COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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GEORGETOWN, DELAWARE 19947

Submitted: August 15, 2008
Decided: September 8, 2008

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Re: *Berger v. Pubco Corp., et al.*
Civil Action No. 3414-CC

Dear Counsel:

This is my decision on defendants' motion to clarify final order and judgment of July 18, 2008 and plaintiff's fee petition of August 13, 2008. For the reasons described briefly below, I conclude that (1) plaintiff's attorney has conferred a significant benefit upon Pubco Corporation ("Pubco") shareholders and is entitled to attorneys' fees and expenses in the amount of $250,000, (2) defendants must provide the reconstructed list of beneficial owners from Cede & Co. to plaintiff, and (3) this Court will not prohibit plaintiff's counsel from communicating with potential class members regarding the information obtained during settlement discussions with defendants.

I. Fee Petition

Plaintiff contends that a $600,000 award for plaintiff's legal fees should be awarded for the successful litigation of this suit. Defendants counter that an award

of only $92,000 is appropriate. Defendants concede that a corporate benefit has been bestowed upon the shareholders and the issue of whether or not there is a corporate benefit is not before this Court. Therefore, the issue is only one of determining the appropriate level of attorneys fees.

Attorneys' fees may be granted when a benefit has been conferred upon a corporation or its stockholders.[1] The corporate benefit doctrine provides that where a common benefit has been conferred upon stockholders, all stockholders should contribute to the costs incurred to confer the benefit.[2] The amount of the attorneys' fee award is within the discretion of the court[3] and should be of an amount sufficient to encourage the undertaking of future meritorious lawsuits while avoiding "socially unwholesome windfalls."[4]

In determining the amount of an award of fees in a given case, this Court typically considers the factors laid out in *Sugarland Industries v. Thomas*.[5] The factors are:

> (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 rightly receive all the credit for the benefit conferred or only a portion thereof; and (vii) the size of the benefit conferred.[6]

The value of the benefit conferred due to the litigation is usually afforded the most weight.[7] "[T]he opportunity to participate in the quasi-appraisal remedy" is

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[1] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989).
[2] *Weinberger v. UOP, Inc.*, 517 A.2d 653, 656 (Del. Ch. 1986).
[3] *In re Plains Resources*, No. C.A. 071-N, 2005 WL 332811, at *3 (Del. Ch. 2005) (citing *Krinsky v. Helfand*, 156 A.2d 90, 95 (Del. 1959)).
[4] *Korn v. New Castle County*, C.A. No. 767-CC, 2007 WL 2981939, at *2 (Del. Ch. Oct. 3, 2007).
[5] *Plains Resources*, 2005 WL 332811, at *3 (citing *Sugarland Indus. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980)).
[6] *Plains Resources*, 2005 WL 332811, at *3.
[7] *Helaba Invest Kapitalanlagegesellschaft mbH v. Fialkow*, C.A. No. 2683-VCL, 2008 WL 1128721, at *3 (Del. Ch. April 11, 2008).

"a substantial benefit."[8] In addition, the benefit of "a heightened level of corporate disclosure . . . may justify the award of counsel fees."[9]

In this case, there is no question that plaintiff's litigation conferred the benefit of heightened disclosure and quasi-appraisal. These benefits are substantial, as they afford shareholders additional information from which to determine whether to pursue the quasi-appraisal remedy as well as the opportunity for the remedy itself. In addition to the lawsuit resulting in disclosure of the method of selecting a merger price, the lawsuit created a public record showing that at least two settlements had taken place with complaining shareholders.[10] Both settlements resulted in payments of an additional 50% of the merger price.[11]

Although the benefits were substantial, the litigation was not overly complex or novel. This militates against a larger attorneys' fee award. It was fairly clear that the notice was improper for failure to follow 8 *Del. C.* § 262 in providing a current copy of the statute. The additional argument that the method of arriving at the merger price was *per se* material was only slightly more complex.

Even though the level of complexity was not high, plaintiff's counsel prosecuted this action in a diligent and competent manner. Defendants note that plaintiff's counsel has engaged in similar cases and may have simply copied some of the legal arguments; but this does not necessarily militate against a higher award. Rather, it supports a higher award because "plaintiff's counsel are experienced in practicing before this court" and were, therefore, able to "prosecute[] this action in a diligent and competent manner."[12]

The stage at which the litigation was resolved also calls for a higher award. Rather than being settled, this case resulted in a final ruling on the motion for summary judgment and subsequent order from this Court. Seeing the claim through to judgment lends weight to a higher award, both because of the greater

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[8] *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 314-15 (Del. Ch. 2005).
[9] *Tandycrafts Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989).
[10] Kalette Aff., Aug. 13, 2008, Ex. B at 3; *see also* Kalette Aff., Mar. 20, 2008, Ex. A.; Pl.'s Fee Pet. Ex. A. This Court notes with some cynicism the "coincidence" that one of the two shareholders, Mr. Kalette, who benefited from a settlement amount of an additional 50% of the merger price, was and presumably still is the past and current Vice President, Secretary and General Counsel of Pubco.
[11] *Id.*
[12] *Berger v. Pubco Corp.*, C.A. No., 2008 Del. Ch. 2224107, at *5 (Del. Ch. May 30, 2008); Final Order and Judgment, July 17, 2008.

risk inherent in litigation compared to settlement and because of the greater legal work required to obtain the judgment. In light of the final stage at which the litigation ended, I do not find that the hours worked by plaintiff's counsel were unreasonable (especially in light of the fact that opposing counsel may have logged an even higher amount of hours).

