COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

July 28, 2011

Jessica Zeldin, Esquire
Rosenthal, Monhait & Goddess, P.A.
919 Market Street, Suite 1401
Wilmington, DE 19801

Kenneth J. Nachbar, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
Wilmington, DE 19801

Steven L. Caponi, Esquire
Blank Rome LLP
1201 Market Street, Suite 800
Wilmington, DE 19801

Re: *Frank v. Elgamal*
C.A. No. 6120-VCN
Date Submitted: May 9, 2011

Dear Counsel:

Richard Frank ("Frank") brought this lawsuit to challenge the approximately $42.5 million acquisition of American Surgical Holdings, Inc. ("American Surgical" or the "Company") by AH Holdings, Inc. ("Holdings")—an affiliate of Great Point Partners I, L.P. ("Great Point"). Now before the Court is his interim application for

an award of attorneys' fees and expenses (the "Application"), which seeks $450,000. Frank contends that an award in that amount is appropriate under Delaware law and would compensate his attorneys for bringing this action, which he argues resulted in American Surgical's corrective disclosures in its definitive proxy statement. Frank's price and process claims remain and will be addressed by the Court in the post-merger context. For the reasons set forth below, the Court will defer ruling on the Application because it is premature.

I. BACKGROUND

Frank has been at all relevant times an owner of American Surgical common stock. The Company is a Delaware corporation that, through its wholly owned subsidiary American Surgical Assistants, Inc., provides surgical assistant staffing services. Other defendants in this action include American Surgical's board of directors,[1] and certain American Surgical employees who purportedly exchanged a portion of their stock in the Company for equity in the surviving entity's post-

[1] American Surgical's board of directors was comprised of Zak W. Elgamal ("Elgamal"), Jaime Olmo-Rivas ("Olmo-Rivas"), Charles Bailey, Michael Kleinman, and Henry Y.L. Toh.

merger parent company.[2] Great Point is a private equity fund that is affiliated with Great Point Partners. It formed Holdings for the sole purpose of effectuating the merger with American Surgical.

The transaction at issue in Frank's complaint arose out of a December 20, 2010 Agreement and Plan of Merger (the "Merger Agreement"). Before then, American Surgical's directors had been considering strategic alternatives for the Company. For that reason, in August 2009, the directors approved creating a mergers and acquisitions committee (the "M&A Committee") and the engagement of the Polaris Group ("Polaris") as a financial advisor. Subsequently, in December 2009, a special committee comprised of independent directors was formed (the "Special Committee"). It ratified the earlier decision to engage Polaris, retained its own legal counsel, and memorialized the M&A Committee's directive to Polaris to conduct a broad solicitation of the market regarding potential business

[2] The complaint alleged that this form of merger consideration differs from that provided to all other American Surgical shareholders, who received only cash for their shares of common stock. These defendants include Elgamal and Olmo-Rivas, along with Bland E. Chamberlain III and Jose Chapa, Jr.—both of whom had been employed as surgical assistants by the Company. The complaint further alleges that these so-called "Rollover Defendants" agreed, through stockholder voting agreements, to vote their collective 64% stake in the Company in favor of the transaction with Great Point.

combinations. Those solicitation efforts were conducted from August 2009 through December 2009.

After various rounds of information sharing involving many strategic and financial entities, four parties emerged as having a continued interest in discussing a possible transaction. Representatives from American Surgical met with personnel from those four entities from September through November 2009. Thereafter, each of the four interested parties submitted non-binding written proposals; three of the entities—including Great Point—submitted proposals that were structured in accordance with the Special Committee's requirements. Revised offers—either in the form of a letter of intent or an indication of interest—were later submitted by those three entities, and the Special Committee deliberated on them before authorizing negotiations to commence with the three potential acquirors.

With its discussions ongoing with other bidders, American Surgical began lengthy negotiations with Great Point. Through that dialogue, the Special Committee determined that Great Point's proposal represented the most favorable transaction for the Company's shareholders—excluding the Rollover Defendants, whose interests differed because of their continuing post-merger equity stake. The

Special Committee subsequently retained a separate financial advisor—Howard Frazier Barker Elliott, Inc.—to render a fairness opinion with respect to a possible transaction with Great Point.

