EFiled: Jul 31 2014 03:41PM EDT
Transaction ID 55816976
Case No. 2399-VCN

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OF THE
STATE OF DELAWARE

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July 31, 2014

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Re: *Sutherland v. Sutherland*
C.A. No. 2399-VCN
Date Submitted: April 1, 2014

Dear Counsel:

Plaintiff Martha S. Sutherland's ("Martha")[1] request for attorneys' fees and legal expenses is the culmination of an acrimonious family dispute which has been actively litigated for ten years.[2] Martha seeks these fees from Nominal Defendants

[1] First names are used in an effort to improve clarity, and no disrespect to the litigants is intended.

[2] *See, e.g.*, *Sutherland v. Sutherland*, 2013 WL 2362263 (Del. Ch. May 30, 2013); *Sutherland v. Sutherland*, 2010 WL 1838968 (Del. Ch. May 3, 2010); *Sutherland v. Sutherland*, 2009 WL 857468 (Del. Ch. Mar. 23, 2009), *on reargument*, 2010 WL 1838968 (Del. Ch. May 3,

Dardanelle Timber Co., Inc. ("Dardanelle") and Sutherland Lumber-Southwest, Inc. ("Southwest"),[3] rather than from its directors and officers, her brothers, Defendants Perry H. Sutherland ("Perry") and Todd L. Sutherland ("Todd").[4] Because the many opinions preceding this letter opinion detail the facts, much of the dispute's background is omitted. However, some consideration of the scope of proceedings is necessary to evaluate Martha's fee petition.

Martha served on Southwest's board along with Perry, Todd, their father, and others until their father's death at the end of 2003. Thereafter, Martha was removed from Southwest's board in February 2004. That same day, Southwest and Dardanelle executed employment agreements with Perry and Todd (the "Employment Agreements"),[5] which purportedly reflected the unwritten understanding between the companies and Perry and Todd. Martha sought books

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2010); *Sutherland v. Sutherland*, 2008 WL 1932374 (Del. Ch. May 5, 2008); *Sutherland v. Dardanelle Timber Co.*, 2006 WL 1451531 (Del. Ch. May 16, 2006); *Sutherland v. Dardanelle Timber Co., Inc.*, 2005 WL 3272125 (Del. Ch. Nov. 18, 2005); *Sutherland v. Dardanelle Timber Co., Inc.*, 2005 WL 1074357 (Del. Ch. Apr. 25, 2005). This is an incomplete restatement of the litigants' recourse to the courts of this state.

[3] Dardanelle is Southwest's sole stockholder.

[4] Mark B. Sutherland ("Mark"), a cousin of the Sutherland siblings, is also a Defendant in the suit and is a director of the Nominal Defendants.

[5] App. to Answering Br. of Nominal Defs. Dardanelle Timber Co., Inc. and Sutherland Lumber-Southwest, Inc. in Opp'n to Pl. Martha S. Sutherland's Pet. for an Award of Attorney's Fees and Litigation Expenses ("App."), Exs. G-H.

and records from the companies in March 2004 and was provided, in April 2004, copies of certain books and records which included the Employment Agreements.

Martha sought additional information and filed a books and records action under 8 *Del. C.* § 220 in August 2004 (the "§ 220 Action"), which was assigned to a Master of this Court. The Master found that Martha had a proper purpose and Defendants were ordered to permit inspection of additional books and records.[6] Defendants took exceptions to the Master's report and this Court adopted the Master's ruling.[7] Martha's attorney asserts that an incomplete compilation of the cost of prosecuting the § 220 Action is $513,741.50, resulting from a total of 1,310.8 hours of work.[8] Defendants' counsel allegedly spent approximately $750,000 in defending against the § 220 Action.[9]

In September 2006, Martha filed a complaint alleging derivative and double-derivative claims against Perry, Todd, and Mark on a variety of grounds, which

