**IN THE COURT OF CHANCERY OF THE STATE OF DELWARE**

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| SOTERION CORPORATION, ROBERT N. JONES and R. SCOTT JONES, | : | |
| Plaintiffs, | : | |
| v. | : | |
| SOTERIA MEZZANINE CORPORATION, CAROUSEL-SOTERIA INV. HOLDINGS, INC., NELSON SCHWAB III, CHARLES GRIGG, FRED BURKE and HARRY NURKIN, | : | |
| Defendants. | : | |
| and | : | |
| SOTERIA IMAGING SERVS., LLC, | : | |
| Nominal Defendant. | : | |
| SOTERIA INVESTMENT HOLDINGS, INC. f/k/a CAROUSEL-SOTERIA INV. HOLDINGS, INC. and SOTERIA IMAGING SERVS., LLC, | : | |
| Counterclaim Plaintiffs, | : | |
| v. | : | **C.A. No. 6158-VCN** |
| SOTERION CORPORATION, ROBERT N. JONES and R. SCOTT JONES, | : | |
| Counterclaim Defendants. | : | |

**MEMORANDUM OPINION**

Date Submitted: July 17, 2012
Date Decided: October 31, 2012

Richard H. Cross, Jr., Esquire and David G. Holmes, Esquire of Cross & Simon, LLC, Wilmington, Delaware, Attorneys for Plaintiffs and Counterclaim Defendants Soterion Corporation, Robert N. Jones, and R. Scott Jones.

Srinivas M. Raju, Esquire and Jillian G. Remming, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, and Michael C. Holmes, Esquire, Daniel Jude Kelly, Esquire, and Dimitri Dube, Esquire of Vinson & Elkins LLP, Dallas, Texas, Attorneys for Defendant and Counterclaim Plaintiff Soteria Investment Holdings, Inc. and Defendants Nelson Schwab III, Charles Grigg, Fred Burke, and Harry Nurkin.

Rolin P. Bissell, Esquire and Richard J. Thomas, Esquire of Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware, Attorneys for Nominal Defendant and Counterclaim Plaintiff Soteria Imaging Servs., LLC.

NOBLE, Vice Chancellor

## I. INTRODUCTION

The genesis of this action was the filing of a complaint (the "Complaint" or "Compl.") by Plaintiff/Counterclaim Defendant Soterion Corporation ("Soterion"), Plaintiff/Counterclaim Defendant Robert N. Jones ("Bob Jones"), and Plaintiff/Counterclaim Defendant R. Scott Jones ("Scott Jones" and, together with Bob Jones, the "Joneses") (the Joneses and Soterion, together, the "Counterclaim Defendants") against Defendant/Counterclaim Plaintiff Soteria Investment Holdings, Inc. ("Soteria Holdings"), Defendant/Counterclaim Plaintiff Soteria Imaging Services, LLC ("Soteria" and, together with Soteria Holdings, the "Counterclaim Plaintiffs"), and other parties associated with Soteria (all of the defendants, together, the "Defendants") (the "Jones Litigation"). It was alleged in the Complaint that the Defendants were attempting to sell medical imaging centers owned by Soteria without obtaining proper approval from its board of managers (the "Board"). In response, the Defendants sought expedition, which was granted, and the Counterclaim Plaintiffs asserted three counterclaims against the Counterclaim Defendants.

A few days before the trial was to be held, the parties agreed to a Judgment and Order, which the Court entered on May 20, 2011 (the "May 20 Order"). Pursuant to the May 20 Order, all of the Counterclaim Defendants' claims were dismissed and the Counterclaim Plaintiffs were granted judgment on two of their

counterclaims. Only two issues remained for trial after entry of the May 20 Order: (1) whether the Counterclaim Defendants committed tortious interference with prospective business opportunities; and (2) whether the Defendants should be awarded attorneys' fees under the bad faith exception to the American Rule.

The Counterclaim Plaintiffs allege that the Counterclaim Defendants tortiously interfered with the prospective sales of two imaging centers, the Lifescan Imaging Center facility (the "Lifescan facility") located in Somerset, Kentucky, and the Nebraska Health Imaging, LLC facility (the "Nebraska facility") located in Omaha, Nebraska. According to the Counterclaim Plaintiffs, the Counterclaim Defendants' filing of the Complaint—which allegedly contained statements the Counterclaim Defendants knew to be false—caused the prospective buyer of the Nebraska facility, Tenet Healthcare Systems ("Tenet"), to delay closing on the sale. After the Counterclaim Defendants' claims in the Delaware suit were dismissed, Soteria provided Tenet with updated due diligence materials, including updated financial information. But, by this time, it had become apparent that the Nebraska facility's financial performance had decreased significantly from the level upon which Tenet had based its original bid. Due to this deterioration in financial performance, the deal for the Nebraska facility fell apart, and, as of the date of trial, the Nebraska facility had not been sold.

The Counterclaim Defendants took an even more active role in meddling with the prospective sale of the Lifescan facility to Lake Cumberland Hospital ("Lake Cumberland"). About three months before filing the Complaint, the Joneses, through their attorney, sent a facsimile to the chief executive officer ("CEO") of Lake Cumberland's parent, Lifepoint Hospitals, Inc. ("Lifepoint"), that included a draft of the Complaint (the "Draft Complaint") and a copy of a separate lawsuit filed by third-party Juju, LLC ("Juju") in a Kentucky state court (the "Juju Litigation"). The Counterclaim Plaintiffs claim that Lifepoint's receipt of the Draft Complaint prevented the deal from closing, although Lake Cumberland was also unwilling to close the deal while the Juju Litigation was ongoing.

In both of these instances, factors other than the prospective buyers' discomfort with the Jones Litigation or the Draft Complaint played a role in Soteria's inability to close the transaction. As a result, this case turns on whether the Joneses' actions were the proximate cause of the Counterclaim Plaintiffs' damages. The Court, in this post-trial memorandum opinion, finds that in both instances the Joneses' actions were not the proximate cause of the Counterclaim Plaintiffs' damages. Moreover, the evidence failed to demonstrate that the Counterclaim Defendants were aware of the sale of the Nebraska facility that might be adversely affected by their conduct. Therefore, the Counterclaim Defendants are not liable for tortious interference. The Court, however, concludes

that the bad faith exception to the American Rule does apply to the Counterclaim Defendants' pursuit of their claims, and the Counterclaim Defendants are liable for the Defendants' attorneys' fees related to the defense of those claims.

## II. THE PARTIES

Bob Jones and Scott Jones are both holders of Class A Common Units of Soteria ("Common Units") and former Board members ("Managers"). Bob Jones formerly served as Soteria's President, and Scott Jones formerly served as its Executive Vice President. Bob Jones is Scott Jones's father. Manager and non-party Margaret Jones is Bob Jones's wife and Scott Jones's mother.

Soterion is an Indiana corporation and a holder of Common Units. Scott Jones is the President of Soterion and acts on its behalf.

Soteria is a Delaware limited liability company with its principal place of business in Louisville, Kentucky. Soteria is a provider of diagnostic imaging services, and it operates imaging centers across the United States with a geographic focus on the South and Midwest.

Soteria Holdings is a Delaware corporation and a holder of Soteria Class A Preferred Units ("Preferred Units"). Soteria Holdings is controlled by Carousel

Capital Partners ("Carousel"), a private equity firm that focuses on investing in companies located in the southeastern United States.[1]

Defendants Nelson Schwab III ("Schwab"), Charles Grigg ("Grigg"), Fred Burke, and Harry Nurkin were Managers at all relevant times.

## III. BACKGROUND

### A. *The Formation of Soteria and Carousel's Investment*

Before 2004, the Jones family owned and operated a number of imaging centers, most of which were located in the Southeast and Midwest regions of the United States. In 2004, Carousel sought to acquire part of the Jones family's interest in approximately twenty-four of the imaging centers. Soteria was formed to effect this transaction, and the Jones family transferred either all or a portion of its ownership interests in some of the imaging centers to Soteria.

Through Soteria Holdings, Carousel invested $17.5 million in Soteria[2] in exchange for Preferred Units representing 52% of Soteria's equity.[3] Allied Capital Corporation ("Allied")[4] provided debt financing for the deal, for which it received a senior note from Soteria (the "Senior Note").[5] The initial principal amount of the

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[1] Defendant Soteria Mezzanine Corporation ("Soteria Mezzanine"), a holder of Preferred Units, was dismissed shortly after the filing of this action.
[2] Joint Pretrial Order ¶ 3.
[3] Joint Trial Ex. ("JX") 1 (Limited Liability Company Agreement of Soteria Imaging Services, LLC) ("LLC Agreement") at Ex. A.
[4] Between the time Allied invested in Soteria and when the primary events at issue occurred, Allied was acquired by Ares Capital Corporation ("Ares"). *See* Trial Tr. ("Tr.") 14.
[5] JX 2.

Senior Note was $9.5 million, and it matured on November 10, 2010.[6] Through Soteria Mezzanine, Allied also made a $2.1 million equity investment in Soteria, and, in return, Soteria Mezzanine was issued Preferred Units representing 6% of Soteria's equity.[7]

For selling its stake in Soteria, the Jones family was paid more than $17 million in cash,[8] and the Joneses and Soterion, combined, received Common Units representing 36% of Soteria's equity.[9] The Joneses also each received a subordinated note (the "Sellers' Notes")[10] that, together, had a combined principal amount of $875,000. The Sellers' Notes were subordinate to the Senior Note, and the Joneses were generally prohibited from demanding or suing for payment of any amounts owed in respect of the Sellers' Notes before the Senior Note was paid in full.[11]

The Board could have as many as seven Managers. As the holder of a majority of the Preferred Units, Soteria Holdings had the right to designate four Managers.[12] At all relevant times, Defendants Schwab, Grigg, Fred Burke, and Harry Nurkin were the Managers designated by Soteria Holdings. The holders of

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[6] *Id.* Although not discussed by the parties, apparently, Allied made several additional loans to Soteria in exchange for additional notes. *See id.*
[7] LLC Agreement at Ex. A. *See also* Tr. 13.
[8] Joint Pretrial Order ¶ 4.
[9] LLC Agreement at Ex. A. *See also* Tr. 14.
[10] JX 3; JX 4.
[11] Sellers' Notes at §§ 4.1, 4.2.
[12] LLC Agreement § 4.1(d).

