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Case No. 2022-0970-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN C. TATUM III and JCT CAPITAL LLC,

Plaintiffs and Counterclaim Defendants,

v.

FAIRSTEAD AFFORDABLE LLC, FCM AFFORDABLE LLC, JD2 AFFORDABLE LLC, STUART FELDMAN, JEFFREY GOLDBERG, FSC EF&F LLC, FAIRSTEAD CAPITAL LLC, FAIRSTEAD CAPITAL MANAGEMENT LLC, JD2 REALTY MANAGEMENT LLC, FA DC LLC, FSC REALTY MANAGEMENT LLC, and SDF FUNDING LLC,

Defendants and Counterclaim Plaintiffs.

C.A. No. 2022-0970-JTL

ORDER GRANTING PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

1. Plaintiffs John C. Tatum and his affiliate, JCT Capital, LLC, seek an award of expenses (including attorneys' fees) in the amount of $4,713,484.71.

2. Tatum relies on a provision in his employment agreement, which states: "In any action arising out of this Agreement the prevailing party shall be entitled to an award of its reasonable legal fees." JX 80 (the "Employment Agreement"). New York law governs the Employment Agreement, but the parties have not identified any material differences between New York and Delaware law. They rely on authorities from both jurisdictions, as does this ruling.

3. The first question is whether this case is an "action arising out of" the Employment Agreement. It is.

a. When a contract is the source of the conduct or events that caused the litigation, the dispute "arises out of" that agreement for purposes of a fee-shifting provision in the contract. *See Phillips v. Audio Active Ltd.*, 494 F.3d 378, 389 (2d Cir. 2007). If claims and counterclaims are inextricably interrelated and logically rise and fall together, then a prevailing-party provision covers the field. *See Diamond D Enter. USA v. Steinsvaag*, 979 F.2d 14, 18 (2d Cir. 1992); *PaySys Int'l v. Atos* Se, 2019 WL 2051812, at *5–8 (S.D.N.Y. May 9, 2019); *Edgewater Growth Cp. P'rs LP v. H.I.G. Cap.*, 68 A.3d 197, 241 (Del. Ch. 2013).

b. The Employment Agreement is the source of this dispute. The defendants (collectively "Fairstead") invoked the Employment Agreement when purporting to terminate Tatum retroactively for cause and to forfeit his member interests in two LLCs. *See* JX 1140. That decision served as the catalyst for this litigation.

c. Fairstead points out that Tatum did not assert any claims under his Employment Agreement. True, because Tatum did not have meaningful rights under the Employment Agreement. Tatum wanted the value of his units, and the LLC operating agreements governed those issues. He also wanted other amounts he had been promised. It was Fairstead that invoked the Employment Agreement as the basis for refusing to pay Tatum anything, and Fairstead that asserted counterclaims grounded in the Employment Agreement. Fairstead also used the LLC operating

agreements' definition of "Cause" to litigate Tatum's obligations under the Employment Agreement. The contractual nexus is therefore satisfied.

4. The next question is whether Tatum was the prevailing party. He was.

a. A court identifies the prevailing party by examining the litigation holistically and assessing whether a party achieved its primary litigation objective. *Sykes v. RFD Third Ave. I Assocs., LLC*, 833 N.Y.S.2d 76, 77–78 (App. Div. 2007). A party can prevail by achieving substantial relief on the core issues in the dispute. *Bd. of Managers of 55 Walker St. Condo. v. Walker St.*, 774 N.Y.S.2d 701, 701 (App. Div. 2004); *accord Duane Reade v. 405 Lexington, LLC*, 798 N.Y.S.2d 393, 394 (App. Div. 2005); *see Excelsior 57th Corp. v. Winters*, 641 N.Y.S.2d 675, 675 (App. Div. 1996).

b. Tatum filed suit to preserve his ownership interests in the LLCs, recover their value, and obtain other amounts he had been promised. To get to that outcome, he had to defeat Fairstead's counterclaims and defenses. The court issued a series of rulings in this case culminating in a post-trial decision. *Tatum v. Fairstead Affordable LLC*, 347 A.3d 1221 (Del. Ch. 2025). Tatum prevailed on those core issues.

