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OF THE  
STATE OF DELAWARE

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April 20, 2004

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***RE: Robert Lee Shapiro v. Healthcare Acquisition, Inc.***  
***C.A. No. 030-N***

Dear Counsel:

At the conclusion of trial, the court reserved decision on the question of the plaintiff's entitlement to an award of his attorneys' fees and expenses. After considering the evidence adduced at trial and the parties' briefs on this issue, the court now concludes that no award of attorneys' fees or expenses is justified.

Under the "American Rule" an award of attorneys' fees is "unusual relief."<sup>1</sup> Normally, each party is obliged to pay his own attorneys' fees. Nevertheless, this court will award fees where the losing party acted in subjective bad faith in opposing the relief sought (as, for example, by unnecessarily prolonging or delaying the litigation or knowingly asserting frivolous claims<sup>2</sup>), or where such party forced the opposing party "to file suit to 'secure a clearly defined and established right.'"<sup>3</sup> The burden of proving an entitlement by clear evidence is on the party seeking fees.<sup>4</sup>

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<sup>1</sup> *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997), *aff'd*, 720 A.2d 542 (Del. 1998)(quoting *Weinberger v. UOP, Inc.*, 517 A.2d 653, 656 (Del. Ch. 1986)).

<sup>2</sup> *McGowan v. Empress Entm't, Inc.*, 791 A.2d 1, 4 (Del. Ch. 2000).

<sup>3</sup> *Id.* (quoting *Abex Inc. v. Koll Real Estate Group, Inc.*, 1994 WL 728827, at \*20 (Del. Ch. Dec. 22, 1994)).

<sup>4</sup> *Arbitrium*, 705 A.2d at 232.

The plaintiff failed to carry this burden of proof. It is true that a long period of relative inactivity occurred between the time Shapiro first made a demand for inspection in March of 2002 and the date he eventually brought suit in October 2003. It is not true that this delay was caused by the corporate defendant's bad faith misconduct. On the contrary, the record at trial shows that the root cause of the delay resulted from the fact that both Shapiro's March 2002 demand and his amended August 2003 demand were significantly overbroad. For the limited purpose of valuing his stock, Shapiro demanded access to virtually every piece of paper in the possession of the corporation and its numerous subsidiaries. The corporation did not act in bad faith in resisting such a broad request, and Shapiro did not demonstrate at trial that he was entitled to such an open-ended inspection. Moreover, it appears from the trial record that a good deal of the delay was attributable to the parties' negotiations over a repurchase of Shapiro's shares. While no agreement was reached, there is nothing in the record from which the court could infer that the negotiations were not conducted in good faith.

The court is also satisfied at trial that the positions taken by the corporation in the litigation were taken and maintained in good faith. Indeed, the testimony of Joseph Steier, the corporation's only trial witness, was refreshingly candid and extremely helpful in pointing the way to a sensible resolution of the matter.

For these reasons, the plaintiff's request for an award of attorneys' fees and expenses is denied. IT IS SO ORDERED.

/s/ Stephen P. Lamb  
Vice Chancellor