Common Units had the right to designate three Managers, "at least two (2) of which shall be members of [Soteria's] current senior management team."[13] At all relevant times, Margaret Jones served as a Manager designated by the holders of Common Units. Both of the Joneses served as Managers designated by the holders of Common Units in the past, but each had resigned from the Board before the time relevant to this action.[14] At least one Manager designated by the Common Unit holders was required to be present at a Board meeting in order for there to be a quorum.[15]

B. *Soteria's Economic Distress and the Divestiture Strategy*

Soteria's performance fell far short of Carousel's expectations. Soteria defaulted on the Senior Note in September 2009,[16] and it was obvious to the Board long before November 2010 that it would be difficult for Soteria to pay the Senior Note when it matured. At a Board meeting[17] held on November 4 and 5, 2009, the Board heard presentations from five investment banks regarding Soteria's "strategic options and advice regarding the maturity of the [Senior Note.]"[18] Later,

[13] *Id.* at § 4.1(c).
[14] Joint Pretrial Order ¶ 8.
[15] LLC Agreement § 4.3(a).
[16] Joint Pretrial Order ¶ 9.
[17] Unless otherwise noted, Board meetings were attended by all of the Managers.
[18] JX 21.

Soteria sought to extend the Senior Note's maturity, but, in March 2010, Ares indicated that it was unlikely to agree to an extension.[19]

The Board eventually decided to pursue a strategy of selling non-core imaging centers as a way to raise cash to pay down the Senior Note (the "Divestiture Strategy"). The Board began specifically discussing the Divestiture Strategy at least as early as April 2010. At an April 1, 2010 Board meeting, Soteria's CEO, Joseph McDonough ("McDonough"), presented a plan to sell five imaging centers, including the Nebraska facility, in order to pay down, in part, the Senior Note.[20] At this meeting, the Board instructed management to continue investigating the possibility of selling non-core imaging centers and then to report back to the Board for approval; Margaret Jones suggested that if Ares would not extend the maturity of the Senior Note, Soteria should seek to sell the entire company.[21]

In an April 29, 2010 email,[22] McDonough updated the Board on management's progress regarding the Divestiture Strategy. Among other things, he noted that that management had discussed Soteria's strategic alternatives with the investment bank Brookwood Associates ("Brookwood") and the business

[19] JX 25 at CAR00114544.
[20] *See* JX 27; JX 28 (April 1, 2010 Board minutes).
[21] *See* JX 28. *See also* Tr. 30-33.
[22] JX 31.

broker River Corporate Associates ("RCA").[23] Furthermore, management was working to finalize an agreement to engage RCA to complete the first set of divestitures.[24] That same day, Margaret Jones called McDonough and fellow Manager Grigg to express her dissatisfaction with management's actions, suggesting that management exceeded the authority granted by the Board.[25] Generally, Margaret Jones believed that management was proceeding too quickly in beginning the sales process and that the Board had only authorized the gathering of information about a potential, hypothetical sales process. Management, on the other hand, believed that its actions were authorized by the Board at the April 1 Board meeting.[26]

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[23] Ultimately, Soteria would retain both Brookwood and RCA to assist it in implementing the Divestiture Strategy. Brookwood served as the lead investment adviser. It provided guidance concerning Soteria's strategic options and undertook efforts to market the company as a whole and the individual centers located in Tennessee and Kentucky. Meanwhile, RCA focused on marketing individual non-core centers. *See* JX 43.

[24] JX 31. The Board had previously authorized management to contact a business broker. *See* JX 28.

[25] *See* JX 31; Tr. 33-34.

[26] It is clear that most of management's actions, as recounted in McDonough's April 29 email, were either specifically authorized by the Board at the April 1 Board meeting or were necessary to complete those that were. *Compare* JX 28 (authorizing management to solicit offers for the Nebraska facility and centers located in Boston and Augusta, to contact a business broker to locate buyers for other non-core centers, to request an update from Brookwood regarding strategic alternatives, and to report back to the Board for approval) *with* JX 31 (reporting that management had created prospectuses for non-core facilities, had solicited indications of interest for the Nebraska facility and centers located in Boston and Augusta, had discussed Soteria's strategic alternatives with Brookwood and RCA, had discussed with RCA the possibility of retaining RCA to market non-core facilities, and was waiting to receive the Board's approval to enter into an agreement with Brookwood). Nonetheless, based upon the April 1 Board meeting minutes, there appears to have been a good faith argument that the Board only authorized management to contact a business broker to discuss the possibility of hiring it to market the non-core facilities, while McDonough's April 29 email stated that RCA would actually begin the

In response to Margaret Jones's concerns, a special Board meeting was held on May 3, 2010, to reaffirm the instructions the Board had given to management at the April 1 Board meeting. At the May 3 Board meeting, the Divestiture Strategy was reviewed and a recap of the actions taken by management to date was provided.[27] Margaret Jones was the only Manager who objected to the Divestiture Strategy and the actions taken by management, and she again evinced a preference for a sale of the entire company.[28]

At the next Board meeting, held on May 13, 2010, Brookwood presented a summary of what it believed to be the best strategy for Soteria.[29] Brookwood suggested that Soteria sell its non-core facilities while continuing to seek a buyer for the entire company or an opportunity to refinance the Senior Note with another lender. Brookwood explained that this strategy would provide Soteria with the most possible options. The Board unanimously voted to engage Brookwood and RCA and to authorize McDonough to enter into engagement letters with them.[30]

After being retained, Brookwood and RCA contacted potential purchasers to gauge their interest in the non-core centers or the entire company. The Board

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marketing process the following Monday. The April 1 Board meeting minutes can also be reasonably interpreted as supporting management's view.

[27] *See* JX 35 (May 3, 2012 Board minutes); Tr. 35.

[28] *See* JX 35.

[29] *See* JX 37 (May 13, 2010 Board meeting minutes).

[30] *Id.*

received regular updates on Brookwood's and RCA's progress.[31] At the Board meeting held on July 29, 2010, Brookwood and RCA gave the Board a formal update on the divestiture process.[32] John Burklund ("Burklund") of RCA provided an overview of the bids that had been received for various non-core facilities, including the Nebraska facility. Margaret Jones, again, made it clear that she was primarily interested in selling the company as a whole, and she requested that Brookwood provide further details regarding that aspect of the sales process. Robert Tyndall ("Tyndall") of Brookwood reported that Brookwood had contacted nearly two hundred potential buyers and none had shown any interest in acquiring the whole company. According to Tyndall, there were up to four or five buyers that might be interested in the whole company, but it was unlikely that a sale of the whole company could be completed in time to meet the deadlines established by Ares.[33]

C. *The Board Suspects that the Joneses are Preparing to File Suit*

In July 2010, certain Managers and members of management were told that Scott Jones was preparing to file a lawsuit against Soteria or the Board related to

[31] *See* JX 40 (update email); JX 41 (same); Tr. 37-38. Progress in the efforts to sell the Lifescan and Nebraska facilities was reported in these updates.
[32] JX 43 (July 29, 2010 Board meeting minutes).
[33] *Id.* By this time, Ares was requesting that Soteria raise $10 million from sales of non-core facilities by September 30, 2010.

the Divestiture Strategy.[34] In the executive session of the July 29, 2010 Board meeting, Schwab asked Margaret Jones whether she was aware of any lawsuits her family was planning to file against Soteria or the Board.[35] She responded that she was not aware of any such suits, but, if she did become aware of any, she would ask her family not to talk about them in front of her and she would not participate in them.[36] Margaret Jones's response did not allay the other Managers' concerns that Scott Jones was preparing to file a lawsuit and that Margaret Jones might provide him with information. As a result, on the advice of counsel, all of the Managers were asked to sign a confidentiality agreement[37] (the "Confidentiality Agreement") in August 2010, and all of the Managers, except Margaret Jones, signed it.[38] Pursuant to the Confidentiality Agreement, the Managers agreed not to disclose certain confidential information or to threaten to bring or to participate in any legal action against Soteria or its Managers. The Confidentiality Agreement further stated that any Manager who refused to sign it would be prohibited from participating in any further Board meetings, and, instead, "the Board [would]

[34] It is unclear who reported this information to the Board and management, but, apparently, one of the sources was Matthew Smith, a holder of Common Units. *See* Tr. 43-45. Scott Jones denied that he was considering filing a lawsuit at this time. Tr. 202. Whether or not Scott Jones was actually planning to file a lawsuit at this time is not crucial to the disposition of this action. This fact is recounted to provide context for the Board's reaction, which, in addition to the Board's belief that Scott Jones was preparing to sue the Board or Soteria, led to an increased level of strife and mistrust between Margaret Jones and the other Managers.
[35] Tr. 46, 538-39.
[36] Tr. 47, 540.
[37] JX 102.
[38] Tr. 48-49.

provide to any such Manager such information as the Board deems appropriate regarding the business and affairs of [Soteria]."[39]

Upon receiving the Confidentiality Agreement, Margaret Jones called Ed Glasscock ("Glasscock"), an attorney hired to represent the Board, to discuss her concerns about it. Over the course of several days, Margaret spoke to Glasscock a number of times regarding the Confidentiality Agreement. Glasscock told Margaret Jones that if she did not sign the Confidentiality Agreement she would not be allowed to attend any Board meetings, and, if she showed up at a Board meeting, she would not be allowed inside. When Margaret Jones reminded him that at least one Manager designated by the Common Unit holders needed to be present at a Board meeting for there to be a quorum, he responded that the other Managers could call her when her participation was required.[40]

D. *The Other Managers Meet without Margaret Jones*

The sense of mistrust held by the rest of the members of the Board toward Margaret Jones convinced them to meet surreptitiously without Margaret Jones (the "Secret Meeting"). The Secret Meeting took place immediately before the August 27, 2010 Board meeting.[41] It was held in Brookwood's office and was attended by a representative from Brookwood. The primary topics discussed in the

[39] JX 102.
[40] Tr. 519-21.
[41] Furthermore, the Board package and the agenda for the August 27, 2010 Board meeting that were emailed to the other Managers were not sent to Margaret Jones. JX 45; Tr. 104-06.