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[6] *See Sutherland v. Dardanelle Timber Co., Inc.*, 2005 WL 3272125 (Del. Ch. Nov. 18, 2005).
[7] *See Sutherland v. Dardanelle Timber Co.*, 2006 WL 1451531 (Del. Ch. May 16, 2006).
[8] Aff. of Stewart T. Kusper in Supp. of Pl. Martha S. Sutherland's Pet. for an Award of Attorneys' Fees and Litigation Expenses ("Kusper Aff.") ¶ 15. Martha's out-of-state counsel billed her $459,301.50 for 1,205.5 hours of work and her local counsel charged $54,440 for 105.3 hours of work. The billing records of an additional local law firm were not included in this sum.
[9] *Id.*

included an allegation that the Employment Agreements were approved through acts of self dealing.[10] In response, the boards of Dardanelle and Southwest added an additional director who became the sole member of a special litigation committee (the "SLC") tasked with investigating Martha's claims. After a December 2006 hearing, Defendants sought, and received, a stay while the SLC completed its investigation. The SLC had completed a report by March 2007, although an opinion of this Court highlighted its various deficiencies.[11]

In April 2007, Defendants moved to dismiss Martha's complaint based on the SLC's recommendation. Martha sought discovery into the SLC's work and conclusions, which Defendants opposed. The Court permitted several broad categories of discovery, and sustained Defendants' objections to certain specific

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[10] Martha also contended that Southwest's ownership of a 50% interest in a private jet used for personal use was inappropriate and that the individual Defendants received improper personal tax and accounting services from a Dardanelle affiliate.

[11] *See Sutherland v. Sutherland*, 2008 WL 571253, at *1 (Del. Ch. Feb. 14, 2008) ("The Report summarizes the investigation done and factual conclusions reached by the SLC in a format that entirely omits any record citation, either to documentary evidence or to the witness summaries the SLC's counsel prepared in the course of its investigation. The Report does contain an appendix but it is limited to certain analyses of one particular aspect of the complaint. None of the source documents or testimonial evidence is found therein. Nonetheless, as sometimes happens in situations of this kind, the Report is relied upon by the nominal defendants as if it were itself evidence of both the good faith of the SLC's investigation and the factual conclusions it reached. This shortcoming was the central argument around which the plaintiff developed her opposition brief.").

document requests and interrogatories in a July 2007 opinion.[12] Later that month, the companies amended the Employment Agreements, based on a recommendation from the SLC.[13] Martha contends that these amendments resulted in significant benefits to the companies by modifying the agreements to prevent Perry and Todd from freely competing with the companies, to place limits on the amount of personal tax and accounting services they could receive at the companies' expense, to eliminate unlimited use of a recreational center at the company's expense, and to eliminate provisions granting Perry and Todd two full years of compensation if they were terminated for cause. However, the salaries of Perry and Todd increased under the amendments and they still permitted personal use of the jet about which Martha complained.[14]

In May 2008, the Court denied the motion to dismiss after reviewing the flaws in the SLC's approach to its investigation.[15] The Court also noted that the SLC's failure to include supporting documentation, as discussed above, "suggests that the SLC has not taken its obligation seriously and has not acted in good

[12] *Sutherland v. Sutherland*, 2007 WL 1954444, at *3-4 (Del. Ch. July 2, 2007).
[13] App., Exs. D-F.
[14] *See Sutherland v. Sutherland*, 2010 WL 1838968, at *16-17 (Del. Ch. May 3, 2010).
[15] *Sutherland v. Sutherland*, 2008 WL 1932374, at *5-7 (Del. Ch. May 5, 2008).

faith."[16] After an additional motion for rehearing, Martha's attorneys had expended 2,042.25 hours of work at a total cost of $863,638.75 plus $3,162.50 in litigation costs.[17] Martha's attorney estimates that the SLC, its counsel, and a company which assisted in the investigation spent approximately $850,000 when attempting to terminate Martha's litigation.[18]

Martha amended her complaint, discovery commenced, and Defendants moved for summary judgment on Martha's claims and substantially prevailed. However, the claim that Dardanelle had improperly paid for personal tax and accounting services for Perry and Todd proceeded to trial and the question of attorneys' fees was deferred.[19] Defendants defeated Martha's remaining claim concerning the personal services after a two-day trial held in November 2012.[20]

Martha now seeks attorneys' fees and costs, as described above, for her attorneys' litigation efforts arising from the § 220 Action and from overcoming the

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[16] *Id.* at *7 n.34.
[17] Kusper Aff. ¶ 25. Martha's out-of-state counsel worked 1740.25 hours for a total cost of $741,913.25 and her local counsel spent 302 hours for a total cost of $121,725.50 and with litigation costs of $3,162.50. *Id.* ¶ 24.
[18] *Id.* ¶ 26.
[19] *See Sutherland v. Sutherland*, 2010 WL 1838968, at *6, *17 (Del. Ch. May 3, 2010).
[20] *See Sutherland v. Sutherland*, 2013 WL 2362263 (Del. Ch. May 30, 2013).

