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Case No. 2018-0029-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE DELAWARE PUBLIC SCHOOLS LITIGATION	)	C.A. No. 2018-0029-JTL **COUNTY TRACK**

ORDER DETERMINING THAT PLAINTIFFS ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND EXPENSES

1. The plaintiffs are non-profit, non-partisan, civic-oriented institutions with a strong interest in Delaware's schools.[1] In January 2018, they filed this litigation because they believe that Delaware's public schools are not providing an adequate education to Disadvantaged Students.

2. The plaintiffs pointed to a broken system for funding public schools as one reason why Delaware's public schools fall short. One third of the funding for Delaware's public schools comes from local taxes. When school districts in Delaware levy local taxes, they must use the assessment rolls prepared by New Castle County, Kent County, and Sussex County. If there are problems with the counties' assessment rolls, then those problems affect the school districts' ability to levy local taxes. The plaintiffs sought to prove that the counties contributed to the problems facing Delaware's schools by failing to collect school-related taxes in a manner that complied with the applicable constitutional and statutory requirements.

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[1] The background of this action is described extensively in the post-trial decision issued on May 8, 2020 (the "Opinion"). *In re Del. Pub. Sch. Litig. (DEO III)*, 239 A.3d 451 (Del. Ch. 2020). This order recites only those facts directly relevant to the plaintiffs' motion for attorneys' fees. Capitalized terms not defined herein have the meaning given to them in the Opinion.

3. In their original complaint, the plaintiffs sued the county officials who supervise the assessment process and collect local taxes, and they also sued state officials for failing to provide an adequate education for Disadvantaged Students. All of the defendants moved to dismiss the complaint. The court issued one decision denying the county officials' motion. *See Delawareans for Educ. Opportunity v. Carney (DEO I)*, 2018 WL 4849935, at *1 (Del. Ch. Oct. 5, 2018). The court issued a separate decision denying the state officials' motion. *See Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109 (Del. Ch. 2018).

4. After resolving the pleading-stage motions, the court bifurcated the litigation into a "County Track" and "State Track." *See* Dkt. 67. In February 2019, the court bifurcated the County Track again, separating the merits phase from the remedial phase. *See* Dkt. 98.

5. In the County Track, the court held a trial on the merits on July 17 and 18, 2019. After post-trial briefing and argument, the court issued the Opinion on May 8, 2020. In that post-trial decision, the court held that all three counties used methodologies for their property assessments that violated the True Value Statute and the Uniformity Clause. *DEO III*, 239 A.3d at 540.

6. The litigation then moved to the remedial phase. Between January and April 2021, the parties reached a settlement with each of the counties. In each settlement, the relevant county agreed to conduct a general assessment. Dkts. 418, 427, 441.

7. On May 10, 2021, the plaintiffs moved for an award of attorneys' fees and expenses. The court instructed the parties first to address whether the plaintiffs are entitled

to an award of attorneys' fees and expenses. Only if an entitlement was found to exist would the parties address the reasonableness of the amount of fees sought. Dkt. 446. This order addresses the issue of entitlement.

8. "[L]itigants in Delaware are generally responsible for paying their own counsel fees, absent special circumstances or a contractual or statutory right to receive fees." *Scion Breckinridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 686 (Del. 2013) (cleaned up). "[A] Chancellor or Vice Chancellor, under his [or her] equitable powers, has latitude to shift attorneys' fees." *Id.* (cleaned up). One circumstance where this power may be exercised is when the litigation creates a common benefit. *Id.* at 686–87. "The benefit may take the form of either a tangible, monetary benefit (*i.e.*, the 'common fund' exception), or an intangible benefit to an entity, such as supplemental disclosures or changes in corporate governance (*i.e.*, the 'corporate benefit' exception)." *Judy v. Preferred Commc'n Sys., Inc.*, 2016 WL 4992687, at *14 (Del. Ch. Sept. 19, 2016) (citing *Dover Hist. Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006)).

9. As a threshold matter, the parties dispute whether the plaintiffs can invoke the common benefit doctrine on the facts of this case. The common benefit doctrine applies most frequently in the context of corporate litigation. Nevertheless, Delaware courts have applied the doctrine in other contexts, including litigation by a creditor that results in the recovery of money or property or the establishment of a lien for the benefit of the plaintiff

and similarly situated creditors,[2] proceedings "instituted by a trustee or executor seeking instructions for the proper administration of the trust or estate,"[3] and lawsuits that create substantial and quantifiable benefits for taxpayers.[4] "The form of suit is not a deciding factor; rather, the question to be determined is whether a plaintiff, in bringing a suit either individually or representatively, has conferred a benefit on others." *Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1166 (Del. 1989) (cleaned up). The Delaware Supreme Court made this comment about the distinction between an individual suit and a representative action, but the lesson applies more broadly. The threshold question is whether the litigation conferred a benefit on others. The related question is whether the circumstances of the case warrant requiring the parties who benefitted (or a suitable intermediary) to bear the cost of generating those benefits in the form of a fee award.