Secret Meeting were the progress of the Divestiture Strategy and the Board's concern that the Joneses might file suit against the Board or Soteria; there is no evidence that any sort of vote was taken at the Secret Meeting. After this meeting ended, the Managers who participated in it went to Carousel's office, where Margaret Jones was waiting, and a formal Board meeting was held.[42] Neither Brookwood nor RCA participated in the formal Board meeting, and the Divestiture Strategy was not discussed at length, if at all.[43] The discussion of the Divestiture Strategy that normally took place at Board meetings had been effectively moved to the Secret Meeting.

Although the other Managers took measures to prevent Margaret Jones from learning of the Secret Meeting, she appears to have quickly realized that it had taken place.[44] Understandably, the Secret Meeting increased Margaret Jones's sense of alienation from the rest of the Board and made her suspicious that the other Managers were withholding important information from her, particularly information regarding the Divestiture Strategy.

[42] Tr. 49-51, 149-52.
[43] JX 46 (August 27, 2010 Board minutes). *See also* Tr. 528 (Margaret Jones testifying that there was no Board meeting held between July 29, 2010, and November 9, 2010, at which time the Divestiture Strategy was discussed).
[44] Tr. 528 (Margaret Jones) ("it was apparent that there had been a meeting without me").

E. *The Prospective Sale of the Lifescan Facility*

The ownership structure of the Lifescan facility was complex. According to the Counterclaim Plaintiffs, Lifescan LLC owned the Lifescan facility, while the medical imaging equipment used by the facility was owned by Somerset Imaging ("Somerset Imaging"). The Counterclaim Plaintiffs contend that Lifescan LLC was majority-owned by Soteria, with non-party Dr. Fred Schultz also owning a one-third interest, and that Somerset Imaging was owned in equal parts by Soteria and non-party Juju. But, in the Juju Litigation, Juju claims that Somerset Imaging has a more substantial ownership interest in the Lifescan facility than what the Counterclaim Plaintiffs acknowledge.[45]

In June 2010, Brookwood contacted Lake Cumberland to see if it was interested in acquiring Lifescan.[46] Details of the discussions between Brookwood and Lake Cumberland were included in the Divestiture Strategy update emails sent to the Board.[47] On September 29, 2010, Lifescan LLC and Lake Cumberland entered into a letter of intent (the "Lifescan LOI").[48] The Lifescan LOI was not a contract for the sale of the Lifescan facility, but it set forth what were expected to be the major terms of a potential sale of the Lifescan facility to Lake Cumberland. Notably, the Lifescan LOI provided for a purchase price of $1.9 million, and,

[45] *See* JX 51 ("Juju Complaint" or "Juju Compl.")
[46] JX 40 at CAR00001877.
[47] JX 40; JX 41.
[48] JX 47 (Lifescan LOI).

under its original terms, it was terminable by either party after November 1, 2010. On October 27, 2010, the termination date was extended to November 15, 2010.[49] This purchase price assumed that Lake Cumberland would successfully complete due diligence. Furthermore, the Lifescan LOI provided that Lifescan LLC and Lake Cumberland would execute a mutually agreeable asset purchase agreement, one of the provisions of which would be that the Lifescan facility was "free and clear of all liens, claims and encumbrances at [c]losing other than [some specifically defined liabilities]."[50]

F. *The Joneses Send the Fax to Lifepoint*

On October 29, 2010, an email was sent to the Managers reminding them that a Board meeting was going to be held on November 9, 2010. This email also noted that the Board meeting would include a "[r]eview of [the] facility Divestiture Process and related actions requiring Board approval (as applicable)."[51] Ultimately, the Board approved the terms of a proposed sale of the Lifescan facility to Lake Cumberland at the November 9, 2010 Board meeting, with only Margaret Jones voting in opposition. But, before that Board meeting took place, the Joneses, on

[49] JX 48 (letter agreement between Lake Cumberland and Lifescan LLC). The letter agreement extending the termination date stated that "the parties are continuing to work toward a prompt Closing and currently are targeting November 15, 2010 as the Closing Date, but in no event would the Closing Date be later than December 1, 2010." *Id.*
[50] Lifescan LOI at A-3.
[51] JX 49.

November 1, 2010, through the attorney representing them at that time,[52] sent a facsimile to the chief executive officer of Lake Cumberland's parent, Lifepoint (the "Fax").[53]

The transmission of the Fax is one of the acts committed (or authorized) by the Joneses that the Counterclaim Plaintiffs claim constitute tortious interference. The Fax consisted of a short letter (the "Letter")[54] and two attachments.[55] The first attachment was the Draft Complaint.[56] According to the Letter, the Draft Complaint was going to be filed that day, November 1, 2010. Actually, the Complaint was not filed until three months later on February 1, 2011.[57] The Letter described the Draft Complaint as alleging that Soteria was "selling assets, including [Lifescan LLC] and/or its assets, without proper authorization to do so" and that Soteria did not "have proper authority to sell any imaging center or any asset of any imaging center."[58] Among other forms of relief, the Draft Complaint sought an injunction prohibiting the sale of any imaging center.[59] It also contained numerous allegations to the effect that Soteria was selling imaging centers without appropriate Board approval and that the proceeds of the sales were being

[52] At this time, the Joneses were represented by Sydow and Associates (the "Sydow firm"). Tr. 490.
[53] JX 50; JX 51.
[54] JX 50.
[55] JX 51.
[56] *Id.*
[57] Compl.
[58] JX 50.
[59] Draft Compl. ¶ 28.

distributed in a manner that wrongfully benefited Carousel to the detriment of the Counterclaim Defendants.[60]

The second attachment was the complaint against Soteria and Somerset Imaging that had been filed in a Kentucky state court by Juju.[61] The Juju Complaint previously had been dismissed, but, by the time the Fax was sent, it had been reinstated.[62] Although the record is not clear regarding when the Juju Complaint was last revived, apparently, this occurred in early September 2010, at the latest.[63] Through the Juju Complaint, Juju sought damages from Soteria and Somerset Imaging under a number of theories, including breach of contract, breach of fiduciary duties, conversion, and fraud. The allegations underlying these claims related to Juju's and Soteria's joint ownership of Somerset Imaging, a management agreement between Soteria and Somerset Imaging, and an operating agreement between Juju and Somerset Imaging. Essentially, Juju alleged that Somerset Imaging hired Soteria to run the Lifescan facility but, instead, Soteria failed to perform its contractual obligations and took the business for itself. Soteria filed an

[60] *See id.* ¶¶ 20-25.
[61] JX 51.
[62] *See* Tr. 128-29.
[63] The Juju Complaint originally was filed in January of 2010. *See* Juju Compl. It had been dismissed in the summer of 2010, but it was resuscitated by September 7, 2010, with Lifescan Imaging added as defendant. *See* Tr. 129; JX 106.

answer and counterclaim in the Juju action in July 2011,[64] and the Juju action was still pending at the time of trial.[65]

G. *The Effect of the Fax on the Prospective Sale of the Lifescan Facility*

The same day the Fax was sent, Soteria's primary contact at Lake Cumberland, Samuel Hutcheson ("Hutcheson"), the director of development at Lifepoint, emailed Tyndall. Hutcheson stated: "We received notice of a lawsuit by Robert Jones against Soteria today that seeks injunctive relief from the sale of the centers. Clearly this is a big problem."[66] There can be little doubt that the contents of the Fax upset a sales process that had been moving towards closing. First, the manner in which the Draft Complaint and the Juju Complaint were disclosed undermined the trust that had been built up between Soteria and Lake Cumberland. Before Lifepoint's CEO received the Fax, Lake Cumberland had not been informed of the Juju Litigation, despite the fact that it had requested information about pending or threatened lawsuits.[67] Of course, Lake Cumberland had also not been informed of the suit threatened by the Joneses, which was not filed until three months after the Fax was sent, even though the Letter stated that the Draft Complaint would be filed that same day. Learning about the Juju Litigation and

[64] JX 126.
[65] Tr. 128.
[66] JX 52.
[67] JX 97 ("Hutcheson Dep.") 31. Although Hutcheson is an employee of Lifepoint, he was designated to testify for Lake Cumberland. *Id.* at 4-5.

the Draft Complaint by way of the Fax after having asked Soteria for information regarding pending or threatened lawsuits made Lake Cumberland distrustful of Soteria.[68] The "surprise factor" of this disclosure was increased by the fact that the Fax was sent directly to Lifepoint's CEO. Soteria, through Brookwood, had been working with Hutcheson on the prospective sale of the Lifescan facility. Unsurprisingly, Hutcheson was not pleased to learn of these issues for the first time by way of a facsimile sent to his boss's boss.[69]

Second, the allegations contained in the Draft Complaint and the Juju Complaint troubled Lake Cumberland. Hutcheson testified that either of the lawsuits *alone* was itself sufficient to prevent Lake Cumberland from closing the transaction to purchase the Lifescan facility.[70] These lawsuits concerned Lake Cumberland because they involved questions regarding the ownership of the assets it sought to buy, and it worried that that sale could later be unwound or be found to have been a fraudulent conveyance.[71]

After receiving the Fax, Lake Cumberland was unwilling to close the deal until both of the lawsuits were resolved.[72] Nevertheless, Lake Cumberland

[68] Hutcheson Dep. 65, 83-84; Tr. 361, 364-65.
[69] *See* Tr. 364, 380-81.
[70] Hutcheson Dep. 83 (Juju Litigation); 57-60, 63-64, 70, 72-73 (Jones Litigation). *See also id.* at 65 (Juju Litigation and Jones Litigation).
[71] *Id.* at 64-65; JX 105; JX 199; JX 122.
[72] Hutcheson Dep. 33-34. *See also id.* at 70, 83.

remained interested in purchasing the Lifescan facility,[73] and the LOI's termination date was extended several times.[74] Even after the latest termination date had passed, Lake Cumberland was still interested in buying the Lifescan facility, but not necessarily at the same price.[75] Although the Joneses' claims against the Defendants in the Jones Litigation were dismissed with prejudice on May 20, 2011, Lake Cumberland will not purchase the Lifescan facility until the Juju Litigation has also been resolved.[76] As of the time of trial, Soteria had not sold the Lifescan facility.[77]

H. *The November 9, 2010 Board Meeting*

The next Board meeting after the Joneses sent the Fax occurred on November 9, 2010. As noted above, a reminder email was sent to the Managers on October 29, 2010,[78] and a Board package was emailed to the Managers on November 4, 2010.[79] The Board package included an update on the Divestiture Strategy. Among other things, it explained that there was one party interested in purchasing the Nebraska facility and that management was seeking authorization from the Board to sign a definitive agreement to sell the Lifescan facility.