After months of additional negotiations between the Company and Great Point, the Merger Agreement was executed in December 2010. That agreement provides that American Surgical's shareholders were to receive $2.87 per share in cash and a final cash dividend payable by American Surgical—a dividend of $0.02 per share was later issued on March 23, 2011.

The Company filed its preliminary proxy statement on January 4, 2011. Soon thereafter, the Plaintiff filed this action alleging breaches of fiduciary duty, unfair price and process, inadequate disclosures, and aiding and abetting by Great Point and its affiliates. On January 14th, Frank moved for expedited proceedings and a preliminary injunction. American Surgical subsequently filed its definitive proxy statement on January 21st, which contained supplemental disclosures that effectively mooted the Plaintiff's disclosure claims. For that reason, Frank withdrew his motions for expedited proceedings and for a preliminary injunction on January 24th. American Surgical's shareholders later approved the proposed

transaction with Great Point at a February 23rd meeting, and the merger closed on March 23rd.

II. DISCUSSION

Although American Surgical's supplemental disclosures mooted Frank's disclosure claims, his price and process claims remain viable. As a result, the current request for an award of attorneys' fees in the amount of $450,000 is interim in nature. For that reason, the Court must determine at the outset whether the timing of the Application is appropriate, or whether it must be denied as premature.

Under the American Rule, litigants normally bear the burden of paying their own attorneys' fees and expenses.[3] Nevertheless, Delaware recognizes certain well-established exceptions to that rule.[4] The Application invokes the corporate benefit doctrine, an exception to the American Rule, under which "the Court may order the payment of counsel fees and related expenses to a plaintiff whose efforts result in . . . the conferring of a corporate benefit."[5] Notably, the litigation need not

---

[3] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1043-44 (Del. 1996).
[4] *See, e.g.*, *id.* at 1044; *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990).
[5] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989) (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).

achieve a pecuniary benefit under that exception; rather, a plaintiff may be entitled to a fee award if the lawsuit produces a substantial benefit to the corporation or its stockholders.[6]

Where a defendant corporation or board of directors moots a plaintiff's claims, as was the case in this instance, attorneys' fees may still be awarded.[7] An award may be granted under those circumstances if (1) the suit was meritorious when filed, (2) the action producing the corporate benefit was taken by the defendant corporation before a judicial resolution, and (3) the resulting corporate benefit was causally related to the lawsuit.[8] In challenging a fee application in that context, the defendant must demonstrate that no causal link exists between the benefit produced and the filing of the plaintiff's action.[9]

---

[6] *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006); *see also Dunkin' Donuts*, 1990 WL 189120, at *4 ("In a corporate benefit case, there is no creation of a fund, yet a . . . 'therapeutic' benefit, worthy of compensation, has been conferred."). Because the corporate benefit need not be economic in nature, "a heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees." *Tandycrafts, Inc.*, 562 A.2d at 1165 (citing *Chrysler Corp.*, 223 A.2d at 386; *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980)).

[7] *Off v. Ross*, 2009 WL 4725978, at *4 (Del. Ch. Dec. 10, 2009).

[8] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997) (citing *Allied Artists*, 413 A.2d at 878).

[9] *Id.* at 1080.

The decision as to whether to award attorney's fees is committed to the Court's discretion.[10] Interim fee awards are generally disfavored.[11] For that reason, "applications for attorney fees are often rejected if the litigation has not been completed."[12] The basis for disfavoring interim fee awards is that "[j]udicial economy and the orderly conduct of litigation are usually better served if interim awards of attorneys' fees are avoided . . . ."[13] Thus, absent exigent circumstances, the Court generally will only consider an application for attorneys' fees when a lawsuit has concluded.[14]

There are instances, however, where "interim fee awards may be appropriate[,]" such as when "the plaintiff has achieved the benefit sought by the claim that has been mooted or settled and that benefit is not subject to reversal or