10. The counties nevertheless maintain that the common benefit doctrine cannot apply to a case like this one. They argue that in *Korn II*, the Delaware Supreme Court extended the common benefit doctrine to suits by taxpayers that create a substantial and quantifiable benefit for other taxpayers, but that the Delaware Supreme Court did not authorize the application of the common benefit doctrine more broadly to litigation that confers a civic benefit. The counties assert that because the plaintiffs are not taxpayers and because the litigation did not confer a benefit on other taxpayers the common benefit doctrine does not apply. *See* Dkt. 447 at 15–26.

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[2] *See Maurer v. Int'l Re-Ins. Corp.*, 95 A.2d 827, 830 (1953).
[3] *See id.*
[4] *See Korn v. New Castle Cty. (Korn II)*, 922 A.2d 409, 410 (Del. 2007).

11. As discussed below, the County Track litigation does benefit taxpayers. Regardless, in making this argument, the counties construe *Korn II* too narrowly. The *Korn II* decision recognized that the common benefit doctrine could apply to public interest litigation. The decision applied the common benefit doctrine to a suit brought by a taxpayer for the benefit of taxpayers, but the Delaware Supreme Court did not limit the doctrine to that setting. As demonstrated by this court's comments on remand, the *Korn II* decision applies more broadly to public interest lawsuits. *See Korn v. New Castle Cty.*, 2007 WL 2981939, at *2 (Del. Ch. Oct. 3, 2007). This court expressed concern about that outcome and viewed the *Korn II* decision as a threat to local governments:

> Under the Supreme Court's holding in this case, local governments face a new financial risk because plaintiff's attorneys are now incentivized to bring public interest lawsuits. It is questionable, however, whether there is a need to incentivize public interest litigation because there are other enforcement or accountability measures (the Delaware Attorney General and the election process come immediately to mind). The same is not true in the context of corporate litigation. Nevertheless, this Court is obligated to award fees against the County reasonable in relation to the benefit the Supreme Court found was conferred.

Id. (footnote omitted). The court would not have expressed a broader concern about public interest litigation unless *Korn II* applied more broadly than just taxpayer suits that generate monetary benefits for other taxpayers. To my knowledge, the fears expressed on remand have not been realized, and the courts have the ability to tailor the doctrine should problems arise.

12. Contrary to the counties' assertion, applying the common benefit doctrine is warranted on these facts. The power to award fees for conferring a common benefit "is a flexible one based on the historic power of the Court of Chancery to do equity in particular

situations." *Tandycrafts*, 562 A.2d at 1166. The core rationale underlying the common benefit doctrine is to incentivize parties to bring meritorious litigation that either (i) confers a benefit on the defendant or (ii) results in a broader class of parties receiving a benefit under circumstances where it is equitable to require the defendant to bear the cost of conferring the benefit. *See Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 789 A.2d 1216, 1231 (Del. Ch. 2001), *aff'd sub nom. Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959 (Del. 2003). Delaware courts have declined to apply the common benefit doctrine where there is no need to incentivize the litigation or where competing policies counsel against it.[5]

13. Public policy supports providing an incentive for litigants like the plaintiffs who take on difficult statutory and constitutional issues like those litigated in the County Track. As the Opinion described at length, Delaware's system of property tax assessment had become irretrievably broken. It has been decades since the counties conducted their last general assessments, and Delaware policymakers have long recognized that the counties' failure to update their assessments undermined Delaware's system for funding public schools. Yet in the intervening decades, no one stepped forward to fix the system.

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[5] *See, e.g.*, *Martin v. Harbor Diversified, Inc.*, 2020 WL 568971, at *4 (Del. Ch. Feb. 5, 2020) (denying plaintiff's request for fees "where it [was] clear that the corporate benefit was a mere externality to the Plaintiff's ultimate goal of achieving a buyout of his interest"), *aff'd*, 244 A.3d 682 (Del. 2020); *Judy*, 2016 WL 4992687, at *16 ("Litigation financiers do not need the common benefit doctrine to give them an incentive to finance litigation."); *Mentor*, 89 A.2d at 1231–32 (denying plaintiff's application for fees and finding "there is no basis in law or policy to force the winning bidder to pay the expenses of the loser" and there is no need to "create a greater incentive for bidders to 'police' the conduct of corporate fiduciaries, identify wrongdoing, and force their observance of fiduciary duties").