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[73] *Id.* at 18.
[74] *Id.* at 23-24.
[75] *Id.* at 18, 69-70, 73-74.
[76] *Id.* at 83.
[77] Tr. 365.
[78] JX 49.
[79] JX 55. A copy of the Board package was also mailed to Margaret Jones. *See* JX 56.

Both Scott Jones and Margaret Jones attended the November 9 Board meeting. Before the meeting began, on November 9, the Sydow firm, under instructions from Scott Jones, faxed a letter to Grigg.[80] According to this letter, which was in the names of Scott Jones, Bob Jones, and Soterion, the Common Unit holders had appointed Scott Jones and Bob Jones as their other two representatives on the Board. Glasscock informed the Board that Scott Jones was not eligible to be a Manager under the terms of the LLC Agreement, and Schwab rejected Scott Jones's request to be recognized as a Manager.[81] Nevertheless, Scott Jones was permitted to attend the Board meeting as an observer, and he did, in fact, participate in the meeting, though he did not vote on any matters.[82]

The Board meeting was contentious, and Margaret Jones or Scott Jones expressed a view contrary to that of the other Managers with regard to almost every topic discussed. Notably, Margaret Jones objected to a motion to accept the minutes for the August 27 Board meeting because, she argued, they did not include

[80] JX 57. *See also* Tr. 228.

[81] *See* JX 58 (November 9, 2010 Board meeting minutes). The Counterclaim Defendants dispute Glasscock's interpretation of the LLC Agreement—which was also advanced by the Counterclaim Plaintiffs—and argue that Scott Jones should have been recognized as a Manager. The main point of contention between the parties is the meaning of § 4.1(c) of the LLC Agreement, which states that "at least two (2) [of the Managers designated by the Common Unit holders] shall be members of [Soteria's] current senior management team." Specifically, the parties disagree about the timing of when Managers designated by the Common Unit holders needed to be members of Soteria's senior management team. The Counterclaim Plaintiffs argue that such potential Managers must have been members of management at the time they were designated to serve on the Board, while the Counterclaim Defendants argue that they only needed to have been members of management when the LLC Agreement was executed. The Court need not, and does not, resolve this issue, as it is not critical to the Court's ruling.

[82] *See* JX 58.

the minutes of the Secret Meeting, which she claimed was a Board meeting.[83] A representative from Brookwood provided an update on the Divestiture Strategy. He explained that the asset purchase agreements for two facilities—one of which was the Lifescan facility—were substantially complete, pending Board approval, and he reviewed the key terms and conditions of these agreements. McDonough explained that the proceeds from the sales of these facilities would be used to pay down the Senior Note. Both transactions were approved by all of the Managers, except Margaret Jones, who voiced concerns that Soteria did not own all of the assets it sought to sell.[84]

On November 12, 2010, the Sydow firm sent a letter[85] to Soteria on behalf of the Joneses requesting that Soteria pay the Sellers' Notes. In the letter, the Joneses claimed that Soteria was "in the process of liquidating [or transferring], to the extent possible, all of its assets[,]" an action that, allegedly, constituted an event of default.[86] In a letter sent by Glasscock in response, Soteria denied that it was liquidating or transferring all of its assets, and it rejected the Joneses' demand to pay the Sellers' Notes.[87] Furthermore, in its letter, Soteria quoted § 2 of the Sellers' Notes, which forbade the Joneses from taking legal action to seek payment

[83] *Id.*
[84] *Id.*
[85] JX 59.
[86] *Id.*
[87] JX 60.

under the Sellers' Notes without first obtaining the written consent of the Senior Note holder.[88]

I. *The Joneses File the Complaint*

The Counterclaim Defendants finally filed the Complaint in this Court on February 1, 2011. The Complaint was verified by Scott Jones, in both his personal capacity and as the president of Soterion, on November 22, 2010, and by Bob Jones, in his personal capacity, on November 19, 2010.[89] Although the language of the Complaint differed somewhat from that of the Draft Complaint, the core allegations remained the same: the Counterclaim Defendants accused the Counterclaim Plaintiffs of selling imaging centers without proper Board authorization and of distributing the proceeds in a manner that improperly benefited the Preferred Unit holders at the expense of the Common Unit holders. The Complaint sought, among other forms of relief, a declaration that the purported sales were void and preliminary and permanent injunctive relief preventing the sale of any of Soteria's assets.

J. *The Prospective Sale of the Nebraska Facility*

On January 28, 2011, Soteria entered into a letter of intent with Tenet to sell the Nebraska facility for $2.9 million (the "Nebraska LOI").[90] Pursuant to § 8 of

[88] *See id.* (quoting Sellers' Notes § 2).
[89] Compl. (Scott Jones Verification, Soterion Verification, and Bob Jones Verification).
[90] JX 64.

the Nebraska LOI, the sale was set to close on March 15, 2011, subject to the satisfaction of certain closing conditions. The Nebraska LOI also provided that the parties would execute an asset purchase agreement containing customary terms and conditions. Notably, § 2.5 of a draft asset purchase agreement[91] for the sale of the Nebraska facility provided that Soteria "shall provide to [Tenet], as promptly as each becomes available prior to the Closing Date, all other interim financial statements . . . with respect to the operation of [the Nebraska facility] updated to within fourteen (14) calendar days prior to the Closing Date."

Tenet had a reputation for being difficult to work with[92] and slow to close a deal. In a January 10, 2011 email, Burklund, a managing partner at RCA which was assisting Soteria with the sale of the Nebraska facility, suggested waiting to enter into a letter of intent with Tenet to allow time for another potential purchaser to submit a letter of intent.[93] Burklund's reason for this suggestion was that "Tenet can be difficult to get across the finish line."[94] Indeed, before Tenet even learned of the Jones Litigation, it had moved the prospective closing date back to March 31,

[91] JX 112.
[92] Tr. 326.
[93] JX 111.
[94] *Id.*

2011,[95] and Soteria believed that the closing date could get pushed back as far as April 15, 2011.[96]

The record is somewhat unclear regarding when, precisely, Tenet was informed of the Jones Litigation. This point in time is described, generally, as mid-March,[97] and it appears that this information was disclosed to someone at Tenet on March 15, 2011.[98] Regardless of when, precisely, Tenet first learned of the Jones Litigation, it ultimately concluded that it would not close on the purchase of the Nebraska facility until the Jones Litigation was resolved.[99] This position was communicated to Soteria on March 22, 2011.[100] At this time, Tenet was still interested in purchasing the Nebraska facility.[101]

After the Joneses' claims were dismissed, Soteria and Tenet again began working towards closing. In a May 24, 2011 email to Chuck Harbison ("Harbison"), a Director in Tenet's finance department, Burklund stated that Soteria sought to close "as soon as possible" and that "May 31 seem[ed] like a

[95] JX 71; JX 115; Tr. 346.
[96] Tr. 334-35 (Burklund testifying that April 15, 2011, was Soteria's outside estimate of when the sale to Tenet would close); *id.* at 347 (Burklund testifying that "April 15th was the estimate of the last possible date of closing of the deal had the Jones case not occurred . . .").
[97] Tr. 333.
[98] JX 98 ("Smith Dep.") 75. Paul Smith is a senior director of development at Tenet and was designated as Tenet's representative.
[99] Smith Dep. 41, 72; JX 76.
[100] JX 75.
[101] *See* JX 76.

logical date."[102] Harbison responded: "That's not likely but we want to close ASAP as well."[103] At some point, June 17, 2011, became the new target closing date.[104]

Although Tenet remained interested in purchasing the Nebraska facility,[105] it needed to update its due diligence, including its analysis of the Nebraska facility's recent financial data, before doing so.[106] In the end, it was the Nebraska facility's deteriorating financial performance that scuttled the deal.[107] When Tenet entered into the Nebraska LOI with a prospective sales price of $2.9 million, it had based its financial projections on the Nebraska facility's historical financial performance through December 2010, but, after it received updated information, it decided that it needed to reevaluate the price.[108] Specifically, Tenet was concerned about the Nebraska facility's net revenue per scan, which "took a stairstep dive from Dec[ember] to January," and through June of 2011 had not recovered.[109] While conducting due diligence in February 2011, before the deal was put on hold due to the Jones Litigation, Tenet had noticed that a sharp decrease in net revenue per

[102] JX 128.
[103] *Id.*
[104] JX 129.
[105] Smith Dep. 44.
[106] *Id.* at 45, 48.
[107] Aside from the Nebraska facility's sinking financial performance, no "business reasons" that otherwise justified the transaction had changed. *See id.* at 51-53.
[108] *Id.* at 48.
[109] JX 127.

scan had occurred between December 2010 and January 2011.[110] At that time, Tenet believed that the change in performance was temporary and was the result of severe weather in January.[111] Later, though, when Tenet reviewed the Nebraska facility's financial performance for the first five months of 2011, it became convinced that the drop in net revenue per scan was permanent.[112] After factoring in this new assumption, $2.9 million appeared to be a wildly inflated sales price; instead, Tenet internally discussed a new price of $1.8 million[113] and, in conversations with Burklund, suggested that its valuation was in the "mid ones."[114] Eventually, Tenet concluded that it simply did not want to buy an imaging center with declining performance.[115] In August 2011, Tenet informed Soteria that it would not purchase the Nebraska facility.[116] As of the time of trial, Soteria had not sold the Nebraska facility.

