IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

INTERNATIONAL RAIL PARTNERS LLC, BOCA EQUITY PARTNERS, LLC, PATRIOT EQUITY, LLC and GARY O. MARINO,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2020-0177-PAF
AMERICAN RAIL PARTNERS, LLC,	)	
Defendant.	)	

ORDER

WHEREAS:

A. On March 9, 2020, Plaintiffs filed their Verified Complaint for advancement of attorneys' fees and expenses against Defendant American Rail Partners, LLC.[1]

B. Both Plaintiffs and Defendant filed cross-motions for judgment on the pleadings.

C. On November 24, 2020, the Court issued a Memorandum Opinion (the "Opinion") granting Plaintiffs' motion and denying Defendant's motion. The Opinion also directed Plaintiffs' counsel to submit an application pursuant to Court

[1] Unless noted otherwise, capitalized terms are as defined in the Court's November 24, 2020 Memorandum Opinion. *Int'l Rail P'rs, LLC v. Am. Rail P'rs, LLC*, C.A. No. 2020-0177-PAF (Del. Ch. Nov. 24, 2020).

of Chancery Rule 88 because they were entitled to recover their reasonable attorneys' fees and expenses, as provided in the American Rail LLC Agreement. Plaintiffs filed a Rule 88 motion on December 7, 2020,[2] and American Rail filed an opposition on December 17, 2020.[3] American Rail is scheduled to file a reply on December 23, 2020.[4]

D. On December 14, 2020, the Court entered a stipulated order establishing a process for the resolution of any objection to the amount of advancement requested during the pendency of the underlying Superior Court Action.[5]

E. The Opinion held that Plaintiffs were entitled to advancement under American Rail's LLC Agreement. In the Opinion, the Court rejected Defendant's contention that Plaintiffs are not entitled to advancement and indemnification for claims brought against them by the company unless the applicable advancement or indemnity provision expressly states that it applies to those claims.[6] In doing so, the Court distinguished the holdings in *TranSched Sys. Ltd. v. Versyss Transit Solutions,*

[2] Dkt. 48.

[3] Dkt. 53.

[4] *See* Dkt. 50.

[5] Dkt. 52. This type of order is commonly referred to as a "*Fitracks* Order," a process devised by Vice Chancellor Laster in a decision bearing that name. *See Danenberg v. Fitracks, Inc.*, 58 A.3d 991, 1003 (Del. Ch. 2012).

[6] American Rail refers to these claims as "first-party claims."

LLC, 2012 WL 1415466 (Del. Super. Mar. 29, 2012), and its progeny, which declined to read standard indemnity provisions as providing for fee-shifting in bilateral commercial contracts.

F. On December 4, 2020, American Rail filed a timely application to certify an interlocutory appeal (the "Application").[7] The Application seeks certification of an interlocutory appeal limited to the issue of whether the "rule" articulated in *TranSched* must be applied to the construction of advancement and indemnification provisions in a limited liability company agreement.

G. American Rail argues that the Opinion decided a substantial issue of material importance.[8] American Rail further contends that the Opinion satisfies four of the eight factors under Delaware Supreme Court Rule 42(b)(iii) that must be considered on an application to certify an interlocutory appeal.[9]

[7] Dkt. 47.

[8] Application ¶¶ 15, 17.

[9] *Id.* ¶ 18.

H. On December 18, 2020, Plaintiffs filed an untimely opposition to the Application.[10] Accordingly, the Court does not consider the opposition.

NOW, THEREFORE, the Court having considered the Application and the criteria set forth in Supreme Court Rule 42, IT IS HEREBY ORDERED, this 23rd day of December, 2020, as follows:

1. Supreme Court Rule 42(b)(i) provides that "[n]o interlocutory appeal will be certified by the trial court or accepted by [the Delaware Supreme] Court unless the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment." Supr. Ct. R. 42(b)(i). "Interlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources." Supr. Ct. R. 42(b)(ii).