SLC's investigation and recommendation to terminate the litigation. She also seeks $25,000 for defending against the summary judgment arguments targeting the Employment Agreement claims. In sum, she seeks approximately $1.4 million. Defendants argue that Martha achieved only minimal, therapeutic benefits and thus should only be awarded $25,000 for her litigation efforts.

* * *

A stockholder plaintiff is entitled to attorneys' fees and expenses when "(i) meritorious litigation is filed, (ii) an action producing a benefit to the corporation or its stockholders is taken by the defendants before judicial resolution is achieved, and (iii) the resulting benefit is causally related to the litigation . . . ."[21] Defendants do not dispute Martha's general entitlement, but do dispute the amount of fees she should receive under the corporate benefit doctrine. The Court's analysis proceeds under the familiar *Sugarland* factors, which weigh

> (i) the amount of time and effort applied to the case by counsel for the plaintiffs; (ii) the relative complexities of the litigation; (iii) the standing and ability of petitioning counsel; (iv) the contingent nature of the litigation; (v) the stage at which the litigation ended; (vi) whether the plaintiff can

[21] *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 355 (Del. Ch. 1999), *aff'd sub nom. First Interstate Bancorp v. Williamson*, 755 A.2d 388 (Del. 2000).

> rightly receive all the credit for the benefit conferred or only a portion thereof; and (vii) the size of the benefit conferred.[22]

However, the Court has traditionally placed greater emphasis on the benefits achieved by the litigation.[23]

Defendants primarily argue that the benefits achieved by Martha are therapeutic or speculative and thus her fees should be discounted accordingly.[24] They also contend that large portions of the litigation did not contribute to any benefit obtained and that the benefit she achieved is akin to a therapeutic disclosure and should not receive an award exceeding five figures. Martha contends she obtained valuable benefits for the companies, prevailed in complicated and risky litigation, was represented by experienced counsel, and in part faced such high legal fees because of Defendants' "scorched-earth" strategy.

Defendants are correct that the benefits achieved by Martha were minimal. Martha argues that the amendments to the provisions permitting Perry and Todd to

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[22] *In re Plains Res. Inc.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005) (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980)).
[23] *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1136 (Del. Ch. 2011) (citation omitted).
[24] *See In re Golden State Bancorp Inc. S'holders Litig.*, 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000).

compete with the companies will prevent future competition and that Perry and Todd did compete against the companies at least once during the 1980s and 1990s.[25] Moreover, although Martha cites to one former example of competitive activities, she otherwise generally lacks supporting evidence. Thus, her claim of current plans to compete, in the absence of the restrictions, is speculative. Nonetheless, the modifications represent a minor benefit and a limited curtailment of the future activities of Perry and Todd.

Martha also touts the substantial benefit achieved by removing the provisions granting Perry and Todd two years of salary upon removal for cause. However, as Martha admits in her petition, "Defendants (and only the Defendants) have complete control over the companies."[26] Thus, the removal of Perry and Todd for cause was unlikely.[27] Nonetheless, again, some minor benefit was achieved.

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[25] The non-competition restrictions were limited to a distance of 25 miles from the companies' stores.
[26] Pl. Martha S. Sutherland's Pet. for an Award of Attorney's Fees and Litigation Expenses at 29.
[27] Martha argues that cumulative voting was formerly in place; nonetheless, by the time of the amendments, it was not. Moreover, even if Martha and her other brother Dwight could use cumulative voting to obtain representation on the board, they would have been unable to obtain control.