## IV. CONTENTIONS

The Counterclaim Plaintiffs allege that the Counterclaim Defendants committed tortious interference with a prospective business opportunity by sending the Fax and filing the Complaint. As a result, according to the Counterclaim Plaintiffs, the prospective sales of the Lifescan and Nebraska facilities did not

[110] Tr. 315.
[111] *Id.*
[112] JX 125.
[113] JX 125.
[114] JX 123.
[115] *See* Smith Dep. 62-63.
[116] JX 83.

close, as they would have otherwise, absent the Counterclaim Defendants' wrongful actions. The Counterclaim Plaintiffs argue that these actions were wrongful because many of the allegations contained in the Letter, the Draft Complaint, and the Complaint were false—and the Joneses knew they were false—at the times the Fax was sent and the Complaint was filed. Moreover, the Counterclaim Plaintiffs contend that the Counterclaim Defendants' goal in committing these acts was to disrupt the divestiture process, thereby giving them leverage to obtain early payment of their Sellers' Notes, which would not otherwise be permitted by the terms of the Sellers' Notes. Indeed, these acts are all the more galling, in the Counterclaim Plaintiffs' view, because they were committed at a time when Soteria was working hard to avoid foreclosure under the Senior Note and to obtain an extension of its maturity date.

The Counterclaim Defendants deny that their actions constituted tortious interference. Far from intending to harm Soteria by holding its deals hostage, the Counterclaim Defendants claim their aim was to protect Soteria from the damage that would have resulted from selling assets it did not own and from selling imaging centers without proper Board authorization. Regarding their actions related to the prospective sale of the Lifescan facility, although the Counterclaim Defendants admit that some of the allegations contained in the Letter and the Draft Complaint turned out to be false, they claim to have been unaware of this at the

time the Fax was sent because the other Managers had kept Margaret Jones in the dark regarding the progress of the Divestiture Strategy. Therefore, they claim that their actions were taken in good faith and were not wrongful or improper. Furthermore, they contend that they cannot be held liable for disclosing the existence of the Juju Litigation because the fact that it existed was truthful information. This is an important point because, according to the Counterclaim Defendants, the Juju Litigation, not the Jones Litigation, was the proximate cause of the failure of the Lifescan transaction to close.

The Counterclaim Defendants argue that they cannot be held liable for tortiously interfering with the prospective sale of the Nebraska facility because they were not even aware that Soteria was seeking to sell that facility; therefore, according to the Counterclaim Defendants, their interference, if any, cannot be considered intentional. They also claim that their conduct cannot be considered improper, either, because it was very remote from the interference, if any, and there was no relation between the Joneses and Tenet. Moreover, the Counterclaim Defendants claim that the Counterclaim Plaintiffs, again, failed to prove that their actions—filing the Complaint, in this instance—proximately caused the prospective sale's failure to close. Instead, they argue, the Nebraska facility's declining financial performance was the true proximate cause.

Even if the Court were to conclude that the Counterclaim Defendants are liable for tortiously interfering with the prospective sales of the Lifescan and Nebraska facilities, the Counterclaim Defendants contend that the Counterclaim Plaintiffs have not proven, with competent evidence, that they suffered any damages.

In addition, the Defendants seek an award of attorneys' fees under the bad faith exception to the American Rule. They argue that the Counterclaim Defendants acted in bad faith by filing a frivolous suit containing claims based on allegations they knew to be false at the time of filing and by generally refusing to participate in the litigation process after having initiated the suit. In response, the Counterclaim Defendants contend that their claims had a good faith basis and that their unresponsiveness was due to changes in their lead counsel and Delaware counsel during the course of this litigation.

## V. ANALYSIS

### A. *Applicable Law*

The parties to this action and the conduct at issue span a number of states. As a result, the Court must first determine which state's law to apply when assessing the Counterclaim Plaintiffs' tortious interference claim.[117]

[117] The parties assumed that Delaware law applies to the tortious interference claim. The Counterclaim Defendants did not directly address the issue of which state's law should apply. The Counterclaim Plaintiffs briefly addressed this issue in a footnote where they stated that they

> Delaware courts utilize four factors when determining which state's law applies: 1) the place where the injury occurred, 2) the place where the conduct causing the injury occurred, 3) the domicil, residence, nationality, place of incorporation and place of business of the parties, and 4) the place where the relationship, if any, between the parties is centered. These contacts should be evaluated according to their relative importance with respect to the issue in each particular case. Although mere incorporation with the state is not necessarily the determinative factor, it is considered to be an important factor when determining which law to apply[.][118]

The Court's assessment of these factors leads to the conclusion that Delaware law applies to the Counterclaim Plaintiffs' tortious interference claim. Two of the five parties—a plurality—are Delaware entities: Soteria and Soteria Holdings. Soterion is an Indiana corporation; Bob Jones is a resident of Kentucky;[119] and Scott Jones is a resident of Texas.[120] The Fax was sent to Lifepoint by the Joneses' counsel at the Sydow firm from his office in Texas.[121] The Draft Complaint included in the Fax was the product of meetings between the Sydow firm and the Joneses that also occurred in Texas.[122] The Fax was sent to Lifepoint's office in Tennessee, and a copy of it was also mailed to Lifepoint's

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had "chosen to analyze their claims under Delaware law" and that "the laws of the several interested states 'all would produce the same decision no matter what state's law applied, [thus] there is no real conflict and a choice of law analysis would be superfluous.'" Opening Post-Trial Br. of Countercl. Pls. Soteria Investment Holdings, Inc., F/K/A Carousel-Soteria Inv. Holdings, Inc. and Soteria Imaging Servs., LLC ("Soteria Opening Br.") 7-8 n.4 (quoting *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *8 (Del. Ch. Jan. 29, 2010)).

[118] *Wavedivision Hldgs., LLC v. Highland Capital Mgmt. L.P.*, 2011 WL 5314507, at *9 (Del. Super. Oct. 31, 2011) (citation omitted), *aff'd*, 2012 WL 2928604 (Del. July, 19, 2012).

[119] JX 94 ("Bob Jones Dep.") 11.

[120] JX 95 ("Scott Jones Dep.") 7.

[121] *See* Tr. 227 (Sydow firm based in Houston, Texas).

[122] Tr. 490-92.

registered agent in Wilmington, Delaware.[123] The Complaint was filed with this Court, and it was originally comprised of Delaware law fiduciary duty and contract claims. Finally, and most importantly, the relationship between the parties is centered in Delaware. When Carousel and the Joneses decided to enter into a commercial relationship, the Joneses formed Soteria as the vehicle through which to conduct this relationship. Carousel, through Soteria Holdings, voluntarily invested in Soteria. This action involves the same parties that voluntarily chose a Delaware entity as the means to conduct their commercial relationship; indeed, that very entity is a party to this action, and the action, itself, is focused on the messy deterioration of that commercial relationship.

In this instance, the Court concludes that the factor with the greatest relative importance is the fourth, the place where the relationship between the parties was centered. That place is Delaware. The Court also notes that its decision to apply Delaware law is further supported by the facts that a plurality of the parties are Delaware entities and one of the allegedly harmful acts, the filing of the Complaint, took place in Delaware.

B. *Legal Standard*

To establish a tortious interference with a prospective business opportunity claim, the Counterclaim Plaintiffs must prove each of the following elements:

[123] *See* JX 50.

> (a) the reasonable probability of a business opportunity, (b) the intentional interference by defendant with that opportunity, (c) proximate causation, and (d) damages, all of which must be considered in light of a defendant's privilege to compete or protect his business interests in a fair and lawful manner.[124]

When assessing tortious interference claims, Delaware "follows the principles announced in the Restatement [(Second) of Torts]" (the "Restatement").[125]

C. *Reasonable Probability of a Business Opportunity*

To meet the reasonable probability of a business opportunity prong, a plaintiff "must identify a specific party who was prepared to enter into a business relationship but was dissuaded from doing so by the defendant and cannot rely on generalized allegations of harm."[126] Furthermore, "[t]o be reasonably probable, a business opportunity must be something more than a mere hope or the innate optimism of the salesman or a mere perception of a prospective business relationship."[127]

The Counterclaim Plaintiffs have met this standard with respect to the prospective sales of both the Lifescan facility and the Nebraska facility. In each case, the Counterclaim Plaintiffs identified a specific party which desired to purchase the facility at issue and had advanced sufficiently far in the sales process

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[124] *DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151, 1153 (Del. 1981) (internal quotation marks and citation omitted).
[125] *Turchi v. Salaman*, 1990 WL 186450, at *2 (Del. Ch. Nov. 26, 1990) (citation omitted).
[126] *Agilent Techs., Inc. v. Kirkland*, 2009 WL 119865, at *7 (Del. Ch. Jan. 20, 2009) (internal quotation marks and citation omitted).
[127] *Id.* (internal quotation marks and citations omitted).

that the opportunity to sell the facility to that party was much more than a "mere hope" or "mere perception of a prospective business relationship." Soteria executed letters of intent with both Lake Cumberland and Tenet. While not binding contracts—which, of course, are not required for a tortious interference with a prospective business opportunity claim—the letters of intent outlined the major terms of the contemplated transactions. Moreover, both Lake Cumberland and Tenet had performed extensive due diligence activities before the Counterclaim Defendants' allegedly wrongful actions became known to each.[128] These due diligence activities included site visits, verifying licenses, obtaining cash reconciliations and patient schedules, and, in the case of Tenet, even discussing employment terms with the Nebraska facility's employees. At the times that Lake Cumberland and Tenet each learned of the Counterclaim Defendants' actions, neither prospective purchaser had identified any business reasons for not proceeding with the transactions.[129] In sum, the Counterclaim Plaintiffs have proven that they had a reasonable probability of a business opportunity with regard

[128] Tr. 312-13 (discussing due diligence efforts undertaken by Tenet for the prospective Nebraska facility sale, including performing drug screening on the Nebraska facility's employees, and informing one employee that he or she would not be employed after the acquisition); Tr. 356-58 (discussing due diligence efforts undertaken by Lake Cumberland for the prospective Lifescan facility sale, including requesting patient schedules in the month of November 2010, indicating that Lake Cumberland anticipated being responsible for patient scheduling soon); Smith Dep. 25-33 (discussing Tenet's due diligence activities).

