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Re: Duthie, et al. v. CorSolutions Medical, Inc., et al.
C.A. No. 3048-VCN
Date Submitted: June 27, 2008

Dear Counsel:

On September 6, 2007, the Court entered an order declaring that the Plaintiffs are entitled to "timely advancement" by Defendant CorSolutions Medical, Inc. (which was acquired by Defendant Matria Healthcare, Inc.) of certain litigation fees. It suffices for present purposes to note that the process has not gone smoothly. The Defendants have objected to the amount of the fees charged and has raised several other issues. Before the Court are the following questions:

1. Are the Plaintiffs entitled to advancement of fees incurred in affirmatively asserting defamation claims against the Defendants based on public statements which the Defendants have made about them regarding the matters already in litigation?

2. Are Plaintiffs, fearing that their counsel would be conflicted, entitled to advancement of fees for other counsel to be available in the event the conflict materialized? The conflict never materialized, and the Defendants argue that advancement is not appropriate for work that turned out to have been unnecessary.

3. Are various fees for which advancement has been sought reasonable?¹

The Court turns to each of the questions in order.

* * *

1. Matria brought claims of fraud and breach of contract against the Plaintiffs. The Plaintiffs are entitled to advancement of the fees necessary to defend against those claims. In addition, Matria repeated its claims publicly and, according to Plaintiffs, did so with the intent to embarrass them and ruin their reputations.² Although advancement is generally associated with the defense of

¹ At issue are hundreds of thousands of dollars in unpaid fees for which advancement has been sought.

² Of course, the Court expresses no view as to the merits of the Plaintiffs' defamation claims.

claims, there are instances in which affirmative claims, asserted as part of a defensive strategy involving the same dispute, may be funded through advancement.³ CorSolutions' certificate of incorporation broadly allows for advancement and cannot be read to preclude advancement for asserting affirmative claims. In a legal conflict fought, such as this one has been, in many fora, affirmative action may be necessary to serve a defensive purpose and to protect. Where a party holding a right to advancement is the target of defamation by his adversary, the ability to "defend oneself" includes the capacity to respond to such attacks by filing defamation actions. Because the alleged defamatory attacks reprise the same charges as advanced in the litigation and because the adverse party has already brought litigation involving the same allegations, it is neither practicable nor reasonable to attempt to draw some line defining which defensive strategy, even though it may involve an assertion of affirmative claims, is appropriate. The full defense of the Plaintiffs against the charges brought by Matria, whether in litigation or in the public forum, requires the advancement of fees to pay for the assertion of defamation claims. This affirmative action arises as

³ See, e.g., *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992).

an outgrowth of Matria's litigation strategy⁴ and is a "necessary part of the same dispute."⁵ Therefore the Plaintiffs are entitled to advancement of fees and expenses reasonably incurred in asserting the defamation claims.

* * *

2. The Plaintiffs have sought advancement of fees for counsel "retained" on what amounts to a standby basis to guard against the risk that their counsel would be subject to a disqualifying conflict that could have left Plaintiffs without any counsel "up to speed" who could protect their interests. The fees at issue involve the review of pleadings and attendance at some hearings. It is the Court's understanding that the services of this "conflict" counsel have been discontinued.

Defendants argue that either there is a conflict or there is not a conflict, and, because it turned out that there was no conflict, the fees were unreasonably and unnecessarily incurred. Certainly, the decision to incur fees in anticipation of a potential conflict must be made carefully. Just because a conflict might somehow, somewhere arise does not justify the additional cost. In this instance, however, the professional concerns about the potential for a conflict appear, from the distance

⁴ See, e.g., *Pearson v. Exide Corp.*, 157 F. Supp. 2d 429, 439-40 (E.D. Pa. 2001).

⁵ *Citadel*, 603 A.2d at 824.

and in the context of the limited review in an advancement proceeding, to have been legitimate. Having counsel ready to step in, if necessary, was prudent and reasonable. Accordingly, the fees, which appear reasonable for the effort involved, are subject to advancement.

* * *

3. The Defendants continue to dispute the reasonableness—ultimately, in terms of their amount—of the fees for which Plaintiffs seek advancement.⁶ Advancement is not the proper stage for a detailed analytical review of the fees, whether in terms of the strategy followed or the staffing and time committed. Typically, a good faith certification from counsel should suffice.⁷ In the absence of clear abuse, the fees should be advanced.

Notwithstanding this reasonably well-established framework, payment has not been forthcoming promptly. The proverbial “logjam” must be broken and, eventually, if the Defendants continue with their refusal to pay the fees certified by

⁶ To the extent that there is a dispute over the Plaintiffs’ right to advancement of fees reasonably incurred in their representation as witnesses at various proceedings related to the underlying dispute between them and Matria, CorSolutions’ certificate of incorporation expressly provides for advancement of their expenses as witnesses.

⁷ *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 177 (Del. Ch. 2003); *DeLucca v. KKAT Mgmt., LLC*, 2006 WL 224058, at *16 (Del. Ch. Jan. 23, 2006).

Plaintiffs' counsel, reference to a Special Master to resolve the Defendants' challenges under the appropriate standards of an advancement proceeding will be necessary. In the meantime, and in a likely to be unfulfilled hope to move this matter forward, the following procedures shall be followed:⁸ (1) Plaintiffs' counsel, if they have not already done so, shall certify in good faith that the fees and expenses for which advancement has been sought were incurred reasonably as a matter of sound professional judgment; (2) Defendants shall identify those fees which they assert fall outside the standard of Delaware law for advancement; their counsel shall certify their good faith belief that the advancement of such fees is not appropriate; (3) the fees as to which there is no dispute shall be promptly paid; this includes those fees addressed above; and (4) the fees as to which any dispute remains shall be submitted to a Special Master.

The parties shall confer and attempt to recommend jointly a Special Master for consideration by the Court. Otherwise, the Court will designate one. The costs of the Special Master will be divided equally between the parties, except that the entire cost of the Special Master will be borne by the Defendants if it turns out that

⁸ It is the Court's understanding that, at least to some extent, several of these procedures have already been implemented.

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their objections to payment of the fees for which advancement has been sought have been made without good cause.

Plaintiffs are entitled to their fees in pursuing the advancement motion addressed in this letter opinion.

No firm schedule has been set for meeting the objectives set forth above. The parties shall confer in an effort to establish a schedule. If agreement cannot be reached, the Court, on application, will fix the schedule.

* * *

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K