Martha also contends that the caps placed on certain services which Perry and Todd could receive from the companies, which would prevent Perry and Todd from receiving more than $15,000 of such benefits, greatly benefitted the companies.[28] However, Martha has not identified the value of the perquisites Perry and Todd received and again her claim that she has limited their behavior is undermined by the generality of her assertions surrounding her brothers' intent to harm the companies. Defendants argue that Perry and Todd only received services exceeding the amended caps once in the period between 2002 and 2007. However, the impact of the litigation on the behavior of Perry and Todd could make that number unrepresentative, and Martha's failure to identify cost savings from the caps makes such an inquiry unnecessary. Again, Martha achieved a minor benefit through the imposition of caps to the amount of services Perry and Todd could receive at the companies' expense, although the benefit was not substantial.[29]

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[28] She appears to overlook that the amendments to the Employment Agreements included increases to Perry's and Todd's salaries, which, to some extent, would offset the other benefits for which she claims credit.

[29] It may also be of some relevance that Martha appeared to be the beneficiary of the same perquisites until she was removed as a director.

Finally, Martha argues that she achieved a change in corporate culture through her litigation; for example, she contends that Defendants are again holding annual meetings and more openly provide information. Defendants note that Martha had signed a waiver of her right to an annual meeting and thus she should not be credited with that achievement. The general corporate cultural shifts Martha claims as a result of litigation are amorphous and are difficult to quantify. They tend to involve awareness of fiduciary responsibilities and of the consequences (including costs) that may flow from their failure to meet such responsibilities.

Defendants assert that Martha should not be rewarded for aspects of the litigation upon which she was unsuccessful. They argue that the § 220 Action was unnecessary, because Martha had already received the Employment Agreements by the time it commenced. Moreover, Martha cannot identify any benefits she obtained after the SLC report's recommendations were implemented in July 2007. Martha essentially argues that the process by which she vindicated her rights and obtained benefits from the companies was unnecessarily drawn out by the conduct of Defendants and their attorneys. A broader perspective of the ordeal which she endured is urged.

The Court has already ruled that Defendants' efforts in defending the § 220 Action were not in bad faith.[30] Although it is difficult for Martha to identify the documents she obtained from the § 220 Action, the effort was unfortunately a necessary part of the process. However, any monetary award from this effort is necessarily minimal and is otherwise incorporated into the recovery authorized here.

Although the Defendants contend that Martha had achieved the benefit by March 2007, the companies' boards adopted those recommendations in July 2007, only after the Court had ruled earlier that month that Martha was entitled to discovery into the SLC's investigation. When considered with the vigorous motion practice Defendants employed, this is unlikely to have been coincidental. However, Martha did not secure additional benefits for the companies after the Employment Agreements were modified. She could have petitioned the Court for fees from that point forward and her efforts against Defendants' summary judgment motion were primarily focused on her other claims, and not on modifying the Employment Agreements.

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[30] *Sutherland v. Sutherland*, 2010 WL 1838968, at *13 (Del. Ch. May 3, 2010).

Other factors cited in favor of her award are uncontested. She was assisted by experienced and sophisticated counsel and did face challenging legal questions which her counsel skillfully navigated. The vigor with which Defendants mounted their defense created litigation risks, increased the complexity of the issues Martha confronted, and certainly raised the costs for all parties involved.[31]

* * *

In sum, the Court finds that Martha's litigation efforts brought about some positive benefits for the companies involved, although those benefits were not as valuable as Martha has argued. Aspects of the potential harms which Martha believes she has corrected are only generally alleged and are somewhat speculative. Martha also ignores that the amendments resulted in increased salaries to her brothers and that somewhat offsets the alleged savings for which she can claim credit. Nonetheless, the Employment Agreements do impose enforceable constraints on the behavior of Perry and Todd. And, despite Defendants' attempts to minimize the amendments, they are more substantial and

[31] And, although Martha did not prevail on her claims, the Court wonders if Defendants' secrecy in their dealings contributed to Martha's belief that misconduct was occurring at the companies. Defendants' unwillingness to deal openly with Martha and their aggressive litigation tactics undoubtedly contributed to the great expense associated with this litigation.

concrete than therapeutic disclosure benefits. In weighing these factors, the Court concludes that Martha should be awarded attorneys' fees and expenses of $275,000.[32]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[32] Defendants also point out that Martha's attorneys have not submitted evidence detailing what work they performed, how many hours were expended, and at what hourly rates. Such evidence may have strengthened Martha's case; but given the Court's primary focus on the benefits achieved, a strict calculation based on the hours devoted does not guide the Court in this instance and somewhat alleviates her counsel's omission.