[129] *See* Smith Dep. 33-34; Tr. 357-58.

to the prospective sales of the Lifescan and Nebraska facilities to Lakes Cumberland and Tenet, respectively.

D. *Intentional Interference*

1. Legal Standard

To meet the intentional interference prong, a plaintiff must prove that the defendant's interference with a business opportunity was intentional and wrongful or improper.[130] The interferer must also have "knowledge of the relationship or expectancy."[131] When considering whether a defendant's actions were improper, the Court must assess these actions "in light of a defendant's privilege to compete or protect [his] business interests in a fair and lawful manner."[132] The Restatement sets forth the following factors for the Court to review[133] in determining if intentional interference is improper or without justification:

> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes
> (d) the interests sought to be advanced by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

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[130] *Agilent Techs.*, 2009 WL 119865, at *8.
[131] *In re Frederick's of Hollywood, Inc.*, 1998 WL 398244, at *5 (Del. Ch. July 9, 1998), *aff'd sub nom., Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001); *Dionisi v. DeCampli*, 1995 WL 398536, at *12 (Del. Ch. June 28, 1995), *amended by*, 1996 WL 39680 (Del. Ch. Jan. 23, 1996); *Bowl-Mor Co., Inc. v. Brunswick Corp.*, 297 A.2d 61, 65 (Del. Ch. 1972), *appeal dismissed*, 297 A.2d 67 (Del. 1972). *See also* Restatement (Second) of Torts § 766 cmt. i (1979) (knowledge of the contract required for liability under intentional interference with the performance of a contract).
[132] *DeBonaventura*, 428 A.2d at 1153 (internal quotation marks and citation omitted).
[133] *See Wavedivision Hldgs.*, 2012 WL 2928604, at *4.

(f) the proximity or remoteness of the actor's conduct to the interference and
(g) the relations between the parties.[134]

The Restatement specifically addresses the circumstances under which threatened or filed litigation can constitute improper interference.[135] According to the Restatement, threatened or filed litigation is wrongful "if the actor has no belief in the merit of the litigation or if, though having some belief in its merit, he nevertheless institutes or threatens to institute the litigation in bad faith, intending only to harass the third parties and not to bring his claim to definitive adjudication."[136] The Restatement goes on to explain that a "typical example of this situation is the case in which the actor threatens [bringing suit] and either does not believe in the merit of his claim or is determined not to risk an unfavorable judgment and to rely for protection upon the force of his threats and harassment."[137]

2. The Lifescan Facility

With regard to the prospective sale of the Lifescan facility, the Counterclaim Plaintiffs allege that the Joneses' transmission of the Fax was the interfering act. The Fax consisted of the Letter, a copy of the Draft Complaint, and a copy of the Juju Complaint. To begin, the act of informing Lifepoint of the existence of the

[134] Restatement (Second) of Torts § 767 (1979).
[135] Restatement (Second) of Torts § 767 cmt. c (1979).
[136] *Id.*
[137] *Id.*

Juju Litigation cannot be considered improper because, in doing so, the Joneses merely disclosed a truth. Under § 772 of the Restatement, "[o]ne who intentionally causes a third person not to . . . enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person . . . truthful information[.]"[138] It does not matter, according

[138] Moreover, in *Agilent Technologies*, the Court cited a case involving the disclosure of ongoing litigation to a third party in support of the proposition that "truthful statements are not actionable." *Agilent Techs*, 2009 WL 119865, at *8 n.40. The Counterclaim Plaintiffs argue that the Counterclaim Defendants' disclosure of the existence of the Juju Litigation is not shielded by the "truthful communication privilege" because that disclosure cannot be "separated from the falsehoods in the cover letter and [the Draft Complaint] that [were also included in the Fax.]" Post-Trial Reply Br. of Countercl. Pls. Soteria Investment Holdings, Inc., F/K/A Carousel-Soteria Investment Holdings, Inc. and Soteria Imaging Services, LLC ("Soteria Reply Br.") 14 n.8. The Court rejects the premise of this argument. The Draft Complaint and the Juju Complaint were completely separate documents, were related to completely separate legal actions, and were attached to the Fax as separate exhibits. Although Lifepoint may have had a slightly stronger reaction to the Fax because it spoke of two legal actions instead of merely disclosing the existence of the Juju Litigation, the evidence shows that Lake Cumberland and Lifepoint assessed the Jones Litigation and the Juju Litigation separately. *See* Hutcheson Dep. 87-88 (stating that in November 2010 Lake Cumberland was more concerned about the Juju Litigation than the Jones Litigation because the Juju Litigation had been filed and the Jones Litigation had not been filed). Simply put, not only was it possible for someone to evaluate information about the Jones Litigation separately from information about the Juju Litigation, but Lake Cumberland actually did so. The Counterclaim Plaintiffs make a broader argument that the truthful communication privilege does not apply to the Counterclaim Defendants' disclosure of the existence of the Juju Litigation because this disclosure was part of a letter that also contained false statements. In support of the proposition that the truthful communication privilege does not apply when a communication contains both truthful and false statements, the Counterclaim Plaintiffs cite *Feldman & Pinto P.C. v. Seithel*, 2011 WL 6758460, at *10-12 (E.D. Pa. Dec. 22, 2011). That case involved an attorney, Seithel, who was fired from a law firm and subsequently started her own practice. After being fired, Seithel sent letters to some of the clients of her former firm. The purpose of the letters was to entice the clients to bring their cases to her. The letters contained numerous false or misleading representations, including representations related to why she left her former firm and the amount and types of experience she had. *Id.* at *9. One representation that was true with respect to *some* letter recipients was that Seithel was the person who had primary responsibility for the recipient's case. *Id.* at *10. The District Court ultimately concluded that the truthful communication privilege did not apply to the letters. *Id.* at *12. *Feldman* is distinguishable from this case because, in *Feldman*, the truthful statement *could not* be separated from the many false ones. In *Feldman*, there was one true statement swimming in a

to the Restatement, whether this information was requested or if the information is presented in such a way that the third-party receiving it immediately recognizes it as a reason to refuse to enter into a contract.[139] With regard to the Juju Litigation, the Letter merely stated that the Juju Complaint, which was included as part of the Fax, had already been filed. The Juju Litigation was ongoing at the time the Fax was sent, and it was still ongoing at the time of trial. Indeed, Lake Cumberland had already requested that Soteria provide it with information regarding pending or threatened lawsuits. Because the existence of the Juju Litigation was a truth at the time the Fax was sent, its disclosure to Lifepoint by the Joneses was not improper.

On the other hand, the Joneses did commit an act of improper intentional interference by faxing copies of the Draft Complaint and the portion of the Letter describing the Draft Complaint to Lifepoint's CEO. There can be no serious debate about whether Lifepoint's receipt of the Draft Complaint interfered with Soteria's prospective sale of the Lifescan facility to Lake Cumberland: Hutcheson testified unequivocally that the Jones Litigation, alone, would have prevented Lake

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sea of false or misleading statements. A letter recipient deciding if she wanted to bring her case to Seithel would likely have considered many of the statements in the letter. In this case, on the other hand, the evidence shows that Lake Cumberland viewed the Jones Litigation and the Juju Litigation as two separate factors weighing against its purchase of the Lifescan facility. *See* Hutcheson Dep. 83 (the Juju Litigation, alone, would have dissuaded Lake Cumberland from purchasing the Lifescan facility); *id.* at 88 (same, with regard to the Jones Litigation).

[139] Restatement (Second) of Torts § 772 cmt. b (1979).

Cumberland from closing on the Lifescan facility.[140] The slightly more difficult question is whether this interference was improper.

The Court will assess this act as one of threatened litigation. While the Draft Complaint did not name Lifepoint or Lake Cumberland as a defendant, the message was clear: if you buy the Lifescan facility, you are buying into a lawsuit and run the risk of having the transaction unwound. The Counterclaim Defendants argue that, at the time the Joneses sent the Fax, they had a good faith basis for all of the claims contained in the Draft Complaint; therefore, according to the Counterclaim Defendants, sending the Draft Complaint to Lifepoint cannot be considered improper.[141] In support of their good faith argument, the Counterclaim Defendants explain that the Joneses believed at the time that the Fax was sent that

[140] Hutcheson Dep. 88.

[141] *See Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 160 (Del. Ch. 1985) (filing a lawsuit is not improper when the claims are asserted in good faith). The Counterclaim Defendants also argue, citing *Turchi*, that, in order to prevail on a tortious interference claim in which the alleged interfering act is a threat of litigation, the Counterclaim Plaintiffs must prove the elements of a malicious prosecution claim. Although the Court in *Turchi* used the malicious prosecution elements to determine whether a *filed* lawsuit constituted improper interference, such an approach is not sensible where the alleged interfering act is *threatened* litigation. One of the elements of a malicious prosecution claim is a showing that "the proceedings have terminated in favor of the person against whom they are brought." Restatement (Second) of Torts § 674 (1979). Where the alleged interfering act is threatened litigation that is never filed, there are no proceedings, and, therefore, this element of the test would be impossible to prove. Although a suit was eventually filed in this case, with regard to the prospective sale of the Lifescan facility, the focus is on the Joneses' threat of litigation. The Court concludes that the proper test for assessing whether filed or threatened litigation is improper is the test set forth in comment c of § 767 of the Restatement. This test requires proof that either the interferer had no belief in the merit of the suit, or, while having some belief in its merit, the interferer institutes or threatens to institute the litigation in bad faith, intending only to harass the third-parties and not to bring his claim to definitive adjudication. Restatement (Second) of Torts § 767 cmt. c (1979).

the Lifescan facility would be sold on November 1.[142] As such, they believed that it was being sold without proper Board authorization, since, at the time the Fax was sent, the Board had not yet approved the terms of a sale of the Lifescan facility.[143] The source of this incorrect information is not clear.[144] The Counterclaim Defendants also contend that certain allegations challenged by the Counterclaim Plaintiffs were literally true at the time the Fax was sent. For example, the Draft Complaint alleged: "No sale of any imaging center has been raised or voted on at any Board of Managers meeting."[145] This was true at the time, the Counterclaim Defendants argue, because the Board did not finally approve any sales until the November 9 Board meeting.

