



IN THE SUPREME COURT OF THE STATE OF DELAWARE

The Ravenswood Investment Company,)	
L.P., individually, derivatively and on)	
behalf of a class of similarly)	
situated persons,)	No. 496, 2018
)	
Plaintiff-Below, Appellant/Cross-)	
Appellee,)	
)	Court Below:
v.)	Court of Chancery of the
)	State of Delaware
The Estate of Bassett S. Winmill,)	C.A. Nos. 3730-VCS
Thomas B. Winmill, and Mark C. Winmill,)	and 7048-VCS (consolidated)
and Winmill & Co. Incorporated,)	
)	
Defendants-Below, Appellees/Cross-)	
Appellants.)	

CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

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ARGUMENT

I. The Evidence Does Not Support the Court of Chancery’s Conclusion That Ravenswood Is Entitled To \$140,000 In Legal Fees and \$25,000 In Expenses

As explained in Defendants’ opening brief on their cross-appeal,¹ the Court of Chancery erred by awarding Ravenswood² \$140,000 in legal fees and \$25,000 in expenses because it incorrectly found that the common fund exception does not apply (COB at 58-59) and that Ravenswood’s litigation instead created a corporate benefit. (COB at 60).

As set forth in that opening brief (COB at 57-58) Delaware follows the American Rule under which litigants are responsible to pay their own attorneys’ fees. *Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011, 1015 (Del. 2007). There are exceptions, and “[i]n the realm of corporate litigation, the Court may order the payment of counsel fees and related expenses to a plaintiff whose efforts result in the creation of a common fund . . . , or the conferring of a corporate benefit.” *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989) (“*Tandycrafts*”) (citation omitted).

¹ Appellees’ Answering Brief on Appeal and Cross Appellants Opening Brief on Cross-Appeal (Trans. ID 62766352) (“COB”).

² Terms not otherwise defined shall have the same meaning as in the COB.

Ravenswood does not dispute this standard applies here. Despite only seeking damages or damages-related relief,³ Ravenswood contends that the \$3.00 nominal damages award is not a common fund, and thus that its attorneys' fees should not be limited to a portion of that fund. (CAB at 36).⁴ Ravenswood argues, instead, that it created a corporate benefit because the Court of Chancery's ruling identified "the appropriate standards in the operation of Winmill" and set "a precedent for future actions." (CAB at 39). As explained in more detail below, because these statements would be true in just about every instance where a breach of fiduciary duty is found, Ravenswood implicitly is arguing that the Court's finding of a breach of fiduciary duty, without more, creates a corporate benefit for Winmill & Co.

Ravenswood's answering brief never "answers" the substantive arguments raised by Defendants. That is, Ravenswood cites to no case in which a Court found a corporate benefit existed based solely upon a finding that a breach of fiduciary

³ Ravenswood implies that it sought relief other than damages or damages-related relief and that Defendants have made a "factual error" by arguing to the contrary. (CAB at 37). In support, Ravenswood notes that its Amended Complaint vaguely sought "compensation and equitable relief" on this claim. (CAB at 9). However, Ravenswood sought only damages or damages-related relief for this claim in the Joint Pre-Trial Stipulation and Order. (A000816).

⁴ Appellant's Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal (Trans. ID 62858085) ("CAB").

duty had occurred (even where that breach might have set “a precedent for future actions”) and, solely on that basis, awarded attorneys’ fees. Ravenswood also asserts that it is entitled to a *quantum meruit* fee award, but its argument skips a needed analytical step because it relies solely on cases which found that the corporations involved had received non-speculative benefits.

A. The Common Fund Here Is \$3.00 In Nominal Damages

After years of litigation, the only benefit Ravenswood generated for Winmill & Co. was the award of \$3.00 in nominal damages. Relying on the Court’s decision below, which determined that the common fund exception to the American Rule does not apply here, Ravenswood argues that nominal damages cannot be the source from which a common fund is created. (CAB at 36).

Neither of the cases Ravenswood cites support its argument. *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709 (Del. Super. Ct. 1967) (CAB at 36), involved jury instructions in an action involving an invasion of the right to privacy. *Guthridge* never discusses either corporate benefits or attorneys’ fees. Nor does *Penn Mart Supermarkets, Inc. v. New Castle Shopping LLC*, 2005 WL 3502054, at *15 (Del. Ch. Dec. 15, 2005) (CAB at 36), which was a post-trial opinion addressing a claim brought under a lease that protected a grocery store from competition by other tenants. *Id.* at *1. No attorneys’ fees were sought or awarded and *Penn Mart* was not a corporate benefit case. *Id.* at *15-16. That nominal damages have been

described as being “damages in name only,” *Guthridge*, 239 A.2d at 714, does not change the fact that they were awarded here, and are the only tangible benefit received by Winmill & Co.

