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Re: Duthie, et al. v. CorSolutions Medical, Inc., et al.
C.A. No. 3048-VCN
Date Submitted: May 4, 2009

Dear Counsel:

This letter opinion addresses the request of Defendants CorSolutions Medical, Inc. ("CorSolutions") and Matria Healthcare, Inc. ("Matria") for modification of this Court's September 10, 2008, order granting advancement in favor of Plaintiffs Angus M. Duthie and Michael J. Condron, two former CorSolutions officers and directors. The Defendants argue that an intervening change in circumstances warrants modification of the advancement award, and that advancement is no longer appropriate.

I. BACKGROUND

A more fulsome discussion of the litigation and arbitration history among the parties has been set forth elsewhere.[1] Only a brief recitation is necessary here.

The parties have been embroiled in disagreement since shortly after Matria's 2005 acquisition of CorSolutions. The parties engaged in arbitration proceedings, litigation before this Court, and litigation before the United States District Court for the Northern District of Illinois. In May of 2007, in an arbitration proceeding in Illinois, the Plaintiffs were accused of fraud and breach of contract based on alleged pre-acquisition misrepresentations and omissions. The Plaintiffs filed suit in this Court to enforce their advancement rights in June of 2007. An order providing for advancement was issued on September 6, 2007.

Additionally, the Plaintiffs sued in the United States District Court for the Northern District of Illinois to enjoin the arbitration proceeding (the "Federal Action"). Allegedly in response to that suit, the Defendants allegedly took their underlying fraud allegations public, accusing the Plaintiffs of, among other things,

[1] *E.g., Duthie v. Matria Healthcare, Inc.*, 540 F.3d 533 (7th Cir. 2008); *Duthie v. Matria Healthcare, Inc.*, 535 F. Supp. 2d 909 (N.D. Ill. 2008); *Duthie v. CorSolutions Medical, Inc.*, 2008 WL 4173850 (Del. Ch. Sept. 10, 2008); *Matria Healthcare, Inc. v. Coral SR LLC*, 2007 WL 763303 (Del. Ch. Mar. 1, 2007).

fraud, fraudulent concealment, and misrepresentations during the process leading up to the CorSolutions/Matria merger. Condron contends that the Defendants retaliated against him by improperly terminating his health care benefits.

As a result, and in response, in February 2008, the Plaintiffs amended their complaint in the Federal Action to include claims against Matria for defamation, tortious interference with prospective economic advantage, and violations of ERISA.

The Plaintiffs returned to this Court to seek advancement of the costs incurred to pursue these affirmative claims. They initially claimed that the Defendants had "refused to advance $636.00 in fees related to affirmative claims filed by the Plaintiffs in connection with their [Federal Action.]" On September 10, 2008, this Court ordered that the Defendants advance the Plaintiffs' fees and costs in connection with certain affirmative claims filed by the Plaintiffs in the Northern District of Illinois because they were defensive in nature, responding to and offsetting claims pending against the Plaintiffs in a separate forum.[2]

[2] *Duthie*, 2008 WL 4173850.

By letter dated April 20, 2009, the Defendants sought a modification of that order. They now argue that all pending arbitration proceedings have terminated, and that they intend to bring no other actions against the Plaintiffs concerning the fraud allegations that spawned the Plaintiffs' affirmative claims. As a result, the Defendants assert that no threat now exists justifying the advancement of the Plaintiffs' fees and expenses incurred pursuing these affirmative claims. The Plaintiffs oppose this modification.

II. DISCUSSION

In *Citadel Holding Corp. v. Roven*, the Delaware Supreme Court rejected the argument that the language "in defending" in an advancement provision should be read to exclude affirmative defenses and compulsory counterclaims.[3] Instead"[i]n a litigation context the term 'defense' has a broad meaning," and asserting affirmative defenses and compulsory counterclaims are actions done "in defending" against a plaintiff's claims.[4] The "primary rationale [of the *Roven* decision] was that the counterclaims were substantively defensive and thus within

[3] 603 A.2d 818, 824 (Del. 1992).
[4] *Id.*

the scope of the contractual words 'in defending' because they 'were advanced to defeat, or offset' the corporation's claims against a director."[5]

CorSolutions' Certificate of Incorporation broadly allows for the advancement of defensive fees and expenses incurred by its officers and directors and cannot be read to preclude advancement for affirmative claims which are defensive in nature.[6]

Relying on *Roven*, this Court required the advancement of the Plaintiffs' fees and expenses in connection with affirmative claims filed by the Plaintiffs in the Federal Action.[7] This Court stated that:

> 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.[8]

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[5] *Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397, at *34 (Del. Ch. May 23, 2008) (citing *Roven*, 603 A.2d at 824).
[6] *Duthie*, 2008 WL 4173850, at *1.
[7] *Id.*
[8] *Id.*