2. Under Supreme Court Rule 42(b)(iii), the Court considers the following eight factors in determining whether to certify an interlocutory appeal:

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[10] Applications for interlocutory appeals are governed by the Supreme Court Rules. *See* Supr. Ct. R. 42(c)(ii) ("An opposing party shall have 10 days . . . after . . . service [of the application] within which to serve and file a written response . . . ."). Therefore, the deadline for any opposition was December 14, 2020. *See* Supr. Ct. R. 11(a) ("When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and other legal holidays shall be excluded in the computation."). Although Supreme Court Rule 11(c) allows for an additional three days if service is made by eFiling, it has no application to the time limitation that governs the initiation of an appeal. *See Jackson v. State*, 763 A.2d 91 (Del. 2000); *Blue Hen Lines, Inc. v. Turbitt*, 757 A.2d 1277 (Del. 2000). Even if Rule 11(c) were applicable, the deadline for Plaintiffs to have filed a timely opposition was December 17, 2020.

> (A) The interlocutory order involves a question of law resolved for the first time in this State; (B) The decisions of the trial courts are conflicting upon the question of law; (C) The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order; (D) The interlocutory order has sustained the controverted jurisdiction of the trial court; (E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; (F) The interlocutory order has vacated or opened a judgment of the trial court; (G) Review of the interlocutory order may terminate the litigation; or (H) Review of the interlocutory order may serve considerations of justice.

Supr. Ct. R. 42(b)(iii). After considering the factors articulated in Supreme Court Rule 42(b)(iii) and making its "own assessment of the most efficient and just schedule to resolve the case," the Court "should identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice. If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal." *Id.*

3. The Opinion decided a substantial issue that relates to the merits of the case.[11] The Opinion decided that American Rail must provide advancement to the Plaintiffs for the Superior Court Action. The Opinion thus resolved a substantial issue "because entitlement to advancement speaks directly to the merits of the

[11] A substantial issue of material importance is one that "relate[s] to the merits of the case." *Castaldo v. Pittsburgh-Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973).

plaintiffs' claims, not collateral matters."[12]

4. American Rail argues that several factors under Supreme Court Rule 42(b)(iii) support the Application. Specifically, American Rail asserts that: (a) the interlocutory order involves a question of law resolved for the first time in Delaware; (b) the question of law relates to the construction and application of a statute which has not been but should be settled by the Supreme Court in advance of a final order; (c) review of the interlocutory order may terminate the litigation; and (d) review of the interlocutory order may serve considerations of justice.[13]

5. First, the Opinion "involves a question of law resolved for the first time in this State." Supr. Ct. R. 42(b)(iii)(A). "The proper construction of any contract . . . is purely a question of law." *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1266–67 (Del. 2017) (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)). Alternative entity agreements "are a type of contract." *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 350 (Del. 2020). The Delaware Supreme Court has not addressed the first-party/third-party distinction in the context of advancement and indemnification

[12] *Sider v. Hertz Global Hldgs., Inc.*, 2019 WL 2501481, at *4 (Del. Ch. June 17, 2019) (holding advancement orders decided a substantial issue under Supreme Court Rule 42 but denying request to certify interlocutory appeal); *see also, e.g.*, *Pontone v. Milso Indus. Corp.*, 2014 WL 4967228, at *2 (Del. Ch. Oct. 6, 2014) (finding that an order granting partial advancement determined a substantial issue under Supreme Court Rule 42).

[13] Application ¶¶ 12, 19–38 (citing Supr. Ct. R. 42(c)(iii)(A), (C), (G), and (H)).

provisions in alternative entity agreements. Indeed, it is not apparent that the Supreme Court has addressed the first-party/third-party distinction articulated in *TranSched* and its progeny in any context. Accordingly, this factor is satisfied. *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2018 WL 3599809, at *2 (Del. Ch. July 26, 2018) (granting certification where "[t]his precise question has not been directly addressed by prior case law").