c. Fairstead points out that Tatum asked for a higher measure of damages than he received. Throughout the case, Fairstead took aggressive positions, starting with Tatum's retroactive termination for cause. Tatum countered with similarly aggressive positions. For example, Tatum initially sought the valuation measure he obtained at trial, but when Fairstead claimed he was entitled to zero, Tatum sought a higher valuation. That pattern repeated itself throughout the

litigation. In each case, Fairstead was the aggressor; Tatum the responder. Tatum should not be penalized for fighting fire with fire.

d. Fairstead also points out that it prevailed on one affirmative claim under the Employment Agreement. Tatum had conceded from the outset that he downloaded information in violation of the Employment Agreement. That was not a big win for Fairstead. If anything, Fairstead lost in its effort to depict that act as a major violation warranting a significant remedy.

e. Tatum prevailed.

5. The next question is the amount of a reasonable award. Tatum is entitled to the full amount sought.

a. "Absent any qualifying language that fees are to be awarded claim-by-claim or on some other partial basis, a contractual provision entitling the prevailing party to fees will usually be applied in an all-or-nothing manner." *W. Willow-Bay Ct., LLC v. Robino-Bay Ct. Plaza, LLC*, 2009 WL 458779, at *8 (Del. Ch. Feb. 23, 2009). The provision on which Tatum relies does not call for a claim-by-claim or issue-by-issue allocation. It contemplates an action-wide assessment and fee recovery. *See Ozbakir v. Scott*, 906 F. Supp. 2d 188, 192–-93 (W.D.N.Y. 2012) (interpreting similar provision under New York law). A court can also award an amount for the entire litigation where overlapping claims preclude meaningful segregation. *See Adstra, LLC v. Kinesso, LLC*, 2025 WL 1070034, at *5 (S.D.N.Y. Apr. 9, 2025)

b. A Delaware court evaluates reasonableness by considering "the factors set forth in the Delaware Lawyers' Rules of Professional Conduct," including: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent." *Mahani v. EDIX Media Gp., Inc.*, 935 A.2d 242, 245–46 (Del. 2007).

c. Under these factors, the total amount Tatum seeks is facially reasonable. The case involved extensive discovery, complex financial and contractual analysis, a five-day trial, and extensive post-trial briefing and argument. The case was litigated as a whole. It is not reasonably possible to segregate out amounts incurred for specific issues or claims. An overall fee award in the full amount sought is therefore warranted.

6. Fairstead object to certain amounts that Tatum's Delaware counsel billed. The court will not second-guess counsel's judgment.

a. Determining the reasonableness of the amounts sought "does not require that this Court examine individually each time entry and disbursement."

Aveta Inc. v. Bengoa, 2010 WL 3221823, at *6 (Del. Ch. Aug. 13, 2010); *accord Blank Rome, LLP v. Vendel*, 2003 WL 21801179, at *8–10 (Del. Ch. Aug. 5, 2003) (rejecting alleged requirement of line-item review). If a party cannot be certain that it will be able to shift expenses at the time the expenses are incurred, the prospect that the party will bear its own expenses provides "sufficient incentive to monitor its counsel's work and ensure that counsel [does] not engage in excessive or unnecessary efforts." *Aveta*, 2010 WL 3221823, at *6; *accord Weil v. VEREIT Operating P'ship, L.P.*, 2018 WL 834428, at *11 (Del. Ch. Feb. 13, 2018); *see Arbitrium (Cayman Islands) Handels AG v. Johnston*, 1998 WL 155550, at *2 (Del. Ch. Mar. 30, 1998) (considering, when evaluating reasonableness, that client faced prospect of bearing full cost of litigation), *aff'd*, 720 A.2d 542 (Del. 1998).