B. The Court’s Finding That Ravenswood’s Litigation Created A Corporate Benefit Was An Abuse of Discretion

While a corporate benefit need not be monetarily quantifiable (CAB at 37), it must *exist* before attorneys’ fees can be justified. This Court has identified the type of actions that constitute a non-monetary corporate benefit justifying an award of attorneys’ fees, including “causing a defendant to abandon a going-private transaction; making corrective disclosures...; returning voting rights to common shareholders; and canceling a preferred stock issue....” *EMAK Worldwide, Inc. v. Kurz*, Del., 50 A.3d 429, 433 (2012) (“*EMAK*”) (citation omitted) (finding preservation of corporate voting rights is a corporate benefit). Likewise, “[c]hanges in corporate policy” and “a heightened level of corporate disclosure” may justify an award of counsel fees. *Tandycrafts* at 1165. None of these benefits, and nothing else similar in concept to these benefits, occurred here.

The Court of Chancery appears to have disregarded these limitations when it found that “[t]he true benefit to Winmill & Co. did not lie in the nominal damage award of \$3 but, rather, in the successful prosecution and ultimate declaration of defendants’ wrongful conduct.” (COB Ex. 1 at 32). Perhaps recognizing that “the successful prosecution and ultimate declaration of defendants’ wrongful conduct,”

without more, has not previously justified an award of attorneys' fees, Ravenswood attempts to support its argument that it is entitled to attorneys' fees with cases where courts found substantial benefits were achieved by litigation. (CAB at 38). None of these cases help Ravenswood because it failed to achieve *any* corporate benefit here, beyond the award of nominal damages.

Robert N. Bass Group, Inc. v. Evans, 1989 WL 137936, at * 3 (Del. Ch. Nov. 16, 1989) (CAB at 37), was a two-phase litigation resulting in a sale which obtained an increase of over \$700 million from the value of a proposed restructuring. The Court of Chancery determined that, while class counsel had not been "primarily responsible" for the benefit, they made "an important contribution to the litigation" because they ensured their clients' interests (which were potentially adverse to the lead party) were represented. *Id.* Thus, they created a concrete benefit.

In *Dover Historical Society, Inc. v. City of Dover Planning Commission*, 902 A.2d 1084, 1090 (Del. 2006) (CAB at 38), the Court considered a petition for attorneys' fees in the context of building construction litigation. The Supreme Court affirmed the denial of that petition, *id.* at 1094, holding that the common fund and corporate benefit exceptions did not apply (*Id.* at 1091). None of this helps Ravenswood.

Ravenswood relies on *Franklin Balance Sheet Investment Fund v. Crowley*, 2007 WL 2495018, at *12 (Del. Ch. Aug. 30, 2007) ("*Franklin*") (CAB at 37) to

support its proposition that fees can be awarded based upon a benefit received by the corporation that was “not contemplated by the litigation.” In *Franklin*, plaintiffs brought claims for breach of fiduciary duties and waste and sought a cash recovery. *Id.* at *1. The Court of Chancery approved a settlement that permitted the defendants to take the company private by completing a tender offer followed by a short-form merger. *Id.* Plaintiffs did not seek a tender offer, but the Court found the plaintiffs’ litigation was a factor in the company’s decision to go private and that the tender offer resulted in “a significant monetary benefit” to the class. Fees were not awarded for a corporate benefit but rather were based on a percentage of the monetary benefit that was created. *Id.* at *8. Here, the only benefit to Winmill & Co. (or its stockholders) that resulted from Ravenswood’s litigation was the creation of the \$3 fund.

Ravenswood’s other citations are equally inapplicable. *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1167 (Del. 1989) (CAB at 38) involved a benefit resulting from “the correction or clarification of the proxy material,” which occurred after the filing of the lawsuit—an obvious corporate benefit. Ravenswood’s reliance on *Cal-Maine Foods, Inc. v. Pyles*, 858 A.2d 927, 929 (Del. 2004) (CAB at 38) is also misplaced because this Court found that plaintiff’s litigation was casually related to the abandonment of a going private transaction. Ravenswood’s litigation had no similar effects here.

1. Ravenswood and the Court of Chancery Draw Inferences That Are Speculative and Unsupported By The Record

At the hearing on attorneys' fees, the Court of Chancery determined that "plaintiff's successful prosecution of defendants' disloyal compensation practices admonished defendants for their past practices and for their conduct in connection with the awards at issue in this case." (COB Ex. 1 at 34). While elsewhere acknowledging that, to justify an award of attorneys' fees, the corporate benefit must be "immediately discernible rather than speculative," the Court of Chancery nonetheless then speculated that "[t]he decision also serves to prevent or at least dissuade this board from repeating its past practices with respect to stock option plans by having declared that the board's past practices in this regard implicate and, if repeated, violate the fiduciary duty of loyalty." (COB Ex. 1 at 33-34).