Normally the contingent nature of a case would add greatly to the award because plaintiff's counsel is undertaking a risk in not receiving compensation. "It is consistent with the public policy of Delaware to reward this risk-taking in the interests of shareholders."[13] Nevertheless, the level of risk for bringing the improper disclosure claim was reduced by the fact that an outdated appraisal statute was sent as part of the notice, in direct violation of the statute. Also, the possibility of future contingency fees has not been foreclosed. Only the initial question of improper disclosure has been finally litigated. To reward plaintiff's counsel at this stage in an amount equivalent to possible future contingency fees, as if the class action for quasi-appraisal had been finalized, would be premature. A more accurate assessment of the value of plaintiff attorney's work, evidenced by a common fund, will be evident once the quasi-appraisal process is completed.

Accordingly, I award attorneys' fees and expenses in the amount of $250,000 to plaintiff's counsel. It is useful to note that this award amounts to just over $953 per hour. The fee award is sufficient to encourage future meritorious lawsuits by compensating plaintiff's attorneys for their investment of time, their skillful litigation, and the risks involved in this type of litigation, while avoiding a socially unwholesome windfall.[14]

II. Pubco's Cede & Co. List

Defendants requested a clarification of the order requiring the defendants to "provide plaintiff's counsel with a list of names, addresses and number of shares owned by all Pubco stockholders of record on the date of the Merger as well as all *available* similar information for beneficial stockholders of the Company."[15]

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[13] *In re Plains Resources Inc.*, 2005 WL 332811, at *6.
[14] *Korn*, 2007 WL 2981939, at *2.
[15] Order ¶ 3, July 17, 2008 (emphasis added).

Under Delaware law, the right of inspection of a shareholder extends only to material that fairly can be said to be in the corporation's possession.[16] A Cede list can be produced almost instantaneously and is, therefore, in the possession of the Company at all times even if it has not yet been produced.[17] In addition, the list of Pubco beneficial owners has already been reconstructed once by Broadridge Financial Services, Inc., a mailing and servicing agent for Cede, for the purpose of sending out the revised notice.[18] Finally, Pubco "was charged an extra fee for this reconstruction process" and should be deemed to own the information.[19]

Therefore, the Cede list is "available"[20] pursuant to the order and must be exactly reconstructed as necessary and provided to plaintiff's counsel within five days of the issuance of the order accompanying this decision.

III. Use of Information Obtained in Settlement Discussions

Defendants also requested a clarification of the order to determine whether plaintiff's counsel may communicate to beneficial owners the information obtained during settlement discussions with Pubco. Defendants cite as support for prohibiting attorney/beneficial-owner communication various court orders limiting settlement discovery as well as D.R.E Rule 408, which states that settlement discussion content is inadmissible as evidence.

Nevertheless, defendants' appeal to these limitations is unavailing. The limitations on settlement negotiation discovery and use as evidence are to ensure the Court's opinion remains unbiased by settlement discussions and offers. Any proposed settlement may have been motivated for reasons other than weakness of

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[16] *RB Assocs. of N.J., L.P. v. Gillette Co.*, C.A. No. 9711, 1988 WL 27731, at *5-7 (Del. Ch. Mar. 22, 1988).
[17] *Id.* at *6; *Hatleigh Corp. v. Lane Bryant, Inc.*, 428 A.2d 350, 354 (Del. Ch. 1981).
[18] Kalette Aff. ¶ 11, Aug. 13, 2008.
[19] *See id.*
[20] An unaquired Cede list is to be distinguished from an unacquired NOBO list. This Court found in *RB Associates* that an unacquired NOBO list is not within the corporation's possession because it takes much longer to produce and is not necessary for a corporation to effect a proxy solicitation as the Cede list is. *RB Assocs.*, 1988 WL 27731, at *6. A Cede list normally contains a breakdown of the brokers acting as stockholders of record rather than a list of the beneficial owners contained in a NOBO list. In this instance, it is immaterial that Pubco's Cede list, created by the mailing and servicing agent for Cede, may contain a list of the beneficial owners similar to the information within a NOBO list rather than simply a breakdown of brokers.

position, such as a desire to compromise or to end litigation.[21]

In this case, allowing communications with beneficial owners regarding settlement discussions will not bias the future quasi-appraisal proceedings. It simply allows the attorney to communicate an indicium of the case's strength or weakness to potential class members. In the normal course of events, an attorney would be free to communicate a potential settlement offer to his clients to determine whether or not to accept the offer. Allowing pre-litigation communication between an attorney and potential class members is not appreciably different.

In addition, defendants have already opened the door to plaintiff's counsel communicating the $10 settlement offer by placing on the public record a similar settlement between Pubco and a beneficial owner for $10 above the $20 merger price.[22] Therefore, I decline to restrain the communications between plaintiff's counsel and beneficial owners.

Very truly yours,

William B. Chandler III

WBCIII:gwq

[21] *See Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 533-534 (Del. 2006) (stating the two principles underlying the inadmissibility of evidence are: "1) the evidence of compromise is irrelevant since the offer may be motivated by a desire to terminate the litigation rather than from any concession of weakness of position; and 2) public policy favors compromise in settlement of disputes.").

[22] Kalette Aff., Mar. 20, 2008, Ex. A.