b. "Determining reasonableness of amounts sought also does not require the Court to assess independently whether counsel appropriately pursued and charged for a particular motion, line of argument, area of discovery, or other litigation tactic." *Weil*, 2018 WL 834428, at *12. "For a Court to second-guess, on a hindsight basis, an attorney's judgment . . . is hazardous and should whenever possible be avoided." *Arbitrium*, 1998 WL 155550, at *4. A party's expenses are reasonable if they were "actually paid or incurred[,] . . . were . . . thought prudent and appropriate in the good faith professional judgment of competent counsel[,] and were charge[d] . . . at rates, or on a basis, charged to others for the same or comparable services under comparable circumstances." *Delphi Easter P'rs Ltd. P'ship v. Spectacular P'rs, Inc.*, 1993 WL 328079, at *9 (Del. Ch. Aug. 6, 1993).

c. Tatum could not be certain that he would be able to shift the amounts his Delaware counsel incurred. He had ample reason to ensure that Delaware counsel did not engage in excessive billing or unnecessary efforts. Because the total amount Tatum seeks is reasonable, the court need not delve into the specifics. The overall amount is reasonable.

7. Fairstead objects to the amounts Tatum seeks for the time Sara Shaw Tatum, his spouse, spent acting as his attorney.

a. The defendants argue that Tatum did not have to pay Mrs. Tatum so they were not "incurred" for purposes of fee reimbursement. As support, they cite *Scion Breckenridge Managing Member v. ASB Allegiance Real Estate Fund (Scion Supreme)*, 68 A.3d 665, 683 (Del. 2013). That ruling is inapposite because the Employment Agreement does not use the term "incurred." It simply authorizes the court to award a reasonable fee to the prevailing party.

b. *Scion Supreme* is not persuasive in this setting. The ruling affirmed a post-trial decision in which affiliates of ASB Capital Management, LLC (collectively "ASB") obtained reformation of three agreements that governed real estate joint ventures with affiliates of The Scion Group, LLC (collectively "Scion"). *See ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC,* 2012 WL 1869416 (Del. Ch. May 16, 2012). More important for present purposes, the ruling reversed a fee award granted under prevailing-party provisions in those same agreements. *ASB Allegiance Real Est. Fund v. Scion Breckenridge Managing Member, LLC (Fee Ruling)*, 50 A.3d 434, 439 (Del. Ch. 2012).

c. The agreements at issue in *Scion Supreme* contained identical language: "In the event that any of the parties to this Agreement undertakes any action to enforce the provisions of this Agreement against any other party, the non-prevailing party shall reimburse the prevailing par[ty] for all reasonable fees and costs incurred in connection with such enforcement, including reasonable attorneys' fees . . . ." *Id.* Having prevailed, ASB sought fees of $2,738,178.45 and costs of $529,176.86. *Id.* at 438. The court awarded those amounts. *Id.* at 439.

d. On appeal, Scion argued that ASB could not recover because it had not incurred anything. The law firm representing ASB had made the mistake requiring reformation—albeit resulting from a series of events in which Scion deserved far greater blame. As part of taking responsibility for its mistake, the law firm took on the litigation *gratis*. The Delaware Supreme Court held that "[t]he plain meaning of 'incurred,' combined with 'reimburse,' does not extend to this situation where ASB did not incur any payment obligation because [the law firm] agreed to represent it without charge." *Scion Supreme*, 68 A.3d at 683.

e. That outcome ran contrary to the weight of authority. *See* Robert L. Rossi, 1 Attorneys' Fees § 6:14 (3d ed. 2025) (collecting cases awarding fees for counsel's time where client did not owe payment obligation to lawyer). It also ran contrary to a Delaware Supreme Court decision affirming that an officer could recover a bonus he agreed to pay his counsel if counsel prevailed, in which case the prevailing-party provision would come into play. *See IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 179 (Del. 2011). Under that structure, the client never incurred the bonus. To be

sure, the client was contractually obligated to pay it, and there could be a setting in which the losing party failed to pay the fee (insolvency, for example). But that possibility could only happen *after* the court awarded relief. When the *O'Brien* court awarded the bonus under the prevailing-party provision, the client had not incurred it.

