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March 21, 2011

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Re: Branson v. Branson
C.A. No. 681-VCN
Date Submitted: March 1, 2011

Dear Counsel:

Defendants prevailed following trial.¹ After entry of judgment, the Defendants moved, ten days later, for the Court to order Vincent to pay their attorney's fees. Vincent opposes that motion on two grounds: (1) the question of attorney's fees for the Defendants was not properly preserved and (2) his conduct did not merit the

¹ The Court's Post-Trial Memorandum Opinion is reported at 2010 WL 3449235 (Del. Ch. Sept. 1, 2010). Plaintiff Vincent J. Branson moved for reargument but eventually abandoned that application. For convenience, the Court draws upon the defined terms employed in the Memorandum Opinion.

extraordinary relief of a shifting of attorney's fees under any of the exceptions to the American Rule, which teaches generally that a party shall bear his own attorney's fees and expenses.²

1. The Defendants did not assert a claim for attorney's fees in the Pretrial Order, and they did not seek any award of attorney's fees in their post-trial briefing.³ Moreover, they did nothing else that might have operated to keep alive any claim for attorney's fees. In short, their request was not properly preserved and is now untimely.⁴

2. Shifting of the cost of representation, in the absence of a statutory or contractual right, is rare. In this instance, the Defendants rely upon an equitable exception to the American Rule that allows the Court, in its discretion, to award attorney's fees if it finds that "a party brought litigation in bad faith or acted in bad

² See, e.g., *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010).

³ The only relief Defendants sought in their post-trial briefing was a rejection of Vincent's affirmative claims and a "final order dismissing the present matter." Defs.' Answering Post-Trial Br. at 28.

⁴ See, e.g., *In re IBP S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001).

faith during the course of the litigation.”⁵ This standard is arduous: “situations in which a party acted vexatiously, wantonly, or for oppressive reasons.”⁶

Although the Court has limited discretion to shift fees,⁷ Vincent’s conduct in these proceedings does not warrant such an award. As the Defendants note, Vincent’s claims and contentions changed during the course of the litigation. Defending against varying lines of attack no doubt was frustrating. Vincent’s actions, however, are more fairly viewed as an aggressive prosecution of deeply held beliefs and not as an example of vexatious or bad faith conduct.

This ultimately is little more than litigation, marked by bitterness, in which one side won and the other side lost.⁸ The parties’ views were deeply personal and fervently held. That, however, does not provide the grounds for an order reallocating litigation expenses.

⁵ *Merrill Lynch Trust Co. FSB v. Campbell*, 2009 WL 2913893, at *13 (Del Ch. Sept. 2, 2009).

⁶ *Id.*; see also *Judge v. City of Rehoboth Beach*, 1994 WL 198700, at *2 (Del. Ch. Apr. 29, 1994) (explaining that in order to justify departure from the American Rule, a party’s “action must rise to a high level of egregiousness”).

⁷ See, e.g., *William Penn P’ship v. Saliba*, 2011 WL 440615, at *7 (Del. Feb. 9, 2011); *In re First Interstate Bankcorp Consol. S’holder Litig.*, 756 A.2d 353, 356 (Del. Ch. 1999), *aff’d* 755 A.2d 388 (Del. 2000).

⁸ The parties quibble about who prevailed. Vincent did prevail with respect to one claim during the summary judgment process, but as for the trial, he was not at all successful.

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Accordingly, for the foregoing reasons, the Defendants' motion for an award of attorney's fees is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K