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Re: Winthrop v. Central Coal and Coke Corp.
C.A. No. 17162

Dear Counsel;

Plaintiffs have petitioned for an award of counsel fees and expenses in this dismissed Section 225 action that was rendered moot by acts of the individual defendants after the filing of the complaint. They rely on the familiar doctrine entitling plaintiff's counsel to fees where (1) the action was meritorious when filed, (2) the defendant takes steps to moot the claim and in so doing produces a corporate benefit, and (3) there is a causal connection between the lawsuit and the benefit. See, e.g., ***Allied Artists Picture Corp.*** v. ***Baron,*** Del. Supr. 413 A.2d 876, 878 (1980). The central and insurmountable problem in applying this familiar theory to the facts of this case is that, to justify a fee award, the "benefit" produced by the defendants' action

must be "the same or similar [to that] sought by the shareholder's litigation." ***Id.*** Here, the exact opposite is true. The circumstances that led to the dismissal of the complaint on grounds of mootness was the execution and delivery of a written consent by a majority of the Central Coal stockholders re-electing the very board of directors Winthrop sought to remove. In the circumstances, there is no basis on which to shift fees from the plaintiffs to the corporate defendant.

Discussion

Winthrop filed this action to contest the validity of the election of directors at the April 21, 1999 annual meeting of Central Coal stockholders. He contended that the defendants did not obtain a plurality of the votes properly cast at the meeting and sought to have the competing slate of candidates (including himself) declared the winners. After completion of discovery but before the date set for the trial, certain of the defendants obtained and tiled with the corporation written consents designating the challenged slate as the board of directors. When this development was reported at the pretrial conference, I adjourned the trial date and directed that plaintiffs be allowed to review the written consents for form and sufficiency. I thereafter entered an order with the parties' consent dismissing the action as moot, but reserving jurisdiction to consider this fee petition.

The upshot of the written consents was to eliminate any practical reason to litigate over the validity of the April 21, 1999 election. This is certainly not the result plaintiffs sought to achieve when they filed this action. Indeed, it is more or less the result that would have obtained had they either not brought the suit or brought it and lost. For that reason, I am unable to conclude that the defendants' actions mooting the litigation "produce[d] the same or similar benefit sought by the . . . litigation." *Id.*

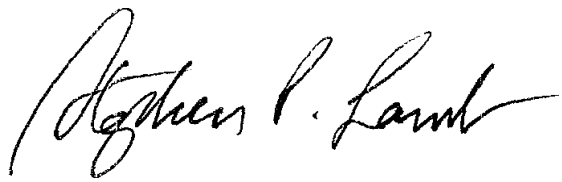
I am also unable to credit plaintiffs' revisionist view of the purpose of their litigation. In their reply papers, they now say that their suit "sought the declaration of a legitimate Board based upon the election results." Because the written consent process established the inarguable entitlement of ***a*** board of directors to office ***(albeit,*** the wrong one), they argue that the litigation achieved its objective and that they are entitled to a fee. The argument is that "[i]n this case, democratic procedures have now been adhered to as a result of Defendants' remedial acts, and a wrong was righted by properly electing Central's Board as opposed to allowing an illegitimately-elected Board to persist." Conceding that the result that obtained in this case is "not the same ultimate result as that sought by the Plaintiffs," they nevertheless arguing, relying on ***Allied Artists,*** that is "a similar result." Suffice it to say that I perceive the purpose of the litigation differently. Like typical plaintiffs in a Section 225 action, plaintiffs

brought suit for the purpose of declaring their entitlement to office. That purpose was utterly defeated by the later written consent process.

Finally, I note that my review of the fee petition cases cited by plaintiffs shows a much tighter fit between the benefit conferred and the objective of the litigation than plaintiffs' argument suggests. In *Allied* ***Artist,*** for example, Baron's complaint sought to displace the board of directors that had been elected by the preferred stockholders The action became moot when, as the result of a merger the corporation and two other companies merged into a new corporation known as Allied Artists of Delaware, Inc., the old board of directors was removed and a new board elected by the common stockholders. Similarly, in *Tandycrafts,* ***Inc. v.*** *Initio* ***Partners,*** Del. Supr., 562 A.2d 1162 (1989), the complaint challenging the sufficiency of proxy disclosures was rendered moot by the mailing of supplemental disclosure materials. Finally, in ***Stroud v.*** *Milliken*, Del. Ch., C.A. No. 8969, Hartnett, V.C. (October 6, 1989), the court awarded a fee because the mooted action caused the corporation to withdraw a defective notice of meeting (challenged in the complaint) and to modify certain proposed charter and bylaw amendments to make them "less detrimental to the stockholders. " The correlation between the type of relief sought in the complaint and the "benefit" conferred was direct and substantial. Here, the suit was filed to unseat the defendants and was mooted by action taken making their entitlement to office inarguable.

For these reasons, I have today entered the enclosed order denying the fee petition.

Very truly yours,



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