6. Second, the question of law presented relates to the construction and application of a statute of this State. Although the Court did not directly construe Section 18-109 of the LLC Act, it relied upon the statutory grant of authority to provide advancement in the context of construing the applicable advancement and indemnification provision in the American Rail LLC Agreement.[14] Thus, the question of law to some extent "relates" to the application of a statute. Nevertheless, as discussed below, American Rail has not advanced a persuasive argument that this issue "should be settled by [the Supreme] Court in advance of an appeal from a final order." Supr. Ct. R. 42(b)(iii)(C).

7. Third, review of the Opinion could terminate the litigation. If the Supreme Court accepts American Rail's argument on the applicability of the *TranSched* line of cases to the LLC Agreement, then Plaintiffs will not be entitled to advancement or indemnification. If, however, the Supreme Court rejects

[14] *See* Opinion at 16–19.

American Rail's argument, Plaintiffs will be entitled to advancement through the conclusion of the Superior Court Action.

8. As to the final factor upon which American Rail relies, there are valid arguments both for and against the proposition that an interlocutory appeal of the Opinion would serve considerations of justice. Delaware has a strong public policy in favor of indemnification and advancement. *See* Opinion at 18. An interlocutory appeal would serve the interests of justice by resolving a legal issue that could have implications for numerous indemnification provisions in alternative entity agreements and the covered persons under those provisions. A decision clarifying whether the *TranSched* line of cases is directly applicable to alternative entity agreements would potentially resolve some advancement disputes before they arise. On the other hand, the benefits of clarifying a discrete legal issue during the interim period before a final judgment in this context are limited. Advancement is essentially a decision to advance credit until the conclusion of the underlying litigation,[15] and advancement would continue in the absence of a stay pending appeal.[16]

[15] *See* Opinion at 17 n.32 (citing *Adv. Mining Sys., Inc. v. Fricke*, 623 A.2d 82, 84 (Del. Ch. 1992)).

[16] Plaintiffs have all submitted written undertakings to repay any funds advanced if it is ultimately determined that they are not entitled to indemnification. Compl. Ex. E.

9. Under Supreme Court Rule 42(b)(i), the decision on whether to certify an interlocutory appeal is not merely whether the Opinion "decides a substantial issue of material importance," but whether it is also one that "merits appellate review before a final judgment." The Opinion satisfies the former criteria, but not the latter. American Rail argues that if its Application is denied, "the parties, this Court and presumably a master, will go through a time consuming, continuing and expensive process that will include Plaintiffs' submission of invoices, [American Rail's] review thereof and possible objections thereto and (a master's) and this Court's rulings thereon." Application ¶ 35. That process, however, is not unique to this case, and as noted above, it is a process the parties would undergo in the absence of any stay pending appeal. Indeed, it "is one shared by the many litigants declared obligated to pay advancement during the entitlement phase." *Sider v. Hertz Global Hldgs., Inc.*, 2019 WL 2501481, at *3 (Del. Ch. June 17, 2019).

10. After careful consideration of all the factors identified in Supreme Court Rule 42(b)(iii),[17] the Court concludes that the likely benefits of interlocutory review do not outweigh the probable costs, such that interlocutory review is in the interests of justice. In so holding, the Court is guided by the principle set forth in

[17] The Court has considered the factors set forth in Supreme Court Rule 42(b)(iii)(B), (D), (E), and (F). These factors were not cited by American Rail as supporting the Application, and the Court concludes that they are not implicated by the Opinion.

Supreme Court Rule 42 that "[i]f the balance is uncertain, the trial court should refuse to certify the interlocutory appeal." Supr. Ct. R. 42(b)(iii).

11. For the foregoing reasons, the Court concludes that the Opinion decided an issue of material importance, but that it does not merit appellate review before a final judgment. Therefore, certification of an interlocutory appeal is not appropriate under Supreme Court Rule 42, and American Rail's Application is **DENIED**.

/s/ Paul A. Fioravanti, Jr.
Vice Chancellor