The Court cited no evidence that supports this speculation about what the Winmill & Co. board might do in the future. (COB Ex. 1). Likewise, although Ravenswood argues the Court's conclusion is "factually based" it cites to no evidence that supports the Court's conclusion that its ruling will "prevent" or "dissuade" any future activities—Ravenswood merely speculates that it will do so. (CAB at 37-40). Ravenswood never introduced evidence on this point, even after Thomas Winmill testified at trial that in 2016, two years before the Court's ruling, at least one new director was elected to the Winmill & Co. board (B00745-B00746 (Thomas)). Because Ravenswood never tried, and the Court never found, what the

appropriate compensation should be, the current board of Winmill & Co. thus would be able to rely on the new director (appointed to a special committee, for example) to adopt the same stock option plan, to grant identical options to management, and take any of the actions the Court found disloyal because they were taken by a board comprised of management unable to meet its burden of entire fairness.

This speculation (that the Court's ruling will change the future fiduciary actions of the Defendants) is inadequate to establish that a current, concrete benefit has been conferred by the litigation. To permit such speculation to form the basis for an attorney's fee award would substantially change current Delaware law, because speculation about the future action of corporate fiduciaries can occur in any case in which directors are found to have done something improper in the past. Nonetheless, Delaware law requires that a specific, substantial, corporate benefit to have been caused by the litigation before fees can be awarded.⁵

2. The Court Only Looks at *Quantum Meruit* After Finding A Corporate Benefit Exists

Ravenswood argues that “[e]ven where the monetary benefit has been shown to be \$0, *quantum meruit* will serve as a basis for a fee award.” (CAB at 38). But

⁵ Ravenswood's argument that Defendants' “unstated and indefensible premise of their assertion that fees are available only when a decision establishes something ‘new under Delaware law’” (CAB at 40) is wrong—Defendants are not making any such argument. The point Defendants were making there (COB at 60) was that Ravenswood did nothing here, beyond creation of the common fund, that justified an award of attorneys' fees.

this is so only where a *corporate benefit* has been created by plaintiff's actions, as acknowledged by each of the cases Ravenswood cites. In *In re Diamond Shamrock Corp.*, 1988 WL 94752, at *3 (Del. Ch. Sept. 14, 1988) (CAB at 37, 38) the Court approved an attorneys' fee award as a result of a settlement based on a finding that the substitution of a rights plan that contained more definite mandatory redemption guidelines and a shorter duration conferred a corporate benefit. Likewise, in *In re Golden State Bancorp Inc. S'holders Litig.*, 2000 WL 62964, at *3-4 (Del. Ch. Jan. 7, 2000) (CAB at 39), the Court found a corporate benefit where a settlement obtained additional disclosures.

Ravenswood cites *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980) ("*Sugarland*") (CAB at 39) to support its argument that the benefit achieved can be minimal, such as the creation of family harmony. But the benefit still must exist. *Sugarland* was resolved through a settlement in which the company *agreed* that "Sugarland has determined that this settlement is beneficial to it and in the best interests of Sugarland and its stockholders." *Sugarland* at 149. Here, defendants have made no such agreement or settlement; thus, the only identifiable *benefit* to Winmill & Co. and its stockholders from this litigation is \$3. Everything else that occurred – the time spent by management and employees of Winmill & Co., and the resulting distraction to them during this litigation over more than 10 years – is certainly no benefit to the Company.

Ravenswood cites to the Opinion⁶ and *EMAK* (CAB at 39) for the proposition that the benefits it achieved here go to a “‘pillar’ of Delaware corporate jurisprudence” and therefore it should be entitled to fees. In *EMAK*, however, the Court found “preserving ... shareholders’ voting rights” and a challenge brought against a transaction that resulted in rescinding the transaction were corporate benefits. 50 A.3d at 433-34. Ravenswood’s lawsuit resulted in no such benefit here.

Ravenswood also argues, based on *San Antonio Fire & Police Pension Fund v. Bradberry*, 2010 WL 4273171, at *7 (Del. Ch. Oct. 28, 2010), that a “future impact” can be the basis for a fee (CAB at 39). But this “future impact” still requires a substantive benefit. In *San Antonio Fire* counsel sought fees for their role in disabling continuing director provisions in two debt instruments. *Id.* at 8. The Court of Chancery found that protecting stockholders’ franchise rights by allowing stockholders to replace a majority of the incumbent board were the type of “specific and substantial benefits” that justified the granting of attorneys’ fee. *Id.* Nothing similar occurred here.

⁶ March 21, 2018 Post-Trial Memorandum Opinion, revised March 22, 2018 (Appellant’s Opening Brief Exhibit B) (“Opinion”).

C. Defendants' Are Not Arguing That Concurrent Corporate Benefit And Common Fund Awards Are Impermissible.

Ravenswood also argues that Defendants have made an “implied legal contention[]” that “the existence of a common fund precludes an award for a corporate benefit.” (CAB at 36-37). Defendants made no such argument. Rather, Defendants argue that there was no corporate benefit here, and therefore the only potential source of attorneys’ fees comes from the corporate fund created by the award of nominal damages. (COB at 60-62).

CONCLUSION

For the reasons set forth here and in Defendants' opening brief on cross-appeal, this Court should reverse the decision of the Court of Chancery only with respect to the award of \$140,000 in attorneys' fees and \$25,000 in expenses and direct that no attorneys' fees and costs should be awarded to Ravenswood beyond its share of the nominal damages common fund.

January 24, 2019

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