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May 29, 2009

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Re: Oliver v. Boston University
C.A. No. 16570-VCN
Date Submitted: November 8, 2007

Dear Counsel:

I write to resolve a few lingering matters in the above-referenced action and to set forth briefly my reasons.

1. Compensation to the Lead Plaintiff

Mr. Oliver served as lead plaintiff and seeks an award of \$50,000 for his work in bringing and pursuing this action on behalf of the class. He bases that application on his estimate, which I accept as reasonable, that he devoted 2,000 hours to that

effort, and the success of the plaintiff class in this action. Awards to representative plaintiffs should be rare. Only in the exceptional case should such an application be granted.¹ Mr. Oliver was deposed extensively, attended each day of trial, and, as the Court observed, interacted extensively with counsel. He helped with document review and recognized an important document from a large set of documents produced that played a key role in supporting the class recovery. In addition, he is employed as a trust officer, thus bringing a degree of knowledge and expertise to the task. In short, this is one of those unusual circumstances in which compensation of the lead plaintiff is appropriate. I find that \$40,000 would constitute reasonable compensation for his efforts.

2. Shifting of Attorneys' Fees²

Under Delaware law, litigants routinely pay their own attorneys' fees and expenses. There are, of course, exceptions that allow for fee shifting. Among these

¹ See *Raider v. Sunderland*, 2006 WL 75310 (Del. Ch. Jan. 4, 2006). That compensation may be awarded finds support in Court of Chancery Rule 23(aa) which provides that no compensation may be paid to the representative party except "as the Court expressly approves to be paid to or on behalf of such person."

² The Court has resolved this issue by bench ruling. Transcript of Bench Ruling (Nov. 8, 2007) at 17-19. This section merely amplifies that analysis. Also, by bench ruling, the Court determined that Plaintiffs' counsel should be awarded fees equal to 33% of the common fund recovered for the benefit of the class. *Id.* at 78.

exceptions are the “common fund exception” which “enables a litigant who succeeds in conferring a monetary benefit upon an ascertainable class of individuals to recover costs from the fund that he or she has created,”³ and the bad faith exception adopted to “deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.”⁴

Although payment of their attorneys’ fees from the class recovery is the Plaintiffs’ fallback position, they have staked out a more aggressive approach. They argue that improper conduct of the Defendants and their counsel warrants a shifting of fees with the result that the Defendants would pay Plaintiffs’ attorneys’ fees and expenses through an additional imposition of liability, above and beyond the class recovery.

Plaintiffs’ bad faith argument follows three themes. First, according to Plaintiffs, Defendant Cassidy perjured himself at trial when he testified that he and lead plaintiff, Mr. Oliver, had never met in person to discuss allocation of the merger proceeds. Perhaps Mr. Cassidy did not testify accurately (Mr. Oliver’s

³ *Dover Historical Soc’y, Inc. v. City of Dover Planning Comm’n*, 902 A.2d 1084, 1090 (Del. 2006) (citing *In re First Interstate Bancorp Consol. S’holder Litig.*, 756 A.2d 353, 357 (Del. Ch. 1999)).

⁴ *Id.* at 1093 (quoting *Brice v. State Dept. of Corr.*, 704 A.2d 1176, 1179 (Del. 1998)).

recollection was supported to some limited extent by Reed Prior's testimony), but the Court cannot conclude that any misstatement was intentional or reckless.

Second, the BU Defendants did not, despite repeated inquiries by Plaintiffs, produce any formal record of BU's board of trustees' meeting minutes which would have addressed Seragen matters. Instead, they claimed that none existed. They resisted use of informal transcripts, which, although not fully accurate, were the best available evidence. Despite the focus on the minute book and the importance of it, the BU Defendants' attorneys consistently reported to the Court that the minute book did not exist.⁵ Ultimately, however, after the trial, a minute book was found. The failure to timely produce the minute book complicated and impaired, to some limited extent, the Plaintiffs' prosecution of the case, although it is difficult to quantify its importance. I am satisfied that the failure to provide the minute book was not intentional or willful. Sometimes important records are not found at the optimal time. This is one of those unfortunate instances and the Court is unwilling to impose sanctions because (1) the impact was relatively minor and (2) the Court is not of the view that any professional conduct shortcomings occurred.

⁵ It should be noted that tapes of the trustees were made available to Plaintiffs, but they chose not to listen to them.

Finally, the Plaintiffs raise again their objections to the BU Defendants' Massachusetts counsel because of perceived conflicts tracing back to that firm's representation of Seragen at the same time it was representing BU. They also point out that Defendant Hirsch was represented by the same counsel, even though Seragen had transactions with Mr. Hirsch's company and even though Mr. Hirsch is not fairly considered a BU Defendant. Whether the various concerns noted by the Plaintiffs should have persuaded counsel for the BU Defendants not to undertake the defense is, at most, a question about which reasonable minds may differ. There is, however, no evidence of any cognizable impact on the fairness of the trial based on the conflicts advanced by the Plaintiffs.⁶ Similarly, there is no reason to conclude that the multiple representatives unfairly affected the Plaintiffs.