The Plaintiffs' right to advancement concerning their pending affirmative defamation claims arose from the substantial identity of the public allegations forming the basis of the affirmative defamation claims and the charges already advanced against them in a pending arbitration proceeding. As a result, this Court concluded that the Plaintiffs' affirmative defamation claims were a sufficiently direct response to pending charges. If successful, those affirmative claims would sufficiently "defeat, or offset" the claims asserted against the Plaintiffs as to warrant advancement. The Defendants have since advanced fees and expenses associated with the Plaintiffs' affirmative claims.[9]

The question presented here is whether that finding is subject to modification[10] once charges asserted against the corporate officers and directors have been terminated and no threat of further litigation exists.[11]

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[9] Although the Court's September 10, 2008, order addressed only the Plaintiffs' defamation claims, the Defendants have advanced fees and costs associated with the Plaintiffs' claims concerning tortious interference and violations of ERISA as well. This letter opinion addresses advancement obligations for all of the Plaintiffs' affirmative claims.

[10] The Plaintiffs argue that this Court's prior advancement decision is "law of the case" and therefore cannot be changed. "The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation." *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990). A fact central to this Court's prior advancement decision has changed, and thus that decision may be revisited.

[11] Tr. Oral Arg. (May 4, 2009) at 6.

To be sure, any right to advancement for fees and expenses incurred in the prosecution of the affirmative claims of these corporate officers depends on whether such claims are defensive in nature.[12] An affirmative claim is defensive in nature where it defends the corporate official by directly responding to and negating the affirmative claims brought against that corporate official.[13]

At the time of this Court's September 10, 2008, decision as to advancement, the Defendants were pursuing an appeal to the Seventh Circuit Court of Appeals of an order enjoining them from pursuing fraud claims against the Plaintiffs,[14] apparently with the goal of asserting those claims against the Plaintiffs if successful on appeal. This Court found that the Plaintiffs faced a continuing threat.[15] The Defendants were unsuccessful in their appeal, and are enjoined from pursuing fraud claims against the Plaintiffs in arbitration. The Defendants' arbitration before the American Arbitration Association against Coral SR LLC, an entity representing the CorSolutions stakeholders, was successful, and the

[12] *See* Reed Aff., Ex. A at p. 3 ("The right to indemnification conferred in this Article Twelfth shall include the right to be paid by the Company the expenses incurred in defending any such proceeding in advance of its final disposition.").
[13] *Zaman*, 2008 WL 2168397, at *35.
[14] Tr. Hearing (June 27, 2008) at 15, 33.
[15] *Cf. Bergonzi v. Rite Aid Corp.*, 2003 WL 22407303 (Del. Ch. Oct. 20, 2003) (final disposition of a proceeding subject to advancement is a final, nonappealable, decision); *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380 (Del. Ch. 2008) (same).

Defendants were awarded $9 million based on parallel fraud allegations. The Defendants have demonstrated their desire not to pursue those claims further against these Plaintiffs individually by filing an answer in the Federal Action without asserting any counterclaims.[16] Finally, the Defendants have represented to this Court that they will not assert fraud claims against the Plaintiffs in any forum.[17] As a result, there is no longer an active (or even threatened) claim that the Plaintiffs need to resist.

Because no threat now exists, the Plaintiffs' defamation claims are no longer a direct response to, nor a negation of, any claims against them. These defamation claims are no longer defensive, but rather, are solely offensive in nature. To be defensive, and thus subject to advancement, affirmative claims must be responsive to some actual threat.[18] When the threat has ended, there cannot be a right to

[16] Defendants' April 21, 2008, letter at 3.
[17] The Defendants represent that this is a business decision, as they believe that the Plaintiffs lack sufficient assets to both satisfy a judgment against them and reimburse the Defendants for legal expenses already advanced. *Id.* at 3 n. 7. The Defendants' commitment not to bring other actions—either by litigation or arbitration—against the Plaintiffs is accepted and relied upon by the Court in reaching the result that it does.
[18] *See Donahue v. Corning*, 949 A.2d 574, 579 (Del. Ch. 2008).

advancement of fees and expenses for affirmative claims designed substantively to defeat that threat.[19]

This Court originally granted advancement for the Plaintiffs' affirmative defamation claims. That decision was in keeping with Delaware's public policy favoring advancement.[20] Indeed, the decision was rendered when the Plaintiffs' defamation claims were in their infancy—only $636.00 had been expended at the time of the Plaintiffs' initial request.

Now that no fraud claims are threatened against the Plaintiffs, it would be an unwarranted expansion of both the plain language of the advancement provisions found in the CorSolutions' Certificate of Incorporation and Delaware case law to order the continued advancement of fees and expenses associated with the Plaintiffs' affirmative claims.

III. CONCLUSION

Accordingly, and for the forgoing reasons, the Court's order of September 10, 2008, is modified, and the Plaintiffs are no longer entitled to the

[19] *See Zaman*, 2008 WL 2168397, at *37 (a party's affirmative claims not subject to advancement once charges were no longer pending against them).
[20] *See e.g.*, *Reddy v. Elec. Data Sys. Corp*., 2002 WL 1358761 (Del. Ch. June 18, 2002).

advancement of fees and expenses associated with their affirmative claims pending in the Federal Action.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K