The counties had not taken action, and the political branches had not stepped in. Absent a legal challenge, Delaware's inequitable system of property tax assessment would have persisted.

14. Nor was it reasonably likely that anyone except groups like the plaintiffs would be able to mount a meaningful challenge. As the Opinion explained,

> From time to time, individual property owners have challenged the staleness of their property assessments in tax appeals, but in those cases, the Uniformity Clause operates to foreclose any single property owner from obtaining a valuation different than what the indefinite-base-year method generates. An individual plaintiff might theoretically sue on a class-wide basis, but it would take a brave and civic-minded person to assert the claim. New Castle County has estimated that after a general assessment, approximately half of property owners would have their taxes go up. Few people like having their taxes raised, and it is hard to imagine an individual suing to fix a dysfunctional system when the outcome could irritate as many as half of her fellow property owners.

DEO III, 239 A.3d at 539 (citations and footnote omitted). If there ever was a setting that called for rewarding courageous plaintiffs for litigating, this was it.

15. The counties point out that the plaintiffs had broader interests that contributed to their willingness to litigate, such as their desire to protect the interests of disadvantaged students by restoring the integrity of the school-funding system. *See* Dkt. 447 at 2–3. It is true that their civic-mindedness was a motivating factor, but that additional impetus does not supplant the need for an award of fees and expenses. *See Martin*, 2020 WL 568971, at *4 ("The fact that the Plaintiff had a personal motive in bringing the litigation is not fatal to a request for fees under the corporate benefit doctrine."). The common benefit doctrine "is a tool for overcoming the collective action problems that would otherwise prevent socially beneficial litigation from being pursued." *Judy*, 2016 WL

4992687, at *15. Fee awards undoubtedly "function as *ex post* judgments that will have the effect of either encouraging or discouraging future lawsuits." *Seinfeld v. Coker*, 847 A.2d 330, 333 (Del. Ch. 2000). The litigation that the plaintiffs pursued is the type of socially beneficial litigation that should be rewarded.

16. Accordingly, it is both equitable and desirable to apply the common benefit doctrine on the facts of this case. The question then becomes whether the plaintiffs have met its requirements.

17. Under the common benefit doctrine, a litigant may recover attorneys' fees if (i) the action was meritorious when it was filed, (ii) an ascertainable group received a substantial benefit, and (iii) a causal connection existed between the litigation and the benefit. *Dover Hist.*, 902 A.2d at 1089.

18. Each of the three elements has been satisfied here. First, the claim was meritorious when filed. This court denied the defendants' motion to dismiss, evidencing that fact. *See DEO I*, 2018 WL 4849935, *11.

19. Second, ascertainable groups will receive substantial benefits. After the general reassessments, each of the sixteen local school districts will have the right to claim a 10% increase in property tax revenue without having to succeed in a tax referendum, *see* 14 *Del. C.* § 1916(b), and the three vocational-technical school districts will have the right to a 10% increase in property tax revenue without seeking legislative approval, *see* 14 *Del. C.* § 2601(c). The additional revenue will make more funds available to support the needs of Disadvantaged Students, which will benefit all students. *See DEO III*, 239 A.3d at 527. The updated reassessments with current data also will make it easier for the counties to

keep their assessments current in the future. When property assessments increase as property values appreciate, the resulting increases in the tax base will help mitigate the need for school districts to call referendums every three to five years, just to keep up with the effects of inflation, as was necessary under the broken system. *See id.* at 471.

20. The counties respond that the potential to claim a 10% increase in tax revenue is too speculative to support an award of attorneys' fees and expenses. Dkt. 447 at 3–6, 17–20. According to the counties, the benefit cannot be quantified because the counties have not yet conducted general assessments, and the school districts may ultimately choose not to exercise their right to increase taxes. Those arguments are not persuasive. Increased optionality is a benefit, so the ability to claim the increased tax revenue standing alone is a positive. Moreover, "it is highly likely that school districts will happily accept the 10% increase in revenue that would result from a general reassessment." *DEO III*, 239 A.3d at 532. Not doing so would be irrational. Regardless, the extent of the benefit can be quantified further during the second phase of briefing on the plaintiffs' motion.

