



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

November 9, 2010

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

Samuel T. Hirzel, Esquire
Proctor Heyman LLP
1116 West Street
Wilmington, DE 19801

Re: Fuhlendorf v. Isilon Systems, Inc.
C.A. No. 5772-VCN
Date Submitted: November 3, 2010

Dear Counsel:

The parties agree that Plaintiff Stuart W. Fuhlendorf is entitled to advancement of expenses incurred in defending several proceedings arising out of his employment with Defendant Isilon Systems, Inc.¹ Although Isilon has advanced substantial sums to fund Plaintiff's defense costs, its enthusiasm for that effort has waned and the parties are now engaged in a dispute over the reasonableness of the amounts sought by the Plaintiff pursuant to Isilon's

¹ The Court awaits submission by counsel of a form of order implementing their agreement that the Plaintiff is entitled to summary judgment as to his right to advancement.

Kevin M. Coen, Esquire
Samuel T. Hirzel, Esquire
November 9, 2010
Page 2

advancement obligation—an obligation created by the Indemnification Agreement between the Plaintiff and Isilon.

Both Delaware law and the Indemnification Agreement recognize that the value of advancement will be impaired if payment is not made promptly and if additional burdens are imposed upon the indemnitee at a time when he is burdened by the underlying litigation for which advancement is appropriate. Nevertheless, the fees and expenses sought by way of advancement must be reasonable. Despite Plaintiff's undertaking to repay any sums improvidently advanced, neither the Indemnification Agreement nor Delaware law can fairly be read as requiring Isilon to honor clearly unreasonable advancement requests.

This Court has addressed a similar impasse in *Duthie v. CorSolutions Medical, Inc.*² Although some level of review is necessary, it is not appropriate to review Plaintiff's requests with the same degree of scrutiny that would be expected in an indemnification proceeding. *Duthie* sets forth an appropriate procedure to be followed:

² 2008 WL 4173850 (Del. Ch. Sept. 10, 2008).

- (1) Plaintiff's 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) Isilon shall identify those fees which it asserts fall outside the standard of Delaware law for advancement; its 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;
- (4) The fees as to which any dispute remains shall be submitted to a Special Master;³ and
- (5) 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 Isilon if it turns out that its objections to payment of the fees for which advancement has been sought have been made without good cause.⁴

³ Correspondence from counsel after oral argument evidences the contentiousness of this dispute and further persuades the Court that appointment of a Special Master is, unfortunately, unavoidable.

⁴ *Duthie*, 2008 WL 4173850, at *2. Isilon appears to believe that paying fifty percent of Plaintiff's advancement requests constitutes reasonable conduct. There appears to be—but the Court does not now determine—no rational, non-arbitrary basis for that bright line. Any proposed rollback from the advancement requests submitted by Plaintiff must be supported by a good faith basis.

In addition, it is imperative that Isilon's review of the Plaintiff's advancement requests be accomplished expeditiously. A leisurely review will necessarily frustrate the Plaintiff's rights. The Court will not now set a timetable, but, if delays ensue, it will, on application, establish a turnaround time.

Kevin M. Coen, Esquire
Samuel T. Hirzel, Esquire
November 9, 2010
Page 4

If necessary, the Court will appoint the Special Master. In this instance, it seems better to ask the parties to attempt to agree upon someone to serve in that capacity. Whether the parties should look to Delaware for someone with expertise in our indemnification law or whether they should look to Seattle because that is where the fees are being incurred is a question that the Court leaves in the first instance to them.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K