f. Most important, the outcome in *Scion Supreme* discounted the economic realities of the case. The litigation team pursuing the claims—the client and the lawyers—incurred real costs in the form of the lawyers' time and out-of-pocket expenses. The fact that the law firm did not charge the client did not alter that fact. The purpose of a prevailing-party provision is to ensure that the losing party bears the cost of the litigation and that the prevailing party is made whole. Shifting the expenses (including attorneys' fees) that the client and counsel incur serves that policy. By not awarding the law firm's fees, *Scion Supreme* did not make the prevailing party whole. Instead, *Scion Supreme* declined to "reward [the law firm] for successfully litigating this reformation action to correct its own mistakes." *Id.* That, however, is the point of a prevailing-party provision. If a party successfully litigates, that party receives its fees. *Scion Supreme* seems to have concluded it was more important to have counsel bear the consequences of its mistake, but that negated the prevailing-party provision.

g. No subsequent case has relied on the *pro-bono*-counsel aspect of *Scion Supreme*, nor has any case cited it with approval. This court has relied twice on its interpretation of the verb "incur." In one case, this court held that counsel

incurred Westlaw charges and was entitled to recover them. *See Roma Landmark Theaters, LLC v. Cohen Exhibition Co. LLC*, 2021 WL 5174088, at *4–5 (Del. Ch. Nov. 8, 2021). In another case, this court held that a party seeking indemnification had not yet incurred any loss. *Horton v. Organogenesis Inc.*, 2019 WL 3284737, at *4 (Del. Ch. July 22, 2019).

h. Instead, Delaware law on fee awards has continued to move in the opposite direction. The Delaware Supreme Court and this court have extended *O'Brien* to encompass the recovery of contingent fees under prevailing-party provisions. *See Williams Cos., Inc. v. Energy Transfer LP*, 2022 WL 3650176, at *3 (Del. Ch. Aug. 25, 2022), *aff'd*, 346 A.3d 1089 (Del. 2023); *S'holder Representative Servs. LLC v. Shire US Hldgs., Inc.*, 2021 WL 1627166, at *2 (Del. Ch. Apr. 27, 2021), *aff'd*, 267 A.3d 370 (Del. 2021); *see also Panzura Hldgs., LLC v. Stelfox*, 2026 WL 731066, at *1 (Del. Ch. Mar. 16, 2026). Under those structures, the client never incurs a fee except in a situation where the prevailing-party provision comes into play. As in *Scion Supreme*, the law firm working on contingency bears the cost of the litigation. As in *O'Brien*, there could be settings in which the losing party fails to pay the fee, but that again can only happen *after* the court awards relief. When the court awards relief under the prevailing-party provision, the client has not incurred any amounts.

i. In extending prevailing-party provisions to cover purely contingent fees, the *Williams* court deemphasized the formal payment structure. The justices stressed instead that the issue should be the reasonableness of the fee, not the details governing payment. *See Energy Transfer, LP v. Williams Cos., Inc.*, 346

A.3d 1089, 1119 (Del. 2023). Consistent with that approach, the Delaware Superior Court distinguished *Scion Supreme* in *Garvin v. Booth*, 2022 WL 247696, at *9 (Del. Ch. Jan. 27, 2022). There, DNREC sought to recover amounts spent to remediate a brownfield and invoked a statute that permitted DNREC to recover "remedial costs incurred." *Id.* at *8. But DNREC itself had not incurred any costs; DNREC had charged them to the Brownfield Development Program, a separate fund created by the General Assembly. Citing *Scion Supreme*, the defendants argued that just as ASB had not incurred amounts that its law firm bore, DNREC had not incurred amounts that the fund bore. The Delaware Superior Court rejected that argument, recognizing that as between DNREC and the brownfields fund, the amounts were indisputably incurred.

j. Other authorities involving prevailing-party provisions have recognized that when lawyers incur time, that time has value. Opportunity cost is a real cost. *See Scott Paper Co. v. Moor Bus. Forms, Inc.*, 604 F. Supp. 835, 837 (D. Del. 1984) (awarding fees for in-house counsel under an opportunity cost rationale); *see generally* Nicholas N. Niergarten, *Fee-Shifting: The Recovery of In-House Legal Fees*, 39 Wm. Mitchell L. Rev. 227, 230–31 (2012) (collecting authorities).

