such a claim would have to have been asserted in this action, as opposed to a later action for indemnification.[47] For these reasons, I decline to retain jurisdiction over Bienstock's request for attorneys' fees.

II. CONCLUSION

For the reasons stated in this Letter Opinion, I deny both Plaintiff's motion for reargument and Defendants' motion for reargument and to supplement the record.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp

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operated to keep alive any claim for attorney's fees. In short, their request was not properly preserved and is now untimely." (internal citations omitted)).

[47] *See Brudno v. Wise*, 2003 WL 1874750, at *4 n.9 (Del. Ch. Apr. 1, 2003) ("[C]laims for indemnity are regarded as not ripe until the liability for which indemnification is sought is determined." (citing *Dana Corp. v. LTV Corp.*, 668 A.2d 752, 755–56 (Del. Ch. 1995), *aff'd*, 670 A.2d 1337 (Del. 1995) (TABLE))).