The Counterclaim Plaintiffs argue that the act of faxing the Draft Complaint cannot be considered to have been performed in good faith because, at the time the Joneses sent the Fax, they knew that many of its key allegations were false. They point to the fact that Margaret Jones attended multiple Board meetings where the Divestiture Strategy was discussed and where votes were taken to move forward with the marketing of certain facilities. The Joneses also admitted to reviewing

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[142] Tr. 212.
[143] *See id.*
[144] Perhaps it came from someone at Lifescan. Scott Jones may have heard from his father. Tr. 191, 199. The Counterclaim Defendants have not allocated much effort to clarifying how they may have arrived at this understanding to justify their actions. Their actions, if not intentional and wrongful, were certainly reckless. Moreover, the Counterclaim Defendants made no effort to cure the harm they caused when they learned (assuming that they did not know all along) that no procedural shenanigans were afoot.
[145] Draft Compl. ¶ 21.

Board meeting minutes as part of the process of drafting the Draft Complaint,[146] and the Counterclaim Plaintiffs contend that these minutes proved that the Board was conducting the sales process in an appropriate manner. Moreover, the Counterclaim Plaintiffs argue, Scott Jones admitted that the very first sentence of the Letter, which stated that the Draft Complaint was being filed in Delaware on November 1, 2010, was false at the time the Fax was sent.[147]

Viewed in this manner, whether sending the Draft Complaint was improper or not depends upon what the Joneses knew and when they knew it. Although the Court harbors serious doubts about whether the Joneses had a good faith belief in the key allegations of the Draft Complaint at the time it was faxed, the Court does not need to resolve this issue because the record and the Court's experience overseeing this case persuade the Court that another of the Counterclaim Plaintiffs' arguments carries the day: their argument that the Counterclaim Defendants never intended to bring their claims to definitive adjudication.[148] Therefore, even if the Counterclaim Defendants had some belief in the merit of the Draft Complaint, using it as a means to interfere with the prospective sale of the Lifescan facility was still improper. The falsehood with which the Joneses began the Letter reveals that they sought to use the Draft Complaint as a means to interfere with the

[146] Tr. 207-08, 490-91; Scott Jones Dep. 108-09, 114; Bob Jones Dep. 95.
[147] Tr. 218-19.
[148] Soteria Opening Br. 15.

prospective sale of the Lifescan facility without having their claims—which also turned out to be false—adjudicated by this Court. In short, they sought the intimidating aura of a filed complaint without actually filing it. The fact that they did eventually file the Complaint *three months* after the date they indicated to Lifepoint that it would be filed does little to prove that they intended to bring their claims to definitive adjudication. This is because, by the time the Complaint was filed, the Joneses knew that key allegations in the Complaint were demonstrably false;[149] there would be little point in seeking to bring such claims to definitive adjudication. Instead, the filing of the Complaint appears to have been just another act intended to interfere with the Divestiture Strategy.[150] It comes as little surprise then that, after filing the Complaint and opposing the Defendants' motion to expedite, the Counterclaim Defendants essentially refused to participate in this litigation for a period of time.[151] Eventually, the Counterclaim Defendants' claims

[149] After Scott Jones attended the November 9, 2010 Board meeting at which the Board approved the sale of the Lifescan facility to Lake Cumberland and approved the sale of another imaging center, he knew that the central allegation of wrongdoing in the Complaint—that Soteria was selling facilities without appropriate Board authorization—was false. After the November 9 Board meeting, Bob Jones was informed by Scott Jones that the Board voted to approve the sales of these two facilities; he was also aware that there was a quorum at this Board meeting. Tr. 501-05. Therefore, Bob Jones also knew that the central allegations of the Complaint were false. Furthermore, Scott Jones directly admitted that at the time the Complaint was filed he knew some of the allegations were false. *See* Tr. 261-63.

[150] Although the Counterclaim Defendants' objective in interfering with the Divestiture Strategy is not entirely clear, the best inference to be drawn from the facts is that they hoped to use their control over the prospective sale of the Lifescan facility, which was obtained through their interfering acts, as leverage to receive early payment of the Sellers' Notes.

[151] The Counterclaim Defendants' original Delaware counsel withdrew because they no longer were receiving any response from the Counterclaim Defendants' primary counsel, the Sydow

were dismissed with prejudice by agreement of the parties.[152] In sum, the Court finds that the Counterclaim Defendants never intended to bring their claims to definitive adjudication,[153] and, as a result, the act of sending the Draft Complaint to Lifepoint was improper.

3. The Nebraska Facility

The Counterclaim Plaintiffs contend that the filing of the Complaint was the improper act that interfered with the prospective sale of the Nebraska facility to Tenet. This act undoubtedly interfered with that prospective sale: Smith testified that Tenet would not close on the sale while the Jones Litigation was ongoing.[154] The Counterclaim Defendants argue that they cannot be held liable for tortiously interfering with the sale of the Nebraska facility because they were not even aware that Soteria had entered into a letter of intent with Tenet at the time they filed the Complaint. In support of this contention, they cite a portion of Scott Jones's trial testimony in which he stated that he could not specifically recall whether or not,

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firm, when they tried to communicate with them. *See* Mot. to Withdraw ¶ 2 (filed by Morris, Nichols, Arsht & Tunnel ("Morris Nichols") on April 11, 2011); Mot. to Withdraw Hr'g Tr. 3-4. Although Morris Nichols communicated with the Counterclaim Defendants through the Sydow firm, the Court is not persuaded that, as Scott Jones testified, the complete breakdown in communication that occurred was wholly the fault of the Sydow firm without some encouragement or acquiesce by the Counterclaim Defendants. *See* Mot. to Withdraw ¶ 1 (Morris Nichols communicated with the Counterclaim Defendants through the Sydow firm); Tr. 274-77 (Scott Jones testifying that he was unaware of the difficulty Morris Nichols had communicating with the Sydow firm).

[152] May 20 Order.

[153] The Court is not persuaded by Scott Jones's testimony to the contrary. *See* Tr. 278 (Scott Jones testifying that he expected the claims to go to trial).

[154] Smith Dep. 41.

before the Complaint was filed on February 1, 2011, Margaret Jones informed him that Soteria had received a letter of intent from Tenet, a fact which was discussed at the January 18, 2011 Board meeting.[155] This indefinite testimony does not prove that the Joneses were not aware that Soteria was pursuing a sale of the Nebraska facility to Tenet.

But, of course, it is the Counterclaim Plaintiffs' burden to provide proof of this element of their claim,[156] and they have failed to do so. Although the Counterclaim Plaintiffs proved that Margaret Jones attended the January 18 Board meeting at which the Nebraska LOI was discussed,[157] they presented no evidence that Margaret Jones informed either of the other Joneses of this development. Nor did the Counterclaim Plaintiffs present any other evidence that shows that the Counterclaim Defendants were aware of the relationship between Soteria and

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[155] *See* Pls./Countercl. Defs.' Post-Trial Opening Br. 33 (citing Tr. 265 (Scott Jones's testimony)); JX 67 (January 18, 2011 Board meeting minutes). The Counterclaim Defendants also cited another portion of Scott Jones's trial testimony in support of this contention, but the cited testimony merely recites that Scott Jones did not directly communicate with Tenet; it did not address the issue of when the Joneses learned that Soteria was trying to sell the Nebraska facility. *See* Tr. 288.

[156] The Counterclaim Plaintiffs argue that they do not need to prove that the Joneses knew that Soteria was marketing the Nebraska facility to Tenet. Instead, they contend that it is sufficient if they show that the Joneses knew, generally, that Soteria was trying to sell the Nebraska facility and that the Joneses sought to block the sales of any and all imaging centers. The Counterclaim Plaintiffs cite no authority in support of this argument, and it plainly runs counter to the oft-cited requirement that the interferer have "knowledge of the relationship or expectancy." *See supra* n.131. The cases the Counterclaim Plaintiffs cited in support of their argument that an interferer need not directly contact the third-party are inapposite with regard to the question of whether the interferer must have knowledge of the relationship or expectancy. *See Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982); *Powers v. Leno*, 509 N.E.2d 46 (Mass. App. Ct. 1987).

[157] JX 67.

Tenet before filing the Complaint. As such, the Counterclaim Plaintiffs have failed to carry their burden to prove that the Counterclaim Defendants were aware of the relationship or expectancy with which they are alleged to have interfered intentionally.

E. *Proximate Cause*

Delaware recognizes the traditional "but for" definition of proximate causation.[158] Under the "but for" test, "[t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it."[159] Put another way, "a proximate cause is one which in natural and continuous sequence, *unbroken by any efficient intervening cause,* produces the injury and without which the result would not have occurred."[160] An intervening cause only breaks the chain of causation when it is a superseding cause, an act or event, itself a proximate cause of the injury, that could not have been anticipated or reasonably foreseen by the original tortfeasor. "[The Supreme] Court has long recognized that there may be more than one proximate cause of an injury."[161]

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[158] *Duphily v. Del. Elec. Coop., Inc.*, 662 A.2d 821, 828 (Del. 1995).
[159] *Culver v. Bennet*, 588 A.2d 1094, 1097 (Del. 1991) (quoting W. Keeton, *Prosser and Keeton on The Law of Torts* 266 (5th ed. 1984)).
[160] *Duphily*, 662 A.2d at 829 (internal quotation marks and citation omitted) (emphasis in original).
[161] *Id.*

Our understanding of proximate cause evolved from circumstances in which a tortfeasor caused something to happen that harmed the victim. The harm might have had more than one possible cause. A supervening cause might be considered the "real cause" if it took over control from yet another cause that might otherwise eventually have resulted in the same (or similar) harm. Here, it is not so much what happened to the victim; it is what did not happen: closing on the sale of the Lifescan facility.