k. In my view, it would be helpful if the Delaware Supreme Court abandoned *Scion Supreme* and followed the majority rule: that time spent is time incurred regardless of the fee arrangement. Under that rule, ASB could have its law firm's fees, and the law firm would have been compensated for its time. Kudos to the lawyers in *Scion Supreme* for prevailing on that technical reading of the prevailing-

party provision on appeal, but the decision's application spawned and continues to generate a spate of disputes. When a prevailing-party provision applies, the lawyers who prevailed should get paid.

l. Admittedly, overturning *Scion Supreme* is not necessary here, because the Tatums incurred the economic cost of Mrs. Tatum's work by any measure. She worked full time on the case for several years. During that period, she could not work on other matters. Without including her time in the fee award, the Tatums would not be made whole.

m. Mrs. Tatum's time has a value best measured by an hourly rate. She has provided adequate justification for her rate. Fairstead does not challenge the estimate.

n. Mrs. Tatum did not record her time contemporaneously, and Fairstead objects on that basis. Contemporaneous records are preferable. But New York does not require them. *See McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 672 N.Y.S.2d 230, 232 (Sup. Ct. N.Y. Cnty. 1997) ("While many federal circuits mandate the maintenance of contemporaneous time records as a prerequisite to recovery of fees . . . the First Department, in *Matter of Karp*, 573 N.Y.S.2d 510 [(App. Div. 1989)] declined 'to adopt such a hard and fast rule that reconstructed time records can never serve as a basis for compensation.'"); *see also Petition of Aris*, 139 N.Y.S.3d 519 (TABLE) (Sur. Ct. Feb. 3, 2021) (considering a fee dispute between an attorney and his own client and emphasizing "the significance of contemporaneously maintained records" compared to "'after the fact' estimations of time expended"). Nor

does Delaware. *See In re Delaware Pub. Schs. Litig.*, 317 A.3d 251, 282 (Del. Ch. 2024) (making award despite lack of contemporaneous records). Here, Mrs. Tatum has provided a credible and conservative measure of the number of hours spent on a case where she was omnipresent.

8. The defendants argue that the Employment Agreement only covers fees, not out-of-pocket expenses. They cite *Bull Hill LLC v. HFZ Member RB Portfolio* LLC, 2024 WL 4202664 (Sup. Ct. N.Y. Cnty. Sept. 16, 2024), where a New York court declined to award expert fees where a prevailing-party provision only referred to fees. This case does not involve expert fees. It involves the value of counsel's time and the amounts counsel incurred for out-of-pocket expenses. Referring to fees is convenient shorthand. Courts routinely refer to fee shifting. Tatum can recover out-of-pocket expenses as well as fees.

9. The defendants also argue for a setoff of the amounts they incurred on the one issue under the Employment Agreement on which they prevailed. If the Employment Agreement called for issue-by-issue analysis, then a setoff could be warranted. The Employment Agreement, however, asks who prevailed in the action and calls for a fee award to make them whole. Here, Tatum prevailed.

10. Tatum separately argues that Fairstead litigated in bad faith such that the court should shift an additional twenty percent of his expenses (including attorneys' fees). The post-trial decision cautioned the parties to "think hard about whether they have grounds to shift attorneys' fees." *Tatum*, 347 A.3d at 1279. When offering that admonition, the court was alluding to the bad-faith exception. This

litigation has been hard fought, and the court anticipated that each side could believe that the other had gone too far. Because Tatum is entitled to recover under the Employment Agreement, the court need not reach the bad faith exception.

11. Tatum separately asks the court to quantify an amount to which Tatum is entitled for Fairstead's breach of the Good Faith Provision. A court can use a rough-justice approach by using proxies to quantify damages. Here, the court's opinion devoted approximately 14% of its factual and legal analysis to the Good Faith Provision. That percentage could support an award well in excess of $500,000. But because Tatum has only requested $500,000, that is what the court awards.

12. The motion is granted. Tatum is entitled to recover $4,713,484.71 in expenses (including attorneys' fees).

/s/ J. Travis Laster
Vice Chancellor Laster
April 16, 2026