---

[10] *Dunkin' Donuts*, 1990 WL 189120, at *3.
[11] *Emerald Partners v. Berlin*, 1994 WL 48993, at *1 (Del. Ch. Feb. 4, 1994); *see also In re Art Tech. Group, Inc. S'holders Litig.*, C.A. No. 5955-VCL, at 3 (Del. Ch. May 16, 2011) (TRANSCRIPT) ("We do have these cases mainly from then-Vice Chancellor Hartnett that say we generally shouldn't [grant interim fees] and that it's generally disfavored."); *Kurz v. Holbrook*, C.A. No. 5019-VCL, at 3 (Del. Ch. July 19, 2010) (TRANSCRIPT) (awarding interim fees, but observing that "interim legal fees are discouraged"); *In re Emulex S'holder Litig.*, C.A. No. 4536-VCS (Del. Ch. Dec. 18, 2009) (ORDER) ("Piecemeal requests for attorneys fees are not favored, and for good reason.").
[12] *Gans v. MDR Liquidating Corp.*, 1993 WL 193526, at *1 (Del. Ch. May 28, 1993).
[13] *Id.*; *see also La. State Employees' Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *3 (Del. Ch. Sept. 19, 2001).
[14] *Emulex*, C.A. No. 4536-VCS (Del. Ch. Dec. 18, 2009) (ORDER).

alteration as the remaining portion of the litigation proceeds."[15] Arguably, these circumstances are present here because the corporate benefit claimed—curative disclosures—was sought in the complaint and those claims were mooted by American Surgical's supplemental disclosures that were published in the definitive proxy statement. Nevertheless, even if a sufficient basis exists for the Court to make a determination on an interim fee award, "the decision to entertain the application remains at the discretion of the trial court."[16] Because the Court is not required to consider an interim fee request, it may properly defer ruling on a fee application until the conclusion of the litigation.[17]

Although Frank seems to assert correctly that his counsel is entitled to a fee award because this action produced a corporate benefit when American Surgical made supplemental disclosures mooting some of his claims, the Court need not presently determine that issue. There are no exigent circumstances that counsel against deferring a decision on the Application. Accordingly, the Court, in its

---

[15] *Citrix Sys.*, 2001 WL 1131364, at *4.
[16] *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *7 (Del. Ch. June 27, 2011); *see also Art Tech. Group*, C.A. No. 5955-VCL, at 3 (Del. Ch. May 16, 2011) (TRANSCRIPT) ("[W]hether to entertain [an interim fee request] is up to the discretion of the Court.").
[17] *Del Monte Foods*, 2011 WL 2535256, at *7.

discretion, will wait to rule on the Application until the Plaintiff's remaining claims have been litigated. At that time, the Court will be able to make a single determination as to what, if any, benefits have been achieved by this action, whether the three-part test cited *supra* has been satisfied, and what total fee award is appropriate based on that analysis. Processing fee applications will generally delay the processing of the remaining substantive claims. Moreover, piecemeal consideration of attorneys' fee applications presents added risk that the Court's fee determination effort may generate even less confidence. That risk arises because full appreciation of the benefits brought about by the Plaintiff's counsel can best—and perhaps only—be accurately achieved when the work is done and all the benefits have been bestowed.[18]

[18] This, of course, is not to say that the Court should never, in the exercise of its discretion, award interim fees. For example, where extensive effort is required to achieve a milestone benefit, an interim fee award would likely be appropriate. In most instances, however, efficiency concerns steer the Court towards making a single fee determination at the conclusion of litigation. *See Art Tech. Group*, C.A. No. 5955-VCL, at 4 (Del. Ch. May 16, 2011) (TRANSCRIPT) ("There are good prudential reasons in many cases why one wouldn't entertain an interim fee award. One of them is the reason repeatedly cited by Vice Chancellor Hartnett, which is it makes sense to do everything once at the end of the case."); *Emulex*, C.A. No. 4536-VCS (Del. Ch. Dec. 18, 2009) (ORDER) (concluding that "[e]fficiency concerns suggest that, absent some exigency, requests for fees all be heard one time at the end of a case").

III. CONCLUSION

For the foregoing reasons, Frank's Interim Application for an Award of Attorneys' Fees and Expenses is denied as premature. The Court will reconsider the Application once Frank's remaining claims have been litigated. An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K