The Juju Litigation and the Fax (and the related Jones Litigation) eventually would each have persuaded Lake Cumberland not to purchase the Lifescan facility. One cannot say, however, that "but for" the Fax Lake Cumberland would have gone through with the acquisition. The Juju Litigation predated the Fax. Lake Cumberland learned of the Juju Litigation at the same time it received the Fax. The Counterclaim Plaintiffs should have already disclosed the Juju Litigation by that time; they were in the process of determining how to perform that obligation.[162] The important point is that regardless of what the Counterclaim Defendants may have done, the Counterclaim Plaintiffs were—out of necessity—going to notify Lake Cumberland about the Juju Litigation and, based on testimony

[162] The Counterclaim Plaintiffs also blame the Joneses for preempting their plan to disclose the litigation to Lake Cumberland. The Joneses "preempted" only in the sense that they disclosed the Juju Litigation before the Counterclaim Plaintiffs did. The Counterclaim Plaintiffs claim to have planned the disclosure in the "ordinary course," but, by the time the Fax was sent, they had waited so long that trying to describe their dilatory conduct as in the "ordinary course" is truly a reach.

of the representative of Lake Cumberland, that would have put the transaction on hold. As of trial, even with no lurking residual specter from the Fax (or the Jones Litigation), Lake Cumberland still had not purchased the Lifescan facility.

The difficult question posed by this litigation is how to address two causes, each of which would have achieved the objective of the interfering parties. If there are two sufficient explanations—one innocent and one wrongful—for why a transaction did not close, is the wrongdoer to be held liable for a transaction that most likely would not have closed even if the wrongdoer had behaved himself? In other words, does the innocent and sufficient explanation relieve the wrongdoer from potential liability, or should there be some effort at apportioning the relative contributions of each of the two causes?[163]

The Counterclaim Defendants' filing of a complaint laden with falsities was part of an ill-conceived strategy intended to interfere with Soteria's sales efforts. That strategy, however, was so ill-conceived that another cause—the separate Juju Litigation—prevented the closing from occurring.[164] Because the Court cannot

[163] The Counterclaim Plaintiffs are correct that "Lake Cumberland's refusal to close the Lifescan sale is a single decision that cannot be divided in any non-arbitrary way." Soteria Opening Br. 22. Moreover, no party undertook to offer a cogent explanation of how, or why, the Court should engage in such a speculative effort.

[164] The Fax adversely affected the relationship that Soteria had with Lake Cumberland. Soteria, however, is not without blame; it had delayed in informing Lake Cumberland about the Juju Litigation. Lake Cumberland's concerns were significantly related to the Juju Litigation, and what the Joneses said about the Juju Litigation was substantially accurate. It was not the deterioration of the working relationship between Lake Cumberland and Soteria that kept the Lifescan transaction from closing; it was the Juju Litigation.

conclude that the sale of the Lifescan facility would have occurred but for the actions of the Counterclaim Defendants, the Counterclaim Plaintiffs have not met their burden of demonstrating the proximate cause component of a tortious interference claim.[165] Ultimately, the Counterclaim Plaintiffs had fundamental problems—unrelated to the Counterclaim Defendants. The Counterclaim Defendants' conduct—however badly intended—cannot be blamed for the refusal of the prospective purchaser to complete the transaction.[166]

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[165] The Counterclaim Plaintiffs try to salvage their claim by citing a Pennsylvania decision, *Neal v. Bavarian Motors, Inc.*, 882 A.2d 1022, 1027 (Pa. Super. 2005), which employed the "substantial factor" test when there were multiple potential causes of tortious harm. Post-Trial Reply Br. of Countercl. Pls. Soteria Investment Holdings, Inc. f/k/a Carousel-Soteria Inv. Holdings, Inc. and Soteria Imaging Servs., LLC 16. Delaware has rejected the "substantial factor" approach. *See Culver*, 588 A.2d at 1098 (rejecting substantial factor analysis in the comparative negligence context and continuing to adhere to the "but for" rule of proximate cause).

[166] The conclusion that the Counterclaim Plaintiffs failed to prove that the Counterclaim Defendants were aware of the Nebraska LOI is not without doubt. *See supra* text accompanying notes 156-57. First, the possibility of a sale of the Nebraska facility might be encompassed within a broader understanding that many Soteria facilities were for sale and the filing of the complaint would impact any potential sale. Second, Scott Jones's testimony regarding his lack of knowledge of the Nebraska LOI before the filing of the Complaint is somewhat suspect. His answers in the nature of "unsure" or "don't know" (*see, e.g.*, Tr. 270-71) carry at least an aura of equivocation. Finally, even though there is no direct evidence, it would not be all that difficult to infer that Margaret Jones told her husband and her son about the potential sale of the Nebraska facility.

Even if the Counterclaim Defendants held the requisite knowledge and intent regarding the Nebraska LOI when the Complaint was filed, there remains, nonetheless, a serious problem with the Counterclaim Plaintiffs' proof that the Counterclaim Defendants were the proximate cause of any damages. Tenet eventually chose not to purchase the Nebraska facility because of declining financial data. The Counterclaim Plaintiffs are, in essence, seeking to base liability on the delay resulting from the Counterclaim Defendants' filing of the Complaint, which may have afforded Tenet the opportunity to realize that it had offered a price well in excess of the value of the Nebraska facility. The Counterclaim Plaintiffs are largely correct that before Soteria delivered the Complaint to Tenet, the sale of the Nebraska facility was on course and both Soteria and Tenet reasonably expected it to close. What the Counterclaim Plaintiffs tend to overlook or minimize are the deteriorating financial conditions of the Nebraska facility's operations. The

Accordingly, the Counterclaim Plaintiffs have failed to prove that Lake Cumberland's decision not to purchase the Lifescan facility was proximately caused by the Counterclaim Defendants. Without proof of that element, their interference claim fails with respect to the Lifescan facility.

F. *Attorneys' Fees*

The Defendants seek an award of attorneys' fees and expenses for all of their costs incurred before the May 24, 2011 trial date of the claims abandoned by the Joneses and Soterion. The Defendants argue that the bad faith exception to the American Rule applies in this case because, among other reasons, the Joneses filed a complaint the core allegations of which they knew were false. Only rarely do

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Counterclaim Plaintiffs are essentially reduced to arguing that, but for the Joneses, the transaction would have closed before Tenet found out about the worsening metrics. Burklund testified that it was "highly likely that [the sale] would close but for the Joneses." (Tr. 313). Burklund, however, did not represent or work for Tenet; he was an advisor to Soteria and completing the sale was the outcome he was interested in achieving. Soteria comes close (Soteria Opening Br. 24) to conceding that the Nebraska facility's financial performance would have prevented Tenet from closing on its acquisition if the transaction could not have been closed before the numbers demonstrating the deteriorating conditions became available. Soteria argues that the Joneses actions delayed the closing. Yet, Tenet had a reputation for not moving quickly and this transaction had been delayed at least three times before. Soteria, in essence, asks this Court to order the Joneses to give it the benefit of its bargain with Tenet, even though the bargain with Tenet was premised upon a lack of understanding about the deteriorating performance of the Nebraska facility. Tenet clearly was not in any rush to close. It is also reasonable to infer that Tenet would have waited for the next round of financials and, with those results, the likelihood that it would have completed its purchase of the Nebraska facility would have decreased materially. Again, although not free from doubt, the better inference is that, even without the interference posed by the Complaint, Tenet would not have purchased the Nebraska facility because of the intervening delivery of the deteriorating financial data. This alternate conclusion that the Counterclaim Defendants did not proximately cause the loss of the sale of the Nebraska facility is consistent with the Court's earlier resolution of this claim on different grounds.

Delaware courts deviate from the American Rule.[167] A litigant may be awarded attorneys' fees under the bad faith exception when the "losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[168] Courts have found bad faith conduct where parties have unnecessarily prolonged or delayed litigation, falsified records, knowingly asserted frivolous claims, or misled the court.[169] The evidentiary burden of producing clear evidence of bad faith conduct is on the party seeking an award.[170] "Generally, a party acting merely under an incorrect perception of its legal rights does not engage in bad-faith conduct; rather, the party's conduct must demonstrate an abuse of the judicial process and clearly evidence bad faith."[171]

This is one of the rare instances where an award of attorneys' fees and expenses is undoubtedly warranted. By filing a lawsuit the core allegations of which they knew to be false at the time they filed it, the Joneses and Soterion behaved in a manner that exemplifies the sort of bad faith conduct deserving of an award of attorneys' fees.[172] For this reason, the Court grants the Defendants an award of all of their attorneys' fees, costs, and expenses incurred before May 24,

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[167] *LeCrenier v. Cent. Oil Asphalt Corp.*, 2010 WL 5449838, at *5 (Del. Ch. Dec. 22, 2010).
[168] *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005) (internal quotation marks and citation omitted).
[169] *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005).
[170] *LeCrenier*, 2010 WL 5449838, at *5.
[171] *Id.*
[172] The Court rejects the Counterclaim Defendants' efforts to show a good faith basis for their actions or to blame it on a change of counsel.

2011, except those fees, costs, and expenses associated with the Counterclaim Plaintiffs' pursuit of their tortious interference claim.[173]

## VI. CONCLUSION

For the foregoing reasons, the Court concludes that the Counterclaim Plaintiffs have not prevailed with regard to their tortious interference claims but awards them all of their reasonable attorneys' fees and expenses incurred before May 24, 2011, except for those fees and expenses associated with their pursuit of their tortious interference claim. Costs are assessed against the Counterclaim Defendants.

Counsel are requested to confer and to submit an implementing form of order.

[173] After the Joneses abandoned their claims in this proceeding, their conduct in this proceeding was not in bad faith or otherwise abusive, and there is no justification for abandoning the American Rule for litigation expenses incurred after the dismissal of their claims.