



## I. ANALYSIS

### A. Plaintiff's Request for Indemnification and for Defendant to pay \$212,297.24 Plus Interest For Defending Himself in the Montgomery County, Pennsylvania and Delaware Cases.

Still's request for indemnification fails for two reasons. First, Still's request is completely improper since it has absolutely no relevance to the case *sub judice*. Although the parties are the same in this action as those in the Pennsylvania and Delaware actions, this does not give Plaintiff a blanket allowance to file any motions he chooses with this Court simply because the parties are the same. It appears as though the Delaware court would be a more appropriate place to file this request since Still is requesting indemnification and advancements in the Delaware action. Second, while Still asks this Court to indemnify him in the Delaware action, he also admits that his request is premature since "indemnification is made after disposition of the underlying claims." (Pl.'s Mem. of Law, 10). Further, while Regulus noted Still's inconsistent position regarding indemnification in its Reply Brief, Still completely ignored the argument in his Sur-Reply and remained silent on the issue. Therefore, this Court will not decide whether Still is entitled to advancements or indemnification in the Delaware and Pennsylvania actions.

### B. Plaintiff's Request for Advancement of \$50,000.00 from Defendant to be Used For Trial Expenses

This Court will not address the merits of Still's request for an advancement in the amount of fifty-thousand dollars for trial expenses in the Delaware action as this request is improper for the same reasons as stated above.

C. Plaintiff's Request for Defendant to Pay All of Plaintiff's Reasonable Attorney's Fees Incurred After March 1, 2002 for the Prosecution of the Instant Action and Defenses of Any Threatened Counterclaims

Plaintiff contends that, per the terms of the Operating Agreement (the "Agreement") between himself and Regulus which controls this issue, he is entitled to an advance payment for the cost of litigating the instant action against Regulus as well as for defending any possible counterclaims asserted by Regulus. Regulus counters that the terms of the Agreement specifically limit the advancement of legal fees to persons who are named defendants or respondents and since Still is the plaintiff he is not entitled to advancements. Both parties agree that Delaware law controls the Agreement.

Delaware law permits a corporation to bind itself in advance, through its bylaws or contract, to advance the costs of litigation incurred by present or former directors or officers. See Del.Code Ann., tit 8 § 145(e); Citadel Holding Corp. v. Roven, 603 A.2d 818, 823 (Del. 1992)(finding corporation was required to reimburse a director for litigation fees). When construing corporate charters and bylaws, this Court must use the same rules applicable to the interpretation of statutes, contracts and other written instruments. Gentile v. Singlepoint Fin., Inc., 788 A.2d 111, 113 (Del. 2001). Therefore, if the bylaw is unambiguous, it is then construed as it is written and the language is given the force and effect required since the Court does need to interpret it or look to the parties' intent. Id.

This Court must determine whether the Agreement entitles Still to advancements in this litigation. Article VII, Section 8.3 of the Agreement, addresses the right to advancement of expenses and states in pertinent part:

the right to indemnification conferred in this Article VII shall include the right to be paid by the company the reasonable expenses incurred by a Person . . . who was, is or is threatened to be made a named defendant or respondent in a Proceeding in advance of the final disposition of the Proceeding and without any determination as to the Person's ultimate entitlement to indemnification; provided, however, that the payment of such expenses. . . in advance of the final disposition of a Proceeding, shall be made only upon delivery to the Company of a written affirmation by such Person, or his or her good faith belief that he has met the standard of conduct necessary for indemnification under this Article VIII and a written undertaking. . . to repay all amounts so advanced if it shall ultimately be determined that such indemnified Person is not entitled to be indemnified under this Article VIII or otherwise.

Article VII, Sec. 8.3. Therefore, in order for Still to be entitled to advancements, he must be “a person who was, is or is threatened to be made a named defendant or respondent in a Proceeding.” Id. Recently, the Supreme Court of Delaware held that there was no ambiguity in a bylaw which was identical to Regulus' bylaw in this case. Gentile at 113(finding that former officer and director was not entitled to advancements for litigation expenses under corporation's bylaws because former officer and director was not a named defendant in the litigation). The Gentile Court found that the bylaw clearly limited advancements to “situations in which the director is a named defendant or respondent in an action.” Id. Accordingly, Still is not entitled to advancements in this action since he is the person who initiated this action and thus is a plaintiff, not a defendant.

Still first argues that Gentile does not preclude him from receiving advancements in this case since he is only requesting advancements for defending Regulus' counterclaims, not the entire suit. However, Still does argue that he is entitled to “advances for all litigation in this case, not just to defend the counterclaim.” (Pl.'s Mem. of Law, 16). Regardless, of Still's

inconsistent assertions to this Court, he is not entitled to any advancements in this action either for his claims or to defend any counterclaims. The bylaw in the Agreement clearly states that the person must be a named defendant or respondent in a proceeding. In this proceeding, Still is the plaintiff and, accordingly, is not entitled to any advancements. Still further argues that Ridder v. Cityfed Fin. Corp., 47 F.3d 85 (3d Cir. 1995) controls the outcome of this case. In Ridder, the Third Circuit determined that the employees of a corporation were entitled to advancements in litigation fees in a suit in which the employees were defending themselves against the corporation. Since the situation in Ridder is completely opposite to the present situation, Ridder clearly does not control. Further, since this Court is required to follow the decisions of the Delaware courts, we must follow the outcome of Gentile.

## **II. CONCLUSION**

For all the foregoing reasons, Plaintiff's motion is denied.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

|                            |   |              |
|----------------------------|---|--------------|
| DAVID B. STILL,            | : | CIVIL ACTION |
| Plaintiff,                 | : |              |
| v.                         | : | NO. 00-6053  |
| REGULUS GROUP LLC, et al., | : |              |
| Defendants.                | : |              |

**ORDER**

AND NOW, this 29th day of May, 2002, upon consideration of Plaintiff's Motion to Require Indemnification and Advancement of Litigation Expenses and for Declaratory Judgment (Dkt. No. 32) and any Responses and Replies thereto, it is hereby **ORDERED** that said motion is **DENIED**.

BY THE COURT:

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ROBERT F. KELLY, Sr. J.