In sum, there is no basis for fee-shifting.

3. Common Fund Issues

The Court's gross award of \$2,837,454, before interest and costs, to the class should be allocated to the class members based on the number of shares of Seragen

⁶ The Court's authority to address conflicts of interest and related professional concerns is generally limited to protecting the fairness of the proceedings before it. See *In re Appeal of Infotechnology, Inc.*, 582 A.2d 215, 221-22 (Del. 1990). Perhaps more to the point, the Court has no quarrel with the professionalism of the BU Defendants' attorneys.

that they held relative to the number of shares held by the class.⁷ A per share award, both before and after expenses, can be calculated.

Because of the claim experience with the payment made by the Ligand Defendants shortly before trial, it can be expected that claims for participation in the award here will leave many shares unaccounted for. That begs two questions: First, should the fees to class counsel be based on the sums ultimately paid to the class—i.e., to those shareholders who come forward during the claim process—or should they be based on the total class award? Second, what should happen to the settlement funds which no class member claims? The options, one presumes, include additional payments to the shareholder class, payment to a charity, and, in these unique circumstances, payment to BU.

The fee award in actions of this nature typically is based upon the common fund established for the benefit of the class as the result of the litigation efforts of class counsel. Class counsel did the work necessary to obtain the result—a fund of \$2,837,454.⁸ Whether members of the class come forward to claim their portion of

⁷ The difficulties encountered in making these calculations are touched upon in Part 5, *infra*. The maximum class recovery is 59% of the total of \$4,809,244, or \$2,837,454.

⁸ This, of course, is in addition to the settlement reached with the Ligand Defendants. In determining appropriate compensation for class counsel, the Court is not unmindful of the previous fee award.

the common fund is (after good faith efforts to reach out to those class members) largely beyond the control of Plaintiffs' attorneys and is no reason to exclude from the fee calculation sums for which class members failed to submit claims. In short, this result is driven by the notion that class counsel's compensation is properly measured by reference to the common fund. Thus, Plaintiffs' attorneys' fees will be based on the class recovery and not on the claims submitted by or paid to the class.⁹

As for the unclaimed funds,¹⁰ paying them to the subset of shareholders who actually filed claims would constitute a windfall to them. Their damages, for which the Defendants were liable, were calculable on a per share basis and that is the appropriate methodology for making payment to them. They have no entitlement to those funds which their fellow class members do not claim.

Leftover settlement funds are frequently and properly paid to charity. In general, they are not returned to the Defendants because it is the conduct of the Defendants that led to such awards and returning these "ill-gotten gains" would

⁹ With the fee award of 33% of the common fund created, Plaintiffs' attorneys are entitled to a fee award of \$936,360.

¹⁰ There is some suggestion that the question of what to do with unclaimed funds may not be ripe. It is a certainty, based on the Ligand settlement claim experience, that a significant portion of the common fund will not be claimed by members of the class. There is no reason for waiting for this certainty to occur. In addition, no intervening event will change the analysis.

perversely reward them for their conduct and defeat the purpose of denying them the financial benefit of their conduct. The Court, however, is satisfied that, in these unique circumstances, the unclaimed funds should be paid to BU. BU, of course, is a distinguished academic institution. The fiduciaries who were found to have breached their duties in this action were, at the time, closely connected with BU, Seragen's largest shareholder. As a general matter, those fiduciaries are no longer directly involved with BU. The Court simply sees no good reason why the funds cannot go to BU, just as well as to any other charity. Certainly, among all the charities one can think of, it has a greater connection to this action than any other.¹¹ Accordingly, unclaimed funds shall accrue to BU.

4. Costs and Expenses

Plaintiffs seek an award of costs under Court of Chancery Rule 54(d) in the amount of \$18,190.08. Defendants do not oppose that request, except for \$3,500 for Plaintiffs' expert, Mr. Penny. The Court did not rely upon Mr. Penny's testimony

¹¹ A theme running through the Plaintiffs' argument sounds as if BU should be denied these funds because some of its trustees engaged in bad behavior—the label is necessarily imprecise. This case, in the Court's view, has never been about evil or corrupt fiduciaries. The Defendants were confronted with those difficult choices that many failing companies encounter. Without BU, it is probable that Seragen would have failed. The Defendants did not fully meet their fiduciary duties and, for that, they have been held accountable. The award here is in the nature of restitution; it is not punitive.

and was not helped by Mr. Penny's testimony in any way. The Court may decline to tax as costs the fees and expenses of an expert witness under these circumstances. Accordingly, costs in the amount of \$14,690.08 are awarded.