21. The general assessments also will benefit other groups by re-establishing vertical equity across the counties, which the Opinion described as price-related uniformity. *Id.* at 487, 491–95. As discussed in the Opinion, by using tax assessments from decades ago, the counties created a system in which residents whose properties had appreciated more paid far less than their fair share of taxes, while residents whose properties had appreciated less paid far more than their fair share of taxes. Across all three counties, higher-valued properties were assessed at a lower percentage of fair market value than lower-valued properties, resulting in a regressive system in which owners of lower-

valued properties bear a greater relative share of the tax burden. *Id.* at 493–95. Residents of the City of Wilmington, for example, paid more than their fair share compared to other residents of New Castle County. *Id.* at 495–96. All of the price-related differentials exceeded the maximum deemed acceptable by the International Association of Assessing Officers. *Id.* at 493–95. The reassessment will re-establish vertical equity and restore price-related uniformity, thereby benefiting those disadvantaged taxpayers who were injured by the counties' regressive system. It is true, of course, that other taxpayers will see their tax bills go up, but those taxpayers were freeriding on the broken system, which effectively gave them a subsidy for being fortunate enough to own properties that benefited from greater appreciation. Those taxpayers had no reliance interest in the continuation of an unconstitutional regime.

22. Third, the lawsuit was the sole cause of these benefits. Throughout this litigation, "the counties have made clear that absent a determination by the Delaware courts, they intend to continue violating the law." *Id.* at 538. The counties only committed to conduct a general assessment after the court ruled against them on the merits and after the parties had spent months conducting remedial discovery.

23. Although the plaintiffs have satisfied all of the elements for a fee award under the common benefit doctrine, the counties argue that they should not be compelled to pay the award because they will not receive any benefits themselves. Dkt. 447 at 20–23. As an initial matter, the counties will benefit. After conducting the general reassessments, the counties will be in compliance with the True Value Statute and the Uniformity Clause. Bringing an organization into compliance with the law is a benefit to that organization, be

it a corporation or a county. *Chicago Milwaukee Corp. v. Eisenberg*, 560 A.2d 489, 1989 WL 27734, at *1 (Del. 1989) (ORDER) ("[I]t is well established under Delaware law that when a transaction is corrected to comply with Delaware law, the corporation and all of its shareholders receive a benefit."); *see Mencher v. Sachs*, 164 A.2d 320, 323 (Del. 1960) ("Cancellation of illegally issued stock is in itself a benefit."); *see also Korn II*, 922 A.2d at 413 (explaining that a social benefit "invariably results when a government agency is required to do its job"). In addition, the counties' residents will benefit from the more equitable tax system, and without the real humans who live within their borders, the counties are empty legalisms. The benefits to the school districts also inure to the counties in the form of improved educational opportunities for the county residents. It is shortsighted for the counties to claim that they have not benefited from this litigation.

24. But even if the counties were not beneficiaries, it remains equitable to require them to pay the award. Under the common benefit doctrine, this court can require a party to pay the award when it is best positioned to compensate the plaintiffs on behalf of the parties that benefitted. In the corporate realm, for example, the court may require a corporation to pay a fee award for a benefit conferred on its stockholders, because the corporation is optimally positioned to compensate the plaintiffs on the stockholders' behalf. Through ownership interest in the corporation, the stockholders indirectly bear the cost of the funding the award. *See In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 362 (Del. Ch. 1999*), aff'd sub nom. First Interstate Bancorp v. Williamson*, 755 A.2d 388 (Del. 2000); *Richman v. DeVal Aerodynamics, Inc.*, 185 A.2d 884, 886 (Del. Ch. 1962) (Seitz, C.).

25. Similar principles apply here. The counties are optimally positioned to pay the award on behalf of their residents who will benefit. If the counties see fit, they can incorporate the cost of the fee award in the determination of a new tax rate, thereby ensuring that the residents who benefit from the corrected system of assessments bear the cost. As the counties themselves point out, Dkt. 447 at 21, no other mechanism is viable. It is thus more than fair to require that the counties pay the award of fees and expenses.

26. Equity therefore requires recognizing that the plaintiffs are entitled to an award of fees and expenses under the common benefit doctrine on the facts presented. Because the plaintiffs are entitled to an award under the common benefit doctrine, the court does not reach the question of whether they can recover under Court of Chancery Rule 37(c). This order also does not address the question of a reasonable amount of fees and expenses. That topic will be the subject of further proceedings.

Vice Chancellor Laster
March 28, 2022