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OF THE
STATE OF DELAWARE**

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Re: *Korn, et al. v. New Castle County, et al.*
Civil Action No. 767-N

Dear Counsel:

My September 13, 2005 Opinion and Order directed that each party bear its own costs and attorneys' fees in this action. On September 20, 2005, the plaintiffs moved for reargument, seeking to have their costs and attorneys' fees paid by New Castle County (the "County"). I allowed the plaintiffs to supplement the record and file a fee application, and the parties have briefed the matter. After carefully considering the expanded record together with the arguments submitted on both

sides, and for the reasons that follow, I conclude that the motion for reargument must be denied.

I.

This suit was brought by two taxpayers of New Castle County against the County, challenging the County's holding of a revenue surplus of $242 million as financial reserves.[1] The initial complaint challenged the legality of these reserves and sought to enjoin the County's proposed $80 million bond issuance, in light of the reserves. While the matter was pending, the County voluntarily withdrew the bond proposal. In the February 10, 2005 Opinion and Order, I found that the reserves were in violation of the County Code. I declined to permanently enjoin the bond issuance.

After that Order issued, the County Council adopted remedial legislation conforming the budget for fiscal year 2005 to the February 10 Order. The plaintiffs were granted leave to amend their complaint to challenge the legality of the remedial legislation. They also sought an amendment to challenge the County's budgetary process on a new ground: that the County was in violation of State law in accumulating a Light Tax Fund surplus instead of using that surplus to

[1] For a more fulsome description of the facts and legal issues, *see Korn v. New Castle County*, Del. Ch., C.A. No. 767-N, Chandler, C. (Feb. 10, 2005), Opinion and Order.

reduce the light tax. Subsequently, the County modified its 2006 budget and the light tax surplus was expended rather than held in reserve, mooting that issue. Ultimately, I found the plaintiffs' complaints about the legality of the remedial legislation to be without merit. It is in this context that the plaintiffs now seek their legal fees and costs of $500,000.

II.

Delaware follows the American rule on fees and costs under which, as a general matter, each litigant is responsible for his own costs and attorneys' fees.[2] Few judicially-crafted exceptions to this general rule exist. The plaintiffs argue that such an exception should be created here. They point to the common fund doctrine, which allows a litigant who is a member of a class, and whose litigation has resulted in creation of a fund for the benefit of that class, to have his attorneys' fees and costs paid from that fund.[3] The rationale, of course, is that having expended his individual funds to create a benefit for the class, justice requires that a litigant be entitled to have those expenses—as well as the bounty they have generated—spread among that class.

A corollary to the common fund doctrine has arisen in the arena of corporate law. Where a shareholder has individually funded litigation that has not resulted

[2] *Maurer v. Int'l Reinsurance Corp.*, 95 A.2d 827, 830 (Del. 1953).
[3] *In re First Interstate Bancorp S'holder Litig.*, 756 A.2d 353, 357-58 (Del. Ch. 1999).

in a fund common to the shareholders, but instead has caused the defendants to take an action that has resulted in a substantial benefit for those shareholders, our courts have recognized that the costs of that litigation (in certain situations) should also be shared by the beneficiary class. The "corporate benefit" exception applies where: (1) the suit was meritorious when filed; (2) the action producing benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and (3) the ensuing benefit was the result of the suit.[4] The plaintiffs seek an expansion of the corporate benefit doctrine into a "taxpayer's benefit doctrine," and seek payment of fees and costs in return for the benefit of the County's remedial actions: amending the County Code so that the County's reserves were in compliance with the Code; canceling the $80 million bond issuance; and amending the 2006 budget to use the light tax surplus to reduce the light tax levied in that fiscal year.

The parties disagree vigorously about whether the corporate benefit doctrine should be expanded in this manner and, if so, what the parameters of such a taxpayer benefit doctrine should be. Because I conclude that, even if such a doctrine were created and applied here, the circumstances of this case make an

[4] *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876 (Del. 1980).

award of fees and costs inappropriate, I need not (and thus do not) address under what circumstances (and to what extent) a corollary to the common benefit doctrine should apply in the taxpayer-suit context.