Plaintiffs received reimbursement of some of their litigation expenses by way of the settlement with the Ligand Defendants shortly before trial. Remaining expenses, net of that payment, are \$65,389.22 and the Court, after review, concludes that Plaintiffs are entitled to those expenses as reasonable.¹²

To be clear, the Court relies upon the Plaintiffs' representation that there is no double counting of expenses and costs.

5. Structuring and Funding of the Judgment

Structuring the judgment has proved problematic. The principal problem is that the number of shares held by the Plaintiff class is fairly subject to debate. The Court concluded that Seragen was harmed in the amount of \$4,809,244 as a result of a certain breach. It intended that the class award would be calculated by the seemingly simple process of multiplying the damage award by the number of

¹² The Court does not address any expenses incurred since the Plaintiffs filed their application.

Seragen common shares held by the class and dividing that product by the number of total outstanding shares.

The Court, relying upon Mr. Weidinger's letter of February 22, 2007, concluded that the appropriate percentage was 59%.¹³ The BU Defendants have since provided some additional information suggesting that there were fewer class shares because of Defendants not affiliated with BU. For example, Defendants associated with Ligand or officers of Seragen were, by definition, not members of the class. The impact of this information—and it is still imprecise—would make a difference of no more than a few percentage points in the allocation of benefits to the class. If truly accurate information had been provided, the Court would have considered reviewing its earlier decision, but, because any recalculation would also be subject to inaccuracies and would not make a significant difference, the Court will continue to use the number previously calculated to determine the amount of the judgment, i.e., \$2,837,454.

This action had been pending for roughly seven years before it was brought to trial. Interest, thus, amounts to a large part of the BU Defendants' liability. They do

¹³ Transcript of Bench Ruling (Feb. 28, 2007) at 21-22.

not dispute that members of the class should have interest traced back to 1998. They suggest, however, that to pay interest on the attorneys' fees would be a windfall to the attorneys when the bulk of their efforts did not begin until roughly 2004. The BU Defendants are correct that awarding interest on attorneys' fees back to 1998 would be inequitable. Under these circumstances, the grossing up of interest on the attorneys' fee award is not warranted. Instead, interest on attorneys' fees should run at the legal rate on and from January 1, 2004.

The class recovery must also bear the cost of notice and claims processing. The Plaintiffs' attorneys shall supervise the claim process; they have asked that notice be minimized because of earlier efforts. The Court agrees that some reduction in the scope of solicitation might be appropriate, but in any event, mailings to the potential class members, as they are known to the Plaintiffs' attorneys or their contractor, must be made. Also, a one-time publication of notice in a national newspaper should help with the process of encouraging class members to file claims. Plaintiffs' attorneys shall develop a budget of the costs of this effort which will be deducted from the class award before determination of net per share distribution.

As noted above, one of the more troubling aspects of this litigation was the small participation by class members. That is likely to repeat. The BU Defendants have suggested that they should not be required to fund the judgment in full; instead, once the claims have been submitted and reviewed, they could pay over the proceeds for distribution.¹⁴ The Court has discretion to develop and implement a settlement distribution process appropriate for the circumstances. There is no reason, in these circumstances, to require the BU Defendants to pay the full judgment and when it is obvious that a substantial portion of that amount will belong to BU at the end of the process. Thus, the BU Defendants will be allowed to fund the judgment on an “as due” basis.

Accordingly, judgment will be entered for the Plaintiff class and against the BU Defendants in the amount of \$2,837,454 together with interest at the legal rate from 1998 and costs. The BU Defendants, if they otherwise substantially comply with the terms of the judgment, will not be obligated to pay the full amount of the judgment, with interest. Instead, they will fund it as follows: they will pay the

¹⁴ This obviously is possible because of the Court’s conclusion that unclaimed funds would belong to BU.

Plaintiffs' attorneys' fees, costs, and expenses (including the award to lead plaintiff, the projected cost of class solicitation, and interest on the fee award) to Plaintiffs' attorneys for disbursement; following solicitation of the class and receipt of claims, they will pay the net per share award (after deductions) based on the number of shares held by the claimants, together with interest on the payments to the claimants.

With payment of the sums set forth above, the judgment will be satisfied. If the BU Defendants fail to comply materially with the terms of the judgment, they will be required to pay the full amount of the judgment, and further consideration of the distribution of additional amounts will be necessary.

This approach to structuring the judgment resolves, in the Court's view, the remaining topics of dispute. The Court has not set forth timelines because the parties are in a better position to establish a reasonable schedule. If necessary, the Court will set a schedule.¹⁵

¹⁵ Nothing set forth here considers the appropriateness of a stay pending any appeal.

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Accordingly, counsel are requested to confer and attempt to agree upon a form of judgment reflecting the matters addressed here, in the Court's bench ruling, and in the Court's Memorandum Opinion on the merits.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Michael J. Maimone, Esquire
Register in Chancery-K