A. Tangible Benefits

The plaintiffs insist that but for the County's remedial action taken in response to and during the pendency of this litigation, this Court would have enjoined the $80 million bond issuance, and would have found the light tax reserves illegal resulting in the use of those reserves to reduce light tax assessments. In the plaintiffs' view, the County forestalled action by this Court only by imposing those results itself, by canceling the bond issuance and expending the light tax reserves. If the Court had ordered these actions, argue plaintiffs, the savings to the taxpayers generated by the Court's Order would have created a fund from which fees and costs could have been recovered under the common fund doctrine. Therefore, they contend, the common benefit doctrine should apply and the County should pay the plaintiffs' fees and costs.

The County points out, correctly, that the cancellation of the bond issuance did not forestall a decision of this Court; in fact, I declined to enjoin the issuance of the bonds. The County also argues that the plaintiffs' allegations concerning the light tax reserves were only part of the reason it decided to expend those reserves and reduce taxes.

I need not determine, however, the extent to which the cancellation of the bond issuance and the expenditure of the light tax reserves were the result of the plaintiffs' legal actions because, in any event, the benefits of those actions to the taxpayers are too speculative to amount to a "substantial benefit" that would justify recovery of the plaintiffs' fees from the County. Setting aside the benefit to citizens of compliance with the law by their government (a not insubstantial benefit I discuss later in this letter decision), the financial consequences of the actions taken by the County are open to speculation. With respect to the cancellation of the bond issuance, the County has decided to forego additional borrowing and spend down the financial reserves. Of course, there are costs associated with issuing bonds to raise revenues. It is these costs that plaintiffs point to as the "savings" to the County and its taxpayers. There are also costs, however, associated with depleting reserves. Determining the appropriate size of financial reserves to be maintained by a governmental unit necessarily involves many considerations, of which the return on investment from those reserves, the effect of the reserve on bond ratings, estimates of future expenses and the future costs of raising capital, are but a few. In other words, except as constrained by law, the decision whether to fund operating and capital expenses by borrowing, taxing, or spending down reserves, and the appropriate size of reserves to be maintained, are quintessentially political questions. Similarly, questions of legality aside, the

amount of light tax and light tax reserves to be levied and maintained are quintessentially political questions. To conjecture that reducing taxes or canceling bond issuances in favor of spending down reserves has worked a calculable economic benefit to taxpayers requires speculation too profound to support an exception to the general American rule on fees.

B. Intangible Benefits

The plaintiffs point out, quite rightly, that their actions have resulted in an amendment to the County Code to conform it to the financial reserves maintained by the County, and have caused the County to amend its 2006 budget to bring its treatment of light tax revenues into compliance with a State statute. Plaintiffs argue, and I agree, that there is a definite, although intangible, benefit to the citizenry when its elected officials are forced to conform their actions to the dictates of law. In some situations where the actions of private whistleblower/litigants are found to confer a benefit upon the State and its citizens, the General Assembly has recognized this benefit by legislation providing that the plaintiffs' fees and costs must be paid by the defendant.[5] In other words, the Legislature has demonstrated that it is cognizant of the fact that our general

[5] *See, e.g.*, 29 *Del. C.* § 10005(d) (authorizing Court to award attorneys' fees to successful litigant in Freedom of Information Act case).

American rule on legal fees does not sufficiently encourage litigation in areas where that litigation is found to be especially meritorious or in the public interest. Presumably, if litigation of the instant kind, involving budgetary authority and taxing authority, were considered to be in similar need of encouragement, the General Assembly would provide for a shifting of fees. It has not done so here. Without minimizing the importance of the result the plaintiffs have obtained on behalf of the interest of all citizens of New Castle County in governmental compliance with the law, the "good government" result achieved here is not the type of benefit that supports a common-law exception to the American rule that each litigant must bear his own costs.

III.

For the foregoing reasons, the motion for reargument is denied.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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